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A Survey of the Employment Contract Law in Florida: An Analysis of the Applications of Employment Contracts to the Interests of Employers and Employees

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A SURVEY OF EMPLOYMENT CONTRACT LAW IN FLORIDA:
AN ANALYSIS OF THE APPLICATIONS OF EMPLOYMENT
CONTRACTS TO THE INTERESTS OF EMPLOYERS AND EMPLOYEES

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A SURVEY OF EMPLOYMENT CONTRACT LAW IN FLORIDA:
AN ANALYSIS OF THE APPLICATIONS OF EMPLOYMENT
CONTRACTS TO THE INTERESTS OF EMPLOYERS AND
EMPLOYEES

RONALD E. JOLLES*

Let me suggest that management-labor relations no longer thrive in a social jungle where the big fish eat the little fish and the devil takes the hindmost.¹

Plaintiff claims that throughout the course of her employment she was subjected to unsolicited sexual invitations from her male supervisor, defendant Jones, the store manager. . . . Jones finally discharged her because she refused to submit to his sexual advances [P]laintiff's employment was terminable at-will, and . . . [t]he Complaint does not allege any conduct by defendants which would support a pendent common law claim other than insulting behavior²

I. INTRODUCTION

IN Florida, the simple creation of a valid employment contract of a definite duration gives employees rights associated with the common law doctrine of wrongful discharge. In the absence of a contract, however, an employee is subject to the common law doctrine of at-will employment. This latter doctrine gives the employer unfettered control over the terms and conditions of employment and termination.³ Employees, on the other hand, merely enjoy the right to quit

* Dedicated to Albert Epstein and to the memory of Leona Epstein. Thanks to Professor William F. McHugh for his inspiration.

1. Russell & Axon v. Handshoe, 176 So. 2d 909, 917 (Fla. 1st DCA 1965) (Sturgis, C.J., dissenting).

2. Forde v. Royal's, Inc., 537 F. Supp. 1173, 1174-76 (S.D. Fla. 1982).

3. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 647 (1963) (at-will employment means the unconditional power to terminate the employment relationship); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter *Protecting At Will Employees*], cited with approval in *Caster v. Hennessey*, 727 F.2d 1075, 1077 (11th Cir. 1984); *LaRocca v. Xerox Corp.*, 587 F. Supp. 1002, 1003 (S.D. Fla. 1984); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. 2d DCA 1983); *Crawford v. David Shapiro & Co.*, 490 So. 2d 993, 996 (Fla. 3d DCA 1986).

when they choose.⁴ Therefore, from the employer's point of view, such a contract should be seen as a Trojan Horse concealing common law rights not available to Florida employees employed at-will.⁵ From the employee's point of view, such a contract goes a long way toward providing protection from employer excesses and abuses,⁶ and may create a limited property right.⁷ However, such contracts are notoriously difficult to enforce in Florida because courts generally strictly construe contract language denoting specific terms of employment.⁸

This Comment endeavors to compile the seminal cases and law review articles comprising and accessing Florida's employment contract law. Cases are grouped according to the interests of employers and employees, and arranged in a checklist fashion, delineating the required and optional provisions of valid contracts. This Comment summarizes common law at-will employment doctrine and provides a neutral applications-oriented view of Florida employment contract law as it presently exists. This analysis demonstrates that employment contracts tend to create liability for employers while protecting employees. Specifically, the Comment describes the requirements necessary to form a valid employment contract, the judicial methods for interpreting that contract, and the available remedies for its breach. It also describes employment contracts in the context of fiduciary duties and peripheral tort and statutory causes of action. This Comment highlights the recent movement toward providing statutory exceptions

4. CORBIN, *supra* note 3, § 70 ("hiring at will" denotes a unilateral contract where the employee does not promise to work for a definite time but instead renders a specified service entitling that employee to a promised salary). Corbin states, "The employee is privileged to stop work at any time; the employer is bound by his promise to pay for service rendered, but has the power of revocation as to service not yet rendered." *Id.*

5. See, e.g., *Olsen v. Allstate Ins. Co.*, 759 F. Supp. 782, 786 (M.D. Fla. 1991) (noting that "[i]f the contract provides for a definite term of employment, termination in advance of expiration of the term is allowable only for cause"); see also Donald W. Brodie, *Individual Contracts of Employment*, 39 LAB. L.J. 585, 590 n.31 (1988).

6. See generally David S. Hames, *The Current Status of the Doctrine of Employment-At-Will*, 39 LAB. L.J. 19 (1988).

7. See *Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. 5th DCA) (noting that a statute can create a property interest if it lists specific grounds for discharge and states an employee can only be dismissed for "just cause"), *rev. denied*, 553 So. 2d 1165 (Fla. 1989), *cert. denied*, 494 U.S. 1029 (1990). *But see* *Stough v. Gallagher*, 967 F.2d 1523, 1530 (11th Cir. 1992) ("Florida deputy sheriffs have no property or liberty interests . . . for purposes of the Fourteenth Amendment.").

8. See *Olsen*, 759 F. Supp. at 786 (stating that "an employer may terminate the employee at will unless prohibited by contractual language," limiting construction to the terms of the contract, and placing the burden of proof on the plaintiff "to prove that the contract is not one terminable at will"); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1123 (Fla. 1979), *aff'd*, 384 So. 2d 1253 (Fla. 1980); *infra* part V.; see also *American Agronomics Corp. v. Ross*, 309 So. 2d 582, 584 (Fla. 3d DCA) (testimony permitted to establish contract terms), *cert. denied*, 321 So. 2d 558 (Fla. 1975).

to Florida's strict at-will doctrine.⁹ Finally, this Comment places Florida employment law causes of action in perspective with other states' causes of action, and recommends legislative enactment of certain causes of action adding to Florida's at-will employment doctrine.

II. A HISTORICAL ANALYSIS OF THE GENERAL RULES OF EMPLOYMENT RELATIONSHIPS APPLICABLE TO CONTRACTS OF EMPLOYMENT

Historically, the common law regarding employment contracts in Florida has been dominated by a static at-will philosophy. The at-will employment relationship is based on a unilateral contract of employment,¹⁰ while an employment contract of a definite duration is based upon a bilateral contract. The employee's additional legal rights hinge upon this distinction.

In Florida, the general rules illustrating an employee's hybrid contractual/tort common law relationship¹¹ to an employer within the unilateral contract/at-will employment philosophy are: first, an employment contract of an indefinite duration is terminable at the will of either party, without cause;¹² second, without a statutory or contractual for-cause termination requirement, the employee has no cause of action in tort for wrongful discharge;¹³ third, because no cause of action in tort for wrongful discharge exists, the employee is similarly left without a cause of action for negligent, malicious, or retaliatory discharge;¹⁴ and fourth, without a cause of action in tort for wrongful or retaliatory discharge, Florida employers are relieved of any obligation of good faith and fair dealing.¹⁵

9. See FLA. STAT. § 440.205 (1979), construed in *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182, 183 (Fla. 1983) (holding that section 440.205 creates a cause of action for wrongful discharge when an employee is fired for bringing a worker's compensation claim).

10. See *Hope v. National Airlines, Inc.*, 99 So. 2d 244, 246 (Fla. 3d DCA 1957) (citing 1 CORBIN, *supra* note 3, § 152 (1950)).

11. See *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950) cited with approval in *Henry Morrison Flagler Museum v. Lee*, 268 So. 2d 434, 436 (Fla. 4th DCA 1972); see generally J.P. McGuire, *Foley v. Interactive Data Corporation: The Implied Covenant of Good Faith and Fair Dealing*, 41 LAB. L.J. 108 (1990) (analyzing whether "special relationship" under California law gave rise to employer's duty).

12. See *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980); *Wynne v. Ludman Corp.*, 79 So. 2d 690 (Fla. 1955); *Knudsen v. Green*, 156 So. 240 (Fla. 1934); *Savannah, F.& W. Ry. v. Willett*, 31 So. 246, 246-47 (Fla. 1901).

13. See *Smith*, 427 So. 2d at 184; *DeMarco*, 360 So. 2d at 136; see, e.g., FLA. STAT. § 112.532 (1991) (granting law enforcement officers protection for exercising certain rights).

14. See *DeMarco*, 360 So. 2d at 136.

15. See, e.g., *Catania v. Eastern Air Lines, Inc.*, 381 So. 2d 265, 267 (Fla. 3d DCA 1980) (refusing to allow a cause of action in tort arising out of an employment contract); *Maguire v. American Fam. Life Assurance Co.*, 442 So. 2d 321, 323 (Fla. 3d DCA 1983) (noting that no action for breach of an employment contract can stand when there is no contract specifying a definite term of employment).

In contrast, an employment contract of a definite duration is based upon a bilateral contract. This fundamental difference alters general common law rules of at-will employment by changing the first common law general rule: it provides the employee with the right to be terminated only for cause—breach of contract¹⁶—and in good faith.¹⁷ Therefore, as a party to an employment contract of a definite duration, the Florida employer becomes liable in tort for wrongful discharge and acquires the common law obligation to deal fairly with employees and in good faith.

Accordingly, Florida employment contract law places heavy emphasis on the distinction between contracts of definite and indefinite durations.¹⁸ For an employment contract to be judicially enforced, the Florida employee must prove that such a bilateral contract is of a definite duration¹⁹ and supported by valid consideration on the employee's behalf. For employees, proving the existence of valid consideration is difficult because it appears that Florida courts do not recognize continued work by the employee as an employee's valid consideration supporting an employment contract.²⁰ However, Florida does recognize as consideration on the employer's behalf, the act of an employer permitting employees to continue employment.²¹

Florida courts reluctantly, yet steadfastly, have deferred to the legislature by their refusal to judicially expand employee causes of ac-

16. *Bacon v. Karr*, 139 So. 2d 166, 170 (Fla. 2d DCA 1962) (citing 56 C.J.S. *Master and Servant*, § 77; 25 C.J.S. *Damages* §§ 5-6).

17. See, e.g., *Hazen*, 117 So. at 855 (noting that when a contract for a definite term contains a provision that says the job must be performed to the employer's satisfaction, the employee may be terminated any time the employer becomes dissatisfied "though no real or substantial grounds for dissatisfaction exists"); see also *Haiman v. Gundersheimer*, 177 So. 199, 199-200 (Fla. 1937). See *infra* part III.A. (comparing objective good faith discharge for general dissatisfaction and good faith discharge for breach of contract).

18. See *infra* part IV.A.

19. See *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980); *Wynne v. Ludman Corp.*, 79 So. 2d 690 (Fla. 1955); *Knudsen v. Green*, 156 So. 240 (Fla. 1934); *Savannah, F. & W. Ry. v. Willett*, 31 So. 246, 246-47 (Fla. 1901).

20. See *Russell & Axon v. Handshoe*, 176 So. 2d 909, 915 (Fla. 1st DCA 1965), *cert. denied*, 188 So. 2d 317 (Fla. 1966); see generally 3A CORBIN, *supra* note 3, § 684; *Brodie*, *supra* note 5, at 596. *But see Lackey v. Whitehall Corp.*, 704 F. Supp. 201, 206 (D. Kan. 1988) (employee continued working after, and in exchange for, the employer's promise of deferred compensation). The *Lackey* court held, "[c]onsideration is sufficient 'if the promisee, in return for the promise does anything legal which he is not bound to do.'" (quoting *Bayshore Royal Co. v. Doran Jason Co.*, 480 So. 2d 651, 656 (Fla. 2d DCA 1985)).

21. *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. 3d DCA 1960) (noting that continued employment and agreement to pay outstanding commissions provided consideration for non-compete agreement).

tion. In *DeMarco v. Publix Super Markets, Inc.*,²² an employee was fired by Publix for not accepting a \$200 settlement for his daughter's permanent eye injuries caused by flying glass from an exploding container in a Publix store.²³ The Florida Supreme Court, however, affirmed summary judgment denying the plaintiff/employee a common law cause of action for retaliatory termination.²⁴ Justice Ben Overton dissented,²⁵ and subsequently referred to *DeMarco* in his special concurrence in *Smith v. Piezo Technology & Professional Administrators*,²⁶ which upheld the newly-created statutory cause of action for retaliatory discharge against an employer who wrongfully fired an employee for filing a Worker's Compensation claim.²⁷ In *Smith*, the first Florida case construing this issue, Justice Overton stated:

In *DeMarco*, the majority of this Court denied the same cause of action to an employee who sought compensation for his injured child. There is neither a logical nor justifiable reason for this inconsistency to remain in our law. If a common law tort for retaliatory discharge were allowed, all persons terminated from an employment at will for seeking compensation for injury, whether to the employee personally or to a dependent of the employee, would be protected and provided full access to the courts.²⁸

Justice Overton's has not gotten his wish, and to this day Florida keeps its finger firmly in the dike of actionable claims for wrongful discharge, retaliatory discharge, and any employee action for breach of contract if an employment contract is of indefinite duration.

III. CREATING AN EMPLOYMENT CONTRACT OF A DEFINITE DURATION

In Florida, few reasons exist for employers to prepare employment contracts. For example, Florida courts have protected employers by not allowing a common law property interest to be created for at-will employment.²⁹ Employers are insulated from employees' causes of ac-

22. 360 So. 2d 134 (Fla. 3d DCA 1978), cert. denied 367 So. 2d 1123 (Fla. 1979), aff'd, 384 So. 2d 1253 (Fla. 1980).

23. *Id.* at 135.

24. *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980).

25. *Id.* at 1254 (Overton, J., dissenting).

26. *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182, 185 (Fla. 1983) (Overton, J., specially concurring).

27. *Id.*

28. *Id.*

29. See *Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. 5th DCA) ("In the absence of a specific statute granting a property interest, a contract of employment [lacking a set duration] is terminable at the will of either party without cause . . ."), rev. denied, 553 So. 2d 1165 (Fla. 1989), cert. denied, 494 U.S. 1029 (1990). In addition, upon terminating an employee, a Florida employer may not have to pay any outstanding commissions. *Cueto v. John Allmand Boats, Inc.*, 384 So. 2d 30, 31 (Fla. 3d DCA 1976).

tion because employees have far fewer rights within the employment relationship without a valid employment contract and its attendant right to be discharged only for cause.³⁰ By providing numerous justifications for employers to avoid creating employment contracts, the current Florida laws addressing at-will employment encourage employers to remain in this dominant position.

Florida's at-will employment laws further favor employers by freeing them from nearly all liability for renegeing on an employment offer which the employee has already accepted.³¹ If a signed employment contract contains no starting date, and the place of employment closes before the employee starts work, the employer is not contractually bound if the trial court determines that the contract did not go into effect.³² This is true regardless of whether the employee has quit a prior position before accepting the position at issue.³³ Damages may be available for breach if the court determines that the contract is accepted *and* has been effectuated.³⁴ The common-law justification is that the law should function "to foster certainty in business relationships."³⁵

Further, Florida does not recognize the common law tort of retaliatory discharge.³⁶ In Florida, an employer can terminate an employee, without recourse, for refusing to perform an illegal act,³⁷ for filing sexual harassment charges,³⁸ and for not dismissing personal injury

30. *Protecting At Will Employees*, *supra* note 3, at 1816.

31. See *Savannah, F. & W. Ry. v. Willett*, 31 So. 246, 247 (Fla. 1901); *Roy Jorgensen Assocs. v. Deschenes*, 409 So. 2d 1188, 1190 (Fla. 4th DCA 1982); *Crawford v. David Shapiro & Co.*, 490 So. 2d 993, 995 (Fla. 3d DCA 1986) ("The mere fact that the rate of pay was expressed in terms of an annual salary does not mean . . . that the duration of employment is to be construed to be one year.").

32. See, e.g., *Quigley v. Laventhol & Howarth*, 382 So. 2d 137, 138 (Fla. 1st DCA 1980) (noting that when there is no provision for a definite term of employment, "either party may terminate at any time").

33. *Id.*

34. See *Knudsen v. Green*, 156 So. 240, 243 (Fla. 1934).

35. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. 2d DCA 1983).

36. See *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. 3d DCA 1978); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1328 (Fla. 3d DCA 1985); *OCHAB v. Morrison, Inc.*, 517 So. 2d 763, 764 (Fla. 2d DCA 1987); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241 (Fla. 4th DCA 1989); see *infra* part VII.A.2.

37. See, e.g., *Hartley*, 476 So. 2d at 1328 (employee refused to violate environmental regulations); *OCHAB*, 517 So. 2d at 764 (employee refused to serve alcohol to intoxicated individual when serving alcohol in such a situation was a crime); *Jarvinen*, 552 So. 2d at 241 (employee refused employer's request to commit perjury).

38. See *Forde v. Royal's, Inc.*, 537 F. Supp. 1173, 1176-78 (S.D. Fla. 1982); *Gmuier v. Garner*, 426 So. 2d 972, 974 (Fla. 2d DCA 1982).

lawsuits brought by employees on behalf of their children.³⁹ In states which recognize the tort of wrongful discharge, such terminations would create causes of action.⁴⁰ There are statutes, however, that provide certain exceptions to Florida's failure to recognize a common law cause of action for retaliatory discharge,⁴¹ but they are very limited in number. For example, an employer cannot discharge an employee for filing a workers compensation claim,⁴² or for fulfilling state jury duty.⁴³

Moreover, Florida courts display no compulsion to create a common law cause of action based on a violation of the Florida constitutional guarantees of access to the courts.⁴⁴ And, the Florida Supreme Court distinctly has held that the lack of a common law action for wrongful firing does not interfere with the individual rights guaranteed under Article I, section 21 of the Florida Constitution.⁴⁵

A. Employer Disincentives

Typically, the employer prepares the employment contract,⁴⁶ and thus must cover the legal fees and costs associated with its preparation. Basically, such costs, plus the added liabilities created by the

39. See *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1123 (Fla. 1979), aff'd 384 So. 2d 1253 (Fla. 1980).

40. See generally *Catania v. Eastern Air Lines, Inc.*, 381 So. 2d 265, 267 (Fla. 3d DCA 1980) (listing other states that have common law causes of action for wrongful discharge); *Maquire v. American Fam. Life Assurance Co.*, 442 So. 2d 321, 323 (Fla. 3d DCA 1983) (listing other states that "have read a 'good faith' requirement into the termination at will doctrine or have recognized broad categories of exceptions to the doctrine itself").

41. See *infra* VII.B.; see also *Hartley*, 476 So. 2d at 1327 n.1.

42. FLA. STAT. § 440.205 (1979), construed in *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182, 183 (Fla. 1983).

43. FLA. STAT. § 40.271 (1991), construed in *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th DCA), reh'g. denied, 551 So. 2d 462 (Fla. 1989).

Florida allows an employer to discharge an employee for fulfilling federal jury duty. See *Hill v. Winn-Dixie Stores, Inc.*, 699 F. Supp 876, 877 (M.D. Fla. 1988), aff'd and rev'd in part on other grounds, 934 F.2d 1518 (11th Cir. 1991); accord *Scott v. Estalella*, 563 So. 2d 701 (Fla. 3d DCA 1990). However, 28 U.S.C. § 1875 prohibits employers from firing employees for jury service in a United States court.

44. *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980) (see also *Overton, J. dissenting*); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134 (Fla. 3d DCA 1978), aff'd, 384 So. 2d 1253 (Fla. 1980) (construing FLA. CONST. art. I, §§ 9, 21 (1968)).

45. *DeMarco*, 384 So. 2d at 1254.

46. For a sample employment agreement, see CHARLES G. BAKALY JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* App. C, at 399 (2d ed. Supp. 1992). This source is indicative of other sources which only illustrate examples of contracts prepared by the employer.

preparation of employment contracts, may outweigh the benefits to the employer. Fiduciary duties imparted at common law, however, encourage employers to simply avoid all of the specifics of good faith requirements by avoiding employment contracts of definite duration. Thus, such fiduciary duties make it redundant for employers to impart them contractually.

In addition to the difficulties and expense of constructing a valid employment contract of a definite duration, such contracts create causes of action for the employee for wrongful discharge.⁴⁷ For example, terminating a valid employment contract necessitates that it be done with a reasonable basis,⁴⁸ or in good faith; but without such a contract, there is no remedy for bad faith termination.⁴⁹ Florida recognizes two variations on "good faith" discharge: (1) good faith discharge based on an employer's general dissatisfaction; and (2) good faith discharge based on an employee's breach of contract. For example, when a valid contract is created, it imparts a duty on the employer to terminate in good faith for the reasons expressed in the contract.⁵⁰ If the contract specifies the employee is to provide services to the employer's satisfaction, the employer may terminate the employee any time he is dissatisfied with the employee, provided the dissatisfaction is in good faith.⁵¹

Lastly, Florida recognizes many fiduciary duties imparted on employees at common law.⁵² For example, employees may not commit any type of disloyal acts in anticipation of future competition,⁵³ such as using trade secrets learned while working for an employer.⁵⁴ Also, employees who may be planning to leave and start their own businesses may not discuss future employment with other employees while still in the service of the employer.⁵⁵ Because these duties are already

47. See *Haiman v. Gundersheimer*, 177 So. 199, 199-200 (Fla. 1937); *Placet, Inc. v. Ashton*, 368 So. 2d 404 (Fla. 3d DCA) (utilizing contract language for the proposition that employee can be terminated only if employee breaches contract), *cert. denied sub nom. Esser v. Ashton*, 378 So. 2d 343 (Fla.), *cert. denied*, 378 So. 2d 347 (Fla. 1979). Note that by employing at-will employees, an employer can avoid liability for terminating an employee in bad faith. *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1328 (Fla. 3d DCA 1985).

48. *Hazen v. Cobb*, 117 So. 853, 855-56 (Fla. 1928).

49. *Hartley*, 476 So. 2d at 1328.

50. See *Placet, Inc.*, 368 So. 2d at 409 (citing *Haiman*, 177 So. 2d at 201) (holding that the employee could be terminated only if the employee breaches).

51. *Hazen*, 117 So. at 856; *Paddock v. Bay Concrete Indus.*, 154 So. 2d 313, 315 (Fla. 2d DCA 1963).

52. See *infra* part VI.A.

53. See *Insurance Field Servs. v. White & White Inspection & Audit Serv.*, 384 So. 2d 303, 308 (Fla. 5th DCA 1980).

54. See *Unistar Corp. v. Child*, 415 So. 2d 733, 735 (Fla. 3d DCA 1982).

55. See *Fish v. Adams*, 401 So. 2d 843, 845 (Fla. 5th DCA 1981); *Security Title & Abstract*,

imparted on employees at common law, the need to impart them on employees contractually is alleviated.

B. *Employer Incentives*⁵⁶

While employment contracts may create disadvantages for employers, several reasons exist which may encourage employers to choose to draft such documents. Even with a valid employment contract, the employer may still discharge an employee under Florida courts' broad interpretation of "just cause," provided the termination is not for unreasonable, arbitrary, capricious, or bad faith reasons.⁵⁷ For example, one court held the "for cause" requirement was satisfied when the "cause" had nothing to do with the employee's performance or conduct.⁵⁸ An employer *voluntarily* closing the portion of his business where the employee worked can constitute "just cause" for termination purposes.⁵⁹

The foregoing discussion illustrates the tendency of Florida courts to interpret employment termination clauses as at-will employment relationships, even when they are part of a valid employment contract.⁶⁰ While a court may uphold the provisions in the rest of the contract, employers may still avoid these obligations simply by terminating the employee. As these cases usually arise when employees sue employers for breach of contract, the results are rulings usually favorable to employers.⁶¹ Generally, courts hold that the plaintiff/employee failed to state a cause of action.⁶²

Inc. v. First Am. Title Ins. Co., 414 So. 2d 604, 605 (Fla. 1st DCA 1982); Puga v. Suave Shoe Corp., 427 So. 2d 288, 289 (Fla. 3d DCA 1983). See generally Sloan v. Sax, 505 So. 2d 526, 528 (Fla. 3d DCA 1987).

56. A discussion of other popular and employee-satisfaction related reasons for employment contracts is beyond the scope of this Comment. See generally Bahman Bahrami, *Productivity Improvement Through Cooperation of Employees and Employers*, 39 LAB. L.J. 167 (1988) (containing a detailed discussion of how providing employment contracts may lead to greater employee satisfaction).

57. See *Telesphere Int'l, Inc. v. Scollin*, 489 So. 2d 1152, 1155 (Fla. 3d DCA), *rev. denied*, 500 So. 2d 546 (Fla. 1986) (holding that "Telesphere had the absolute right to terminate Scollin under the terms of the agreement but may have been guilty of fraudulently inducing him to enter into it").

58. *Id.* at 1153.

59. See *id.*

60. Employment termination clauses denote a contractual requirement that the employer state reasons for termination; such a requirement denotes the definitive for cause employment relationship.

61. See, e.g., *Hope v. National Airlines*, 99 So. 2d 244, 245 (Fla. 3d DCA 1957) (holding invalid an oral contract for permanent employment).

62. *Id.* But see 1A CORBIN, *supra* note 3, § 152 n.11.20.

1. *Noncompete Agreements*⁶³

Employers may wish to create a valid employment contract to incorporate noncompete agreements, in order to protect their legitimate business interests.⁶⁴ For instance, by binding an employee to a noncompete agreement, the employer can protect interests such as "trade secrets, customer lists, and the right to prevent direct solicitation of existing customers."⁶⁵ Additionally, employers who have paid to increase and develop the skills of their employees through additional job training or education are somewhat protected from their employees using the acquired skills to compete against them in the same market.⁶⁶

In an attempt to protect the employer's property interest in its human investment while allowing marketplace competition for valued employees, the Florida legislature has enacted laws regulating the amount of control employers have over their employees after they have stopped paying them.⁶⁷ While section 542.33, *Florida Statutes*, permits noncompete agreements that afford the employer protection from unfair competition by the employee,⁶⁸ it declares invalid any employment contract that simply prohibits the employee from competing with the employer.⁶⁹ Further, noncompete agreements within employment contracts have been invalidated when employers breach by arbitrarily reducing the employee's contracted-for salary,⁷⁰ and when employers restrain employees' marketing and use of their "unprotectible" skills which they did not acquire at the employer's expense.⁷¹

Primarily, section 542.33 attempts to balance employers' desires to maintain dominion over valuable employees against the need of society, and of the marketplace, for unfettered trade in personal skills.⁷²

63. The rules of noncompete agreements have changed dramatically within the past four years. Although a comprehensive summary of these changes is outside the scope of this Article, this part will touch upon some of the significant changes as they relate to employment contracts. See generally FLA. STAT. ANN. § 542.33 (West Supp. 1993) (providing a more comprehensive review of the current state of Florida law regarding noncompete agreements); *Hapney v. Central Garage, Inc.*, 579 So. 2d 127 (Fla. 2d DCA), *rev. denied*, 591 So. 2d 180 (Fla. 1991); Kendall B. Coffey & Thomas F. Nealon, III, *Noncompete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105 (1992).

64. *Hapney*, 579 So. 2d at 134 (construing FLA. STAT. § 542.33 (West Supp. 1990)).

65. *Id.*

66. *Id.*

67. See FLA. STAT. ANN. § 542.33 (1), (2)(a) (West Supp. 1993).

68. See *Hapney*, 579 So. 2d at 134. See Coffey & Nealon, *supra* note 63, at 1138.

69. *Hapney*, 579 So. 2d at 134.

70. See *Troup v. Heacock*, 367 So. 2d 691, 692 (Fla. 1st DCA 1979) (holding that reducing the agreed-upon salary was breach of the employment contract).

71. *Hapney*, 579 So. 2d at 134.

72. See Coffey & Nealon, *supra* note 63, at 1139.

At the extremes, employers' desires to keep an employee whose skills they have paid to increase,⁷³ as well as their desires to protect their sales markets and territories from ambitious employees, are balanced against laws prohibiting involuntary servitude and peonage.⁷⁴

Subsequent to the 1990 amendments to section 542.33,⁷⁵ courts have further interpreted the section to apply retrospectively and to provide the following: (1) covenants designed solely to prohibit the former employee from competing with the former employer are void; (2) the covenant must protect an employer's legitimate business interest; (3) covenants are applicable to agents, independent contractors, and employees; (4) the employer has the burden to plead and prove the protectible interests; (5) trade secrets, customer lists, and the right to prevent direct solicitation of the employer's existing customers are *per se* protectible interests; and (6) other business interests such as extraordinary training or education *may* be protectible interests.⁷⁶

Although mutuality of obligation is a requirement for a valid employment contract,⁷⁷ in *Wright & Seaton Inc. v. Prescott*,⁷⁸ the court held that an employee whose employment contract did not contain such mutuality, may still be bound by a noncompete clause provided the agreement is supported by *independent* consideration.⁷⁹ The *Wright* court found that since the notice agreed to was *written*, it provided consideration, and thus alleviated the need for mutuality of obligation.⁸⁰ Although providing notice is an employer's common law obligation and thus a preexisting duty, the additional required act of writing appeared to be the peppercorn providing consideration. While the 1990 amendments to section 542.33 provide a more stringent standard for the creation of valid noncompete agreements,⁸¹ they did not

73. See, e.g., *Hapney*, 579 So. 2d at 134.

74. See *Troup*, 367 So. 2d at 692; *Hapney*, 579 So. 2d at 129 (citing *Standard Newspapers, Inc. v. Woods*, 110 So. 2d 397 (Fla. 1959)); *BAKALY & GROSSMAN*, *supra* note 46, at § 1.5, 13 (rev. 2d ed. Supp. 1992).

75. FLA. STAT. ANN. § 542.33 (West Supp. 1993).

76. *Hapney*, 579 So. 2d at 134 (construing FLA. STAT. ANN. § 542.33 (West Supp. 1993)); see also *Coffey & Nealon*, *supra* note 63, at 1133-40.

77. See discussion *infra* part IV.C.

78. 420 So. 2d 623 (Fla. 4th DCA 1982).

79. *Id.* at 624 n.2; see also *infra* parts IV.B-C.

80. See *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 627 (Fla. 4th DCA 1982) (holding that an employer's agreement to give an employee written notice of termination is sufficient consideration for a noncompete clause); see also *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52, 54 (Fla. 3d DCA 1960) (holding that continued employment and the employer's agreement to pay outstanding commissions provided consideration for the employee's agreement not to compete).

81. See *Coffey & Nealon*, *supra* note 63, at 1133-40.

specifically address the *Wright* court's cavalier treatment of mutuality of obligation.⁸²

2. *Binding Upper Level Management Through Complex Deferred Compensation Agreements and Stock Option Plans*

Employment contracts intending to create a consensual, long-term employment relationship may include compensation agreements such as the gradual vesting of profit-sharing or the offering of stock options through the sale of securities. While it is axiomatic that the primary reason for memorialization of a complex employee compensation agreement is to avoid future disagreement over its terms, section 678.319, *Florida Statutes*, codifying section 8-319 of the Uniform Commercial Code, *requires* that the sale of securities be in writing.⁸³

Yearly offers of stock options do not necessarily form an employment contract, nor do they constitute offers to enter into unilateral employment contracts.⁸⁴ "[T]he mere existence of a stock option or other inchoate employee benefit is insufficient, standing alone, to indicate an agreement" upon anything more than an employment contract that is terminable at-will.⁸⁵ In Florida, however, the offer of stock options has given rise to a duty of good faith not to terminate the employee for purposes of frustrating the employee's exercise of the stock options.⁸⁶

It is important to note that such agreements would be perfectly valid and achieve their desired results if memorialized outside of an employment contract of a definite duration. That an employment contract containing a compensation agreement may be terminable at-will does not automatically invalidate the compensation agreement.⁸⁷ Further, the Third District Court of Appeal has held that a stock option compensation agreement of a definite duration within a terminable-at-will employment contract does not create an employment contract of a definite duration.⁸⁸

An employer may unilaterally modify the terms of the compensation plan of an employment-at-will contract provided the employee

82. *Id.* at 1129 n. 148; see discussion *infra* IV.B-C.

83. See BAKALY & GROSSMAN, *supra* note 46, at § 5.1, 64.

84. See *Harrison v. Jack Eckerd Corp.*, 342 F. Supp. 348, 350 (M.D. Fla.), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

85. *Id.*

86. *Id.*

87. See *Martin v. Golden Corral Corp.*, 601 So. 2d 1316, 1317 (Fla. 2d DCA 1992).

88. See *Hoffman v. Robinson*, 213 So. 2d 267, 268 (Fla. 3d DCA 1968).

receives notice of the change *and* the employee accepts the change.⁸⁹ The burden of proof is on the party asserting the modification.⁹⁰ Therefore, although employers may unilaterally modify such plans, modifications may be invalidated, even within at-will employment relationships, if the employer cannot prove both notice and acceptance.⁹¹

In sum, the reasons for constructing an employment agreement should not be confused with the reasons for written memorialization of the language of long-term compensation. From an employer's perspective, if an agreement is not needed then an agreement should not be formed; if the employer requires no more than an incentive for the employee to remain with the employer, then care should be taken not to bind the employer to more responsibilities than necessary.

3. "Loser Pays" Clauses

An employer can use the employment contract to provide a disincentive for an employee to litigate non-substantive, employment-related claims by contractually binding the employee to a "loser pays" provision. This type of provision requires the loser of post-employment contract litigation to pay the winner's legal fees and costs. These provisions make both parties aware of the risks of an unsuccessful lawsuit and thereby deter baseless or harassing claims.⁹²

Although the Florida Rules of Civil Procedure allow that, in general, initiating frivolous claims can result in attorney's fees sanctions,⁹³ several justifications exist for including a "loser pays" clause in an employment contract. First, employees are more likely to be aware of express provisions in their own employment contracts than a possible legal sanction derived from a rule of civil procedure, therefore a "loser pays" clause in the contract throughout preliminary negotiations and throughout the employment relationship could better deter nonsubstantive claims. Secondly, it may be easier to recover fees under a contractual "loser pays" clause than to recover fees as a sanction for a frivolous action. However, section 57.105(2), *Florida Statutes*, requires that if the "loser pays" provision attempts to bind the

89. *Martin*, 601 So. 2d at 1317.

90. *Id.*

91. *Id.*

92. See generally *Swint v. Volusia County Dep't of Pub. Works*, No. 83-226-ORL-CIV-18, 1984 WL 1098, at *6 (M.D. Fla. 1984) (holding that defendant employer was entitled to costs and reasonable fees because the plaintiff's claim that he was discharged for racial reasons was frivolous).

93. See FLA. STAT. § 57.105(1) (1991); accord *Swint*, 1984 WL 1098 at *6 (justifying award of fees because plaintiff presented no evidence in support of claim).

employee only, in lieu of the *losing party*, it will be the *losing party* that will have to pay fees and costs, regardless of the contractual language.⁹⁴

An employer who is able obtain a judgment for fees and costs pursuant to a "loser pays" clause is often subsequently faced with collecting them from an unemployed debtor. Therefore, the primary benefit of including a "loser pays" clause in an employment contract is not the award of fees and costs, but the disincentive to litigate non-substantive claims.

4. *Creating Express Employee Liability*

It is axiomatic that breach of an express contractual provision is a breach of contract, providing just cause for termination of the contract, and possibly the award of damages to the non-breaching party. Whereas the issue of an employee's breach of *express* duty is more amenable to summary judgment, the issue of an employee's breach of *implied* or *fiduciary* duties may require a trial. Although determining both types of duties are questions of law, determining whether an employee breaches a duty is a question of fact.⁹⁵ *Punkar v. King Plastic Corp.*,⁹⁶ however, modifies this principle by limiting the issue of fact to the jury only "if the pertinent evidence on this issue could lead the minds of reasonable men to conflicting conclusions. If not, the issue becomes a question of law to be decided by the court."

The nature of an express duty is similar to that of an express act, and an act is a more concrete concept than an implied fiduciary duty. Accordingly, determining the breach of an express duty can be done more easily by admitting uncontroverted evidence of the commission or omission of an act.⁹⁷ For example, if an employment contract states that an employee is "to make reports in the manner and form required by the employer,"⁹⁸ or that "leaving rate information" with a non-employee is grounds for discharge,⁹⁹ determining a breach of contract is as easy as determining the commission of these acts. Yet, when no duties are expressed, it is merely implied "that the employee will faithfully perform the duties required . . . in the manner directed by the employer, provided, of course, the employer may reasonably

94. See FLA. STAT. § 57.105(2) (1991).

95. See *Haiman v. Gundersheimer*, 177 So. 199, 200-01 (Fla. 1937); *Punkar v. King Plastic Corp.*, 290 So. 2d 505, 507 (Fla. 2d DCA) (quoting *Jimarye, Inc. v. Pipkin*, 181 So. 2d 669 (Fla. 1st DCA 1966)), *cert. denied*, 297 So. 2d 30 (Fla. 1974).

96. 290 So. 2d 505 (Fla. 2d DCA), *cert. denied*, 297 So. 2d 30 (Fla. 1974).

97. See *Haiman*, 177 So. at 200-01.

98. *Id.*

99. *Olsen v. Allstate Ins. Co.*, 759 F. Supp. 782, 785 (M.D. Fla. 1991).

make such requirements."¹⁰⁰ This implied duty contains ambiguous terms such as "faithfully," "manner," and "reasonably" which can become arguable issues for a jury to determine, but which could be avoided by creating express contractual duties.

The creation of express employee liability for violating express fiduciary duties is another reason to form an employment contract.¹⁰¹ Where the type of duty allegedly breached is express rather than implied, summary judgment for contract breach and injunctive relief would be more quickly and easily obtained, thereby avoiding a trial.

Immediate injunctive relief may be necessary where a business is failing as a result of an ex-employee's breach of a fiduciary or other duty.¹⁰² If the employee is critical to the employer, or handles sensitive information or clients, it would be easier to enforce such duties, or be compensated for their breach, if the employment contract specifically addressed such duties. Finally, express duties and provisions, like an express "loser pays" clause, provide more of a deterrent and are thus less likely to be breached than implied common law duties unknown to the employee.

5. *Limiting the Employer's Liability for Employee Actions*

Employers may be liable to third parties for their employees' intentional voluntary torts and crimes.¹⁰³ Employer liability divides into two causes of action: (1) liability for negligent hiring and retention, and (2) liability under the doctrine of *respondeat superior* for committing acts that further the employer's interests.

a. *Negligent Hiring and Retention*

Negligent hiring occurs when employers breach their duty to "independently investigate" an employee's background and fail to learn

100. *Haiman*, 177 So. at 201.

101. See Jon M. Gumbel & Jim Hoover, *Employment Contracts: An Option To Consider*, 41 LAB. L.J. 175, 177-78 (1990).

102. See *Haiman v. Gundersheimer*, 177 So. 199 (Fla. 1937); *Fish v. Adams*, 401 So. 2d 843 (Fla. 5th DCA 1981); *Security Title & Abstract, Inc. v. First Am. Title Ins. Co.*, 414 So. 2d 604 (Fla. 1st DCA 1982); *Unistar Corp. v. Child*, 415 So. 2d 733 (Fla. 3d DCA 1982); *Puga v. Suave Shoe Corp.*, 427 So. 2d 288 (Fla. 3d DCA 1983); *Phillips Chem. Co. v. Morgan*, 440 So. 2d 1292 (Fla. 3d DCA 1983), *rev. denied*, 450 So. 2d 486 (Fla. 1984); *Sloan v. Sax*, 505 So. 2d 526 (Fla. 3d DCA 1987); *Templeton v. Creative Loafing Tampa, Inc.*, 552 So. 2d 288 (Fla. 2d DCA 1989); *In re Hallmark Builders, Inc.*, 57 B.R. 121 (Bankr. M.D. Fla. 1986).

103. See *Island City Flying Serv. v. General Elec. Credit Corp.*, 585 So. 2d 274, 276 (Fla. 1991); *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1239-40 (Fla. 2d DCA 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981); *Gonpere Corp. v. Rebull*, 440 So. 2d 1307, 1308 (Fla. 3d DCA 1983); *Abbott v. Payne*, 457 So. 2d 1156, 1157 (Fla. 4th DCA 1984).

pertinent information about the employee's past.¹⁰⁴ Such information would have placed the employer on notice that the employee should not have been allowed to have contact with customers or have been allowed in their homes.¹⁰⁵ "Negligent retention . . . occurs when during the course of employment, the employer becomes aware or should have become aware of problems with an employee . . . indicat[ing] unfitness for customer contact]" but "fails to take further action, such as investigation, discharge, or reassignment."¹⁰⁶ If a court determines that an employer's negligent hiring or retention is the proximate cause of an employee's tortious conduct, then the employer will be held liable for any proven damages.¹⁰⁷

Employers cannot contract away their liability for these torts. Employers remain obligated to take a written application, diligently inquire of the employee's references, and, depending on the nature of the employee's tasks, make other appropriate inquiries.¹⁰⁸

b. Respondeat Superior Liability for Acts Committed by Employees While Furthering the Employer's Interests

If an employee breaks the law while furthering the employer's interests, the employer could be held liable.¹⁰⁹ For example, one jury determined that a building owner was liable for its apartment manager's shooting of a tenant who failed to leave the premises after receiving an eviction notice.¹¹⁰ The jury found the apartment manager's action to be in furtherance of the employer's interest.¹¹¹ Had the building owner made an attempt to delineate in writing the expected reasonable scope of the apartment manager's duties, the owner's liability for the apartment manager's irrational conduct may have been alleviated somewhat. The general rule states:

An employer is liable in damages for the wrongful act of his employee that causes injury to another person, if the wrongful act is

104. See *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 751-52 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992) (citing *Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954)); *Williams*, 386 So. 2d at 1240; *Abbott*, 457 So. 2d at 1157.

105. See *Williams*, 386 So. 2d at 1240; *Harrison*, 583 So. 2d at 751-52.

106. *Harrison*, 583 So. 2d at 753 (citing *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986)).

107. See *Williams*, 386 So. 2d at 1239-40; *Harrison*, 583 So. 2d at 750-55.

108. See *Harrison*, 583 So. 2d at 751-52.

109. See *Gonpere Corp. v. Rebull*, 440 So. 2d 1307, 1308 (Fla. 3d DCA 1983); *Garcy v. Broward Process Servers, Inc.*, 583 So. 2d 714, 716-17 (Fla. 4th DCA 1991) (Glickstein, J., dissenting).

110. *Gonpere Corp.*, 440 So. 2d at 1308.

111. *Id.*

done while the employee is acting within the apparent scope of his authority as such employee to serve the interests of the employer, even though the wrongful act also constitutes a crime not a homicide or was not authorized by, or was forbidden by, the employer, or was not necessary or appropriate to serve the interests of the employer, unless the wrongful act of the employee was done to accomplish his own purposes, and not to serve the interests of the employer.¹¹²

Employment contracts could serve to alleviate employers' potential liability for the intentional torts and crimes of their employees by clearly defining the scope of employee duties, and by specifically identifying employer interests. The contract would thus serve as a tool for the jury and the court to use in assessing whether the employee's actions were within the scope of employment.

6. *Allowing for the Liquidation of Litigation-Related Claims*

An employment contract could also alleviate the need for a trial to determine damages by including a liquidated damages clause.¹¹³ Such clauses are also found within noncompete agreements where the employer tries to create a valid, easily enforceable remedy for when employees, such as certified public accountants, quit and take with them their employer's clients.¹¹⁴ This remedy is applicable in any situation where employees can meet their employer's clients, subsequently form their own businesses, and then attempt to solicit their employers' clients are their own.

7. *Suspending the Onset of For-Cause Employment By Setting Probationary and Temporary Employment Periods*

Termination without cause during a probationary period has been upheld as an exception to the termination for-cause requirement inherent in both employment contracts of a definite duration¹¹⁵ and public service employment.¹¹⁶ Designating a probationary employment period allows the employer to terminate the employee at-will for a specified duration prior to the onset of for-cause termination rights.¹¹⁷

112. *Id.* (quoting *Stinson v. Prevatt*, 94 So. 656, 657 (Fla. 1922)).

113. For a more detailed discussion of liquidated damages clauses see *infra* part VIII.C.

114. *Id.*

115. See *Critchlow v. WFC Mortgage Co.*, 315 So. 2d 483, 484 (Fla. 3d DCA 1975).

116. See *Swint v. Volusia County Dep't of Pub. Works*, No. 83-226-ORL-CIV-18, 1984 WL 1098 (M.D. Fla. 1984); *Brodie*, *supra* note 5, at 588.

117. See *Palmer v. Dist. Bd. of Trustees*, 748 F.2d 595, 601 (11th Cir. 1984); see generally *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856 (Fla. 4th DCA 1989).

Although employment manuals typically cover probationary and temporary employment periods, addressing and setting these provisions in a separate employment contract will temporarily suspend the employee's termination for-cause rights without binding employers to other terms included in the employment manual.¹¹⁸

IV. THE STRUCTURE OF A VALID EMPLOYMENT CONTRACT

Essential characteristics of a valid employment contract in Florida include: (1) a term of definite duration, and (2) consideration or mutuality of obligation by both parties. Other provisions may be essential to the contracting parties, but their exclusion will neither render the contract unenforceable nor preclude a cause of action for breach.

A. Duration

For an employee to be considered wrongfully discharged at law, the employee must be employed for a definite term.¹¹⁹ There is no cause of action without a binding definite term of employment.¹²⁰ Therefore, employment contracts of an indefinite duration are not enforceable in Florida.¹²¹ However, internal provisions, such as the promise of a guaranteed bonus, have been held to be valid despite being part of such a contract.¹²²

An employment contract containing a specified term of employment requires "definiteness and certainty in its terms,"¹²³—i.e., a definite start date and a definite term of duration.¹²⁴ The court may look anywhere within the contract to determine the existence of and to de-

118. See discussion *infra* part IV.E.3.

119. *Haiman v. Gundersheimer*, 177 So. 199, 199-200 (Fla. 1937) (fired employee sued employer for damages for wrongful firing; existence of a definite start date within the contract created a valid employment contract of a definite duration and allowed termination for cause only).

120. *Maguire v. American Fam. Life Assurance Co.*, 442 So. 2d 321, 323 (Fla. 3d DCA 1983), *rev. denied*, 451 So. 2d 849 (Fla. 1984).

121. See *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980) (quoting *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1123 (Fla. 1979), *aff'd*, 384 So. 2d 1253 (Fla. 1980)); *Wynne v. Ludman Corp.*, 79 So. 2d 690, 691 (Fla. 1955); *Knudsen v. Green*, 156 So. 240, 242 (Fla. 1934); *Savannah, F. & W. Ry. v. Willett*, 31 So. 246, 247 (Fla. 1901).

122. See *De Felice v. Moss Mfg.*, 461 So. 2d 209, 210 (Fla. 3d DCA 1984).

123. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 268 (Fla. 2d DCA 1983) (denying that contract terms were vague enough for the jury to be permitted to draw inferences). *But see American Agronomics Corp. v. Ross*, 309 So. 2d 582, 584 (Fla. 3d DCA 1975) (allowing the jury to evaluate contradictory evidence of contract terms), *cert. denied*, 321 So. 2d 558 (Fla. 1975).

124. *E.g.*, *Hazen v. Cobb*, 117 So. 853, 855 (Fla. 1928) (upholding contract of employment "for one year from date"); *Haiman v. Gundersheimer*, 177 So. 199, 199-200 (Fla. 1937).

fine definite start dates and terms of duration.¹²⁵ However, inconsistencies regarding the term of appointment which create disputed ambiguous inferences are to be resolved by the trier of fact.¹²⁶

There are numerous Florida cases defining definite start dates and terms of duration.¹²⁷ Courts have held that contractual language extending a work assignment for a definite period and beginning on a specific date, had created a valid employment contract.¹²⁸ However,

125. See *Paddock v. Bay Concrete Indus.*, 154 So. 2d 313, 315-16 (Fla. 2d DCA 1963).

126. See *Kasweck v. Florida Inst. of Tech.*, 590 So. 2d 1100, 1102 (Fla. 5th DCA 1991).

127. See *Hazen*, 117 So. at 855 (upholding contract of employment "for one year from date"); *Haiman*, 177 So. at 199-200 (existence of a definite start date within the contract created a valid employment contract); *Bacon v. Karr*, 139 So. 2d 166, 168 (Fla. 2d DCA 1962) (existence of a definite start date followed by a definite term of duration created valid employment contract); *Paddock*, 154 So. 2d at 315 (the phrase, "[t]he terms [sic] of this contract shall be for 5 years from the date hereof, except as hereinafter provided," created a valid contract); *Placet, Inc. v. Ashton*, 368 So. 2d 404, 406 (Fla. 3d DCA 1979) (contractual language which specified a seven-year period with a start and finish date constituted a valid contract), *cert. denied sub nom. Esser v. Ashton*, 378 So. 2d 343 (Fla.), *cert. denied*, 378 So. 2d 347 (Fla. 1979); *Maines v. Davis*, 491 So. 2d 1233, 1235 (Fla. 1st DCA 1986) (a written contract stating a one-year term of duration, providing for annual compensation, and resulting in work performed for two and one-half months with wages being paid into the third month constituted a legally enforceable contract); *Grappone v. City of Miami Beach*, 495 So. 2d 838, 839 (Fla. 3d DCA 1986) (contract with a duration "commencing April 8, 1985, and ending upon the return of the regular secretary who was on a six-month maternity leave" created a valid employment contract); *Harris v. Coconut Grove Dev. Co.*, 59 So. 11, 11-12 (Fla. 1912) (finding that a cause of action immediately arises upon "breach of a contract of employment for one year. . ."); *Nunes v. Margate Gen. Hosp., Inc.*, 435 So. 2d 916, 917 (Fla. 4th DCA 1983) (evidence that during hiring employee expressed "that his term of employment had to be definite; i.e., for the entire school year" and that employee "would not be terminated during the school year unless he did 'something really disastrous'" was sufficient to send the case to the fact finder); *Kasweck*, 590 So. 2d at 1101-02 (letters stating that a professor's appointment was for the "academic year beginning September 14, 1987, and ending June 11, 1988" with a three-year term of appointment were sufficient to prove the validity of the employment contract); *Venus Lab., Inc. v. Katz*, 601 So. 2d 630, 631 (Fla. 3d DCA) (enforcing new owner/employer's promise of employment to former owner "as a consultant for \$20,000 a year, plus expenses . . . for so long as any portion of the obligations in the larger agreement between the parties . . . remained to be paid . . ."), *rev. denied*, 613 So. 2d 12 (Fla. 1992).

Compare *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 857-58 (Fla. 4th DCA 1989) (contract language stating "[t]his transfer will be temporary in nature for a thirty-six month period commencing from the time of your visa approval," combined with employer's recognition of plaintiff as a "permanent employee" may constitute a valid employment contract) *with* *Roy Jorgensen Assocs. v. Deschenes*, 409 So. 2d 1188, 1189 (Fla. 4th DCA 1982) (the language "on or about October 31 you will be assigned to [a certain place] for a period of 28 months" failed to state a definite duration).

See also *American Agronomics Corp.*, 309 So. 2d at 584 (testimony contradicting contract terms was sufficient to send a factual dispute to the jury); *cf. Hoffman v. Robinson*, 213 So. 2d 267, 268 (Fla. 3d DCA 1968) (a stock option compensation agreement stating "this agreement shall be in force for a period of twenty-five (25) years from the date hereof" within a terminable at-will employment agreement did not create an employment agreement of a definite duration).

128. See *Raytheon Subsidiary Support Co. v. Crouch*, 548 So. 2d 781, 782-84 (Fla. 4th DCA 1989) (agreement stating "[y]our assignment has been extended for twelve months commencing on August 20, 1977" created a valid employment contract).

an employee's *expectations* of the employment time frame, albeit encouraged by the employer, have been insufficient to establish a definite term of employment.¹²⁹ In addition, a company policy of yearly reviews was held not to have created a series of annual employment contracts subject to satisfactory performance by the employee.¹³⁰ Finally, regardless of the existence of a valid employment contract of a definite duration, establishing probationary and temporary employment periods may forestall the onset of a definite employment period.¹³¹

B. Consideration

"[I]n the absence of . . . good consideration additional to the services contracted [for], a contract for permanent employment . . . is no more than an indefinite general hiring terminable at the will of either party."¹³² In Florida, relinquishing prior employment cannot be consideration to support a lifetime employment contract.¹³³ The reasoning for this is that employees could, throughout their stay at their new job, be said to have relinquished such prior employment for the new job.¹³⁴ It is presumed that an employee must relinquish such prior employment to accept the new position. The act of relinquishment does

129. See *Roy Jorgensen Assocs.*, 409 So. 2d at 1190 (contract providing that employee was to be transferred to Ecuador "for a period of 28 months" was merely language of expectation, not language creating a definite term of employment); *Maguire v. American Fam. Life Assurance Co.*, 442 So. 2d 321, 323 (Fla. 3d DCA 1983) (insurance agent canceled California license at the behest of employer insurance company in reliance on employer's sponsorship for Florida license. Court held that employer's breach of promise resulting in employee's loss of license and renewal income did not comprise cause of action without a binding definite term of employment), *rev. denied*, 451 So. 2d 849 (Fla. 1984). *Cf.* *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 859 (Fla. 4th DCA 1989) (contract stating that employee's "transfer will be temporary in nature for a thirty-six month period" created more than a mere *expectation* of employment and therefore may allow a cause of action for wrongful discharge).

130. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 268 (Fla. 2d DCA 1983).

131. *Critchlow v. WFC Mortgage Co.*, 315 So. 2d 483, 484 (Fla. 3d DCA 1975); see also discussion *supra* part III.B.7.

132. *Russell & Axon v. Handshoe*, 176 So. 2d 909, 915 (Fla. 1st DCA 1965) (quoting Annotation, *Duration of Contract Purporting to be For Permanent Employment*, 35 ALR 1432 (1925)), *cert. denied*, 188 So. 2d 317 (Fla. 1966); see also 3A CORBIN, *supra* note 3, § 684 (1963) ("[I]f the employee gives a *sufficient consideration* for the employee's promise, the lack of mutuality of obligation is immaterial." (emphasis added)). *Brodie*, *supra* note 5, at 596-97. *But see* *Bayshore Royal Co. v. Doran Jason Co.*, 480 So. 2d 651, 656 (Fla. 2d DCA 1985) (quoting 11 FLA. JUR. 2D *Contracts* § 63 at 355-57 (1979) ("Consideration is sufficient if the promisee, in return for the promise does *anything* legal which he is not bound to do" (emphasis added))).

133. See *Hesston Corp. v. Roche*, 599 So. 2d 148, 152 (Fla. 5th DCA 1992).

134. *Knudsen v. Green*, 156 So. 240, 242-43 (Fla. 1934).

not constitute consideration.¹³⁵ Finally, there can be no award for damages based on the relinquishment of prior employment.¹³⁶

Employers have a common law duty to give "reasonable notice" of termination to employees.¹³⁷ Accordingly, they have a preexisting obligation to provide this "reasonable notice." Since preexisting obligations cannot constitute good consideration,¹³⁸ Florida courts should hold that "reasonable notice" cannot be consideration for a valid employment contract. Nevertheless, Florida courts have held that the obligation on an employer to give "written notice" of termination could constitute consideration on the part of the employer to support an employment contract.¹³⁹

By permitting an employee to continue his employment, rather than exercising the right to terminate the employee at-will, the employer has given adequate consideration to support an employment contract¹⁴⁰ as well as a noncompete clause.¹⁴¹ However, Florida does not recognize an employee's continued work performance as an employee's valid consideration supporting an employment contract.¹⁴²

Under common law, it is axiomatic that either party's change of position can be the detrimental reliance providing the necessary consideration for a contract. Nonetheless, Florida does not recognize an employee's change of position as giving rise to such detrimental reliance.¹⁴³ However, Florida has recognized that an employer's change

135. See *id.* at 243.

136. *Id.*

137. Florida-Georgia Chem. Co. v. National Labs., Inc., 153 So. 2d 752, 754 (Fla. 1st DCA 1963); Perri v. Byrd, 436 So. 2d 359, 361 (Fla. 1st DCA 1983); Malver v. Sheffield Indus., 462 So. 2d 567, 568 (Fla. 3d DCA 1985); Crawford v. David Shapiro & Co., 490 So. 2d 993, 996 (Fla. 3d DCA 1986).

138. See Slattery v. Wells Fargo Armored Serv. Corp., 366 So. 2d 157, 159 (Fla. 3d DCA 1979) ("The performance of a pre-existing duty does not amount to the consideration necessary to support a contract.") (citing Brinson v. Herlong, 164 So. 137 (Fla. 1935)).

139. See Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 624-25 (Fla. 4th DCA 1983).

140. *Id.* at 628 (citing Tasty Box Lunch Co. v. Kennedy, 121 So. 2d 52, 54 (Fla. 3d DCA 1960)).

141. See Coastal Unilube, Inc. v. Smith, 598 So. 2d 200, 201 (Fla. 4th DCA 1992); Tasty Box Lunch Co., 121 So. 2d at 54; Criss v. Davis, Presser, & LaFaye, P.A., 494 So. 2d 525, 527 (Fla. 1st DCA), *rev. denied*, 501 So. 2d 1281 (Fla. 1986).

142. See Hope v. National Airlines, 99 So. 2d 244, 246 (Fla. 3d. DCA 1957) (holding that continued employment during a strike merely constitutes personal services and does not provide sufficient consideration to effect a binding contract).

143. Maguire v. American Fam. Life Assurance Co., 442 So. 2d 321, 323 (Fla. 3d DCA 1983), *rev. denied*, 451 So. 2d 849 (Fla. 1984) (holding that no enforceable employment contract existed due to absence of definite term of employment even though insurance agent, in detrimental reliance upon his employer's promise that he would be allowed to transfer to Florida, canceled his California license).

of position will give rise to such detrimental reliance, thus providing consideration for the contract.¹⁴⁴

Finally, it should be noted that the act of selling a business provides adequate consideration on the seller's part that will support a business purchaser's promise given as part of the business sale agreement; in this case the promise was to employ the business seller, and the duration of the employment was contingent on an act to be performed by the business purchaser.¹⁴⁵

C. *Mutuality of Obligation*

Contracts which are enforceable against one party only are said to lack mutuality.¹⁴⁶ The court in *Wright & Seaton, Inc. v. Prescott*¹⁴⁷ explained the rationale:

[a]s an [sic] unilateral contract is not founded on mutual promises, the doctrine of mutuality is inapplicable to such a contract. It is applicable, however, to a bilateral contract containing mutual executory promises because there both parties are bound by reciprocal obligations and the promise of one is the consideration for the promise of the other.¹⁴⁸

More succinctly, "[A] contract [which] could not have been enforced [by an employer] against [an employee] was lacking in mutuality. Consequently, [an employee] can not enforce it against [an employer]."¹⁴⁹

Additionally, mutuality of obligation measures the inherent fairness of a contract by balancing comparable commitments of the contracting parties.¹⁵⁰ However:

The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach as

144. *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626-27 (Fla. 4th DCA 1983) ("[T]here was complete performance by appellant of what it had promised to do in exchange for appellee's promise not to compete; as a result appellee's promise not to compete became binding upon him and enforceable by injunction.'").

145. *Venus Lab., Inc. v. Katz*, 601 So. 2d 630, 631 (Fla. 3d DCA) (holding that a purchaser's promise to employ the former owner until the company completed payments to the owner was adequate consideration in exchange for the owner's promise to sell), *rev. denied*, 613 So. 2d 12 (Fla. 1992).

146. See generally, 1A CORBIN, *supra* note 3, § 152 n.11.20 (1963).

147. 420 So. 2d 623 (Fla. 4th DCA 1983).

148. *Id.* at 625 (citing *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3d Cir. 1924)); see also 3A CORBIN, *supra* note 3, § 684 (1963) ("[i]f the employee gives sufficient consideration for the employee's promise, the lack of mutuality of obligation is immaterial.'").

149. *Hope v. National Airlines*, 99 So. 2d 244, 247 (Fla. 3d DCA 1957).

150. See *Hesston Corp. v. Roche*, 599 So. 2d 148, 151 (Fla. 5th DCA 1992).

the other. Mere difference in the right stipulated for does not destroy mutuality of remedy . . . so long as the bounds of reasonableness and fairness are not transgressed.¹⁵¹

Florida courts distinguish between consideration supplied for the executory portion of contracts and consideration supplied for the executed portion of contracts.¹⁵² Florida holds the executory features of contracts to be void for lack of consideration *and* lack of mutuality.¹⁵³ For example, an employer's promise to employ an employee for life, in exchange for the employee's act of crossing a picket line for the employer, was held to be an unenforceable agreement because of lack of mutuality.¹⁵⁴ Further, one court held that a contract lacked mutuality because the employer could not *require* the employee to remain at a job for a fixed period of time—this precluded the employee from claiming permanent employment.¹⁵⁵

The extended discussion in *Wright & Seaton, Inc. v. Prescott*¹⁵⁶ regarding *written* notice as consideration states that *written* notice is valid consideration binding an employee to a noncompete agreement.¹⁵⁷ Further, it was immaterial to the *Wright & Seaton* court that the written notice requirement was not even part of the employment contract.¹⁵⁸ Simply, the court held that an employee's obligation under a written employment contract was valid,¹⁵⁹ despite a contractual fact pattern similar to those voided by other courts for lack of mutuality and indefiniteness.¹⁶⁰

D. Statute of Frauds

Employment contracts that are "not to be performed within the space of one year from" the making thereof, must comply with the

151. *Thompson v. Shell Petroleum Corp.*, 178 So. 413, 419 (Fla. 1938) (quoting 32 C.J. *Injunctions* § 297).

152. See *Hope*, 99 So. 2d at 246 (citing 1 CORBIN, *supra* note 3, § 152 (1950)).

153. See *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693, 694 (5th Cir. 1924); *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. 4th DCA 1983); *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216, 218 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1361 (Fla. 1982).

154. See *Hope*, 99 So. 2d at 246 (holding that employee's promise to work during a strike effectively promised nothing since he could terminate his employment at any time).

155. *Russell & Axon v. Handshoe*, 176 So. 2d 909, 916 (Fla. 1st DCA 1965).

156. 420 So. 2d 623 (Fla. 4th DCA 1983).

157. *Id.*

158. *Id.*

159. *Id.*

160. See *Russell & Axon v. Handshoe*, 176 So. 2d 909, 916 (Fla. 1st DCA 1965), *cert. denied*, 188 So. 2d 317 (Fla. 1966).

statute of frauds.¹⁶¹ Florida follows the majority rule regarding lifetime employment contracts which is that the statute of frauds does not apply because "death is uncertain and the contract could therefore terminate prior to the expiration of one year."¹⁶² Finally, oral contracts for an indefinite period of time likewise do not have to comply with the statute of frauds.¹⁶³

E. Other Provisions

1. Arbitration Clauses

"It is well settled that, in order to preserve the integrity of the arbitration process, 'courts will not review the finding of facts contained in an award, and will never undertake to substitute their judgment for that of the arbitrators.'"¹⁶⁴

Parties are bound by procedures set forth in contracts and collective bargaining agreements made by the parties' designated agents.¹⁶⁵ Regardless of which party initiates a collective bargaining agreement containing an arbitration clause, and which party subsequently pursues a grievance in conformity with the procedures within the arbitration agreement, the decision of the designated arbitrator is final and binding.¹⁶⁶

2. Lifetime Contracts and the "Doctrine of Additional Consideration"

Lifetime employment contracts require "additional consideration" on the part of the employee,¹⁶⁷ given at the inception of employment.¹⁶⁸ Lifetime employment contracts need this "additional consideration" because employers cannot require employees to remain within their employment for a fixed period of time.¹⁶⁹ This further

161. FLA. STAT. § 725.01 (1991), construed in *Hesston Corp. v. Roche*, 599 So. 2d 148, 152 (Fla. 5th DCA 1992).

162. *Hesston Corp.*, 599 So. 2d at 152 (citing *Schenkel v. Atlantic Nat'l Bank of Jacksonville*, 141 So. 2d 327, 330 (Fla. 1st DCA), cert. denied, 148 So. 2d 280 (Fla. 1962)).

163. *Id.* (citing *Johnson v. Edwards*, 569 So. 2d 928 (Fla. 1st DCA 1990)).

164. *Fraternal Order of Police v. Miami*, 598 So. 2d 89, 91 (Fla. 3d DCA 1992) (citing *Ogden v. Baile*, 75 So. 794, 797 (Fla. 1917)).

165. *Heath v. Central Truck Lines, Inc.*, 195 So. 2d 588, 590 (Fla. 1st DCA 1967); *Koenig v. Tyler*, 360 So. 2d 104, 106 (Fla. 3d DCA 1978).

166. *Fraternal Order of Police*, 598 So. 2d at 91.

167. *Russell & Axon v. Handshoe*, 176 So. 2d 909, 916 (Fla. 1st DCA 1965); *Hesston Corp.*, 599 So. 2d at 151.

168. *Lurton v. Muldon*, 523 So. 2d 706, 708-09 (Fla. 1st DCA 1988).

169. *Russell & Axon*, 176 So. 2d at 916.

consideration gives the contract mutuality and thus allows the employee to claim permanent employment.¹⁷⁰ This is called the "doctrine of additional consideration."¹⁷¹ "[I]ndependent consideration to support the 'lifetime' employment promise must be present and that relinquishment of another position, even a better paying position, is insufficient."¹⁷² The doctrine of "additional consideration" as applied to employment contracts, specifically requires collateral consideration only, and excludes performance based consideration.¹⁷³ Collateral consideration approved as "additional consideration" so far has been limited to the employee's bringing along and giving to the employer the rights to the employee's patented product.¹⁷⁴

3. *Employment Manuals*

In Florida, provisions within employment manuals are not necessarily binding on employees or employers. The trial court must make an initial determination of whether the provisions/personnel policies are a part of an employment contract before holding them enforceable as part of the employment relationship.¹⁷⁵ Employment manuals are considered to be "mere unilateral expectations, rather than explicit mutual promises necessary to create a binding contractual term."¹⁷⁶ However, where courts have found evidence of "hospital literature" describing benefits available to "permanent part-time employees," and signed applications disavowing the employer's commitment to any specific period of employment, they have permitted the case to reach the fact-finder.¹⁷⁷

Some courts have held employment manuals to be nothing more than non-binding, non-enforceable statements of company policy.¹⁷⁸ Letters, executive memoranda, and employee handbooks that assure

170. *Id.*

171. *Lurton*, 523 So. 2d at 708-09.

172. *Hesston Corp.*, 599 So. 2d at 152.

173. *Chatelier v. Robertson*, 118 So. 2d 241, 243 (Fla. 2d DCA 1960) (holding that employee's lifetime employment was a condition of the contract for the sale of his plant food business to his employer).

174. *Id.*

175. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. 2d DCA 1983); *Falls v. Lawnwood Medical Ctr.*, 427 So. 2d 361, 362 (Fla. 4th DCA 1983); *McConnell v. Eastern Air Lines, Inc.*, 499 So. 2d 68, 69 (Fla. 3d DCA 1986).

176. *Bryant v. Shands Teaching Hosp. & Clinics*, 479 So. 2d 165, 168 (Fla. 1st DCA 1985); *see also Muller*, 427 So. 2d at 270; Michael W. Hawkins, *Employment At Will: A Survey*, 39 LAB. L.J. 525, 527 n.11 (1988) (citing *Caster v. Hennessey*, 727 F.2d 1075 (11th Cir. 1984)); *LaRocca v. Xerox Corp.*, 587 F. Supp. 1002, 1004. (S.D. Fla. 1984).

177. *Nunes v. Margate Gen. Hosp., Inc.*, 435 So. 2d 916, 917 (Fla. 4th DCA 1983).

178. *Lurton v. Muldon*, 523 So. 2d 706, 708-09 (Fla. 1st DCA 1988); *Olsen v. Allstate Ins. Co.*, 759 F. Supp. 782, 786 (S.D. Fla. 1984); *see generally Brodie, supra* note 5, at 599.

employees of the right to a for-cause termination are not enforceable "without more."¹⁷⁹ Presumably, the "more" means evidence of an employer's intent to incorporate the terms of the manual into the contract. An employee's continued employment is not valid consideration for promises in an employment manual given to the employee after the commencement of employment.¹⁸⁰

V. COURTS' CONSTRUCTION OF WRITTEN AND ORAL EMPLOYMENT CONTRACTS

"It is a question of law for the court to determine what would constitute a breach of the contract and then a question of fact for the jury to determine as to whether or not that thing which would constitute a breach of the contract has occurred."¹⁸¹

A. Construing Written Contracts

Courts have the duty of construing *written* contracts.¹⁸² Unable to shift this burden to the jury, the court itself must construe the contract and then inform the jury of the construction.¹⁸³ The jury, nevertheless, may determine narrow questions stipulated by the parties¹⁸⁴ and factual disputes where contract terms are contradicted by testimony.¹⁸⁵ In contrast, the jury is to factually determine the literal terms or the actual language of an *oral* contract.¹⁸⁶

The general rules of contract construction in Florida instruct courts to ascertain the intent of the parties by examining "the total instrument" and to construe various provisions so as to give effect to each;¹⁸⁷ constructions which lead to absurd conclusions must be abandoned in favor of constructions consistent with "reason and probabil-

179. *Muller*, 427 So. 2d at 270; *McConnell*, 499 So. 2d at 69.

180. *Stough v. Gallagher*, 967 F.2d 1523, 1530 (11th Cir. 1992) (citing *Caster v. Hennessey*, 727 F.2d 1075 (11th Cir. 1984)).

181. *Haiman v. Gundersheimer*, 177 So. 199, 201 (Fla. 1937).

182. *Id.* at 200-01; *Paddock v. Bay Concrete Indus.*, 154 So. 2d 313, 316 (Fla. 2d DCA 1963); *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 859 (Fla. 4th DCA 1989).

183. See *Paddock*, 154 So. 2d at 316 (citing *Leesburg v. Hall*, 117 So. 840 (Fla. 1928)).

184. See *Russell & Axon v. Handshoe*, 176 So. 2d 909, 912 (Fla. 1st DCA 1965), *cert. denied*, 188 So. 2d 317 (Fla. 1966).

185. *American Agronomics Corp. v. Ross*, 309 So. 2d 582, 584 (Fla. 3d DCA) (holding that contradictory evidence of a written contract containing the exact start date for the period of employment and testimony contradicting contract terms regarding the duration of employment was sufficient to send factual dispute to jury), *cert. denied*, 321 So. 2d 558 (Fla. 1975).

186. *Dickinson v. Auto Ctr. Mfg. Co.*, 594 F.2d 523, 529-30 (5th Cir. 1979) (applying Florida law).

187. See *Paddock*, 154 So. 2d at 315-16; *Roy Jorgensen Assocs. v. Deschenes*, 409 So. 2d 1188, 1190 (Fla. 4th DCA 1982).

ity;”¹⁸⁸ courts may not construe clear and unambiguous language to mean something other than that expressed;¹⁸⁹ courts have no power to remake contracts; ¹⁹⁰and unambiguous agreements must be enforced according to their terms.¹⁹¹ Courts may also consider the parties’ interpretations of uncertain or doubtful terms where the interpretations are “not completely at variance with the principles of correct legal interpretations of the contract provisions.”¹⁹²

Florida courts construe employment contracts according to the following rules:

(1) the contract should not be held void for uncertainty unless indefiniteness reaches a point where construction becomes futile; (2) ambiguities are to be construed against the drafter; (3) the conduct of the parties through their course of dealings shall be considered to determine the meaning of the written agreement where the terms are in doubt; (4) the objects to be accomplished shall be considered, and to this end the court shall place itself in the position of the parties when the contract was entered into; (5) the interpretation of the contract should be consistent with reason, probability, and the practical aspects of the transaction; and (6) the contract should be considered as a whole, not in its isolated parts.¹⁹³

Because an employment contract must contain a definite term of employment to avoid being an at-will contract, the existence of an actual employment time frame in the contract can be determinative of the contract’s validity. Determining such a time frame depends upon a reading of the entire contract.¹⁹⁴ Additionally, oral evidence may be introduced to show that the terms of the written agreement did not encompass the entire agreement, and that such parole evidence needs to be admitted in order to prove fraudulent inducement in signing the written employment contract.¹⁹⁵

Construing Oral Contracts

Determining the literal terms or language of an oral contract is the responsibility of the factfinder,¹⁹⁶ in contrast to the court’s being responsible for construing written contracts.¹⁹⁷

188. See *Paddock*, 154 So. 2d at 315-16.

189. *Id.*

190. *Id.*

191. *Id.*

192. *American Agronomics Corp. v. Ross*, 309 So. 2d 582, 584 (Fla. 3d DCA) (citing *Bouden v. Walker*, 266 So. 2d 353, 354 (Fla. 2d DCA 1972)), *cert. denied*, 321 So. 2d 558 (Fla. 1975).

193. *Maines v. Davis*, 491 So. 2d 1233, 1235 (Fla. 1st DCA 1986) (citations omitted).

194. *Roy Jorgensen Assocs. v. Deschenes*, 409 So. 2d 1188, 1190 (Fla. 4th DCA 1982).

195. *Elmore v. Vatrano*, 485 So. 2d 888, 890 (Fla. 1st DCA 1986).

196. *Dickinson v. Auto Ctr. Mfg. Co.*, 594 F.2d 523, 529 (5th Cir. 1979) (applying Florida

VI. COMMON LAW EMPLOYMENT RELATIONSHIP DUTIES

A. *Employees' Common Law Fiduciary Duties*

Implicit in every employment contract is the requirement that the employee faithfully perform the duties demanded by the employer in a manner directed by the employer.¹⁹⁸ The most fundamental of fiduciary duties is the duty of employees not to deal for their own benefit while employed by someone else.¹⁹⁹ Employees may not commit disloyal acts in anticipation of future competition.²⁰⁰ During their employment, employees may not enter into a business that competes with the employer's business and keep for themselves the profits from the competing business.²⁰¹ However, employees may make "arrangements to compete" prior to leaving their current employment and they have no duty to disclose such plans.²⁰²

One example of a duty hovering on the outskirts of employees' implicit common law fiduciary duties is the duty not to falsify warranties and representations when selling a business. Ostensibly, this is applicable and remediable only when the seller has stayed on to work for the new owner as an employee.²⁰³

There is also an implied duty not to use confidential information gained in the course of employment such as trade secrets, secret designs, plans, and certain customer lists.²⁰⁴ Finally, employees have a

law); see *Juvenile Diabetes Research Found. v. Rievman*, 370 So. 2d 33, 37 (Fla. 3d DCA 1979) (upholding an oral employment contract).

197. *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313, 315 (Fla. 2d DCA 1963) (citing *Leesburg v. Hall*, 117 So. 840 (Fla. 1928)).

198. *Haiman v. Gundersheimer*, 177 So. 199, 201 (Fla. 1937).

199. *United States v. Bowen*, 290 F.2d 40, 42 (5th Cir. 1961); *Phillips Chem. Co. v. Morgan*, 440 So. 2d 1292, 1293 (Fla. 3d DCA 1983).

200. See *Insurance Field Servs. v. White & White Inspection & Audit Serv.*, 384 So. 2d 303, 307-08 (Fla. 5th DCA 1980).

201. *Singletary v. Mann*, 24 So. 2d 718, 723 (Fla. 1946); see also *New World Fashions, Inc. v. Lieberman*, 429 So. 2d 1276, 1277 (Fla. 1st DCA 1983); *In re Hallmark Builders, Inc.*, 57 B.R. 121, 123 (Bankr. M.D. Fla. 1986).

202. See *New World Fashions*, 429 So. 2d at 1277.

203. *Austin's Rack, Inc. v. Austin*, 396 So. 2d 1161, 1162-63 (Fla. 3d DCA), *rev. denied*, 402 So. 2d 607 (Fla. 1981).

204. *Bert Lane Co. v. International Indus.*, 84 So. 2d 5, 7 (Fla. 1955); *Unistar Corp. v. Child*, 415 So. 2d 733, 734 (Fla. 3d DCA 1982). *But see* *Fish v. Adams*, 401 So. 2d 843, 845 (Fla. 5th DCA 1981) (holding that the *planning and formation* of a competing business does not breach employee's implied duty where no confidential information is used); *Templeton v. Creative Loafing Tampa, Inc.*, 552 So. 2d 288, 289-90 (Fla. 2d DCA 1989) (holding that customer lists developed by the employee may not constitute trade secrets).

duty not to attempt to or to conspire to lure away existing fellow employees in order to hire them for a future competitive business.²⁰⁵

B. Employers' Common Law Duties to Employees

As discussed previously, Florida employers owe employees "reasonable notice" before termination.²⁰⁶

C. Employers' Common Law Duties to Third Parties

An employer may be held liable for an employee's acts if the employer fails to make a reasonable inquiry into the employee's background.²⁰⁷ The general rule is that employers are liable for their employees' acts if such acts are performed in furtherance of the employers' interests.²⁰⁸ However, employers have even been held liable for their employees' criminal acts which were not done in furtherance of their employers' interests where the employee's actions were foreseeable, or *would have been* foreseeable had the employer made a reasonable inquiry into the employee's background.²⁰⁹ For example, if employees commit offenses similar to offenses already on their criminal record, employers will be considered to have been on notice of such employees' criminal records, and are thus held liable for their employees' actions.²¹⁰ Therefore, employers should make a reasonable

205. See *Fish*, 401 So. 2d at 845; *Puga v. Suave Shoe Corp.*, 427 So. 2d 288, 289 (Fla. 3d DCA 1983); *Security Title & Abstract, Inc. v. First Amer. Title Ins. Co.*, 414 So. 2d 604, 605 (Fla. 1st DCA 1982).

Third parties are also liable in tort along with employees for such conspiracy. See *Phillips Chem. Co. v. Morgan*, 440 So. 2d 1292, 1293 (Fla. 3d DCA 1983), *rev. denied sub nom. Gamble v. Phillips Chem. Co.*, 450 So. 2d 486 (Fla. 1984).

206. See *Florida-Georgia Chem. Co. v. National Labs., Inc.*, 153 So. 2d 752, 754 (Fla. 1st DCA 1963) (noting that contracts for an indefinite period "may be terminated at will on giving reasonable notice"); *Perri v. Byrd*, 436 So. 2d 359, 361 (Fla. 1st DCA 1983); *Malver v. Sheffield Indus.*, 462 So. 2d 567, 568 (Fla. 3d DCA 1985); *Crawford v. David Shapiro & Co.*, 490 So. 2d 993, 996 (Fla. 3d DCA 1986); see also *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 626 (Fla. 4th DCA 1983) (discussing written notice). However, upon terminating an employee, a Florida employer may not have to pay any outstanding commissions. *Cueto v. John Allmand Boats, Inc.*, 334 So. 2d 30, 31 (Fla. 3d DCA 1976).

207. See *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980) (holding that an employer has a duty to make a "reasonable inquiry" into the background of an employee who will have access to tenants' homes), *rev. denied*, 392 So. 2d 1374 (Fla. 1981); *Abbott v. Payne*, 457 So. 2d 1156, 1157 (Fla. 4th DCA 1984) (holding that an employer must make a reasonable background check of an employee who will have free access to customers' homes).

208. See *supra* notes 109-112 and accompanying text.

209. *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 750-51 (Fla. 1st DCA 1991), *rev. denied*, 595 So. 2d 558 (Fla. 1992).

210. *Island City Flying Serv. v. General Elec. Credit Corp.*, 585 So. 2d 274, 276-77 (Fla. 1991).

inquiry into their employees' backgrounds to limit the liability arising from their employees' acts, even if such acts were crimes not done in furtherance of employers' interests.²¹¹

VII. NON-CONTRACTUAL CAUSES OF ACTION

A. Claims Sounding in Tort

A court may enjoin tortious interference with a business or employment relationship by an employee²¹² or employer²¹³ and, where appropriate, award damages for such interference.²¹⁴ Courts will recognize as a defense defendants' proof that the interference involved lawful competition.²¹⁵

1. Employers' Claims

The law will import into every contract of employment a prohibition against employees using trade secrets for their own benefit to the detriment of the employer.²¹⁶ If the defendant in a tortious interference action is an employee, customer lists, when distilled from larger customer lists compiled with considerable effort, qualify as trade secrets and their use may be enjoined and damages awarded.²¹⁷ Nevertheless, employees may use contacts, expertise, and customer lists which they developed during the course of their employment.²¹⁸

2. Employees' Claims

Employees may have a cause of action in tort for fraudulent inducement to contract despite a court's finding that the employee's dismissal due to the employer's closing of a portion of a business constituted valid dismissal "for cause."²¹⁹ Key language used by the

211. *Williams*, 386 So. 2d at 1240-41; *Abbott*, 457 So. 2d at 1157.

212. *Unistar Corp. v. Child*, 415 So. 2d 733, 735 (Fla. 3d DCA 1982).

213. It is important to note that, in Florida, a party to a business or employment relationship cannot be liable for tortiously interfering with that relationship if the party was acting within the scope of his duties within the relationship, regardless of whether the relationship is contractual or noncontractual. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 271 (Fla. 2d DCA 1983).

214. See *Insurance Field Servs. v. White & White Inspection & Audit Servs.*, 384 So. 2d 303, 308 (Fla. 5th DCA 1980).

215. See *Perez v. Rivero*, 534 So. 2d 914, 916 (Fla. 3d DCA 1988); *Unistar Corp.*, 415 So. 2d at 734.

216. See *Perez*, 534 So. 2d at 916; *Unistar Corp.*, 415 So. 2d at 734.

217. See *Unistar Corp.*, 415 So. 2d at 734.

218. See *Templeton v. Creative Loafing Tampa, Inc.*, 552 So. 2d 288, 289-90 (Fla. 2d DCA 1989).

219. See *Telesphere Int'l, Inc. v. Scollin*, 489 So. 2d 1152, 1153-54 (Fla. 3d DCA), *rev. denied*, 500 So. 2d 546 (Fla. 1986).

court in holding fraudulent inducement claims valid is if “. . .the promise [of employment] is made without any intention of performing or made with the positive intention not to perform.”²²⁰ In addition, employees may have a cause of action for fraudulent misrepresentation regarding the terms and conditions of the new job.²²¹ However, there is no cause of action sounding in tort for a violation of the public policy expressed in Florida’s “Right to Work” statute.²²²

Further, there is no cause of action for tort claims derived from contract claims for such as retaliatory discharge²²³ or for mental anguish derived from contract breach.²²⁴ Yet, this does not preclude an employee from maintaining a cause of action for intentional infliction of emotional distress if committed within the employment relationship.²²⁵

B. Statutory Causes of Action

An employee has a statutory cause of action for wrongful discharge when the employee is discharged (1) for pursuing a worker’s compensation claim;²²⁶ (2) serving on a state jury trial;²²⁷ (3) for membership in a labor union;²²⁸ (4) for discharge on the basis of race, color, relig-

220. See *Hamlen v. Fairchild Indus.*, 413 So. 2d 800, 802 (Fla. 1st DCA 1982).

221. *Telesphere Int’l, Inc.*, 489 So. 2d at 1154.

222. See *Catania v. Eastern Air Lines, Inc.*, 381 So. 2d 265, 267 (Fla. 3d DCA 1980) (construing FLA. STAT. § 447.01 (1979)).

223. *Smith v. Piezo Tech. & Prof. Adm’rs*, 427 So. 2d 182, 184 (Fla. 1983); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89, 90 (Fla. 3d DCA 1978); *OCHAB v. Morrison, Inc.*, 517 So. 2d 763, 764 (Fla. 2d DCA 1987); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1330 (Fla. 3d DCA 1985); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241, 242 (Fla. 4th DCA 1989).

224. *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1123 (Fla. 1979), *aff’d*, 384 So. 2d 1253 (Fla. 1980); see also *Kirksey v. Jernigan*, 45 So. 2d 188, 189 (Fla. 1950) (“[T]here can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the *negligent breach* of a contract whereby simple negligence is involved.”) (emphasis added); *Henry Morrison Flagler Museum v. Lee*, 268 So. 2d 434, 436 (Fla. 4th DCA 1972) (holding that mental anguish is not recoverable even where it results from a “willful and flagrant” breach of contract).

225. See *Henry Morrison Flagler Museum*, 268 So. 2d at 434 (quoting *Griffith v. Shamrock Village*, 94 So. 2d 854, 858 (Fla. 1957)).

226. FLA. STAT. § 440.205 (1983); *Smith*, 427 So. 2d at 182-84; see also *Notarian v. Plantation AMC Jeep, Inc.*, 567 So. 2d 1034, 1035 (Fla. 4th DCA 1990).

227. See *Hill v. Winn-Dixie Stores, Inc.*, 699 F. Supp. 876, 877 (M.D. Fla. 1988) (interpreting FLA. STAT. § 40.271 (1987) to extend protection to employees from discharge on account of state, but not federal, jury service), *aff’d and rev’d in part on other grounds*, 934 F.2d 1518 (11th Cir. 1991). Cf. *Scott v. Estalella*, 563 So. 2d 701, 704 (Fla. 3d DCA 1990) (Cope, J., dissenting) (arguing that FLA. STAT. § 40.271 (1987) was also intended to protect employees from discharge for fulfilling federal jury service).

228. FLA. STAT. § 447.17(1) (1983).

ion, sex, national origin, age, handicap, or marital status;²²⁹ and (5) for wage discrimination on the basis of sex.²³⁰

Public employees may maintain statutory causes of action against county or municipal employers if their discharge was based on personal characteristics,²³¹ and against state or state governmental subdivision employers if based on age.²³² Additionally, law enforcement and correction officers may maintain a statutory cause of action for retaliatory discharge for the officer's expression of the rights enumerated in section 112.532(1), *Florida Statutes*.²³³

Recently, the Florida Supreme Court, in *Scott v. Otis Elevator Co.*,²³⁴ held that if an employer intentionally violates section 440.205, *Florida Statutes*, by wrongfully discharging an employee for filing a Worker's Compensation claim, the employee may maintain a cause of action for infliction of emotional distress.²³⁵ The *Scott* court reasoned that because an employer who discharges an employee in violation of section 440.205 is committing an *intentional* tort, the employer is liable for damages resulting from the concomitant tort of intentional infliction of emotional distress.²³⁶ Although the holding in this case only addressed the applicability of this reasoning in cases involving wrongful discharge for filing Worker's Compensation claims, the same reasoning appears to justify plaintiffs' claims for emotional distress arising from violations of any of the previously identified employment-related statutes.

VIII. REMEDIES

“[A] cause of action immediately arises upon the wrongful discharge of an employé under contract for a definite time, and it is not

229. *Id.* § 760.10(1)(a).

230. *Id.* § 448.07(2)(b).

231. *Id.* § 112.042(1) (1991). These characteristics currently include “race, color, national origin, sex, handicap, or religious creed.” *Id.*

232. *Id.* § 112.044(4).

233. *Id.* § 112.532(1), (5) (1987); *see also* *Sylvester v. Delray Beach*, 584 So. 2d 214, 215 (Fla. 4th DCA 1991) (holding that section §112.532(5) provides injunctive relief but not damages). *But see* *Stough v. Gallagher*, 967 F.2d 1523, 1530 (11th Cir. 1992) (“Florida deputy sheriffs have no property or liberty interests in their positions for purposes of the Fourteenth Amendment.”).

Note the “Policeman’s Bill of Rights” provides remedies for police seeking injunctive relief from their employers—this has been limited to reinstatement and back-pay (but not damages). FLA. STAT. § 112.532(5) (1987).

234. 572 So. 2d 902 (Fla. 1990).

235. *Id.*; *see also* *Henry Morrison Flagler Museum v. Lee*, 268 So. 2d 434, 436-37 (Fla. 4th DCA 1972) (noting that recovery for mental anguish requires more than simple breach of contract); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1123 (Fla. 1979), *aff’d*, 384 So. 2d 1253 (Fla. 1980).

236. *Scott*, 572 So. 2d at 903; *see generally* Comment, *Workers’ Compensation: Florida’s Resistance to Nonstatutory Limits to the Employment-At-Will Doctrine*, 43 U. FLA. L. REV. 583 (1991).

necessary to await the termination of that period before asking the courts for redress."²³⁷

A. Equitable Relief

Employers enforce employment contracts in equity, through negative injunctions.²³⁸ For example, courts prohibit employees from competing with employers in violation of noncompete agreements.²³⁹ In addition, a court may enjoin an employee's tortious interference in a business relationship and order an accounting of profits by the employee as a result of his interference,²⁴⁰ and/or award damages to the employer.²⁴¹

B. Damages

In a breach of an employment contract action, the plaintiff has the burden of proving the amount of damages suffered as a result of the breach.²⁴² When an employment contract of a specific duration is breached, damages are measured by "wages for the unexpired part of the term, including, of course, any unpaid balance due under the contract at the time of discharge for services already performed."²⁴³ Further, when an employer breaches his promise to promote an employee to a higher-paying position if the employee will leave his current employment, the employee must prove the salary of the new position, "not the loss of advantages derived from another contract between the servant and [his] previous employer" to determine the necessary damages.²⁴⁴ Courts have also awarded damages and prejudgment interest to an employee for an employer's anticipatory breach of an employment contract,²⁴⁵ as well as for breach of an employment contract extension.²⁴⁶

237. *Harris v. Coconut Grove Dev. Co.*, 59 So. 11, 11 (Fla. 1912).

238. See BAKALY & GROSSMAN, *supra* note 46, at 1.2, 5-7.

239. See discussion *supra* part III.B.1.

240. See *New World Fashions, Inc. v. Lieberman*, 429 So. 2d 1276, 1277 (Fla. 1st DCA 1983).

241. See *Insurance Field Servs. v. White & White Inspection & Audit Serv.*, 384 So. 2d 303, 308 (Fla. 5th DCA 1980).

242. See *Juvenile Diabetes Res. Found. v. Rievman*, 370 So. 2d 33, 36 (Fla. 3d DCA 1979).

243. *Hazen v. Cobb*, 117 So. 853, 859 (Fla. 1928).

244. See *Servamerica, Inc. v. Rolfe*, 318 So. 2d 178, 180 (Fla. 1st DCA 1975) (quoting *Knudsen v. Green* 156 So. 240, 242-43 (Fla. 1934)).

245. See *Venus Lab., Inc. v. Katz*, 601 So. 2d 630, 631-32 (Fla. 3d DCA), *rev. denied*, 613 So. 2d 12 (Fla. 1992).

246. See *Raytheon Subsidiary Support Co. v. Crouch*, 548 So. 2d 781, 782 (Fla. 4th DCA 1989) (holding that employee who was given an extension of his employment contract could recover damages and interest when the employer breached this extension).

Unlike in a breach of contract action, it is unnecessary to prove damages as a prerequisite for a court's finding that an employee was wrongfully discharged. However, if an employee is found to have been wrongfully discharged, the employee may recover damages. Courts have also awarded damages to compensate an employee for lack of reasonable notice of termination, provided the parties reasonably contemplated such a provision during contract negotiations even though only an at-will relationship existed at that time.²⁴⁷

Courts may calculate damages by treating the contract as continuing and determining the amount of the contract price or wages for the unexpired portion of the term.²⁴⁸ Further, an employer is entitled to an accounting for the profits received by an employee due to the employee's breach of a fiduciary duty owed to the employer.²⁴⁹ The court determines the right to an accounting, if there is such a right, and then determines the appropriate amount.²⁵⁰

1. *Employees' Duty to Mitigate*

"As a general proposition a wrongfully discharged employee is not obligated to seek other employment."²⁵¹ The damages recoverable, however, will be reduced by the income the discharged employee earned,²⁵² to the extent they were not produced by additional labor and effort beyond that required by the original contract.²⁵³ Therefore, it is often said that an employee has a duty to mitigate damages by earning income "through the use of due diligence in other employment of like nature," for the remainder of the contract term.²⁵⁴ This duty to mitigate, however, does not require taking a job below the appropriate skill level²⁵⁵ or one which requires labor and effort beyond

247. See *Florida-Georgia Chem. Co. v. National Labs., Inc.*, 153 So. 2d 752, 754 (Fla. 1st DCA 1963); *Perri v. Byrd*, 436 So. 2d 359, 361 (Fla. 1st DCA 1983); *Malver v. Sheffield Indus.*, 462 So. 2d 567, 568 (Fla. 3d DCA 1985); *Crawford v. David Shapiro & Co.*, 490 So. 2d 993, 996 (Fla. 3d DCA 1986).

248. *Hazen v. Cobb*, 117 So. 853, 859 (Fla. 1928).

249. See *New World Fashions, Inc. v. Lieberman*, 429 So. 2d 1276, 1277 (Fla. 1st DCA 1983).

250. *Id.*

251. *Punkar v. King Plastic Corp.*, 290 So. 2d 505, 508 (Fla. 2d DCA), *cert. denied*, 297 So. 2d 30 (Fla. 1974).

252. *Reed Constr. Corp. v. Zimmerman*, 133 So. 2d 579, 580 (Fla. 3d DCA 1961); *Southern Keswick, Inc. v. Whetherholt*, 293 So. 2d 109 (Fla. 2d DCA 1974); *Juvenile Diabetes Res. Found. v. Rievman*, 370 So. 2d 33 (Fla. 3d DCA 1979); *Zayre v. Creech*, 497 So. 2d 706, 707-08 (Fla. 4th DCA 1984).

253. *Punkar*, 290 So. 2d at 508.

254. See *Juvenile Diabetes Res. Found.*, 370 So. 2d at 36.

255. See *Punkar*, 290 So. 2d at 508.

that required by the original contract.²⁵⁶ Mitigation is an affirmative defense with the burden of proof by the greater weight of the evidence placed on the employer.²⁵⁷

C. Liquidated Damages and Penalty Damages

Liquidated damages clauses "determine in advance what damages will be assessed in the event of a breach" with certain limitations.²⁵⁸ The two criteria considered in determining whether a liquidated damages clause in an employment contract is enforceable are (1) how well the parties are informed, and (2) whether the agreements were reached through arms-length negotiations.²⁵⁹ For example, in the context of breaching a noncompete clause, it is permissible to agree to an amount of liquidated damages when the amount is reasonable,²⁶⁰ when the amount is not a penalty,²⁶¹ and when actual damages are by their nature uncertain.²⁶² The reasonableness of the amount tends to be the determinative factor in enforcing such clauses.²⁶³

It is well settled in Florida that parties to a contract may stipulate an amount to be paid as liquidated damages in the event of a breach.²⁶⁴ However, a liquidated damages clause will be invalid if it is found to be a "penalty" for breach of contract.²⁶⁵ In *Hyman v. Cohen*,²⁶⁶ the Florida Supreme Court established a two-prong analysis to determine whether a liquidated damages clause is a penalty: (1) whether the damages were readily ascertainable by the parties at the time the contract was entered into and (2) whether the liquidated dam-

256. *Id.*

257. See *Juvenile Diabetes Res. Found.*, 370 So. 2d at 36 (noting that the burden of proof is measured by "the greater weight of the evidence").

258. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 640 (3d ed. 1987).

259. *Criss v. Davis, Presser & LaFaye, P.A.*, 494 So. 2d 525, 526 (Fla. 1st DCA) (upholding as reasonable the liquidated value of accounting clients when successfully solicited by a former employee, and that such liquidated value could be derived from the price of an established accounting business), *rev. denied*, 501 So. 2d 1281 (Fla. 1986).

260. *Id.*

261. *Cherry, Bekaert & Holland v. LaSalle*, 413 So. 2d 436, 437 (Fla. 3d DCA 1982) (striking liquidated damages clause upon finding that the given liquidated value of clients in a fact scenario similar to that in *Criss* "was predicated upon inadequate consideration and imposed an oppressive penalty"), *cited with approval in Criss*, 494 So. 2d at 526.

262. *Criss*, 494 So. 2d at 526 (citing *Secrist v. National Serv. Indus.*, 395 So. 2d 1280 (Fla. 2d DCA 1981)).

263. CALAMARI & PERILLO, *supra* note 258, at 640. For a more thorough discussion of liquidated damages clauses and their limitations, see *id.* at 639-46.

264. See *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

265. See *Poinsettia Dairy Prod., Inc. v. Wessel Co.*, 166 So. 306, 309 (Fla. 1936); *Lefemine*, 573 So. 2d at 328.

266. 73 So. 2d 393 (Fla. 1954) (although this case dealt with a liquidated damages clause in a lease, the analysis is equally applicable to employment contracts).

ages are "grossly disproportionate" to the actual damages resulting from the breach.²⁶⁷ An affirmative answer to these questions will generally lead a court to find that the liquidated damages clause is a "penalty," and thus invalid.

D. Limitations of Damages

At the core of the at-will employment philosophy the value of a job is no more than the value of an underlying *opportunity* to work for money.²⁶⁸ Florida places nominal value on such *opportunities* when not accompanied by completed performance,²⁶⁹ and thus does not consider at-will employment as a property interest.²⁷⁰ Accordingly, an employee's measure of damages for an employer's breach is not the value of the previous employment which the employee gave up to accept his current position, but rather the damages the employee suffered as a result of the breach of the current employment contract.²⁷¹ Similarly, damages for an employer's breach of a lifetime employment contract cannot be calculated by assuming the employment would have continued for the life of the corporation.²⁷² "Such damages would be so speculative as to render them impossible of determination."²⁷³ Finally, damages for breach of an employment contract are limited to those which foreseeably flow from the breach and do not include damages for tort-based injuries such as severe embarrassment or humiliation.²⁷⁴

The aforementioned rules act as *limitations* on damages which may be recovered upon a breach of contract. A court may also determine that employees may waive their rights to recover damages. For example, employees may waive their rights to damages for an employer's breach "by failing to timely demand performance of the obligations appurtenant to that right."²⁷⁵

267. *Id.* at 401.

268. See discussion *supra* part III; 1 CORBIN, *supra* note 3, § 70 (1963) (the employment relationship as a unilateral contract); *Protecting At Will Employees*, *supra* note 3, at 1818-19.

269. See *Knudsen v. Green*, 156 So. 240, 243 (Fla. 1934). In Florida, "upon a breach of such contract the servant's measure of damages is the worth of the bargain upon which the action is based." *Id.*

270. See *Kelly v. Gill*, 544 So. 2d 1162, 1164 (Fla. 5th DCA), *rev. denied*, 553 So. 2d 1165 (Fla. 1989), *cert. denied*, 494 U.S. 1029 (1990).

271. *Id.*; see also discussion *supra* part VIII.

272. *Hope v. National Airlines*, 99 So. 2d 244, 246 (Fla. 3d DCA 1957).

273. *Id.*

274. *Henry Morrison Flagler Museum v. Lee*, 268 So. 2d 434, 435 (Fla. 4th DCA 1972).

275. *Arbogast v. Bryan*, 393 So. 2d 606, 608 (Fla. 4th DCA 1981) (employee/real estate salesman waived rights to commissions by failing to object to commission reductions during six year employment period) (citing *Davis v. Davis*, 123 So. 2d 377 (Fla. 1st DCA 1960)).

IX. CONCLUSION

Legal practitioners should consider the effects of an employment contract on the client, who will probably be an employer, by comparing the for-cause duties the contract imparts on the employer with those few duties imparted in a common law at-will employment relationship. Such consideration may necessitate giving the client advice contrary to the client's desire to form such a contract, but it may avoid having the client bound to additional common law duties the client neither considered nor desired.

The Florida Legislature, short of making Florida into a wrongful discharge state,²⁷⁶ may see fit to legislate causes of action for retaliatory discharge for refusing to perform illegal acts at the behest of employers, for filing sexual harassment charges against the employer, for "whistle-blowing," and for exercising a vested or statutory right.²⁷⁷

Additionally, employers who make express promises to their employees, such as in employment manuals, should be held to them regardless of the promises' unilateral characteristics or lack of consideration,²⁷⁸ provided, of course, that employees change position in reliance on such promises. Currently, an employee's detrimental reliance is not consideration for a cause of action for breach of contract, absent a showing that the manual has been integrated into the contract. As employers have control over their promises, employees should not be denied a cause of action simply because they relied on promises made within employment manuals or "literature" without supplying additional consideration in addition to performance.²⁷⁹ "[Employment contract] language should not be a mare's nest for prospective employees . . . [because] not all prospective employees are law students."²⁸⁰

Florida employees should not be discouraged from whistle-blowing, exercising their rights at law, or accessing the courts. Additionally, employers should not easily evade their promises just because employees failed to master the intricacies of complying with lawyers' terms of art—i.e. knowing when to "supply additional consideration" or the importance of "mutuality of obligation."²⁸¹ This would make Justice

276. See generally C. Ray Gullett & George D. Greenwade, *Employment at Will: The No Fault Alternative*, 39 LAB. L.J. 372 (1988).

277. See, e.g., Gumbel & Hoover, *supra* note 101.

278. Cf. Nunes v. Margate Gen. Hosp., Inc., 435 So. 2d 916, 918 (Fla. 4th DCA 1983) (reversing the trial court's summary judgment that the term "permanent employees" as applied to appellant in no way meant a permanent employee).

279. *Id.*

280. *Id.*

281. See generally *id.*; Brodie, *supra* note 5.

Overton content, deliver Florida from the finger-in-the-dike rationale of limiting employee rights, and place no undeserved burden on the employer.