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## Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination

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WORKING GROUP ON CHAPTER 2 OF THE PROPOSED  
RESTATEMENT OF EMPLOYMENT LAW: EMPLOYMENT  
CONTRACTS: TERMINATION

BY

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## I. SECTION 2.01<sup>1</sup>

### § 2.01 Default Rule of an At-Will Employment Relationship

**Unless an agreement, statute or other law or public policy limits the right to terminate, either party may terminate an employment relationship with or without cause.<sup>2</sup>**

The validity or invalidity of the core provision raises a substantial question of whether there should be a Restatement of Employment Law at all at this time. Certainly, the action of a reputable organization such as the ALI issuing a document that this particular statement of the at-will rule is the law, if in fact it is not accurate, would be damaging to the long-term common law process of refining rules by evolution. This is especially true in this circumstance, where only after a long period of judicial inaction while the rule had fallen into virtual desuetude,<sup>3</sup> from the late nineteenth century to the late twentieth century, forty-nine state supreme courts have begun again to work out new rules in the evolutionary process which is the common law. Thus, the ALI's assertion that the at-will rule "is" the law today, if, in fact, the law is in considerable flux, would be inaccurate. State judicial acceptance of the assertion would be counterproductive to the common law process. There are circumstances where the best tradition of the Restatement, out of respect for the developing common law, would be to forebear from attempting to restate a law that is still changing. From a close reading of the cases of many jurisdictions, this is one of those circumstances. With only Montana thus far taking a purely statutory reform

1. The critique of section 2.01 was written by Lea VanderVelde.

2. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 (Council Draft No. 3, 2008).

3. There are several reasons that the common law failed to refine the at-will status in the early twentieth century but one notable reason derives from logic. Most employees could not afford to hire lawyers at the lawyers' customary higher pay rate to pursue job loss when the financial expectancy of recovery was less than the lawyers' fee.

path,<sup>4</sup> the evolutionary process necessarily involves the forty-nine other state supreme courts as “little laboratories of state common law experimentation.”<sup>5</sup>

Moreover, the evidence suggests that different states have developed differently, in part based on the order of cases that came before them,<sup>6</sup> but harmonization between states’ employment status rules has not yet been given the time to work itself through. There is a very serious question whether harmonization should be forced in an ALI project that is denominated a proposed Restatement of existing law. As has been suggested by some of the ALI membership, it may be a wiser approach to proceed with a project of “Principles” rather than a “Restatement.”<sup>7</sup>

#### *A. Is the Employment Law of American Jurisdictions Stable?*

The Proposed *Restatement’s* reporter justifies this ALI intervention by suggesting that the principles of employment law are stable.<sup>8</sup> The written commentary to the project offers no empirical evidence for that position and no rationale for an intervention at this time. There are several different reasons to believe that state law of employment continues to be in considerable flux.

First, the dissent and concurrence rate is very high in this particular

4. While Montana is the only state to have passed legislation modifying the archaic at will doctrine, MONT. CODE ANN. § 39-2-501 (2007), it is not the only U.S. jurisdiction to have done so, as both Puerto Rico, P.R. LAWS ANN. tit. 29 §185b (2008), and the U.S. Virgin Islands, V.I. CODE ANN. tit. 24, § 76 (2008), have legislation modifying the harshness of the doctrine. In 1996, Arizona enacted the euphemistically named Arizona Employment Protection Act, which consolidated the legal theories that could be pursued in termination cases. ARIZ. REV. STAT. § 23-1501 (LexisNexis 2008). Georgia, GA. CODE ANN. § 34-7-1 (2008), and South Dakota, S.D. CODIFIED LAWS § 60-4-4 (2005), have enacted legislation that restates the at-will doctrine in statutes. South Dakota’s statute provides: “An employment having no specified term may be terminated at the will of either party on notice to the other unless otherwise provided by statute.” S.D. CODIFIED LAWS § 60-4-4. Louisiana and North Dakota have similar statutes. LA. CIV. CODE ANN. art. 2747 (2009); N.D. CENT. CODE § 34-03-01 (2008).

5. The famous phrase, “laboratories of democracy,” derives from Brandeis’s commentary on the virtues of federalism: “[T]he happy incident [] of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

6. One could call this path dependency. *See, e.g.*, Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

7. *Discussion of Restatement of the Law Third, Employment Law*, PROC. 85TH ANN. MTG., AM L. INST. 278 (2008) (comments of Mr. Greenwald).

8. *See e.g. id* at 230 (remarks of Reporter Sam Estreicher to the effect that “where the law is settled we report it as such, but where the jurisdictions are divided we try to give guidance . . . in terms of the better rule,” implying that the law is settled, or at least that rules within individual jurisdictions are settled.). A closer look at the workings of the common law suggests that the rules are far from settled in many of the states

area, higher than in most state common law areas. Among the forty-nine citations utilized by the Reporters in an appendix to the Council suggesting that “at will” is the rule in the respective states, only half were unanimous decisions.<sup>9</sup> Yet, according to a survey of state supreme Court Clerks of Court, most supreme court decisions tend toward unanimity.<sup>10</sup> In addition to the relatively higher dissent rate in common law employment cases, several courts failed to reach unanimous decisions because of concurrences. Even though a concurring opinion indicates a justice deciding with the court in result, the fact that the concurring justices’ reasons differ from those expressed by the majority implies that there is a lack of agreement upon theory and accordingly, upon some range of the case decision’s application.<sup>11</sup> This fact further evidences that the governing common law principles, particularly the core principles, are very much in flux.

Second, even within individual jurisdictions, the law appears to be in flux; cases adopted by majorities in one year are side stepped, repudiated or

9. A very high proportion of the cases cited in the Restatement list had dissents as well as concurrences, and there were several with multiple dissenting justices. *Webb Wheel Prods., Inc. v. Hanvey*, 922 So.2d 865, 870 (Ala. 2005) (Lyons, Harwood, Woodall, Parker, JJ., dissenting); *Demasse v. ITT Corp.*, 984 P.2d 1138, 1153 (Ariz. 1999) (Jones, J., concurring in part, dissenting in part); *Id.* at 1160 (Martone, J., concurring in part, dissenting in part); *Ross v. Raging Wire Telecommunications, Inc.*, 174 P.3d 200, 209 (Cal. 2008) (Kennard, Moreno, JJ., concurring in part, dissenting in part); *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 530 (Colo. 2004) (Rice, Hobbs, Bender, JJ, dissenting); *Mason v. Load King Mfg. Co.*, 758 So.2d 649, 657 (Fla. 2000) (Shaw, Anstead, Pariente, JJ., dissenting); *Balmer v. Elan Corp.*, 599 S.E.2d 158, 162 (Ga. 2004) (Sears, P.J., Benham, J., dissenting); *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1353 (Ill. 1997) (Nickels, Miller, McMorrow, JJ., dissenting); *Taliento v. Portland West*, 705 A.2d 696, 700 (Me. 1997) (Lipez, Roberts, Dana, JJ., dissenting); *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 609 (Md. 2003) (Bell, C.J., Eldridge, Baker, JJ., dissenting); *White v. Blue Cross & Blue Shield*, 808 N.E.2d 1034, 1038 (Mass. 2004) (Cowin, J., dissenting); *Lytle v. Malady*, 579 N.W.2d 906, 920 (Mich. 1998) (Brickley, J., concurring); *Id.* (Mallett, C.J., concurring in part, dissenting in part); *Id.* (Cavanaugh, Kelly, JJ., dissenting); *Trosper v. Bag’N Save* 734 N.W.2d 704, 712 (Neb. 2007) (Gerrard, McCormack, Miller-Lerman, JJ., concurring); *Id.* at 716 (Stephan, J., Heavican, C.J., dissenting); *Kurtzman v. Applied Analytical Indus., Inc.*, 493 S.E.2d 420, 424 (N.C. 1997) (Frye, J., dissenting); *Aberle v. City of Aberdeen*, 718 N.W.2d 615, 623 (S. D. 2006) (Sabers, J., dissenting); *Ford v. Trendwest Resorts, Inc.*, 43 P.3d 1223, 1229 (Wash. 2002) (Chambers, Sanders, Ireland, JJ., dissenting); *Bammert v. Don’s Super Valu, Inc.*, 646 N.W.2d 365, (Wis. 2002) (Bablitch, Bradley, JJ., Abrahamson, C.J., dissenting).

10. According to a survey of Clerks of Court for State Supreme Courts, most state supreme court decisions are unanimous. State Supreme Courts appear to have a much greater desire for unanimity in their decisionmaking than for example, the United States Supreme Court. State Supreme Court Clerks of Court estimate dissents to occur in only 2 percent to 10 percent of opinions. For example, the Georgia Clerk of Court, Bill Martin, reports that only 2.5 to 3 percent of cases have dissents, while Jason Oldham, the Clerk of the Kansas Supreme Court reported dissents on some issues occurring in 9 percent of the cases. This survey, conducted by email by Professor Lea VanderVelde in late 2008, was not a randomized sample but a request for data from all State Supreme Court Clerks of Court.

11. *See, e.g.*, *Anderson v. Johanninger v. Mid-Minn. Women’s Ctr., Inc.*, 637 N.W.2d 270, 277 (Minn.2002) (Blatz, C.J., concurring); *Chavez v. Sievers*, 43 P.3d 1022, 1028 (Nev. 2002) (Rose, Leavitt, JJ., Maupin, C.J., concurring); *Yunker v. Easter Assoc. Coal Corp.*, 591 S.E.2d 254, 259 (W. Va. 2003) (Davis, Maynard, JJ., concurring). Such disagreement alone indicates that the law is not settled.

modified in later years only to be resurrected still later. Taking but one jurisdiction, consider the Wisconsin cases of *Brockmeyer v. Dun & Bradstreet*,<sup>12</sup> *Winkelman v. Beloit Memorial Hospital*,<sup>13</sup> and most recently, *Bammert v. Don's Super Valu, Inc.*,<sup>14</sup> with its deeply divided majority and dissent. In *Brockmeyer* and *Winkelman*, the Wisconsin Supreme Court illustrated considerable yawing, first, in *Brockmeyer*, in a decision favoring employers in a four to three split, then, in *Winkelman*, in a decision favoring employees. This path, demonstrating considerable swinging back and forth in successive cases by the same court rather than a straight path toward a singular and coherent view of the existing doctrine and ending in a deeply divided decision in *Bammert*, evidences a court still attempting to seek an appropriate balance between competing interests and a background status rule that has not settled into any level stability. Such tilting back and forth is typical in the common law process when the law is still in the process of being worked out.

Even within much narrower sub-topics of the common law of employment, like the legal significance of various modes of employment handbooks, sequential cases sometimes alternate between cases favoring employees and those favoring employers.<sup>15</sup> This pattern suggests two possible dynamics: one that in the course of balancing interests the courts are engaging in a roughly intuitive split of the difference between the competing interests, or two, deciding courts are still attempting to find some middle ground of fairness between the competing interests, but have not yet drawn a clear conceptual line of where that proper balance exists. Thus, this pattern of decision-making is indicative of the fact that the at-will rule is by no means "well settled," even within individual states.

Third, and perhaps most importantly for a Restatement project of national scope, the fact that the same legal dispute would be handled under quite different theoretical exceptions in different states suggests that the law is far from stable among different states: that is, the judicial conception of what "at-will" really means is really framed by the exceptions that derogate from it; and as these differ greatly from jurisdiction to jurisdiction

12. 335 N.W.2d 834 (Wis. 1983) (holding in favor of the employer); *Id.* at 843 (Day, Callow, Ceci, JJ., concurring).

13. 483 N.W.2d 211 (Wis. 1992) (six to one decision for employee).

14. 254 N.W.2d 347 (Wis. 2002).

15. The line of employee handbook cases in Iowa stretches from *Cannon v. National By Products, Inc.*, 422 N.W.2d 635 (Iowa 1988) to *Kern v. Palmer College Of Chiropractic*, 757 N.W.2d 651 (Iowa 2008). These two cases, with five more in between, follow almost an alternating pattern of cases favoring employees followed by cases favoring employers. The result totals even out with roughly the same number of cases decided for each respective party.

so, too, does the core conception against which these exceptions resonate.<sup>16</sup>

Consider, for example, the fact pattern of *Murphy v. American Home Products*.<sup>17</sup> In *Murphy*, a long-time employee was fired in retaliation for truthfully whistle-blowing and was discharged in an abusive manner. Some states, notably California, would provide Murphy relief under an “implied in fact” theory of contract, providing good cause job security, given the length of his employment.<sup>18</sup> Some states, notably Alaska, would provide an employee like Murphy relief under a covenant of good faith and fair dealing rubric.<sup>19</sup> Some states – probably the majority of states—would provide Murphy relief under a public policy rubric for his truthful whistle-blowing activity. Still others would provide Murphy with relief for the abusive and undignified way that he was publicly treated as a criminal and his possessions were dumped out when he came to retrieve them, (notably Iowa, Texas, Oregon, and Arkansas).<sup>20</sup> In other instances and in other states, promissory estoppel rules provide employees with cushions against the unjust harshness of the strict application of the at-will rule.<sup>21</sup>

The key outlier is the state of New York where *Murphy* continues to be the law.<sup>22</sup> A true test of whether the strong form of the declarative provision of section 2.01 (that the employer “may terminate an employment relationship . . . without cause”) continues to be the default rule in other states would be to determine where, other than New York, an

16. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193 (1991).

17. 448 N.E.2d 86 (N.Y. 1983).

18. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Pugh v. See's Candies*, 171 Cal. Rptr. 917 (Ct. App. 1981). As *Pugh* illustrates, a number of factors may be relevant to determining whether an employer and employee have varied at-will: duration of employment; positive job evaluations, promotions and commendations; lack of criticism; assurances; and the employer's policies including any contained in a written handbook. 171 Cal. Rptr. at 917.

19. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1131 (Alaska 1989).

20. See *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) (applying Texas law which would likely recognize this as the tort of intentional infliction of emotional distress); *Tandy Corp. v. Bone*, 678 S.W.2d 312 (Ark. 1984) (recognizing that the tort of intentional infliction of emotional distress could be brought against an employer who was abusive in its interrogation of employee related to an investigation of theft); *Hunter v. Bd. of Trustees of Broadlawns Med. Ctr.*, 481 N.W.2d 510 (Iowa 1992) (recognizing cause of action for tortious interference with an employment contract where supervisor's conduct is improper and disrespectful); *Bodewig v. K-Mart*, 635 P.2d 657, 661 (Or. App. 1981) (allowing a cause of action for intentional infliction of emotional distress to limit employer's power over employee). Some states recognize abusive actions under a tort of outrage theory.

21. E.g., *Grouse v. Group Health Plan*, 306 N.W.2d 114, 116 (Minn. 1981). If Murphy had been offered the job with certain “reasonable period” expectations on which he detrimentally relied, a firing early in his tenure for whistleblowing might trigger a promissory estoppel action in several jurisdictions, including Minnesota. This supports the broader point that tort, contract, and quasi-contract exceptions to at-will have continued to grow and evolve.

22. Only the 1992 case of *Wieder v. Skala*, in which a law firm required an associate to violate the rules of ethics, has made a dent in New York law. *Wieder v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992).



employee in Mr. Murphy's circumstances would have no relief at all for his mistreatment. (There is little doubt that the weak form of the provision that an employer can terminate an employee at any time with cause is true.<sup>23</sup>) Should the application of exceptions outnumber and outweigh the so-called default rule in the *Murphy* fact pattern, as we suspect they would, that declarative statement can no longer be said to be the norm in legal practice. That different states would provide an employee like Murphy with some significant relief, albeit through different avenues and different measures, suggests that the strong form of default rule stated in the document as the foundational premise of the proposed Restatement really only maintains in the state of New York.

Thus, the nub of the issue with regard to the current version of the Proposed Restatement of Law section 2.01 is whether the strong form, the worst case scenario from the employee's perspective, continues to be the legally accepted one. Will courts outside of New York look the other way and deny good productive employees protection from malicious abuse of power?<sup>24</sup> We believe that this statement does not accurately reflect the current state of the law. We believe that most states do stretch those exceptions applicable in their states to bring justice into alignment with doctrine, resulting in a more nuanced legal reality.

In other words, if state A "continues to adhere"<sup>25</sup> to the at-will rule but embraces a robust application of promissory estoppel, state B "continues to adhere" to the at-will rule but adheres to a robust application of implied-in-fact contract terms limiting discharge, state C "continues to adhere" to the at-will rule but embraces the *Restatement of Contracts*' robust conception of good faith and fair dealing, and jurisdiction D "continues to adhere" to the at-will rule but applies an expansive notion of those circumstances that implicate the public good to constrain a dismissal, it would be misleading in the extreme to assert that all four "continue to adhere to the at-will rule" – which is just what the draft does.<sup>26</sup> More than that, by decoupling "the at-will rule" from the many and nuanced exceptions to it, the draft overlooks

23. The only exception to this is situations that are true sinecures, lifetime employment without performance standards or performance expectations.

24. One may legitimately ask why an institution would ever terminate a productive employee, but the fact narratives often disclose the reasons: other productive employees needing little training may be easily found and if an employee has crossed his immediate supervisor in some way, he may be subject to the supervisor's retaliation as a show of power. *See, e.g.,* Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974).

25. Or, as an intermediate appellate court in Pennsylvania tellingly put it, "[Pennsylvania] still clings to the at-will presumption." *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 834 (Pa. Super. 1986) (emphasis added).

26. RESTATEMENT (THIRD) OF EMPLOYMENT LAW app. to ch. 2 reporters' notes.

the many state-specific hybrids that have been constructed to protect employees from the most severe, harsh and unjust results. By decoupling the rule from the exceptions, the draft marginalizes the significance of those exceptions. Only when one steps back from each of the discrete blackletter propositions to contemplate the structure of the draft as a whole does it become obvious how profoundly reductionist the draft's approach is. The draft first states the at-will rule declaratively and then narrowly cabins the exceptions, in the process, overemphasizing the scope of the at-will rule and ignoring the multiple at-will hybrids that have evolved as functional doctrines of governing law in different states.<sup>27</sup>

A similar exercise of application of state law could be done with *Wagenseller v. Scottsdale Memorial Hospital*.<sup>28</sup> In *Wagenseller*, another factual pattern of employer overreaching which jarred customary norms of civil conduct, if it did not shock the conscience, the Arizona Supreme Court stretched available theories to nearly the breaking point to provide relief for the employee. Different states have developed their hybrids differently based on the order of cases that came before them,<sup>29</sup> but harmonization between states' employment status rules has not yet been given the time to work itself through.

It is in fact through sensational fact narratives, such as the abuse of employer power in the mistreatment of employees like Mr. Murphy and Ms. Wagenseller, that the old at-will rule is chipped away and reformed with the invention of new exceptions, the rationalization of the exceptions, and perhaps ultimately, if the common law is left to its own justice-seeking processes, various states will invent substitute rules that permit some new sustainable theoretical rubric across the various states. That moment has

27. See, e.g., *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 554 (Colo. 1997) ("There is no doubt that implied contract claims based on employee handbooks are not classic contracts, but rather are hybrids arising from the application of contract and equitable principles, as well as common sense."); *Decampos v. Kennedy Center, Inc.*, No. CV89 0260290 S, 1990 WL 264687, at \*2 (Conn. Super. Nov. 21, 1990); *Holtz v. Bd. of Comm'rs*, 560 N.E.2d 645, 646 (Ind. 1990); *Adams v. Inst. of Cmty. Servs., Inc.*, 727 So.2d 739, 743 (Miss. App. 1998) ("Wrongful discharge actions, not founded on some theory of contract essentially sound in tort, although some of the theories have attributes associated with both contract and tort" and describing these cases as hybrids (citation omitted)); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 552 (N.H. 1974); *McConkey v. AON Corp.*, 804 A.2d 572, 594 (N.J. Super. Ct. App. Div. 2002) ("Of the courts allowing recovery, many have adopted hybrid approaches which allow recovery for emotional distress in fraud actions under some circumstances," quoting *Nelson v. Progressive Corp.*, 976 F.2d 859, 867-68 (Alaska 1999)); *Reiss v. Players Guild of Canton, Inc.*, No. 2001CA00323, 2002 WL 501679, at \*3 (Ohio App. Mar. 28, 2002) (Hoffman, P.J., concurring) (suggesting that the contract created a hybrid employment relationship); *Groves v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 875 (Ohio App. 1991) (discussing three hybrids of tort actions employees could bring against employers for invasions of privacy); *Wojciak v. Sec.-Peoples Trust Co.*, No. 1407-A-1983, 1984 WL 2219 (Pa. C.P. Erie County Jan. 26, 1984).

28. 710 P. 2d 1025 (Ariz. 1985).

29. One could call this path dependency, as noted *supra* note 6.

not yet arrived. Seeking uniformity across state common law rules now can only be achieved by stripping back the employee-protective exceptions that have developed in most states. The core statement of section 2.01 having marginalized the many exceptions to a dependent clause remains a codification of nineteenth century understandings of the master's domination of the servant.

*B. Is Section 2.01 in Fact the Current State of the Law in American Jurisdictions and Is It the Best Articulation of the Current State of the Law?*

There are several reasons to believe that section 2.01 is not an accurate statement of law in the majority of states. As noted above, at-will may not be an accurate statement of the operative legal rule, in part because the many exceptions so dominate the jurisprudence in the area that there have rarely been recent judicial decisions completely non-suited to a productive employee who has been discharged in circumstances that seem manifestly unfair. Moreover, the structure of this declarative statement is flawed because it conflates two types of interests, termination with cause and termination without cause, and because it suggests a mutuality of contract between persons of notably unequal and asymmetric power in unilaterally terminating the relationship.

First, if the proposed *Restatement* is seeking a common starting point, a much more accurate statement is that at-will *was* the dominant rule, rather than that it *is* the dominant operative rule. With the current state of the laws, composed of different hybrids in different states, and balancing and rebalancing competing interests as new cases arise in the same state courts, it is difficult, if not impossible, to create a statement that is sufficiently accurate and unifying. At-will was the rule during a series of decades when collective bargaining was more prevalent and union density in the United States was higher. Currently, the at-will rule continues to be recited by state courts much as the common law origins of many archaic doctrines are often recited, but actually only as preambles to further judicial reasoning.<sup>30</sup> It would be a significant misinterpretation to claim that these recitations are

30. For example, recitations of archaic principles of the nineteenth century doctrine of dower often precede modern rulings in intestacy or coverture discussed in modern divorce cases. *See, e.g.,* Karsenty v. Schoukroun, 959 A.2d 1147, 1167 (Md. 2008); Austin v. Austin, 100 So. 591 (Miss. 1924); In re Santelli's Estate, 146 A.2d 449 (N.J. 1959); Deutsche Bank Trust Co. Ams. v. Smith, No. 89738, 2008 WL 2349289, \*1 (Ohio App. June 10, 2008); Barrett v. Barrett, 894 A.2d 891, 895-96 (R.I. 2006).

Several cases stress the history of the at-will doctrine during the *laissez-faire* period of American business before turning to exceptions. *See, e.g.,* Suburban Hosp., Inc. v. Dwiggin, 596 A.2d 1069, 1973 (Md. 1991).

actually being followed in cases where courts grant employees relief. The conjunction in the declarative sentence of “with or without cause” masks the fact that employers can always legally discharge an employee for cause.<sup>31</sup> To make section 2.01 useful in guiding the courts, the key point to be isolated is whether and to what extent employers can discharge employees without any rationale, reason, or cause, or for reasons that seem maliciously motivated.

To support the premise that at-will is the rule in forty-nine jurisdictions, the Reporters have provided the ALI Council with a list in which various state supreme courts recite the nineteenth century formulation of the rule. Even among these cases, however, the courts do not always recite the phrase as it is worded in section 2.01. More importantly than the words used as preambles to judicial reasoning are the courts’ orders. Many of these listed cases do not apply the declarative portion of the so-called “default rule.” Instead they find for the plaintiff employee on one or another of the exceptions. Thus, in those cases where employees prevail, the more legally precise and analytically rigorous statement is that employers cannot terminate employees in those circumstances. Since an articulation of the at-will rule in such cases is not necessary to the case holding, it may properly be identified as dicta.<sup>32</sup>

More particularly, in Connecticut,<sup>33</sup> Iowa,<sup>34</sup> Minnesota,<sup>35</sup> Ohio,<sup>36</sup> and

31. Even employees with express, bilateral employment contracts can be discharged for cause. *E.g.*, *Krizan v. Storz Broad. Co.*, 145 So.2d 636, 637-38 (La. App. 1962). Moreover, in some cases, recognizing cause for discharge is sometimes the easier decision. *See, e.g.*, *Phipps v. IASD Health Serv. Corp.*, 558 N.W.2d 198 (Iowa 1997) (holding no need to examine public policy exception where there was just cause to terminate an employee under an indefinite term).

32. The cases that have been listed for each state in the Appendix, do not distinguish cases where the archaic rule of at-will was recited as compared to those where such a rule was followed, thus by better legal analysis, the cases in the appendix do not necessarily follow the rule and their recitations of such a rule are not necessarily holdings of the respective cases.

33. *Lingenfelter v. Gerald Metals, Inc.*, No. CV010181883S, 2002 WL 1491994 (Conn. Super. June 10, 2002).

34. For example, in *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741 (2006), a unanimous Iowa Supreme Court held that a jury instruction that a former employer had right to terminate employment of a former “at-will” employee at any time, for any reason, with or without just cause, was improper, prejudicial to the employee, and reversible error.

Jury instruction no. 17 stated: The plaintiff was an employee at will with the defendant. This means that the employer had the right to terminate the plaintiff’s employment at any time, for any reason, with or without just cause. Therefore, you need not decide whether the employer had just cause for terminating her employment. The mere fact that her employment was terminated does not establish her claim for damages.

Jury instruction no. 17 was an inaccurate statement of the law because there are a number of exceptions to the at-will employee doctrine based on public policy and legislative enactment.

*Id.* at 749. Additionally, in a line of cases, the Iowa Supreme Court has opined that the traditional doctrine of termination is now more properly stated as permitting “termination at any time for any lawful reason.” *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000) (quoting

Tennessee,<sup>37</sup> recent cases hold that a jury instruction stating that the employer can fire for any reason or no reason is reversible error. The modern formulation seems to be that employers can terminate employees at any time for any lawful reason.<sup>38</sup> Such a formulation does not overly constrain the common law from determining what is lawful. These reversals in phrasing occurring in individual jurisdictions invite a closer look at subtle changes occurring in other states, states that no longer honor the harsh application of the at-will rule, phrased as the default rule of section 2.01. “Any reason or no reason” is the functional equivalent of the *Restatement’s* declarative statement, “with or without cause.”

On closer look, other states are pursuing other paths to reforming the common law by muting the application of a harsh result in circumstances where it would seem unjust. Quite recently a significant dissent in a case in the Maine Supreme Court urged that the state adopt the “implied in fact” contract theory as a basis for claiming wrongful discharge.<sup>39</sup> What began in *Pugh* in California has been extended to describe certain additional wrongful discharge circumstances in Arizona, Idaho, and Washington State.<sup>40</sup> This recognition of employment security to some extent based on duration of service has a profound appeal as recognizing a long-term employee’s increasing reliance on the particular employment relationship. This avenue of recognition could finally eliminate the ancient rule from its position of prominent recitation in those states.

In yet a third group of cases, lawsuits against chief executive officers

*Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 577 N.W.2d 845, 846 (Iowa 1998)).

35. “Unless otherwise agreed, an employment relationship is presumed to be ‘at will,’ which means that employment exists for an indefinite term and that both the employer and the employee remain free to terminate the relationship at any time and for any lawful reason.” *Alexandria Hous. & Redev. Auth. v. Rost*, 756 N.W.2d 896, 903 (Minn. App. 2008) (citing *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986) and *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962)).

36. *Schwenke v. Wayne-Dalton Corp.*, 155 Lab. Cas. (CCH) ¶60,589 (Ohio App. 2008) (citing *Greeley v. Miami Valley Maint. Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990)). “Thus, the employer may terminate the employee for any lawful reason, and the employee may leave the relationship for any reason.” *Zajc v. Hycomp, Inc.*, 873 N.E.2d 337, 344 (Ohio App. 2007) (Gallagher, P.J., dissenting) (disagreeing with the majority’s result and arguing that termination was lawful).

37. *Watson v. City of Laverne*, No. M2006-00351-COA-R3-CV, 2007 WL 1341767, at \*1 (Tenn. App. May 7, 2007).

38. *E.g., Fitzgerald*, 613 N.W.2d at 275 (citing *Lockhart*, 577 N.W.2d at 846).

39. *Taliento v. Portland West*, 705 A.2d 696, 700-06 (Me. 1997) (Lipez, Roberts, Dana, JJ., dissenting) (noting that at that time, thirty-eight jurisdictions had recognized implied contracts not to discharge except for cause in the employment context).

40. *Pugh v. See’s Candies*, 171 Cal. Rptr. 917 (App. 1981); *see Demasse v. ITT Corp.*, 984 P.2d 1138, 1143 (Ariz. 1999); *Jenkins v. Boise Cascade Corporation*, 108 P.3d 380 (Idaho 2005); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087-88 (Wash. 1984) (holding that a handbook or other expression of policies that creates an atmosphere of job security and fair treatment can create that job security if the employee relies on that by continuing to work for the employer).

and other employees for tortious interference with economic advantage are providing employees with cognizable causes of action even in circumstances in which a claim against the employer has settled or cannot be brought.<sup>41</sup> The success of these cases suggests that although the employee may not have some absolutely protected interest in his or her job, he or she has some relatively stronger protected interest against individuals who would intentionally interfere with such interests. Thus the employee has something akin to a relative protectable interest where tortious interference actions are successful.

Second, by most reliable indicators, whatever the state of the law, the at-will rule can be predicted to change considerably in the years to come. Some of the predicted change is apparent from the multiplicity of dissents and concurrences. Over time one would expect some proportion of the seeds of argument found in the dissenting and concurring opinions to grow and blossom into new positions acknowledged by the majority.<sup>42</sup> The distinctions in result and theory found in dissenting and concurring opinions grow into refinement from exposure to additional fact patterns in subsequent cases.

Another method by which the nineteenth century version of the at-will rule is being reformed is by modern customary practice. A strict application of the outdated at-will rule (and the statement of a “default” in section 2.01) is that an employee would receive no pay for one minute of the day after the announcement of the employer’s decision to terminate that employee. Currently, the custom of most reputable employers is to pay the terminated employee at least until the end of the day on which the employee is terminated, and many employers pay terminated employees for the remainder of the week, two-week, or monthly pay period. This custom – that a discharged employee receives two week’s severance pay – is becoming a commonly held customary expectation, even though it is not

41. See, e.g., *Stanek v. Greco*, 323 F.3d 476, 479 (6th Cir. 2003) (applying Michigan law); *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754, 767-68 (Ill. App. 2004); *Jenkins v. Parkview Counseling Ctr.*, 17 I.E.R. Cas. (BNA) 484 (Ohio App. 2001). *Wilson v. Modjadidi*, No. CL06-4670, 2008 WL 5539824 (Va. Cir. Ct. Norfolk County Jan. 23, 2008); see generally Frank J. Cavico, *Tortious Interference With Contract In The At-Will Employment Context*, 79 U. DET. MERCY L. REV. 503 (2002); John Alan Doran, *It Takes Three To Tango: Arizona’s Intentional Interference With Contract Tort And Individual Supervisor Liability In The Employment Setting*, 35 ARIZ. ST. L.J. 477 (2003); Elisa Masterson White, *Arkansas Tortious Interference Law: A Proposal For Change*, 19 U. ARK. LITTLE ROCK L.J. 81 (1996); Mark R. Hinkston, *Tortious Interference With At-Will Employment*, WIS. LAW., Sept. 2001, at 14.

42. For example, the common law evolution of the implied warranty of habitability in landlord-tenant cases in the District of Columbia followed early dissents analyzing the unfairness of leaving vulnerable tenants without legal protection. See CHARLES M. HAAR & LANCE LEIBMAN, *PROPERTY AND LAW* 330 (2d ed. 1985) (detailing the common law shift from tenant’s Caveat Emptor to the implied warrant of habitability in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (1970)).

legally required under the strict application of the at-will rule. Many employers believe that the good will created by such a custom assuages the unfortunate circumstance of discharging an employee, and employers will sometimes pay employees for unworked time even where cause exists for discharge, such as in reductions in workforce. That employers are engaging in the practice of paying employees some sort of severance even where they are not legally obligated to do so leads to an increased expectation on the part of employees to severance pay where the employer wishes to discharge but lacks cause to discharge an employee. Where employers revise employment practices by adopting customary procedures more generous than a strict application of the outdated rules, those outdated rules lack normative support. The position that severance pay has gained normative force cannot necessarily be tested through common law litigation because there is no opportunity to test the legality of a practice contrary to custom. Still, the operative application of the old rule, that an employer only need pay to the minute of discharge, erodes away, not through the kind of judicial reversal that can be found in a line of common law cases but by disuse and the shift in ordinary public expectation. Ironically, though custom and practice is a traditional legal means of implying contractual terms, the test of the draft *Restatement* ignores that traditional methodology and doctrine.<sup>43</sup>

Yet a third reason to predict further cushioning of the harsh version of the rule derives from the current economic climate. Some theorist believes that legal regimes move toward greater protection of the weaker party in times of economic downturn. It remains to be seen whether this will lead to a greater cushioning effect for the weaker party in common law decisionmaking as well. During the economic bubble of the last two decades, the at-will doctrine was frequently commended as a public policy which was necessary to successful unbridled capitalism and economic growth.<sup>44</sup> This justification for the at-will rule has apparently been adopted

43. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06.

44. See, e.g., *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910, 914 (Ark. 1991) (“It remains true that ‘the employer’s prerogative to make independent, good faith judgments about employees is important in our free enterprise system.’”) (citation omitted); *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 448-49 (Del. 1996) (“The doctrine of employment at-will . . . serves important social and economic goals. A significant erosion of the Doctrine could produce unacceptable costs in employment relationships.”); *Clifford v. Cactus Drilling Corp.*, 353 N.W.2d 469, 474 (Mich. 1984) (“[A]n employer’s ability to make and act upon independent assessments of an employee’s abilities and job performance as well as business needs is essential to the free-enterprise system.”); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997) (“The employment-at-will doctrine recognizes that employers need freedom to make their own business judgments without interference from the courts”) (quoting *Mason v. Seaton*, 942 S.W.2d 470, 474 (Tenn. 1997)).

Some states enshrine the at-will doctrine as distinctively American and free from stricture. See, e.g., *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 136 (Ind. 2006) (“Employment at will is an

by the ALI Reporters without reflection and deeper consideration. The ALI Director expressed such a rationale in his recent remarks on why there should be an at-will rule and a *Restatement of Employment Law*.<sup>45</sup> If the ALI's justification for the at-will rule is grounded in economic analysis, the proposed draft should say so. Then the proposition would be open to debate with reference to the wealth of serious scholarly research and analysis about the argument's premises, which are by no means universally agreed upon by mainstream economists.<sup>46</sup>

Moreover, industrial law and policy has long maintained that circumstances of economic downturn, reductions in force, and business closings are cause for discharge anyway. One may seriously wonder in the coming years whether the several state supreme court statements that the exceptions to at-will be narrowly construed will maintain in those cases where an employee is discharged without justification, not even the accepted just cause of the need for a reduction in force. Will the employer prerogative of being able to discharge a productive person without justification, other than the employer's ability to demonstrate power over the individual, continue to be seen as contributing to stable positive growth of the economy? Because the judicial opinions in the next few years may well need to adapt to economic change as, historically, judicial opinions have been swayed by the economic context, this is not the time to "restate"

American doctrine, one that freed both employer and employee from the strictures of the English common law. English law presumed that employment contracts of unspecified duration were to last for a year.").

45. "[T]here are essentially economic arguments for a fundamentally employment-at-will system that have so far prevailed in the legislatures and in the courts of almost all the states." *Discussion of Restatement of the Law Third, Employment Law*, 2008 A.L.I. Proc. 228 (comments of Director Liebman).

46. See generally PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990). Professor Paul Weiler, looking at the economic arguments concluded that law should treat the sale of labor very differently from the way it treats the sale of fish or tomatoes or other goods: (i) employees lack adequate information about the incidence of unjust or frivolous discharges (hence they are in no position to "bargain" lower wages for higher job security even if they wanted to); (ii) they don't want to make this bargain for psychological reasons (humans don't usually trade present compensation to avoid the perceived low risk of a high severity event in the future); (iii) the Public goods problem – employers can't really provide for job security without a full program of progressive discipline, personnel documentation, recordkeeping, appeals, etc. – and all employees won't opt in because of free rider issues (unless you have collective bargaining); (iv) divided management – even if the informational, behavioral, and structural issues are overcome, and shareholders see it as in their interest to add job security to employment contracts, the firm's managers will resist to avoid bearing the direct costs of their own job reconfiguration – they don't want to spend all that time on monitoring and building paper trails, and they resent the loss of wielding unreviewable power over their subordinates, which can be overcome by paying management more (perhaps lots more) but that in turn helps make the employment contract even more unusual and the theoretical basis more questionable. See also Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *CORNELL L. REV.* 105 (1997) (focusing on the information asymmetries between employers and employees).



employment law.

### *C. Considering Section 2.01 as Phrased*

A structural fault in the phrasing of section 2.01 is its suggestion that the employer's prerogative to fire an employee at-will is the *quid pro quo* for the employee's ability to quit. Section 2.01 refers to both parties as if they stood in parallel equality of power or equality of legal right. On the contrary, an employee has a superior right to terminate his or her employment, based in the Thirteenth Amendment of the United States Constitution.<sup>47</sup> The employee has an unquestioned right to quit employment by virtue of the Thirteenth Amendment of the United States Constitution, whether he or she is subject to contract terms or not.<sup>48</sup> An employee is recognized as having a right to quit whether he has received a contractual advance.<sup>49</sup> An employee may be obligated to pay back the contractual advance, and the employee may in some circumstances be liable for contractual damages for leaving off service, but the employee still retains a constitutional right to quit. An employer, on the other hand, has no concomitant absolute right to terminate an employee without regard to contractual or other limitations. Employers are prohibited constitutionally from requiring work from employees even in circumstances where an employee received an advance wage payment.

Like other constitutional rights, the right to quit employment that the employee finds objectionable for any reason or no reason may be subject to time, place, and manner restrictions. Similar limitations exist for many constitutional rights, such as freedom of speech. An employee's right to quit may also possibly be countermanded for reasons such as national security.<sup>50</sup>

By contrast, the Thirteenth Amendment does not give the employer a constitutional right commensurate to the employee's right to quit. There is no constitutional guarantee provided to an employer – the party who for the most part is in the position of greater power – to terminate an employee for no reason at all. The constitutional right to free association may be invoked

47. See U.S. CONST. amend. XIII, § 1.

48. *Bailey v. Ala.*, 219 U.S. 219, 243-45 (1911).

49. *Id.*

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952); Mitchell H. Rubinstein, *A Lawyer's Worst Nightmare: The Story Of A Lawyer And His Nurse Clients Who Were Both Criminally Charged Because The Nurses Resigned En Masse* 103 NW. U. L. REV. COLLOQUY 317 (2009) (describing a flawed attempt to prosecute nurses who resigned en masse; the charges were dismissed because the nurses did not abandon patients, resigned at the ends of their shifts, and left no shift uncovered).

where an employee is a personal servant within the employer's household, but generally it does not extend to most large scale employment relations.<sup>51</sup> And in many industrial circumstances, employee reinstatement may even be ordered by courts.<sup>52</sup> Given that employees have a right to quit, regardless of contract, status, or prior advancement of wages, a right that can only be countermanded by the greatest of national security arguments, insuring this constitutionally guaranteed right should not be thought to be the basis of a prerogative right vested in the employer.

Thus, section 2.01 is structurally defective as written and should be divided into two sections to acknowledge the independent sources of the right or entitlement to terminate an employment relationship. Such a statement is more accurate and more in keeping with the prudential idea of transparency that a *Restatement* proposal to demonstrate the policies upon which a legal rule depends.

Many statements of "at-will" also declare that employers may terminate without notice and without following any procedures.<sup>53</sup> The failure to explore the expanded application of the at-will doctrine as a prerogative of contract,<sup>54</sup> means that the full power of employer prerogative is not exposed. In addition, the exceptionalism of the at-will doctrine is not brought to light in comparison with the termination law regimes of other nations.<sup>55</sup>

Default rules are not necessarily contract rules, they are as likely to be status rules, particularly where the parties have failed to engage in substantive negotiation. Consider the default rules of common law

51. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

52. Reinstatement is a permitted remedy under Title VII and other statutes. 42 U.S.C. § 2000e-5(g)(1) (2000); 42 U.S.C. § 1981a (2000). And it has long been recognized as a legitimate remedy in arbitration. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 1236-43 (Alan Miles Ruben, ed., 6th ed. 2003).

53. See, e.g., Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68 (2000).

54. See PHILLIP SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 122-23, 131 (1969); JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 87-88 (1983).

55. For example, the principal difference in termination law between the U.S. and Canada is that Canadian law requires reasonable notice for terminations not supported by good cause. See, e.g., Robert C. Bird & Darren Charles, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 AM. BUS. L.J. 205, 207-10 (2004). One significant document demonstrating how far American at-will doctrine differs from internationally accepted standards is the International Labour Organization [ILO], *Termination of Employment Convention*, ILO C158 (June 22, 1982), available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (scroll down to C158 and click). Another is the Canadian experience. CANADA LABOR CODE, R.S.C. pt. III (1985). A study by a national review panel of the functioning of the code found that providing an adjudication process for discharge for non-unionized workers was not necessarily costly, and indeed improved the quality of workplace conditions. FEDERAL LABOUR STANDARDS REVIEW, *FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY* 176-77 (2006), available for download at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=953049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953049)>.

marriage or intestate succession premised on what a decedent would most likely to have preferred had the decedent written a will.<sup>56</sup> Of the many cases on the subject of employment at will, fully 2003 different cases include the word “status” in describing the employee’s relationship.<sup>57</sup> Employees who have not been able to bargain a contract that revises the so-called default rule may in fact be in a dependent status relationship rather than a contractual one,<sup>58</sup> because employment security in circumstances where a discharge is unmerited was never actually negotiated.

The Comment to section 2.01 refers to the provision as a “presumption” and a “default rule.”<sup>59</sup> Although default rules generally do create rebuttable presumptions, the two things are not the same, and the proposed Restatement conflates rather than distinguishes them. “Default rule” describes the substantive principle,<sup>60</sup> and “presumption” describes the evidentiary effect that at-will has in litigation.<sup>61</sup> Beyond the proposed *Restatement*, “at-will” often is referred to as a “doctrine.” Part of the problem of articulating contract or relational principles in employment, is that “at-will” is never adequately explained and placed in context in employment contract law by section 2.01. It is variously considered by courts and commentators to be a default contract rule, an evidentiary rebuttable presumption, and perhaps even a substantive rule of employment law. This confusion and complexity give the doctrine some degree of

56. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 71-157 (2000) (treating intestacy as an “Estate Plan by Default”).

57. *E.g.*, *Balmer v. Elan Corp.*, 599 S.E.2d 158, 232 (Ga. 2004) (“At-will employment is a bundle of different privileges, any or all of which an employer can surrender through an oral agreement. In addition to employment for a specified employment term or a for-cause requirement for termination, an employer can, for example . . . promise not to fire employees for a certain reason, thereby modifying the employee’s at-will status.”) (alteration in original, citation and emphasis omitted); *Kamaka v. Goodsill Anderson Quinn & Stifel*, 176 P.3d 91, 120 (Haw. 2008); *Meyers v. Meyers*, 861 N.E.2d 704 (Ind. 2007); *Taliento v. Portland W.*, 705 A.2d 696 (Me. 1997); *Trosper v. Bag’N Save*, 734 N.W.2d 704, 715 (Neb. 2007); *Aberle v. City of Aberdeen*, 718 N.W.2d 615, 620, 621 (S.D. 2006) (“Aberle’s status as an at-will employee” as compared to “[a]s evidence of his status as a contract employee”); *Finch v. Farmers Co-Op Oil Co.*, 109 P.3d 537, 543 (Wyo. 2005).

58. See Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 *COMP. LAB. L. & POL’Y J.* 187 (1999).

59. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 cmt. a, at 61; *id.* reporters’ notes cmt. b, at 66.

60. Default rules are substantive rules that act as gap fillers if the parties do not bargain around them. *See, e.g.*, David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in Federal Courts*, 82 *TULANE L. REV.* 973, 981-83 (2008).

61. *See* FED. R. EVID. 301. Regarding at-will as a rebuttable presumption, see 1 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 6.06 (5th ed. 2006); 1 PAUL H. TOBIAS, *LITIGATING WRONGFUL DISCHARGE CLAIMS* § 4.1 (2003) (“[T]he ‘at-will’ doctrine establishes only a presumption that a contract of indefinite duration can be terminated at any time for any reason. As with any presumption as to intent, the at-will rule may be overcome by evidence that the parties contracted for some other arrangement.”).

mystique, but basically confound sound contract analysis or relational analysis. While rebuttable presumptions by definition can be rebutted by evidence to the contrary, in many states courts dealing with employment termination cases begin by stating that employment is at will and then require qualities and quantities of evidence to rebut it that plaintiff employees rarely can satisfy. Similarly, default rules apply unless parties bargain around them, but “at-will” is a default rule that is not likely to be displaced by bargaining for several reasons, including the following: 1) very little bargaining takes place in the formation of most employment relationships; 2) many employees are not aware of, or do not understand, the at-will default rule;<sup>62</sup> and 3) there is an inequality of bargaining power between potential employees and potential employers. One is left with the idea that at-will is either a rebuttable presumption that is almost irrebuttable or a default rule that tends toward an immutable rule.<sup>63</sup> Section 2.01 does not capture the confusion and complexity of the law in American state supreme courts today. To be useful, section 2.01 should attempt at least to explain what it means to refer to at-will as a “default rule” or a “presumption.”<sup>64</sup> Demystifying at-will would facilitate sound analysis.

The draft’s commentary states that “employment is a contractual relationship.”<sup>65</sup> In fact, it is a most peculiar contract if it is entered without terms being specified and if the expectations of the parties to the contract with regard to termination are not the same.<sup>66</sup> Consider how unusual the resulting status arrangement is were it truly considered a contract. The Horace G. Wood at-will rule for contracts of indefinite term<sup>67</sup> sets up a “contract” that cannot be breached. It is the unbreachable contract. Can a relationship really be deemed a contract at all if it is unbreachable? There is nothing to hold the parties to, and thus designating the at-will employment relation as a contract does little except to insulate employers from those sorts of duties that strangers owe each other in tort.

62. See, e.g., Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002).

63. See Peter Linzer, “Implied,” “Inferred,” and “Impose”: *Default Rules and Adhesion Contracts – The Need for Radical Surgery*, 28 PACE L. REV. 195 (2008). As Professor Linzer says of default rules: “[T]he very concept of default rules suggests a possibility of choice for both parties.” *Id.* at 199. In most instances, it is improbable for an employee to bargain for written job security, despite expecting that it will come his or her way by fair dealing of his or her new employer.

64. The Reporters’ Note to Comment b repeats that At-will is only a rebuttable presumption and rejects case law that seems to treat it as something more. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 reporters’ notes cmt. b.

65. See *Id.* § 2.01 cmt. a.

66. See Kim, *supra* note 46, at 147-55.

67. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 273-74 (2d ed. 1886).

The Proposed Restatement comments list two justifications for the at-will default rule. The first justification provides that “the rule reflects the background assumptions of the parties to the employment contract, and if the parties want a different rule governing termination they are free to negotiate it.”<sup>68</sup>

This expression of the justification ignores many serious scholars of the subject, most prominently, the work of Paul Weiler<sup>69</sup> and Pauline Kim.<sup>70</sup>

The second justification made in the commentary is basically a non-sequitur: “it reflects not so much the premises of the parties but, rather, the property rights of the employer, and for that reason any departure from that baseline should be bargained for, in the absence of a statutory or public-policy restriction.”<sup>71</sup>

However, property theorists recognize that departures from baselines are adjusted by courts in the name of equity, asymmetric power relations, and changed circumstances all the time. One need only look at the history of the implied warranty of habitability in landlord-tenant laws,<sup>72</sup> or the transformation of the waste doctrine<sup>73</sup> to see that modifications of property baselines are the assigned task of state supreme courts when they are engaging in modification to the benefit of the dependent party. The argument that the at-will rule is premised on a property right of the employer supports the idea that the relationship is a status relationship, a status relationship of dependency, and more particularly, a status

68. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §2.01 reporters’ notes cmt. a, at 65 (citing Richard Epstein, *In Defense of the Contract at Will*, 51 U.CHI. L. REV. 947 (1984)) The Reporters note that “[t]his rationale has been challenged by some writers who point to survey evidence that employees believe they have rights against termination without cause when in law they do not.” *Id.* (citing Kim, *supra* note 46 and Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447). The Reporters further note that “[o]ther studies emphasize the incidence of employment relationships reverting to at-will status in response to court decisions recognizing limits on termination without cause, as evidence that the agreements parties in fact reach correspond to the at-will default rule.” *Id.* (citing Andrew P. Morriss, *Bad Data, Bad Economics and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996)).

69. WEILER, *supra* note 46.

70. Kim, *supra* note 46. Although the draft acknowledges Professor Kim’s work in this area, it does not suggest that employees’ beliefs should have any effect on what the rule should be considered to be. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW §2.01 reporters’ notes cmt. a, at 65.

71. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §2.01 reporters’ notes cmt. a, at 65-66. The only citation that the draft retains is for the counter proposition – William Gould’s, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885 (1986). As the Reporters state, Professor Gould’s article is antithetical to the claim that employers’ are the ones with property rights worth protecting. Professor Gould argues that a job be considered the property of the employee rather than the property of the employer.

72. See HAAR & LIEBMAN, *supra* note 42, at 294-324.

73. See generally Jedediah Purdy, *The American Transformation Of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 563 (2006).

relationship in which courts should protect the dependent party because the dependent party lacks the ability to do protect himself or herself.

## II. SECTION 2.02<sup>74</sup>

### § 2.02 Agreements and Binding Employer Promises Providing for Terms Other than At-Will Employment

The employment relationship is not terminable at will by an employer if:

(a) an agreement between the employer and the employee (1) provides for a definite term of employment, or (2) provides for an indefinite term of employment and requires cause to terminate the employment (§ 2.03);

(b) a promise by the employer to limit termination of employment reasonably induces detrimental reliance by the employee (§ 2.02, Comment c);

(c) a policy statement made by the employer limits termination of employment (§ 2.04);

(d) the implied duty of good faith and fair dealing applicable to all employment agreements (§ 2.06) limits termination of employment; or

(e) any other principle recognized in the general law of contracts limits termination of employment (§ 2.02, Comment d).<sup>75</sup>

Section 2.02 is about those contractual arrangements that modify the at-will rule set out in section 2.01. Accordingly, the black letter rule should set forth contractual modification, the covenant of good faith and fair dealing, and promissory estoppel. It does articulate these grounds, but it fails to articulate contractual modification in a way that facilitates coherent analysis of how employment contracts that modify at-will employment are formed. Sections 2.02(a) and (c) are thus deficient. Although the Reporters state that the contractual variations set forth in section 2.02 are explained in more depth in sections 2.03, 2.04, and 2.05,<sup>76</sup> the function of section 2.02 is the identification (or naming) of the contractual theories that can modify at-will employment. Without a clear statement of the theories in section 2.02, sections 2.03 through 2.05 are not likely to succeed in providing depth and clarification.

One of the distinctive features about employment contracts is the lack of formality and the lack of bargaining in the formation of most

74. William Corbett is the author of the critique on sections 2.02 and 2.03.

75. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.02.

76. *Id.* cmt. a.

employment contracts. There is little law in the United States requiring specific steps in the formation of employment contracts. The employment relationship begins as it ends with few legal requirements and little formality, putting aside the Statute of Frauds. Accordingly, for most jobs there is very little negotiation over terms, and often terms are not reduced to writing.<sup>77</sup> Additionally, the terms of employment change over the life of an employment relationship. Given the lack of bargaining for employment terms at the commencement of the employment relationship and the changes that occur over time, the traditional bargained-for exchange model of contract law may be inadequate to describe many employment contracts. As many have suggested, relational contract theory<sup>78</sup> may provide a more relevant description of employment contracts.<sup>79</sup> Regardless of whether traditional or relational contract theory is applied, the analysis should take into account that in the employment context, rarely will there be a document that sets forth many or any of the employment terms.<sup>80</sup> Thus, employment terms will be communicated in various ways at various times. Section 2.02 does not articulate a sufficiently detailed contract theory that takes this reality into account.

Section 2.02(a) should state that employment contract terms that depart from an at-will relationship can be created by specific statements (written or spoken), nonspecific statements, conduct, or operation of law. By so stating, the section would recognize what are termed express contracts and implied contracts. This would be consistent with well established law<sup>81</sup> and is accordingly reflected in the organization of contract law treatises,<sup>82</sup> employment law treatises,<sup>83</sup> and employment law casebooks.<sup>84</sup> Instead, section 2.02, following the same faulty model of

77. See, e.g., Carole A. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 SAN DIEGO INT'L L.J. 341, 354-55 (2006).

78. See generally JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 8 (4th ed. 2001).

79. See 1 PERRITT, *supra* note 61, § 6.02. The *Restatement* seems to be based heavily on the traditional model of contract law. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 cmt. a ("The agreements that are the subject of this Section are based on consideration or bargained-for exchange.").

80. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 747 (3d ed. 2005) ("Relatively few workers have individual written contracts of employment."). In contrast, laws in many nations require writings specifying certain agreed upon terms. E.g., Employment Rights Act (1996) §1.1 (Eng.) (requiring a written statement regarding particular terms within two months of an employee's starting work); Wolfgang Däubler & Qian Wang, *The New Chinese Employment Law*, 30 COMP. LAB. L. & POL'Y J. 395, 396 (2009) (describing China's new Labor Contract Law, which became effective January 1, 2008, and requires a written labor contract and imposes penalties for failure to provide it).

81. See, e.g., *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985).

82. See, e.g., 1 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 1:5-1:6 (4th ed. 2007).

83. See, e.g., ROTHSTEIN ET AL., *supra* note 80, §§9.2-9.5.

84. See, e.g., STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS ch. 5 (4th ed. 2007).

section 2.01, begins with employment-at-will, rather than contract principles, and states that the at-will relationship may be varied by a definite term of employment or a requirement of cause for termination. As mentioned in the prior part critiquing section 2.01, this is an incomplete statement of at-will employment, and it is unnecessary to say that parties can agree to terms other than at-will employment. The drafters, by limiting the terms to which employer and employee can agree to “a definite term of employment” and a requirement of cause to terminate, foreclose the possibility of contracts terminable for other than cause, such as satisfaction contracts, or contracts not terminable at all.<sup>85</sup> The issue for section 2.02 should be how modification of at-will employment occurs. Sections 2.02(b) and (d) do specify legal theories, but (a) does not.

Further muddling the organization of the section, section 2.02(c) specifies that “policy statement(s)” may limit an employer’s power to terminate. Although employment law casebooks and treatises do indeed treat handbooks and employment policies in a separate subsection from express and implied contractual modifications, this separation unduly obfuscates the analysis. Handbooks and policy manuals have been found to contain statements that modify at-will employment; but this is only one way in which express or implied contract terms modify at-will employment. Express contractual modification occurs through fairly specific statements at variance with at-will employment. Implied contractual modification is more complicated and needs to be treated in section 2.02 in more detail.<sup>86</sup> Instead, “implied terms” is mentioned only in Comment f to section 2.03. Implied contracts and implied contract terms are used by courts and commentators to describe everything from nonspecific oral statements to implied-in-fact employment contracts, as in *Pugh v. See’s Candies, Inc.*<sup>87</sup> As *Pugh* illustrates, a number of factors may be relevant to determining whether an employer and employee have varied at-will employment: duration of employment; positive job evaluations, promotions and commendations; lack of criticism; assurances; and the employer’s policies.<sup>88</sup> Implied contracts have been recognized by courts in

85. See *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377, 382 (N.J. 1988) (“[A] lifetime contract that protects an employee from any termination is distinguishable from a promise to discharge only for cause. The latter protects the employee only from arbitrary termination.”); see also *Mayerson v. Washington Mfg. Co.*, 58 F.R.D. 377 (E.D. Pa. 1972) (contract for “reasonable period”).

86. Professor Perritt explains the relationship between express and implied employment terms as follows in describing what he terms “implied in fact contract claims”: “Although the promise of employment security often is express, communicated directly in a conversation with an individual employee, or stated in an employee handbook, its incorporation into the employment contract usually is implied.” 1 PERRITT, *supra* note 61, § 6.06.

87. 171 Cal. Rptr. 917 (App. 1981).

88. *Id.* at 927.



many states.<sup>89</sup> The failure to treat implied contract terms in some detail in section 2.02 renders this large and complex part of contract analysis an enigma under the proposed *Restatement*. For example, section 2.05 allows that consideration of an employer's course of conduct or the usage of the trade or industry can be looked to in deciding whether an employer commitment to an employee has "vested" and so is insulated from unilateral change. But section 2.02 declines to acknowledge that these same sources may be looked to in deciding whether a commitment to employment for a fixed term or for permanent employment should be contractually recognized at all, *i.e.*, as implied in fact. Because it is not mentioned in a *Restatement* section, but instead is relegated to a comment to another section, the likely effect of the *Restatement* will be that courts consulting the *Restatement* will not find implied contracts. There is a large and complex body of case law that should be given a label in section 2.02(a). Perhaps the answer of the drafters is that 2.02(e) covers it in the catchall "any other principle recognized in the general law of contracts." This is not an adequate answer. First, the meaning of the catchall section is not clear. Second, implied contract belongs with express contract as two ways to contractually modify at-will employment terms. If the drafters believe that implied contract is not well recognized, they should note that it is more broadly recognized than the implied covenant of good faith and fair dealing recognized in 2.02(d).<sup>90</sup> Even New York, where the Court of Appeals has been reluctant to recognize judicially created exceptions to at-will employment, recognized a version of an implied contract term in the context of a law firm requiring an associate to violate the rules of ethics.<sup>91</sup>

89. See, e.g., *Kingsford v. Salt Lake City Sch. Dist.*, 247 F.3d 1123 (10th Cir. 2001) (applying Utah law and stating, "[a]n implied-in-fact promise to terminate only for cause can be demonstrated by 'the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances which show the existence of such a promise,'" quoting *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1044 (Utah 1989)); *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1101 (Cal. 2000) ("The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' conduct evidencing their actual mutual intent to create such enforceable limitations." (emphasis in original)); *Hudson v. Village Inn Pancake House*, 35 P.3d 313, 315 (N.M. App. 2001) ("Implied employment contracts have been upheld 'where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances.'" quoting *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 779 (N.M. 1993)).

90. It should be noted that some courts have treated breach of the covenant of good faith and fair dealing as a tort theory rather than a breach of contract theory. See, e.g., *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212 (Tex. 1988); *Metz v. Laramie County Sch. Dist. No. 1*, 173 P.2d 334 (Wyo. 2007); cf. *ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1154 (Alaska 1988) That point would not be obvious from the placement of the covenant of good faith and fair dealing in this section.

91. *Wieder v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992) ("valid claim for breach of contract based on an implied-in-law obligation in his relationship with defendants").

If section 2.02 had clearly articulated express and implied contracts as ways of modifying at-will employment, then section 2.02(e) probably should have been omitted, as it is not helpful to say that there are some other contract principles limiting termination that the *Restatement* is not covering.

Section 2.02 addresses the theory of promissory estoppel.<sup>92</sup> The section requires a promise to limit termination that “reasonably induces detrimental reliance by the employee.”<sup>93</sup> To make the theory consistent in terminology with the theory of promissory estoppel articulated in the *Restatement (Second) of Contracts*, Section 2.02(b) should use the term “foreseeably” relies rather than “reasonably” relies.<sup>94</sup>

The comments to section 2.02 would have been an appropriate vehicle to further explain and give examples of express and implied contractual modification of at-will employment. That is what the comments do with promissory estoppel in Comment c and the Illustration below it. Instead the comments recognize that collective bargaining agreements can and do modify at-will employment, but collective bargaining agreements are beyond the scope of the *Restatement*.

What section 2.02 leaves us with is the promise in Comment a that subsections 2.01(a) through 2.01(d) are considered in depth in Sections 2.03 to 2.05. As stated above, this is a problem because both promissory estoppel and breach of the covenant of good faith and fair dealing are clearly named in section 2.02, but the theories of contractual modification are not. We turn then to see if section 2.03 explains the contract theories.

### III. SECTION 2.03

#### § 2.03 Agreements for a Definite or Indefinite Term

##### (a) An employer must have cause for termination of

(1) an unexpired agreement for a definite term of employment,  
or

(2) an agreement for an indefinite term of employment  
requiring cause for termination.

92. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.02(b).

93. *Id.*

94. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”) (emphasis added). A comment to section 90 does state that the reasonableness of the reliance is one factor that may be taken into account in determining whether enforcement of the promise is necessary to avoid injustice. See *id.* cmt. b. However, Section 2.02(b) of this *Restatement* elevates the significance of reasonable reliance beyond that accorded to it in the *Restatement (Second) of Contracts*.

**(b) In the absence of an express agreement otherwise by an employee, the employee is under no reciprocal obligation to have cause to terminate the employment relationship.<sup>95</sup>**

Section 2.03 continues the problematic approach begun in section 2.01 and carried into section 2.02: the focus is on at-will employment rather than employment contracts. Section 2.02(a) states that at-will employment does not apply if a contract provides for a definite term or provides for an indefinite term with a good cause restriction.<sup>96</sup> Although Comment a to section 2.02 said that section 2.02(a) would be considered in depth in section 2.03,<sup>97</sup> the text of section 2.03(a) adds nothing to it.

If section 2.02 adequately had set forth contractual variation of at-will employment, the text of section 2.03 could have been devoted to the important issue of what constitutes good cause. Instead, the discussion of good cause is relegated to the comments.

Section 2.03(b) states a reversal of the mutuality of obligation argument, that an employer is not bound by a term or by good cause because an employee is not bound. Mutuality of contract was a principle that provided there was no consideration to support a contract if the economic value given in exchange was much less than that of the promise or the promised performance; this “mutuality of obligation” was said to be essential to a contract.<sup>98</sup> The drafters of the *Restatement (Second) of Contracts* abandoned that notion, however, providing that “If the requirement of consideration is met, there is no additional requirement of . . . ‘mutuality of obligation.’”<sup>99</sup>

This draft *Restatement* provides that if an employer is bound, an employee is not similarly bound unless there is an express agreement. This provision seems consistent with the general criticism leveled against the requirement of mutuality of obligation.<sup>100</sup> The Comment on this principle adds that when an employee agrees to be bound, an employer seeking relief for a breach ordinarily cannot obtain specific performance, but a covenant

95. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03.

96. *Id.* § 2.02(a).

97. *Id.* § 2.02 cmt. a, at 68.

98. RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. a.

99. *Id.* § 79. Comment f to the *Restatement (Second) of Contracts* further provides:

Clause (c) of this Section negates any supposed requirement of “mutuality of obligation.” Such a requirement has sometimes been asserted in the form, “Both parties must be bound or neither is bound.” That statement is obviously erroneous as applied to an exchange of promise for performance; it is equally inapplicable to [other contracts]. Even in the ordinary case of the exchange of promise for promise, § 78 makes it clear that voidable and unenforceable promises may be consideration.

*Id.* § 79 cmt. f.

100. See, e.g., WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION: RIGHTS & REMEDIES* 14-17 (2d ed. 1993).

not to compete for a reasonable period is enforceable.<sup>101</sup> A covenant not to compete is a separate agreement, which does not necessarily have any relationship to an employee's breach of her employment contract. The topic of covenants not to compete is simply out of place in this section or the comments thereto.

Comment g notes that the black letter rule departs from the weight of authority by providing that good cause restrictions can be agreed upon in indefinite term contracts. This is a good result which follows the freedom of contract principle that parties can agree to anything that is not illegal or against public policy. A problem in Comment g and Illustrations 6 and 7 that follow it is the failure to distinguish between indefinite term agreements, permanent employment, and lifetime employment.<sup>102</sup> A related issue that should be addressed by the *Restatement* is whether an employer's promise not to fire an employee, even for good cause, is enforceable. The moral hazard problem of employees with such assurances shirking has caused courts to infer a good cause term in such agreements.<sup>103</sup> However, if the parties want to enter into such an agreement, there is no reason why the law should not recognize it.

Comments h(i) and h(ii) provide different default meanings of good cause for definite term and indefinite term agreements. Economic circumstances of the employer can satisfy good cause for indefinite term, but not definite term agreements. No explanation is offered for this distinction. Comment h(iii) Illustration 8 uses material facts of *Ohanian v. Avis Rent a Car Systems, Inc.*,<sup>104</sup> to illustrate that an economic reason is good cause for an indefinite term agreement. The illustration is problematic because the language used by the employer, "unless you screw up badly" should be interpreted as limiting good cause to reasons attributable to the employee, such as inadequate job performance or violation of rules, and not reasons attributable to the employer, like economic reasons or profitability.<sup>105</sup> This illustration seems to contradict the position in Comment h that "[t]he parties are, of course, free to define in the agreement

101. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 cmt. e.

102. See, e.g., *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377, 382 (N.J. 1988) ("[A] lifetime contract that protects an employee from any termination is distinguishable from a promise to discharge only for cause. The latter protects the employee only from arbitrary termination.").

103. See WILLBORN ET AL., *supra* note 84, at 99 nn.1-2.

104. 779 F.2d 101 (2d Cir. 1985); see RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 reporters' notes cmt. b (identifying *Ohanian* as the source).

105. Although the illustration does not identify *Ohanian* as authority for the proposition, if that is implicit and the Reporters' Note suggests this, it is misguided. Although *Ohanian* discussed whether an economic reason satisfied good cause, it was in the context of circumventing the statute of frauds to enforce an agreement.

their own special understanding of what would constitute cause sufficient to terminate the agreement without breach.”<sup>106</sup> The cases cited in the Reporters’ Notes to Comment h, particularly *Cotran v. Rollins Hudig Hall International*,<sup>107</sup> grant broader discretion to employers in determining good cause when a contract is implied rather than express. This distinction is not exactly the same as the distinction drawn by Comment h between definite term and indefinite term agreements.

Comment i states that if procedures are provided for in an employment agreement, they must be exhausted as a prerequisite to the employee’s filing a lawsuit.<sup>108</sup> The point seems misplaced. Section 2.03 is about contractual modification of at-will employment; thus, the creation of procedures as a contract term is relevant, but exhaustion of remedies is a different topic. The principle, appearing in Comment i, is dealt with too summarily. The final sentence of Comment i and Illustration 12 make the point that an employer that otherwise has stated a good cause should be required to apply the reason given in an even-handed, nondiscriminatory manner.<sup>109</sup> Both Comment i and Illustration 12 deal not with procedures, the topic of Comment i, but substantive good cause.

#### IV. SECTION 2.04<sup>110</sup>

##### *A. Draft Restatement Position and Comment*

### § 2.04 Binding Employer Policy Statements

**Policy statements by an employer – made in such documents as employee manuals, personnel handbooks, and employment-policy directives provided, or made accessible, to employees – that, reasonably read in context, establish limits on the employer’s power to terminate the employment relationship are binding on the employer until modified or revoked.**

Section 2.04 adopts the position that policy statements made in such documents as employee manuals, personnel handbooks, and employment-policy directives that establish limits on the employer’s power to terminate the employment relationship “are binding on the employer until modified

106. RESTATEMENT (THIRD) OF EMPLOYMENT LAW §2.03 cmt. h.

107. 948 P.2d 412, 418-20 (Cal. 1998).

108. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.03 cmt. i, at 78-79.

109. *Id.* § 2.03 cmt. i, illus. 12, at 78-79. It could be that the implied covenant of good faith and fair dealing would impose the same obligation of equal protection in an employer’s exercise of its power to terminate an employment held at will. But the draft rejects that extension; again, without explanation. See the discussion of § 2.06, *infra*.

110. Stephen F. Befort is the author of the critique on sections 2.04 and 2.05.

or revoked.”<sup>111</sup>

The Reporters’ Notes explain that “[t]his Section adopts the position of the overwhelming majority of U.S. jurisdictions that unilateral employer statements can in appropriate circumstances establish binding employer obligations.”<sup>112</sup> Comment b asserts that “some” courts reach this result by applying unilateral contract analysis.<sup>113</sup> This Comment criticizes this approach as “a conceptually awkward fit” in that employees rarely are aware of the content of these statements when they accept or continue employment.<sup>114</sup> Comment b goes on to state that “other courts, and this Restatement, rest the binding effect of unilateral employer statements on general estoppel principles.”<sup>115</sup> Making an analogy to “administrative agency estoppel,” Comment b contends that when an employer announces unilateral statements intending to govern personnel policy matters, those statements should be binding on the employer until properly modified or revoked.<sup>116</sup>

Comment c states that unilateral employer statements should be “reasonably read in context” to determine whether they have a binding effect.<sup>117</sup> This Comment references three factors that should be considered in this regard: the presence of a prominent disclaimer, the mode by which the employer disseminates the document, and whether the particular “workplace culture feature[s] dominant reliance on bilateral agreements.”<sup>118</sup>

## B. Critique

### 1. The Binding Nature of Employer Policy Statements

Although some jurisdictions, such as Georgia, Florida, and Missouri, continue to view handbook pronouncements as mere statements of policy without any enforceable effect,<sup>119</sup> the Reporters’ Notes are clearly correct

111. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04.

112. *Id.* § 2.04 reporters’ notes cmt. a.

113. *See id.* § 2.04 cmt. b.

114. *Id.*

115. *Id.*

116. *See id.*

117. *Id.* § 2.04 cmt. c.

118. *Id.*

119. *See Quaker Oats Co. v. Jewell*, 818 So.2d 574, 576-77 (Fla. Dist. Ct. App. 2002); *Doss v. City of Savannah*, 660 S.E.2d 457, 463 (Ga. Ct. App. 2008); *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 661-62 (Mo. 1988). In addition, Montana has created a claim for wrongful discharge by statute which expressly preempts any claim for discharge that may arise from “express or implied contract.” MONT. CODE. ANN. § 39-2-913 (2007).

in asserting that the vast majority of U.S. jurisdictions recognize that provisions in employee handbooks and similar documents can be binding on the employer even though promulgated unilaterally.<sup>120</sup> A few jurisdictions have suggested in dicta that unilaterally promulgated policy statements may be enforceable but have not addressed the issue squarely.<sup>121</sup> Finally, New Hampshire has only found handbook provisions to be binding when collateral employment benefits are promised; it is unclear if a promise of job security is enforceable on the same grounds.<sup>122</sup>

## 2. Rationale for Enforcement

Although Comment b states that “some” courts employ unilateral contract principles in analyzing handbook statements,<sup>123</sup> it is clear that the vast majority of courts that have recognized the enforceability of handbook provisions have done so on the basis of unilateral contract theory.<sup>124</sup> In general, an implied-in-fact unilateral contract can be established if: “(1) [the] handbook is sufficiently definite in its terms to create an *offer*; (2) the handbook is communicated to and accepted by the employees so as to constitute *acceptance*; and (3) the employee provides *consideration*.”<sup>125</sup> Most courts utilizing unilateral contract principles find that an employee’s continued work performance after receiving a handbook or similar policy statement provides both the requisite acceptance and consideration to support a binding unilateral contract.<sup>126</sup>

In contrast, only a handful of states rely on estoppel principles in determining the binding nature of employer policy statements.<sup>127</sup> The Michigan Supreme Court has been the most influential proponent of this view with two landmark decisions: *Toussaint v. Blue Cross and Blue Shield*

120. See Jason A. Walters, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree’s Assent*, 32 CUMB. L. REV. 375, 379 (2002).

121. See, e.g., *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 891 (Ind. Ct. App. 2007) (declining to decide the issue of whether handbook provisions can modify the at-will rule); *Neri v. Ross-Simons, Inc.*, 897 A.2d 42, 47-48 (R.I. 2006) (stating that even if it were to recognize the enforceability of handbook statements, the presence of a disclaimer foreclosed the possibility of such a claim’s success in that instance).

122. See *Butler v. Walker Power, Inc.*, 629 A.2d 91, 93 (N.H. 1993).

123. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04 cmt. b.

124. See Bruce Yoder, *How Reasonable is “Reasonable”? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L. J. 1517, 1523 (2008); see, e.g., *Asmus v. Pac. Bell*, 999 P.2d 71, 81 (Cal. 2000); *Torosyan v. Boehringer Ingelheim Pharms, Inc.*, 662 A.2d 89, 96-97 (Conn. 1995); *Pine River State Bank v. Metille*, 333 N.W.2d 622, 629-30 (Minn. 1983); *Woolley v. Hoffman- La Roche, Inc.*, 491 A.2d 1257, 1266-67 (N.J. 1982).

125. *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 203 (Iowa 1997).

126. See, e.g., *Metille*, 333 N.W.2d at 629.

127. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L. J. 326, 344 (1992).

of Michigan,<sup>128</sup> and *Bankey v. Storer Broadcasting Co.*<sup>129</sup> As the Michigan court summarized in *Bankey*, “written personnel policies are not enforceable because they have been ‘offered and accepted’ as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.”<sup>130</sup> Most states that use promissory estoppel analysis do so as a co-existing alternative to unilateral contract analysis, thus providing two possible justifications for enforcing unilateral policy statements.<sup>131</sup>

Comment b’s endorsement of the estoppel rationale comes with some obvious advantages and disadvantages. On the plus side, the estoppel approach arguably entails a more purposeful inquiry into the policy reasons underlying the enforcement of handbook statements. As one commentator has summarized:

The promissory estoppel analysis offers two advantages in the handbook arena. First, promissory estoppel appropriately focuses on the legitimacy of employee expectations rather than on the somewhat fictionalized search for the contract law technicalities of acceptance and consideration. Second, promissory estoppel theory goes beyond the promise principle to consider explicitly the underlying equities or “injustice” of enforcement or nonenforcement. While the equity factor may well drive many of the handbook cases under either theory, promissory estoppel analysis does so openly and directly instead of covertly through a manipulation of other factors.<sup>132</sup>

On the other hand, the draft *Restatement’s* choice comes with three arguable disadvantages. First, the draft’s adoption of the estoppel rationale does not simply restate or clarify the law; it instead seeks to alter existing law in most jurisdictions. Since the vast majority of U.S. jurisdictions currently utilize unilateral contract principles in evaluating the enforceability of employer policy statements, the draft *Restatement’s* rejection of that theory represents a significant departure from the existing legal landscape. A second potential drawback is that traditional promissory estoppel theory requires a showing of individualized reliance, and some courts have refused to enforce handbook promises where the employee in question has failed to prove detrimental reliance on specific handbook terms.<sup>133</sup> This requirement imposes difficult proof problems and could

128. 292 N.W.2d 880 (Mich. 1980).

129. 443 N.W. 2d 112 (Mich. 1989) (en banc).

130. *Id.* at 119.

131. *See, e.g.*, *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *Russell v. Bd. of County Commr’s*, 952 P.2d 492, 503-04 (Okla. 1997); *Taylor v. Nat’l Life Ins. Co.*, 652 A.2d 466, 475 (Vt. 1993), *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089-90 (Wash. 1984).

132. Befort, *supra* note 127, at 344 (citations omitted).

133. *See, e.g.*, *Russell*, 952 P.2d at 503-04 (finding a material fact dispute as to whether plaintiff



result in inconsistent levels of job security among employees covered by the same policy language. This drawback could be minimized by adopting the approach of those courts that dispense with the requirement of individual reliance in favor of a rule requiring only a showing of objectively established group reliance.<sup>134</sup> Comment b's approving reference to notions of "administrative agency estoppel" may be consistent with the latter approach,<sup>135</sup> but, as discussed below, this concept suffers from other infirmities. At a minimum, the drafters should make clear their position on this issue. Finally, promissory estoppel may provide a very limited remedy. Under traditional promissory estoppel analysis, a successful plaintiff is entitled only to recover damages incurred in past reliance as opposed to the anticipated value of future benefits.<sup>136</sup>

### 3. Contextual Construction – The Particular Importance of Disclaimers

Comment c states that certain contextual factors may influence the enforceability of employer statements. As an example, the draft correctly points out that the mode of an employer's dissemination of a policy statement may inform the enforceability determination.<sup>137</sup> As the Reporters' Notes indicate, "some courts deny enforcement altogether to statements distributed only to supervisors."<sup>138</sup>

In addition, courts generally will enforce only statements that are "definite in form" as opposed to mere "general statements of policy."<sup>139</sup> As the Illinois Supreme Court has stated, a handbook statement, to be deemed an offer for unilateral contract purposes, "must contain a promise clear enough that an employee would reasonably believe that an offer has been made."<sup>140</sup>

The most important contextual consideration concerns the impact of

established element of detrimental reliance on provision in personnel manual); *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1146 (Wash. 1988) (finding that plaintiff failed to submit proof of individual reliance on handbook layoff policies).

134. *See, e.g.*, *Bankey v. Storer Broad. Co.*, 443 N.W. 2d 112, 119 (Mich. 1989) (stating that handbook promises should be enforced if they benefit an employer by encouraging employee expectations that lead to an "environment conducive to collective productivity").

135. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04 cmt. b, at 85.

136. *See, e.g.*, *Grouse v. Group Health Med. Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981); *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 588 N.W.2d 798, 801 (Neb. 1999).

137. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04 cmt. c, at 85-86.

138. *Id.* reporters' notes cmt. a, at 87.

139. *Pine River State Bank v. Metille*, 333 N.W.2d 622, 626, 630 (Minn. 1983); *see also Aberle v. City of Aberdeen*, 718 N.W.2d 615, 621-22 (S.D. 2006) (ruling that a handbook can create an implied contract only if it embodies the clear intention of the employer to surrender its usual at-will prerogative).

140. *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).

disclaimers. Although they come in many different formats, the typical disclaimer is a provision within a policy document that states that nothing contained in the document should be construed as a contract and that the employment relationship may be terminated on an at-will basis.<sup>141</sup>

A substantial majority of U.S. courts find that a clearly stated disclaimer will serve to bar the enforcement of employer policy statements.<sup>142</sup> This is particularly true in those jurisdictions employing unilateral contract analysis where a disclaimer generally is found to preclude contract formation as a matter of law.<sup>143</sup> In these jurisdictions, the disclaimer effectively negates any notion that a policy statement constitutes an offer such that the court can dispose of the employee's claim without the need for jury deliberation.<sup>144</sup>

There are, however, some limitations on this general rule. First, courts generally will submit the issue of enforceability to the jury if the language of the disclaimer is ambiguous or if its placement is not conspicuous.<sup>145</sup> Indeed, a few court decisions have gone so far as to find ambiguous disclaimers to be ineffective as a matter of law.<sup>146</sup> Second, some courts find an inherent ambiguity in handbooks that contain both specific promises of job security and a disclaimer that attempts to negate the enforcement or such promises.<sup>147</sup> The outcome in these cases is for the ambiguity to be resolved by a jury rather than the court.<sup>148</sup>

Those jurisdictions that utilize promissory estoppel principles apply a somewhat different analysis. In many instances, courts in these

141. See Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 386-87 (1989).

142. See Yoder, *supra* note 124, at 1535; see, e.g., *Massey v. Krispy Kreme Doughnut Corp.*, 917 So.2d 833, 841 (Ala.Civ. App. 2005); *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 505 (D.C. 2002); *Phipps v. IASD*, 558 N.W.2d 198, 204 (Iowa 1997).

143. See, e.g., *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 401-02 (Utah 1998); *Bouwens v. Centrilift*, 974 P.2d 941, 946-47 (Wyo. 1999).

144. See Befort, *supra* note 127, at 348-49; Yoder, *supra* note 124, at 1535.

145. See, e.g., *Ferguson v. Host Int'l, Inc.*, 757 N.E.2d 267, 271-72 (Mass. App. 2001); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 341-42 (W.Va. 1995); *Clay v. Horton Mfg. Co. Inc.*, 493 N.W.2d 379, 382 (Wis. App. 1992).

146. See, e.g., *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989); *Hicks v. Methodist Med. Ctr.*, 593 N.E.2d 119, 121-22 (Ill. App. 1992); *Nicosia v. Wakefern Food Corp.*, 643A.2d 554, 561-62 (N.J. 1994).

147. See, e.g., *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1103-04 (Cal. 2000) (finding a question of fact with respect to the effect of a disclaimer "where other provisions in the employer's personnel documents themselves suggest limits on the employer's termination rights"); *Fleming v. Borden, Inc.*, 450 S.E.2d 589, 596 (S.C. 1994) (ruling that a disclaimer is merely one factor in ascertaining whether handbook as a whole conveys enforceable promises); *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703, 707 (Vt. 2002) (finding ambiguity despite a disclaimer where language of the handbook and employer action indicated intent to create a contract)

148. *Guz*, 8 P.3d at 1103-04; *Fleming*, 450 S.E.2d at 596; *Dillon*, 819 A.2d at 707.

jurisdictions find as a matter of law that a clear and conspicuous disclaimer negates the existence of a promise on which employees reasonably may rely.<sup>149</sup> In other instances, however, courts applying estoppel theory find that a disclaimer does not automatically foreclose enforceability, but instead is just one piece of evidence for a jury to consider in determining whether a policy statement, taken as a whole, reasonably induced the work force to rely on its terms.<sup>150</sup> The Colorado Court of Appeals in *Cronk v. Intermountain Rural Electric Association*,<sup>151</sup> for example, ruled that an employee is entitled to enforce a handbook promise, notwithstanding the presence of a disclaimer, if it can be shown that:

The employer should reasonably have expected the employee to consider the manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied upon the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures.<sup>152</sup>

The task of the jury in these cases, accordingly, is not to resolve ambiguous policy language, but to determine the reasonable expectations that such language generates.<sup>153</sup>

It is not clear what weight the draft *Restatement* gives to disclaimers. Comment b states that the presence of a prominent disclaimer may indicate that a policy statement is only “hortatory” in nature, but that the broader context of the statement and other employer policies may indicate otherwise.<sup>154</sup> This sheds little light on such an important issue. Under prevailing handbook jurisprudence, the presence of a clear and conspicuous disclaimer generally will negate the enforcement of most employer policy statements.<sup>155</sup> Given that reality, it is inadequate for Section 2.04 to proclaim that employer policy statements generally are binding when, in fact, they are not. And, significantly, many commentators maintain that employment policy is ill-served by a legal rule that gives preclusive effect to boilerplate disclaimers without regard to the actual expectations created by employer policy statements.<sup>156</sup> The proposed *Restatement*, in short,

149. See, e.g., *Lytle v. Malady*, 579 N.W.2d 906, 911-12 (Mich. 1998).

150. See, e.g., *Allabashi v. Lincoln Nat'l Sales Corp.*, 824 P.2d 1, 3 (Colo. App. 1991); *Haselrig v. Pub. Storage, Inc.*, 585 A.2d 294, 299-300 (Md. Spec. App. 1991).

151. 765 P.2d 619 (Colo. App. 1988).

152. *Id.* at 624.

153. See Befort, *supra* note 127, at 366-67.

154. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.04 cmt. b.

155. See *supra* notes 142-44 and accompanying text.

156. See, e.g., Befort, *supra* note 127, at 372-76; Estlund, *supra* note 62, at 19-20; Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 751-52 (1986); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1106-07 (1984);

needs to address how disclaimers actually impact and should impact the ultimate enforceability determination.

Having endorsed the estoppel approach to handbook enforcement, a key question is whether the Restatement similarly endorses an estoppel approach to disclaimer analysis. If so, one would assume that the presence of a disclaimer would not automatically defeat handbook enforcement – the usual unilateral contract result – but instead would serve only as a factor in determining the appropriateness of collective reliance on handbook statements. This, of course, would entail a more fact-intensive examination that in many instances would not be appropriate for resolution via summary judgment. Whether or not this is the intent, the proposed Restatement should explicitly deal with the crucial impact of disclaiming language.<sup>157</sup>

## V. SECTION 2.05

### A. *Draft Restatement Position and Comment*

#### **§ 2.05 Modification or Revocation of Binding Employer Policy Statements**

**(a) An employer may modify or revoke its binding policy statement by providing reasonable notice of the modified statement or revocation to the affected employees.**

**(b) Modifications and revocations apply to all employees hired, and all employees who continue working, after the effective date of the notice of modification or revocation.**

**(c) Modifications and revocations cannot adversely affect vested or accrued employee rights that may have been created by the statement, an employment agreement based on the statement (covered by § 2.03), or reasonable detrimental reliance on a promise in the statement (covered by § 2.02(c)).<sup>158</sup>**

Section 2.05 adopts the position that an employer may modify or revoke a previously issued and binding policy statement by providing reasonable notice of the change so long as such action does not adversely affect vested or accrued employee rights.

Comment e to section 2.05 notes that the courts are split with respect to an employer's ability to modify existing policy statements, stating that "[a] number of courts have held that employees who continue to work for

Yoder, *supra* note 124, at 1535-36.

157. In addition, the draft *Restatement* does not address the broader problem of how to weigh disclaimer language in other employment-related documents such as job applications and job offer letters.

158. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05.

the employer after receiving proper notice of a modification or revocation of a unilateral employer statement . . . are deemed to have ‘accepted’ the changed personnel policy.”<sup>159</sup> At the same time, Comment e notes that “[a] roughly equal number of courts have held that a changed personnel policy covers only those incumbent employees who have expressly agreed to the change.”<sup>160</sup> Comments d and e endorse the former view, asserting that an employer should be entitled to alter existing documents by providing the same or substantially equivalent notice as was provided when the prior documents were disseminated.<sup>161</sup> In terms of rationale, Comment a states that “[i]t is not reasonable to assume that an employer intended permanently to circumscribe its operational policies through such non-bargained-for [unilateral statements].”<sup>162</sup> In addition, Comment e contends that permitting employers to alter policy statements only by means of a bilateral agreement is contrary to the equitable estoppel grounds that the Restatement recognizes as the basis for enforcing such statements.<sup>163</sup>

## B. Critique

### 1. Two Conflicting Views

#### a. Majority View

According to the scholarly commentary, a clear majority of the states find that an employer may modify or revoke previously issued policy statements on a unilateral basis.<sup>164</sup> These jurisdictions take the position that an employee’s continuing to work after receiving notice of the change constitutes acceptance and consideration just as it did for the previously issued document.<sup>165</sup> In essence, these courts adopt a “reverse” unilateral contract analysis, concluding that since the employer created the binding document unilaterally, it may also terminate or modify the resulting obligation in the same manner.<sup>166</sup> As summarized by the Supreme Court of

159. *Id.* § 2.05 cmt. e, at 92.

160. *Id.*

161. *See id.* § 2.05 cmts. d-e, at 92-93.

162. *Id.* § 2.05 cmt. a.

163. *See id.* § 2.05 cmt. e, at 92-93.

164. *See* Brian T. Kohn, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 *CARDOZO L. REV.* 799, 819 (2003); Walters, *supra* note 120, at 387; Yoder, *supra* note 124, at 1527.

165. *See, e.g.,* *Asmus v. Pac. Bell*, 999 P.2d 71, 78 (Cal. 2000); *Sadler v. Basin Elec. Power Coop.*, 431 N.W.2d 296, 298 (N.D. 1988); *Fleming v. Borden, Inc.*, 450 S.E.2d 589, 594-95 (S.C. 1994); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998).

166. *See* Befort, *supra* note 127, at 357-58; Kohn, *supra* note 164, at 819.

California, requiring actual assent “would incorrectly impose a bilateral principle on the unilateral relationship, leaving the employer unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles.”<sup>167</sup>

Courts applying the majority rule generally place two limits on an employer’s ability to unilaterally withdraw or alter previously-issued policy statements. First, these courts require that the employer provide affected employees with reasonable notice of the alteration.<sup>168</sup> There is, however, no well-accepted understanding of what type of notice is “reasonable.” Some courts find that constructive notice is sufficient, such that the dissemination of a revised handbook itself constitutes reasonable notice.<sup>169</sup> Some other courts require more in the way of actual notice that specifically references the key alterations.<sup>170</sup> Meanwhile, a few courts, most notably the California Supreme Court in *Asmus v. Pacific Bell*, appear to require a period of advance notice before an announced alteration may take effect.<sup>171</sup>

As a purported second limitation, these courts frequently state that an employer’s modification of a previously existing policy may not interfere with any rights that may have vested under the prior policy.<sup>172</sup> This rule occasionally has been invoked to bar an employer from refusing to provide a benefit, such as accrued vacation pay, that an employee has fully earned under a pre-existing policy.<sup>173</sup> But, this notion has no real meaning with respect to unilateral policy statements that provide for some limitation on the at-will dismissal presumption. Since the majority rule recognizes an employer’s right to rescind such policies on a unilateral basis, such employment security rights never truly vest.<sup>174</sup> In practical effect, accordingly, the majority view forecloses any possibility of a claim based on the vesting of a promise of job security.

167. *Asmus*, 999 P.2d at 78 (citing *Demasse v. ITT Corp*, 984 P.2d 1138, 1155 (Ariz. 1999) (J. Jones, dissenting)).

168. See *Walters*, *supra* note 120, at 387; *Yoder*, *supra* note 124, at 1533.

169. See, e.g., *Elliott v. Bd. of Trustees*, 655 A.2d 46, 51-52 (Md. Spec. App.1995) (finding that employer’s dissemination of amended policies and procedures manual without explanation constituted sufficient notice).

170. See, e.g., *Fleming v. Borden*, 450 S.E.2d 589, 595-96 (S.C. 1994) (requiring that employer provide actual notice to employee of modification of previously binding handbook).

171. 999 P.2d 71, 80 (Cal. 2000) (finding that employer that gave five months notice before revised policy took effect provided employees with “ample advance notice”).

172. See, e.g., *id.* at 76.

173. See, e.g., *Amoco Fabrics & Fiber Co., v. Hilson*, 669 So.2d 832, 835 (Ala. 1995) (vacation pay); *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 777 (Ohio App. 1984) (severance pay).

174. See *Asmus*, 999 P.2d at 79 (stating that “no court has treated an employment security policy as a vested interest for private sector employees”)

### b. Minority View

A smaller number of courts take a more restrictive view and find that an employer can modify the terms of a binding unilateral policy only upon obtaining the mutual assent of covered employees and/or by providing additional consideration.<sup>175</sup> These courts reason that since the employee already possesses contractual rights flowing from the initial handbook, an employer's attempted modification that seeks to circumscribe those rights should be effective only if it satisfies the elements of a new bilateral contract.<sup>176</sup> These courts contend that an employee's continuing to work is insufficient consideration in this context since the requisite consideration should benefit the employee who is relinquishing rights rather than the employer who is gaining rights.<sup>177</sup> They find that the majority rule, in contrast, places an employee in an impossible bind. As the Connecticut Supreme Court has stated: "[t]he employee's only choices [when presented with a modified document] would be to resign or to continue working, either of which would result in the loss of the very right at issue – that is, the loss of the right to retain employment until terminated for cause."<sup>178</sup>

### 2. Scholarly Commentary

The scholarly commentary rather strongly disfavors the majority view. The range of opinion expressed by the academy on this issue falls along the following spectrum: 1) those that favor the minority view as best embodying pertinent contract law principles;<sup>179</sup> 2) those that believe that modification attempts should be evaluated under the basic estoppel principle of whether the modified document nonetheless generates reasonable employee expectations;<sup>180</sup> and 3) those that believe that an employer should be able to modify or revoke policy statements with a

175. See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138, 1144 (Ariz. 1999) (requiring mutual assent and additional consideration); *Torosyan v. Boehringer Ingelheim Pharms., Inc.*, 662 A.2d 89, 99 (Conn. 1995) (requiring mutual assent); *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1145 (Ill. 1999) (requiring additional consideration); *Brodie v. Gen. Chem. Corp.*, 934 P.2d 1263, 1268 (Wyo. 1997) (requiring mutual assent and additional consideration).

176. See *Thompson v. King's Entm't Co.*, 674 F. Supp. 1194, 1198 (E.D. Va. 1987); Befort, *supra* note 127, at 359-60.

177. See, e.g., *Doyle*, 708 N.E.2d at 1145 (stating "[b]ecause the defendant was seeking to reduce the rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification").

178. *Torosyan*, 662 A.2d at 99.

179. See Kohn, *supra* note 164, at 804-05; Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 221 (1990); Stephen Carey Sullivan, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261, 293 (1995).

180. See Befort, *supra* note 127, at 377-78.

reasonable period of advance notice ranging from a minimum of one week to a maximum of three months for those revisions that seek to extinguish a previously existing promise of job security.<sup>181</sup>

### 3. Restatement Rationale

Section 2.05 adopts the prevailing majority view and recognizes an employer's authority to repudiate prior policy statement pronouncements on a unilateral basis.<sup>182</sup> The only limitation on this authority is that the employer must provide reasonable advance notice to affected employees in at least the same or substantially equivalent manner that gave rise to the earlier obligation.<sup>183</sup> Thus, an employer that distributed its initial policy manual without explanation would be free to do the same in revoking or modifying representations contained in the earlier document.

Comment e to Section 2.05 offers two justifications for the adoption of this position. First, Comment e states that "requiring express agreement by employees to changes in employer statements would be unworkable for companies with large workforces."<sup>184</sup> Two commentators have offered competing views on this issue. Bruce Yoder, in a 2008 article, provides general support for the justification offered by Comment e in the following passage:

Perhaps the most persuasive argument against requiring additional consideration is that proscribing unilateral modification of handbooks would be an unwieldy and impractical policy for employers to implement. Such a rule would become a logistical nightmare, as a company manual "could never be changed short of successful renegotiation with each employee who worked while the policy was in effect." Problems with holdouts, dates of hiring, and various manuals that had been previously issued would mean that employers could have drastically different obligations to many different employees.<sup>185</sup>

In contrast, Professor Matthew Finkin argues that the concern that an employer may end up with potentially different obligations owing to different employees is over-stated. He writes:

[E]mployers seem to have no difficulty today in freezing their guaranteed benefits pension plans vis-à-vis incumbent workers and hiring new workers under defined contribution plans (sometimes employer non-contributory) or affording them no pension benefits at all. Nor are employers apparently troubled by having the same work done in

181. See Yoder, *supra* note 124, at 1539.

182. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05.

183. See *id.* § 2.05 cmt. d.

184. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 cmt. e, at 93.

185. Yoder, *supra* note 124, at 1531 (quoting *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 120 (Mich. 1989)).



the same workplace by both regular and agency workers who work side-by-side under vastly different wage and benefits policies. Uniformity of treatment does not seem to be of much concern to employers in these cases. It is never explained [in the draft Restatement] why uniformity of treatment should drive in the opposite direction when it comes to job security.<sup>186</sup>

Comment e also contends that requiring employers to obtain a bilateral agreement to modify or revoke a unilateral policy statement is contrary to the equitable estoppel basis for enforcing such statements.<sup>187</sup> Some support for this view is provided by the analysis of the Michigan Supreme Court in *Bankey v. Storer Broadcasting Company*.<sup>188</sup> In that case, the court considered a certified question asking whether an employer could replace a discharge-for-cause policy statement with an at-will policy on a unilateral basis.<sup>189</sup> In addressing this issue, the court surveyed the various theoretical bases for enforcing policy statements and concluded that enforceability in Michigan “arises from the benefit the employer derives by establishing such policies,” namely by fostering employee expectations that “promote an environment conducive to collective productivity.”<sup>190</sup> The court, applying this estoppel-like standard, found that when an employer revokes an earlier policy by eliminating promissory language, “the employer’s benefit is correspondingly extinguished, as is the rationale for the court’s enforcement of the discharge-for-cause policy.”<sup>191</sup> Thus, handbook modification should be permissible, even on a unilateral basis, if the employer also rescinds the source of its potential benefit.

The *Bankey* logic, however, does not necessarily extend to handbook modifications as opposed to handbook revocations. Take, for example, the case of an employer that seeks to modify a policy statement containing representations of job security through the addition of a disclaimer. If the new document contains both specific promises of job security as well as a disclaimer, the benefit to the employer is not necessarily extinguished. In this instance, the employees may conclude that the new handbook, read as a whole, continues to offer a credible promise of job security.<sup>192</sup> In this context, as discussed above, a number of courts applying estoppel principles would find a jury question as to the reasonable expectations

186. Matthew W. Finkin, *Shoring Up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 11-12 (2006) (citations omitted).

187. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 cmt. e, at 92.

188. 443 N.W. 2d 112 (Mich. 1989) (en banc).

189. *Id.* at 117.

190. *Id.* at 119.

191. *Id.*

192. See Befort, *supra* note 127, at 377; Pratt, *supra* note 179, at 223.

generated by the document's overall tenor.<sup>193</sup>

The likely retort from the drafters of Section 2.05 to such criticism is that the *Bankey* rationale is not the type of "equitable estoppel" that they have in mind. As Comment e notes, the equitable estoppel basis for policy statement enforcement differs from "traditional contract principles of consideration, bargained-for exchange, or even promissory estoppel."<sup>194</sup> Instead, the equitable estoppel basis for enforcement likely refers to the "administrative agency estoppel" concept discussed in comment b to Section 2.04.<sup>195</sup> Under that theory, procedural rules promulgated by an administrative agency are binding on the agency while in effect, but the agency may modify or revoke those rules on a unilateral basis going forward subject only to the provision of reasonable notice.<sup>196</sup>

The analogy to administrative agency estoppel may be subject to at least two criticisms in the context of employer policy statements. First, no jurisdiction has adopted administrative agency estoppel as the underlying rationale for enforcing employer policy statements. As such, the draft *Restatement* here again proposes to change rather than to restate or clarify existing law.

Second, it is not clear that the rules governing administrative agency procedure are comparable in nature to the rules governing the substance of the employment relationship. While a procedural rule in an agency context serves to provide guidance on the process of how an agency intends to determine substantive rights going into the future, a promissory statement made in the context of an ongoing employment relationship itself directly establishes the substantive rules governing that relationship. In some employment contexts, such as in the realm of procedural due process rights afforded by the Constitution to public employees, an employer's unilaterally promulgated rules and even practices have been found to be binding and not subject to unilateral alteration.<sup>197</sup> Further, promissory employer policy statements frequently foster expectations about future treatment. As Professor Finkin has stated in criticism of the Restatement's analogy to administrative agency estoppel:

This logic elides the fact that the loyalty the employer's policy sought to instill rested upon creating reasonable employee expectations about how they will be treated in the future. The labor of a human being is a non-durable good. The individual's dwindling supply is expended, other

193. See *supra* notes 149-53 and accompanying text.

194. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 cmt. e, at 92-93.

195. See *id.* § 2.04 cmt. b, at 85.

196. See *id.*

197. See *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

opportunities ignored or foregone, at least partly because of the expectation of fair treatment the employer has engendered. If expectation of deferred income could estop the employer from abrogating retroactively its commitment to severance pay, it would seem much the same should apply in the matter of job security; or, less strongly, that the draft rather badly needs to explain why it would not, by reason other than that abrogability better serves an employer's interest.<sup>198</sup>

## VI. SECTION 2.06<sup>199</sup>

### § 2.06: The Implied Duty of Good Faith and Fair Dealing

**(a) Every employment contract imposes on each party a non-waivable duty of good faith and fair dealing, which includes an agreement by each not to hinder the other's performance under, or to deprive the other of the benefit of, the contract.**

**(b) In at-will employment, the implied duty of good faith and fair dealing must be read consistently with the at-will nature of the relationship.**

**(c) In any employment relationship, including at-will, the employer's implied duty of good faith and fair dealing includes the duty not to terminate or seek to terminate the employment relationship in order**

**(1) to prevent the vesting or accrual of an employee right or benefit, or**

**(2) to retaliate against the employee for performing the employee's obligations under the employment contract or law.<sup>200</sup>**

The defects of the proposed *Restatement* are well evidenced in its treatment of the covenant of good faith and fair dealing: the want of depth in scholarship; the lack of conceptual coherence; the absence of analysis, of any reasoned explanations for the choices it makes; and the blunting effect of the blackletter rules it proposes on the potential for the growth of law. Each of these will be documented below. But first the basic thrust of the provision should be outlined.

The proposed section 2.06(a) asserts that every contract of employment, including an employment that is held at will, contains (the draft says "imposes") a non-waivable duty of good faith and fair dealing on both parties. This proposition is consistent with the position taken in the *Restatement (Second) of Contracts*.<sup>201</sup> Although the Reporters' Notes do

198. Finkin, *supra* note 186, at 12.

199. Matthew W. Finkin is the author of the critique of section 2.06.

200. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06.

201. RESTATEMENT (SECOND) OF CONTRACTS § 205.

not dwell on it, the draft would appear to be a progressive departure from the legal status quo in those jurisdictions where courts have, thus far, been reluctant to recognize such an obligation, insofar as at-will employment is concerned.<sup>202</sup> That declination proceeds from a perception that inasmuch as the at-will rule might license the employer to discharge for *any* reason, even an arbitrary, malicious, duplicitous, or other morally squalid reason (save for a reason violative of public policy), an obligation to act in “good faith” or “fairly” would be inconsistent with it. However, the draft’s seemingly progressive assertion in section 2.06(a), that the implied obligation does extend to the at-will contract, is followed immediately by the assertion in section 2.06(b) that the obligation “must be read consistent with the at-will nature of the relationship.” The two propositions seem discordant.<sup>203</sup> What the bench, the bar, and the academy are to make of these conjoined propositions is, presumably, explained by section 2.06(c). This sets out, as embodying the obligation, a duty not to terminate or to seek to terminate an employment relationship for one of two reasons: (1) to prevent the vesting or accrual of a right or benefit; or, (2) to retaliate against the employee for performing a contractual or legal obligation. These two and, from what appears in blackletter only these, at once embody the implied obligation and remain “consistent with the at-will nature of the relationship.”

202. A compendium of cases as of the late 1980s listed about twenty jurisdictions – often lower federal courts predicting what state law would be – rejecting the covenant of good faith and fair dealing in at-will employment. 1 HOWARD SPECTER & MATTHEW FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* § 10.52 (1989 & 1991 Cum. Supp.). More recently, *see, e.g.*, *Nguyen v. Voorthuis Opticians, Inc.*, 478 F. Supp. 2d 56, 63 (D.D.C. 2007) (applying Virginia law); *Niedoajaldo v. Central Me. Moving & Storage*, 715 A.2d 934, 937 (Me. 1998) (declining to imply any covenant of good faith and fair dealing beyond insurance contracts and transactions covered by the Uniform Commercial Code); *Van Lente v. Univ. of Wyo. Research Corp.*, 975 P.2d 594, 597 (Wyo. 1999).

203. By this I mean to say *i.e.*, insofar as only at-will employment, in contrast to employment *per se*, is taken to limit the scope of the duty. The District of Columbia, for example, has been insistent that good faith and fair dealing do not apply to at-will employment. *Gomez v. Tr. of Harvard Univ.*, 676 F. Supp. 13, 15 (D.D.C. 1987). But it has embraced good faith and fair dealing in other contractual settings including contracts of employment for a stated term. *Allworth v. Howard Univ.*, 890 A.2d 194, 201–02 (D.C. 2006). Thus, an employer’s decision to terminate an at-will relationship is not subject to challenge on the ground of bad faith; but an employer’s decision not to renew a contract of employment for a fixed duration after its expiration is subject to challenge on that ground. *Gaujacq v. Electricite de France Int’l, No. Am., Inc.*, 572 F. Supp. 2d 79, 93 (D.D.C. 2008) (unsuccessful in that case for want of any showing of bad faith). So, too, in Louisiana, which has enacted the obligation of good faith in its Civil Code, an employee under a contract of permanent employment who has the contractual right to terminate the contract by providing notice is bound to exercise the privilege to give notice of termination in good faith. *Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 758 So.2d 286, 294 (La. App. 2000) (the party exercising the right to terminate “should consider not only his own advantage, but the hardship to which the other party would be subjected because of the termination.” (citation omitted)). The draft makes no effort to resolve the apparent doctrinal incongruity; indeed, it is not mentioned.

### A. An Assessment

#### 1. The Doctrinal Grounding

The Reporters' Notes, Comment a, opine that the seeds of the implied covenant were sown in Judge Cardozo's famous opinion in *Wood v. Lucy, Lady Duff-Gordon*.<sup>204</sup> The doctrine then took root, as exemplified in a 1933 New York theatrical law decision, and was eventually embodied in section 205 of the *Restatement (Second) of Contracts*. That is the extent of the draft's grounding. A good deal more needs be said both to assure adequate context and to highlight the role of a Restatement as an instrument for legal change.

The implied obligation of good faith in carrying out the obligations of a contract has roots in Roman law,<sup>205</sup> found expression in the medieval *jus commune*,<sup>206</sup> and became a major feature in the civil law, notably in Germany – in the implied obligation of “fidelity and faith,” *Treu und Glauben*, under section 242 of the German Civil Code (BGB) of 1900 – and elsewhere on the continent.<sup>207</sup> In the United Kingdom, however, the common law was, generally speaking, hostile to the general implication of such an obligation. As late as 1963, for example, Lord Justice Pearson could opine with confidence that a “person who has a right under a contract . . . is entitled to exercise it and can effectively exercise it for a good reason or bad reason or no reason at all.”<sup>208</sup> According to Robert Summers, such was essentially the state of the law in the United States at the same time.<sup>209</sup>

Both Summers and Allan Farnsworth attribute the subsequent growth of law in the United States to two sources. First, to the Uniform Commercial Code (UCC) whose primary draftsman, Karl Llewellyn, drew upon the German conception of *Treu und Glauben*.<sup>210</sup> And second, to

204. 118 N.E. 214 (N.Y. 1917).

205. Martin Josef Schermaier, *Bona Fides in Roman Contract Law*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW* 63 (Reinhard Zimmermann & Simon Whittaker eds., 2000).

206. James Gordley, *Good Faith in Contract Law in the Medieval Jus Commune*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW*, *supra* note 205, at 93.

207. Simon Whittaker & Reinhard Zimmermann, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW*, *supra* note 205, at 7.

208. *Chapman v. Honig*, [1963] 2 Q.B. 502, 520 (service of notice of termination of a lease, pursuant to the notice provision in the lease, because the leasee testified against the landlord in an unrelated matter does not render the lessor in contempt of court; Lord Denning dissented).

209. Robert Summers, *The Conceptualization of Good Faith in American Contract Law: A General Account*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW*, *supra* note 205, at 118, 119 (“Before the 1960s, it could not be said that the American states acknowledged any *general* obligation of good faith in their contract law.”) (italics in original).

210. *Id.* at 119; E. Allan Farnsworth, *Good Faith in Contract Performance*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 153, 154-55 (Jack Beatson & Daniel Friedmann eds., 1995).

section 205 of the *Restatement (Second) of Contracts*, which extended the obligation beyond transactions covered by the UCC to all contracts as a general principle of contract law. In other words, the covenant of good faith and fair dealing is a newcomer to American contract law,<sup>211</sup> its content and meaning in application remain fully to be developed. Farnsworth notes, after a review of competing (and conflicting) views of what the obligation does – his view, Professor Summers’ view and Professor Steven Burton’s view – that,

[c]ourts have looked to all three of these views – Burton’s, Summers’, and mine – for support, often without recognizing a conflict among them, which is scarcely surprising, because in the context of performance the meaning of good faith may turn on which of its several functions is in issue. Sometimes good faith is the basis of a limitation on the exercise of discretion conferred on a party . . . Sometimes good faith is the basis for proscribing behaviour which violates basic standards of decency . . . Sometimes it is merely the basis of an implied term to fill a gap or deal with an omitted case . . . the most restrictive of the three views.<sup>212</sup>

Importantly, the *Restatement of Contracts* has played a key role in establishing judicial acceptance of the covenant, just as one might expect this *Restatement* to educate jurisdictions that have not yet come to appreciate how the covenant constrains or should constrain the reach of employment at will. As will be seen below, however, this draft adopts the most restrictive view of what the covenant does, and does so without explaining or attempting to justify that choice.

## 2. Defining the Obligation

The vagueness of the obligation poses a challenge to any effort to capture it in blackletter terms. As Summers put it, “general definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity.”<sup>213</sup> The draft approaches this challenge by setting out two groups of cases.<sup>214</sup> Two, but only two. Comment c does explain that the two case clusters are “not necessarily exclusive.”<sup>215</sup> But the thrust of the blackletter treatment obscures the possibility that yet other groups of cases could implicate the obligation. In

211. Maine’s declination to extend the covenant to at-will employees is in keeping with its refusal to extend the covenant to any transaction outside the UCC, except for insurance contracts. *Niedojaldo v. Central Me. Moving & Storage*, 715 A.2d 934, 937 (Me. 1998).

212. Farnsworth, *supra* note 210, at 163.

213. Summers, *supra* note 209, at 128.

214. The Reporters do not acknowledge the commonality in approach, but this is just what German treatise writers attempt to do with *Treu und Glauben*, to set out groups of cases, *Fallgruppen*, for “orderly and rational analysis” of the obligation. Whittaker & Zimmermann, *supra* note 207, at 23.

215. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 cmt. c, at 96.

fact, that possibility is made ever more remote by the explicit rejection in the Reporters' Notes of one category of potential application and the most obvious one at that. More on that in a moment; but first to the two situations the draft does admit.

The first is a discharge to prevent the payment or accrual of a right or a benefit.<sup>216</sup> Comment c explains that this is not inconsistent with the at-will rule – in its strong form, the license the employer enjoys to dismiss for *any* reason whatsoever – because the contractual promise of the benefit or the right implies that the employer will not act to deny the right or benefit it promised, *i.e.*, by promising the benefit or the right the employer has tacitly agreed to modify the at-will nature of the employment by limiting to that extent the exercise of its otherwise plenary power to discharge.<sup>217</sup> By that reasoning, however, this group of cases has less to do with discharge than with an employee's contractual right to an accrued benefit or promised compensation. Consequently, the draft provides that the remedy in this discharge case is restitution of the benefit or right denied, not compensation (or reinstatement) for the discharge. And, in point of fact, there is good law that an employer may not act opportunistically to modify its compensation policies even when no discharge from employment is involved.<sup>218</sup> In other words, contract law need not draw upon any notion of "good faith" to achieve this result.<sup>219</sup>

The second category is a discharge in retaliation for the employee's performing her contractual (or legal) obligations.<sup>220</sup> As the draft's illustrations make clear, this category hinges on deciding just what the employee's contractual job duties are,<sup>221</sup> which may be more nuanced than the draft's brief treatment acknowledges. But, again, being discharged for

216. *Id.*

217. *Id.* § 2.06 cmt c, at 96-97

218. For example, Minnesota does not recognize any obligation of good faith and fair dealing in employment contracts. *Brozo v. Oracle Corp.*, 324 F.3d 661, 668 (8th Cir. 2003). But when a contract term, for example, governing the payment of commissions, leaves discretion to the employer, that discretion cannot be exercised on the basis of fraud, bad faith, or in "gross mistake of judgment." *Id.* at 667; *accord* *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984); *Allen D. Shadron, Inc. v. Cole*, 416 P.2d 555, 557 (Ariz. 1966) *aff'd on reh'g* 419 P.2d 520 (Ariz. 1966). Thus an employer may not reject an order procured by a salesman for the purpose of depriving the salesman of the commission that would be due on the sale. *Callahan v. Prince Albert Pulp Co.*, 581 F.2d 314, 317 (2d Cir. 1978).

219. This point is made with customary brio by then Circuit Judge Scalia in *Tymshare, Inc. v. Covell*, 727 F.2d at 1152-53.

220. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 cmt. d. As to the performance of obligations imposed by law, as the draft notes this is also covered by its treatment of the tort of discharge for a reason violative of public policy. It remains to be seen what is added by subsuming legal obligations additionally into a contract claim. Indeed, though this section never mentions it, by treating the covenant as solely a matter of contract the draft tacitly rejects a tort theory of bad faith with obvious if unaddressed remedial consequences.

221. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 cmt. d, illus. 2.

doing what one has been authorized to do could be in breach of contract without the need to refer to an implied duty of good faith. Just as in the first category, the employer's authorization to do the act implies that one will not be dismissed for doing what one has been told or allowed to do, just as a contracting party may not prevent the others' performance. The authorization to do the act contractually modifies the employer's right otherwise to dismiss at will.<sup>222</sup> Here, as on the question of whether the courts should acquiesce in an employer's opportunistic exercise of the power it reserved to defeat the accrual of a right or benefit, there are cases to the contrary.<sup>223</sup> But it is important to note that the two propositions the draft lays out to define what the covenant means can and have been dealt with without the implication of an implied obligation of good faith.

### 3. The Limit of the Draft's Reach

What is remarkable is the draft's foreclosure of any potential for broadening the doctrine's application to other situations where good faith and fair dealing would apply under section 205 of the *Restatement (Second) of Contracts*; to take only one if rather striking example, to prohibit a discharge grounded in malice or duplicity. The draft's rejection of this application is made clear in the Reporters' Notes. It states that, "This Section disagrees with the broader implications"<sup>224</sup> in *Monge v. Beebe Rubber Co.*, which held open that very prospect,<sup>225</sup> albeit later narrowed by that court.<sup>226</sup> The Reporters' Notes next proceed immediately to close out the treatment of this question with equal brevity: "In some jurisdictions, the covenant does appear to have a broader scope and is invoked as a contractual basis for challenging fraud or deceit by the employer or its agents."<sup>227</sup>

That is the extent of the draft's discussion: Any judicial inquiry into dishonesty, malice, or more is foreclosed because the draft says it is to be. No more is offered. But surely more has to be said.

Delaware is not alone in giving the covenant a broader reach. Montana similarly forbade discharge of an at-will employee grounded in

222. *Hammond v. Heritage Comm'n Inc.*, 756 S.W.2d 152, 154 (Ky. App. 1988).

223. *DeVries v. McNeil Consumer Prods. Co.*, 593 A.2d 819 (N.J. App. Div. 1991) which the draft acknowledges; *see also Paul v. Lankenau Hosp.*, 569 A.2d 346 (Pa. 1990); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983).

224. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 reporters' notes cmt. b, at 99.

225. 316 A.2d 551 (N.H. 1974).

226. *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274 (N.H. 1980).

227. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 reporters' notes cmt. b, at 99 (citing *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 831 (Del. 2005)).



dishonesty,<sup>228</sup> which common law doctrine was broadened and superceded by the enactment of a statute prohibiting unfair dismissal generally. Alaska has given the covenant the most detailed attention. It has distinguished the two components – “good faith,” a subjective component, and “fair dealing,” an objective component – as having independent application.<sup>229</sup>

The employer commits a subjective breach “when it discharges an employee for the purpose of depriving him or her of one of the benefits of the contract.” The objective aspect of the covenant requires that the employer act in a manner that a reasonable person would regard as fair.<sup>230</sup>

The draft accepts the former proposition of Alaskan law; but it rejects the latter without explanation or even reference to the fact that that is the law in this jurisdiction. In fact, Alaska requires that employers “treat like employees alike” in exercising the prerogative to discharge.<sup>231</sup> The draft accepts this very principle when an employer exercises its prerogative to dismiss under contracts of fixed or indefinite duration requiring just cause to dismiss;<sup>232</sup> but it refuses to apply the same principle of equal protection to the discharge of at-will employees. The draft declines to note the disparity; nor does it mention that at least one state would have employers treat *all* employees alike when it comes to the differential application of a ground for discharge.

The reader is left entirely to speculate on why employers should be contractually unconstrained to act out of malice or duplicity, for example, when discharging an at-will employee but not when exercising the analogous privilege to terminate a business relationship that they are otherwise privileged to terminate.<sup>233</sup> The only answer that can be teased out of the text is that to do so would be “inconsistent” with the at-will rule under section 2.06(b). That would be so if the draft were to cast its restatement of the at-will rule in robust nineteenth century *laissez-faire*

228. *E.g.*, *Stark v. Circle K. Corp.*, 751 P.2d 162, 167 (Mont. 1988).

229. *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002).

230. *Id.* (quoting *Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1286–87 (Alaska 2001)). Note that the test of business reasonableness, applied to commercial transactions by the UCC, would be foreclosed by the draft in the employment setting. *See* text accompanying note 234, *infra*.

231. *Charles*, 55 P.3d at 62 (quoting *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 789 n.6 (Alaska 1989)).

232. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 2.03 illus. 12.

233. As the court in *Bohne v. Computer Assoc. Int'l., Inc.*, 445 F.Supp.2d 177 (D. Mass. 2006), noted, the courts “have applied the duty of good faith to override a range of express termination clauses.” *Id.* at 182 (citing *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1386–87 (6th Cir. 1975) and involving termination of a general agency agreement), *rev'd on other grounds*, 514 F.3d 141 (1st Cir. 2008); *see also de Treville v. Outdoor Marine Corp.*, 439 F.2d 1099, 1100 (4th Cir. 1971) (termination of a franchise agreement), *Shell Oil Co. v. Marinello*, 307 A.2d 598, 600 (N.J. 1973) (same).

terms – as expressly including a license to discharge dishonestly or maliciously. But the draft does not do that. Section 2.01, which proposes to restate the at-will rule, provides only that absent agreement on duration or requiring just cause to discharge, the employer is free to discharge at any time; thus the employer, absent an obligation to do so, need not be required to prove just cause to dismiss. But nothing in *that* formulation is inconsistent with an obligation implied by law not to discharge maliciously or dishonestly, for such a limitation, the burden of proof of which rests with the employee, does *not* require proof of just cause, just as the Delaware courts have made clear.<sup>234</sup> Thus, the adoption of the common law approach taken in Montana earlier and taken today in Delaware and Alaska is no more “inconsistent” with the at-will rule, as a rule only governing the duration of employment, than is a rule disallowing a discharge to defeat the accrual of a benefit or in retaliation for doing what one has been told to do.

It could be that the draft’s effort to close off this course of legal development is grounded in an economic judgment. That is what the Colorado Court of Appeals said in just such a case, of a discharge allegedly rigged on fraudulent grounds:

The at-will employment doctrine promotes flexibility and discretion for employees to see the best position to suit their talents and for employers to seek the best employees to suit their needs. By removing encumbrances to quitting a job or firing an employee, *the at-will doctrine promotes a free market in employment analogous to the free market in goods and services generally.*<sup>235</sup>

But the obligation to act honestly and in good faith *has* been applied to the market in goods and services generally; that, at least, is the thrust of the UCC and of section 205 of the *Restatement (Second) of Contracts*. Consequently, if the basis of the draft’s rejection is grounded in an

234. *Ulmer v. Home Depot, Inc.*, 471 F. Supp. 2d 474, 477–78 (D. Del. 2007).

235. *Wishart v. Meganck*, 66 P.3d 124, 126 (Colo. App. 2002) (emphasis added). There was a strong dissent in that case as well. *Id.* at 130 (Webb, J., dissenting). Ironically, the widely accepted rule is that managers and supervisors who do not act in good faith in the employer’s interest or for a bona fide business reason but out of personal hostility to cause the employer to discharge an at-will employee may be civilly liable for the tort of malicious interference in current or prospective economic advantage. 2 SPECTER & FINKIN, *supra* note 202, § 13.02; *see, e.g.*, *Welch v. Ciampa*, 542 F.3d 927, 944 (1st Cir. 2008) (applying Massachusetts law). “[A] supervisor can be liable for tortious interference if ‘actual malice’ . . . was the ‘controlling factor’ in the [supervisors’] interference’ . . . [A]ctual malice is a ‘spiteful, malignant purpose, unrelated to the legitimate corporate interest.’” *Welch*, 542 F.3d at 944 (citations omitted). And such would seem to be the law in Colorado. *Preston v. Atmel Corp.*, 560 F. Supp. 2d 1035, 1039 (D. Colo. 2008) (reviewing authority). In such a case, the manager who effects the discharge would be liable, but the company that dismisses on the ground of the manager’s malice would not. Nowhere does the draft advert to this anomaly which places both the jurisprudential *and* economic grounding of the preclusion of corporate liability in question. The draft’s refusal to engage with this anomaly is all of a piece with its refusal to mention the analogous incongruity of limiting the obligation of good faith to employment at will while applying it to employment of fixed duration. *See supra* note 203 and the text accompanying notes 231 and 232.

economic distinction between fairness in the market for goods and fairness in the market for services provided by independent contractors and franchisees on the one hand, and fairness in market for labor provided by employees on the other, that distinction needs rather badly to be articulated, and the economic bases engaged with for the economic proposition is by no means self-evident.<sup>236</sup> As it is, those who are to have recourse to the proposed *Restatement* are left with nothing more than the Reporters' – and, if adopted, the ALI's – naked preference that the courts should not develop the obligation of good faith and fair dealing in the employment relationship as it has been understood in mainstream contract law actually to require good faith and fair dealing.

### B. Stultification

As late as the mid-1970s, there was little in the nature of a robust obligation to observe good faith and fair dealing in the common law of employment on either side of the English-speaking Atlantic. The *Restatement (Second) of Contracts'* endorsement of such an obligation, generalized to all contractual relations, is as yet imperfectly realized in employment law. But in Great Britain, the courts have vitalized the law by creating and expanding the “implied obligation of trust and confidence” in the employment relationship,<sup>237</sup> starting first with the judicial treatment of constructive discharge the late 70s and 80s and broadening out since,<sup>238</sup> and similar legal expansion can be seen elsewhere in jurisdictions in the orbit of the common law, notably in Australia.<sup>239</sup> This is not to say that these courts have supplanted the exercise of reasonable business judgment:

236. See generally SIMON DEAKIN & PRABIRJIT SARKAR, ASSESSING THE LONG-RUN ECONOMIC IMPACT OF LABOUR LAW SYSTEMS: A THEORETICAL REAPPRAISAL AN ANALYSIS OF NEW TIME SERIES DATA 4 (CLPE Research Paper No. 6, 2008); cf. BRUNO AMBLE ET AL., EMPLOYMENT PERFORMANCE AND INSTITUTIONS: NEW ANSWERS TO AN OLD QUESTION (IZA Discussion Paper No. 2731, 2007).

237. MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT 154 (2003).

238. *Id.* at 154-70; see also Douglas Brodie, *The Heart of the Matter: Mutual Trust and Confidence*, 25 INDUS. L.J. [U.K.] 121 (1996). On more recent legal shifts, see Douglas Brodie, *Mutual Trust and Confidence: Catalysts, Constraints and Commonality*, 37 INDUS. L.J. [U.K.] 329 (2008).

239. See ROSEMARY OWENS & JOELLEN RILEY, THE LAW OF WORK 196, 254-60 (2007); see also Guy Davidov, *Unbound: Some Comments on Israel's Judicially-Developed Labor Law*, 30 COMP. LAB. L. & POL'Y J. 283 (2009) (discussing a judicially imposed restriction on dismissal as being “based doctrinally on the duty to perform contracts in good faith,” and efforts by now retired Justice Elisheva Barak-Oroskin of the National Labor Court to replace the Israeli default rule with one of “just cause”). Professor Davidov acknowledges Israel's “common-law roots,” but discounts that as explaining the expansion of employee protection at the hands of the judiciary.

Faced with changing realities in the labor market, judges developed the law in a way they considered most suitable. They sometimes looked for inspiration from other legal systems – common law as well as civil law ones – but mostly just based their new developments on normative considerations.

*Id.* at 309.

“Even those jurists who are generally quite favourable towards good faith accept that it should not be allowed to lead to the idea of an ‘absolute altruism negating one’s own interests’.”<sup>240</sup> But it is to say that by ensconcing a particularly narrow interpretation of the covenant, by limiting it to situations where it need not be called upon at all,<sup>241</sup> the draft would blunt the growth of the law of good faith and fair dealing more in line with mainstream contract doctrine. As that appears to be the Reporters’ normative judgment, they should make it explicit. If they did, the issue would be publicly joined of whether it is an appropriate exercise of its influence for the ALI to attempt to steer the courts away from taking up standards of “decency” and “fairness,” to use the language of the *Restatement (Second) of Contracts*, and consider applying them to the most common form of the employment relationship.

240. Whittaker & Zimmermann, *supra* note 207, at 38 (quoting Jacques Mestic (reference omitted)).

241. As the Reporters note of the first case cluster, the Employee Retirement Income Security Act already prohibits the discharge of an employee for the purpose of interfering in the attainment of any right to which a benefits plan participant may become entitled under that Act. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.06 cmt. c, at 96. A similar result can and has been reached grounded in state wage payment law. *See, e.g.,* Cook v. Alexander & Alexander, Inc., 488 A.2d 1295 (Conn. Super. 1985).