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Employment at Will and the Law of Contracts

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COMMENTS

EMPLOYMENT AT WILL AND THE LAW OF CONTRACTS

INTRODUCTION

It is undoubtedly true that in a typical job interview a prospective employee is little concerned with the possibility of an abusive or capricious discharge by his employer.[1] The interview will be conspicuously cordial, centering on such topics as salary, job classification, benefits, the employer's expectations as to performance, and other related matters. Of course, whether the interviewer mentions it or not, the employer's right to discharge his employee, absent a specific term to the contrary, is an assumed provision of the employment contract. We all take the chance that our choice of employment will withstand constantly changing economic conditions—that business decisions, market demands, or technological developments will not claim our own job.[2] We may rage at cruel fate when told that we have been replaced by a machine, but we perforce withdraw. When discharged for an abusive, unreasonable, or arbitrary reason, however, an employee may be expected to react in a far less stoic manner. The discharged party suddenly becomes very interested in his rights under the employment "contract." His loss may be substantial. He may have devoted many years of his life to his job, he may lose retirement benefits, and may have very likely incurred indebtedness and family responsibility. A discharge, for whatever cause, often impairs his ability to secure another job.[3] When challenged, the employer need only refer to his implied power to "terminate at will," and need not

1. A recent news article notes the emergence of what may be a contrary trend, at least in the upper and middle management levels of larger companies. One employment consultant noted that "one in three individuals requests and gets some type of termination allowance now; five years ago, it was one in ten." Ricklefs, *More Executives Ask —and Get—Pay Pledges Should They Be Fired,* Wall Street Journal, Dec. 11, 1972, at 1, col. 6.

2. *See generally* R. ARONSON, JOBS, WAGES, AND CHANGING TECHNOLOGY: RECENT EXPERIENCE (1965).

3. *See* H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 143 (1960).

establish any other defense.[4] This Comment will examine the abusively discharged employee's rights under the employment contract where the contract is terminable at will by either party.

I. The Basis of the Common Law Right to Discharge

The employment relationship—which is characterized for legal purposes as "at will"—is the result of the development of the law of master and servant, and the common law of contracts.[5] The words "master" and "employer," and "servant" and "employee" are in most cases synonymous.[6]

> The relation of master and servant exists, where the master retains or exercises the power of control in directing, not merely the end sought to be accomplished, but as well the means and details of its accomplishment; not only what shall be done, but how it shall be done.[7]

The doctrine of "master and servant" was not originally concerned with notions of contract, but developed from status or tenure

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4. The employee, however, is not likely to feel satisfied with such cavalier treatment of the termination.

> [A]ll employees expect management recognition of certain rights by virtue of their common participation in the employee role. They feel that they entered into the role in good faith, with intent to fulfill the requirements of their jobs in the best way possible. Their feeling is that the burden of proof is upon him who claims that anyone has failed to perform his job as required. . . . Rules are . . . seen as having their basis in expectations regarding fair and consistent practice, rather than in the arbitrary will of management.

Id.

5.

> The basis of our contract law is the common law, not statute, and the essentials of the law of master and servant are thus founded on the common law, for in spite of many statutes regulating the relation of master and servant, the creation and termination of that relation depends upon the free agreement of the parties, and the expectancy enforceability of agreements is in the main a matter of common law and not of statutory regulations.

F. Batt, The Law of Master and Servant 27 (1967).

6. Northwestern Nat'l Life Ins. Co. v. Black, 383 S.W.2d 806, 810 (Tex. Civ. App. 1964). The common law has for centuries referred to this relationship as "master and servant," although modern usage has developed the more egalitarian terms of "employer and employee." *See* G. Fridman, The Modern Law of Employment 30-32 (1963).

7. Shannon v. Western Indem. Co., 257 S.W. 522, 523 (Tex. Comm'n App. 1924). The term "employee" was seen as including "all those in the service of another whether engaged in the performance of manual labor, or in positons of management and trust, and whether being paid wages or a salary, so long as they remained under the ultimate control of the employer." *Id.*

in land.[8] The early phases of the law were influenced by the nature of the servant's association with the feudal lord, and also by the series of Statutes of Laborers[9] which treated the relationship of master and servant as entirely one of status. It was not until the Statutes were abandoned[10] that contractual doctrines finally prevailed.[11] Nearly a century has elasped since then, but the rules governing the employment relationship are little changed.[12]

As in other consensual agreements, a contract,[13] written or oral,[14] express or implied,[15] is necessary to establish the employment relationship. No one fact is conclusive of the existence of such agreement; rather, it must be determined from all the surrounding circumstances.[16]

When interpreting these contracts the courts often rely on the principle of freedom of contract—"that men should have the greatest

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8. F. BATT, *supra* note 5, at 26. *See also* Harrison, *Termination of Employment,* 10 ALBERTA L. REV. 250, 251 (1972).

9. 5 Eliz., c. 4 (1562).

10. They were finally repealed in 1875 by the Conspiracy and Protection of Property Act (Imp) 38 and 39 Vict., c. 86, § 17.

11. The Statutes' influence, however, still obtains in the common law notions of termination by notice and dismissal for cause. *Cf.* 1 E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND 114 (12th ed. 1959).

12. One writer has opined that these rules may be "the most conservative of the common law rules protecting freedom of enterprise . . . ." Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season,* 24 RUTGERS L. REV. 480, 481 (1970).

13. *See* Holland v. Celebrezze, 223 F. Supp. 347, 350 (E.D. Tenn. 1963); Thurston v. Hobby, 133 F. Supp. 205, 210 (W.D. Mo. 1955).

14. *See* Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 313-14 (Iowa 1971); Rubin v. Dairymen's League Co-Op Ass'n, 284 N.Y. 32, 29 N.E.2d 458, *aff'g* 259 App. Div. 23, 18 N.Y.S.2d 466, *rehearing denied,* 284 N.Y. 816, 31 N.E.2d 927 (1940); Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960); *cf.* Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N.E. 802 (1892);

> It has . . . been frequently decided that where a contract is personal in its character, as a contract for personal services, which might terminate with the death of the party making it, though the contract be for an indefinite period or a term of years, it is not within the statute of frauds.

Id. at 118, 32 N.E. at 805. *But see* Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251 (1951) (oral contract of employment for definite term is employment at will because of the Statute of Frauds).

15. *See* Wilkins v. City of St. Louis, 404 S.W.2d 783, 788 (Mo. Ct. App. 1966); American Ins. Group v. McCowin, 7 Ohio App. 2d 62, 64, 218 N.E.2d 746, 749 (1966); Delzell v. Pope, 200 Tenn. 641, 294 S.W.2d 690 (1956).

16.

> In its common law and usually accepted sense, such relationship is tested by (a) the contractual relationship of the parties; (b) direction and control; (c) compensation to be paid therefor; and (d) services rendered. When those matters are considered along with surrounding circumstances, the bona fides of a contract is a mixed question of law and fact.

Thurston v. Hobby, 133 F. Supp. 205, 210 (W.D. Mo. 1955).

possible liberty to make such contracts as they please."[17] Strict adherence to this principle implies a belief that the bargaining need not be equal, nor the exchange finally agreed upon be fair. Judges are often unwilling to remake the employment contract, reasoning that if the parties wished to assure employment security for the employee, it would have been provided for in their agreement.[18] At the beginning of this century the Texas Supreme Court invalidated a state law which would have required an employer to show cause why an employee was fired. Barely able to restrain its incredulity, the court stated:

> The requirement that the corporation give to the discharged employee, on his demand, a statement of the "true cause" for his discharge, necessarily implies that there must have been a cause to justify the dismissal, else, how could the "true cause" be given? The value of the contract to each party consisted largely in the mutual right to dissolve the relation of master and servant at will. The destruction of that right in the corporation was a violation of the provisions of the fourteenth amendment to the constitution of the United States.[19]

The court realized that an employer may act out of "whim", but identified that as an element of his right to terminate.[20]

As in contracts generally, both parties must assent to its terms. In the employment interview[21] many terms are expressly detailed,

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17. M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949, 962 (2d Cir. 1942), *aff'd*, 318 U.S. 643 (1943).

18. *Cf.* Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 172 N.E.2d 280, 210 N.Y.S.2d 516 (1961).

19. St. Louis Sw. Ry. v. Griffin, 106 Tex. 477, 171 S.W. 703 (1914).

20. *Id.* at 480, 171 S.W. at 706. Many decisions have regarded employment at will as a means of keeping the employee free from any encumbrances which would impair his chances of improving himself. *See, e.g.,* cases cited note 27 *infra* & accompanying text.

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself . . . .

Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 67, 139 So. 760, 761 (1932). Thus, a prime cause of employment insecurity, and the justification for capricious and arbitrary conduct by employers, is placed upon the shoulders of the employee. It is for his own benefit, we are told, that employers exert such inordinate power over the employee's life. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404, 1419 (1967).

21. The interview in the employment situation is more than just analogous to negotiations in other forms of contracts—it *is* a negotiation wherein the parties set the terms of the contract, albeit in a ritualized and symbolic way. Negotiation is "that which pass[es] between parties or their agents in the course of or incident to the making of a contract." BLACK'S LAW DICTIONARY 1188 (rev. 4th ed. 1968).

but much is left unsaid. To an employee subjected to an abusive termination the most important of these may well be the duration of the employment. While the employee may have contemplated working until retirement, the employer, in the usual case, contemplates the relationship to last only as long as the employee is needed—a period of uncertain duration. If a definite time has been expressly agreed upon,[22] the employer will be subject to suit for wrongful discharge. Where no express time period is shown, however, the employee must be able to demonstrate either that a term of service is implied, that the employment is permanent,[23] or for life,[24] or that a definite duration has arisen from business usage or custom.[25] Failing this, the employment relationship will be terminable at will, leaving the employee without a remedy despite the inequitable, or even outrageous, circumstances which may surround the dismissal.[26] The discharged employee's task is clear: he must demonstrate to the court's satisfaction that there is a definite term to the contract. However, one need not survey the reported cases assiduously to see that such a task is formidable. Although not conclusive, there is a strong presumption that employment contracts are terminable at will unless the terms of the contract or other circumstances clearly manifest the parties' intent to the contrary.

> The presumption is grounded on a policy that it would otherwise be unreasonable for a man to bind himself permanently to a position, thus eliminating the possibility of later improving that position.[27]

This presumption has resulted from social and economic factors said to be endemic to this country,[28] and has given rise to the so-called "American rule," formulated nearly a century ago:

> In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. . . . With us, the

22. *See* Brekken v. Reader's Digest Special Prods., Inc., 353 F.2d 505 (7th Cir. 1965).

23. Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972).

24. Stauter v. Walnut Grove Prods., 188 N.W.2d 305 (Iowa 1971).

25. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971).

26. *See, e.g.,* Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959); Odum v. Bush, 125 Ga. 184, 53 S.E. 1013 (1906).

27. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 590 (1967). *See* Peacock v. Virginia-Carolina Chem. Co., 221 Ala. 680, 130 So. 411 (1930).

28. *See* H. WOOD, MASTER AND SERVANT § 136 (2d ed. 1886).

> rule is inflexible that a general or indefinite hiring is, prima facie, a hiring at will; and if the servant seeks to make it out a yearly hiring the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.[29]

The rule was incorporated into the common law in *Martin v. New York Life Insurance Co.*,[30] and has been generally followed to the present. It is not surprising, then, that so many of the cases have been fought over the presence or absence of a definite term of service.

II. The Duration of the Employment Contract

A. *Contracts for a Definite Term*

Whether the contract of employment contains a provision for a definite term of service depends upon a number of factors which are, unfortunately, inconsistently and ambiguously applied by the courts. This serves to intensify the confusion and frustration that attend many employment terminations. The following cases illustrate the difficulty of ascertaining a definite term of service in an employment contract.

Atwood v. Curtiss Candy Co.[31] involved a suit by an attorney who agreed to work for the defendant company at the rate of $20,000 per year. Upon release, he argued that since the terms of his contract specified that it was for a definite period, a hiring for an annual salary created a contract for one year. However, the court disagreed and held that the nature of the employment demonstrated that no fixed period of time was intended. The contract could, therefore, be terminated at the will of either party.[32] A hiring at a monthly or yearly salary, if no duration is specified in the contract, is presumed to be at will, and either party may terminate without liability.[33]

Many courts have failed to find a durational provision, even where a job is described in terms of a definite period of time. *Hanna v. R.C.A. Service Co.*[34] demonstrates how meaningless inducement may

29. *Id.*
30. 148 N.Y. 117, 42 N.E. 416, 26 N.Y.S. 283 (1895).
31. 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959).
32. *Id.* at 371, 161 N.E.2d at 357.
33. *Id.*
34. 336 F. Supp. 62 (E.D. Penn. 1971).

be. Plaintiff in *Hanna* responded to an advertisement soliciting electrical engineers for an 18-month assignment in Thule, Greenland. In the interview he was again told the assignment was to last 18 months, and was offered a salary payable bimonthly. However, he signed a document which read "I also acknowledge that my employment is for no fixed period of time and that it may extend indefinitely if the company and I so agree or it may be terminated by myself or the company at will."[35] Discharged without cause after three months in Greenland, plaintiff instituted an action for breach of the oral 18-month employment contract. The District Court held that plaintiff was hired for an indefinite period of time, and in the absence of a contract or a statute, employment is at will and may be terminated at any time by either party without cause.[36]

A similar rationale was used in *Bucian v. J. L. Jacobs & Co.*,[37] but a thoughtful dissenting opinion provides a refreshing alternative to this rigid application of contract principles. Plaintiff began employment with defendant company as an agent in Saudi Arabia, at $1250 per month. A document indicated that the employment was "scheduled . . . for a period of eighteen months."[38] One month later employment was terminated, allegedly because his work was unsatisfactory, and the sole question litigated was whether the employment was for a definite duration or terminable at will. The plaintiff relied on the 18-month duration of the assignment and defendant's tax statement of his wages, which acknowledged an exclusion for continuous employment outside the United States for 17 of 18 consecutive months. The court found these arguments insufficient to convert an employment relationship terminable at will into a contract of specific duration.[39]

The dissent concluded that plaintiff should have been granted a trial to determine whether the defendants had made a *reasonable* determination that his work was unsatisfactory. Although the employee was free to terminate at will, the personal and family disruption necessarily involved in the move to a distant country was sufficient to prevent the contract from being illusory. Enforcement of defendant's promise to continue the employment for the full 18 months,

35. *Id.* at 64.
36. *Id.*
37. 428 F.2d 531 (7th Cir. 1970).
38. *Id.* at 532.
39. *Id.* at 533-34.

subject to termination for cause, should have been granted.[40] This dissent is a rare instance of judicial notice of external factors which might have converted an obvious employment-at-will contract into one of definite duration. Such a finding, however, is against the overwhelming weight of authority.[41]

The contracts in *Atwood, Hanna* and *Bucian* express their duration in terms of a *rate* of pay. In addition, all three contracts abound with extrinsic facts which tend to demonstrate the intent of both parties to form a contract. The decisions reached in these cases are not, however, atyptical. Without a provision expressly detailing the duration of an employment contract, the presumption is that it may be terminated at the will of either party.

B. *Contracts for Permanent Employment*

A distinct problem arises when an employee claims that he is entitled to "permanent" employment (or for as long as a certain set of facts exists), "lifetime" employment, or employment for an extended period of time. Very often these forms of employment appear to bind the employer for the employee's life, while leaving the employee free to terminate at will.[42] As in other contractual situations, such a term may affect the existence of a valid contract, raising questions of mutuality of obligation and sufficiency of consideration[43]—two concepts which are often confused and inconsistently applied.[44]

The concept of mutuality of obligation is used to express the notion that each party has made a promise and each has incurred an obligation.[45] The rule is often stated that, when the contract is based

40. *Id.* at 534 (dissenting opinion).

41. *See, e.g.,* Boatright v. Steinite Radio Corp., 46 F.2d 385 (10th Cir. 1931); Peacock v. Virginia-Carolina Chem. Co., 221 Ala. 680, 130 So. 411 (1930); Great Atl. & Pac. Tea Co. v. Summers, 25 Ala. App. 404, 148 So. 332 (1933); Wolfe v. Stark Bros. Nurseries & Orchards Co., 288 S.W. 1004 (Mo. Ct. App. 1926).

42. *See, e.g.,* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961); Dallas County Water Control & Improvement Dist. v. Ingram, 395 S.W.2d 834 (Tex. Civ. App. 1965).

43. *See* 1A A. CORBIN, CONTRACTS § 152, at 13 (1963).

44. Meurer Steel Barrel Co. v. Martin, 1 F.2d 687 (3d Cir. 1924):

> The terms "consideration" and "mutuality of obligation" are sometimes confused. "Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise . . . ."

Id. at 688 (cite omitted). *See also* Jackson v. Pepper Gasoline Co., 280 Ky. 226, 133 S.W.2d 91, 93 (1939).

45. 1A A. CORBIN, CONTRACTS § 152, at 4 (1963).

solely on the mutual promise of the parties, either both parties are bound, or the contract lacks mutuality and neither is bound.[46] When an employee is free to terminate at will and the employer is not, the contract would be void for want of mutuality. However, the requirement of mutuality of obligation is subject to numerous exceptions[47] and has led to conflicting results. Modern decisions rarely hold that lack of mutuality alone is sufficient to destroy an employment contract.[48] Indeed, many modern authorities have urged the abandonment of the term,[49] and by implication, the notion that both parties must somehow be "bound."[50]

Mutuality of obligation has been ascribed various roles in the law of contracts. It is sometimes used to denote the presence or absence of consideration;[51] conversely, it is often said to be inessential to the formation of a contract.[52] But despite this ambiguity, it is obvious that in the employment situation, the real problem is lack of consideration, and injustice may result when a court merely finds no enforceable return promise. The issue that should be considered is whether the extent of the employee's sacrifice is sufficient to bind the employer to the contract.

46. *See, e.g.*, Storm v. United States, 94 U.S. 76 (1876); Rich v. Doneghey, 1 Okla. 204, 177 P. 86 (1918); Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 194 S.E. 727 (1938).

47. For example, "unilateral" contracts, once widely believed to be void for want of mutuality, are today generally recognized as valid when the promise supplies some form of consideration. *See, e.g.*, Chinn v. China Nat'l Aviation Corp., 138 Cal. App. 2d 98, 291 P.2d 91 (Dist. Ct. App. 1955); Delaware Trust Co. v. Delaware Trust Co., 43 Del. Ch. 186, 222 A.2d 320 (1966); Ireland v. Charlesworth, 98 N.W.2d 224 (N.D. 1959); Scott v. J.F. Duthie & Co., 125 Wash. 470, 216 P. 853 (1923): "The principle of mutuality of obligation, as generally applied in the law of contracts, has no place in the consideration of unilateral contracts." *Id.* at 471, 216 P. at 853. *But see* Pfeffer v. Ernst, 82 A.2d 763 (D.C. Mun. Ct. App. 1951).

48. *But see* Hope v. National Airlines, Inc., 99 So. 2d 244 (Fla. 3d Dist. Ct. App. 1957); Drake v. Block, 247 Iowa 517, 74 N.W.2d 577 (1956).

49. *See* 1A A. CORBIN, CONTRACTS § 152 (1963); G. GRISMORE, LAW OF CONTRACTS § 68, at 116 (rev. ed. 1965); RESTATEMENT (SECOND) OF CONTRACTS § 81 (1969).

50. J. CALAMARI & J. PERILLO, CONTRACTS § 67, at 131 (1970).

51. Frierson v. Sheppard Bldg. Supply Co., 247 Miss. 157, 154 So. 2d 151 (1963). "Mutuality is a legal term of elusive meaning, but as it relates to the validity of contracts in California, lack of mutuality means only lack of consideration." J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D. Cal. 1954).

52. *See* Meurer Steel Barrel Co. v. Martin, 1 F.2d 687 (3d Cir. 1924); Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N.E. 711 (1921); Hanson v. Central Show Printing Co., 256 Iowa 1221, 130 N.W.2d 654 (1964). "If the lack of mutuality amounts to a lack of consideration, then the contract is invalid . . . . Though consideration is essential to the validity of a contract, it is not essential that such consideration consist of a mutual promise." Standard Oil Co. v. Veland, 207 Iowa 1340, 1343, 224 N.W. 467, 469 (1929).

Hablas v. Armour & Co.[53] demonstrates the destructive effect of strict adherence to a mutuality requirement in employment contracts. There, plaintiff was fired one year before retirement, after 45 years of service with the defendant, for allegedly engaging in conduct "unbecoming an Armour management employee." He lost all rights in the company pension fund (except the right to the return of his contributions), and brought suit for damages resulting from the discharge. A jury found plaintiff free of misconduct sufficient to warrant dismissal but its verdict was subsequently vacated by the trial court.

Plaintiff had been a valued employee who on several occasions had sought more remunerative employment with other companies, but each time had been dissuaded by the defendant. He was often told of his worth to the company, and reminded of the retirement benefits he would lose. One of defendant's managers had told him, "Well, I think you are crazy. You simply can't afford to pass up all the pension rights you have coming for the sake of [increased salary with a competitor]."[54] Plaintiff argued that he had been induced to continue in defendant's employ by implications that he would be retained until retirement, and reliance on such promises made his discharge wrongful.[55]

Plaintiff became a participant in the pension plan in 1911, at which time he signed the following agreement:

> I . . . understand that the employment obtained under this application may be terminated at the pleasure of either employer or employee without previous notice.[56]

On appeal, the *Hablas* court noted simply that the plaintiff-employee was at all times free to terminate his employment at will; "[t]his being true, the purported employment contract is void for want of mutuality of obligation."[57] Therefore, defendant had an "absolute right to discharge the plaintiff with or without cause . . . ."[58] Despite the apparent hardship involved, the court blamed the contract itself as one which did not afford protection to the plaintiff. Lacking mutuality, there must be a valid consideration, and the court could not,

53. 270 F.2d 71 (8th Cir. 1959).
54. *Id.* at 76.
55. *Id.* at 75.
56. *Id.* at 73.
57. *Id.* at 78.
58. *Id.* at 74 n.2.

under the circumstances of this case, find any consideration supplied by the plaintiff to bind his employment until retirement. The document signed by the plaintiff 44 years earlier, acknowledging his employment to be at will, did not permit the court to remake the contract for the parties. The durability of this ancient document defies understanding. To the court, it had maintained its vitality despite the obvious change in the nature of the employment, the expectations of the parties, and the very basis of the understanding by which the employment endured.[59]

A contrary result was reached in *Chinn v. China National Aviation Corp.*[60] Plaintiff, an airline pilot, notified his empolyer of his intention to resign. He was then informed of new severance benefits which were attractive enough to induce him to remain with the airline for another month and a half, at which time he was fired. Plaintiff sought a proportionate share of the termination benefit, but defendants argued that since plaintiff gave no consideration, their offer was merely a gratuity. The court held, however, that the employer's regulations, providing employment benefits upon severance and termination, constituted an offer of a unilateral contract. This offer was accepted when the employee remained because of the lure of the additional benefits. The consideration was the employee's continuing to work and his foregoing other opportunities. The court found sufficient consideration even though there was no mutuality of obligation and held that a valid unilateral contract had been formed.[61]

These cases demonstrate the need to look beyond the doctrine of mutuality of obligation for the validity of employment contracts. The determining factor in such contracts is the presence or absence of consideration given by the employee to make the employer's promise legally enforceable. What constitutes sufficient consideration, however, is an open question and the subject of much litigation.

C. *The Problem of Sufficient Consideration*

The general rule has emerged that, absent any consideration beyond the employee's promise to perform, a contract for permanent or

59. *Id.* at 78-79.

60. 138 Cal. App. 2d 98, 291 P.2d 91 (Dist. Ct. App. 1955).

61. *See also* Lloyd v. American Can Co., 128 Wash. 298, 222 P. 876 (1924). "Any contract containing a consideration is enforceable, whether it is otherwise mutual or not." *Id.* at 301, 222 P. at 879.

lifetime employment is construed to be for an indefinite period terminable at will by either party.[62] Even where an employee has given additional consideration in connection with a contract for permanent employment, a question arises as to what the parties intended by the term "permanent employment."

> There might be several possible durations for a contract of permanent employment. Among those could be employment for a reasonable period; employment for life; for as long as the employee was able to perform the services (his work life); for as long as the employee's services were satisfactory; for as long as employment was available in the business with which the employment was connected.[63]

Clearly such contracts abound in ambiguities that are not readily reconciled. Courts are generally reluctant to view a contract as creating permanent or lifetime employment. The weight of authority appears to be that where purported long-term contracts are called into question, they will not be sustained unless such an intention of the parties is clearly and expressly stated.[64] There is a presumption that the parties, though speaking in terms of permanent employment, have in mind the ordinary business contract for a continuing employment, terminable at the will of either.[65] The assumption rests on the view that, in effect, these contracts are quite often unilateral undertakings by the employer to provide employment for so long as the employee wishes to work, with allowance for the employee to terminate at will. Further, as such contracts involve personal services for unusually long periods, courts are reluctant to render the employer liable to

62. Bixby v. Wilson & Co., 196 F. Supp. 889, 902 (N.D. Iowa 1961); Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311 (Iowa 1971); Hanson v. Central Show Printing Co., 256 Iowa 1221, 1223, 130 N.W.2d 654, 657 (1964); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 589 (1967).

63. Bixby v. Wilson & Co., 196 F. Supp. 889, 902 (N.D. Iowa 1961). District Judge Graven suggested in *Bixby* that where the term "permanent employment" is present, for the sake of clarity and administrative efficiency, such term should mean that the parties intended the employment to be continued for a reasonable period. In determining that period the trier of fact should consider all the surrounding circumstances "including such circumstances as the probable continuing ability to perform the services and the probable continuing need of the employer for such services in the business to which the employment related." *Id.* at 902-03.

64. Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 89 A.2d 237 (1952); Shiddell v. Electro Rust-Proofing Corp., 34 N.J. Super. 278, 112 A.2d 290 (1954).

65. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 400, 153 N.W.2d 587, 589 (1967).

pay wages into an uncertain business future.[66] The employee who would claim his right to permanent or lifetime employment has, therefore, a difficult course to follow; even when faced with unfair results, the courts have generally held against him.

In the interesting case of *Odum v. Bush*,[67] plaintiff was a highly skilled coffin maker who had attained the position of superintendent of a coffin factory in Newberry, South Carolina. He had also acquired, in his 25 years employment, an unstated number of shares in the company. Defendants wished to begin a rival factory in Columbus, Georgia, but they knew nothing of the coffin making business, and thus needed an expert to assist them. To this end they journeyed to Newberry, and there solicited plaintiff to go with them to Columbus and join their venture on the following terms: (1) plaintiff was to be superintendent of the new factory at a salary of $100 per month but was to draw reduced wages sufficient only to cover his immediate living expenses; (2) he was to be a stockholder in the new company by investing in it whatever money he could raise from the sale of his property and stock in his former company; and (3) at the end of the year he would be able to convert the withheld salary into stock of the new company.[68]

Plaintiff then sold his property and stock, disposed of his residence, resigned his old position, and journeyed to Columbus. The defendants relied solely on plaintiff to develop the company. A few months later, after the company was assured of success, defendants fired plaintiff without cause. Plaintiff instituted suit for breach of contract, claiming damages for losses sustained in moving to the new city, disposing of his property, foregoing the opportunity to secure other employment, and loss of the large profits which would have accrued to him had he become a stockholder. It was alleged that his dismissal without cause was a breach of the contract, thus allowing recovery of all damages which might flow directly or indirectly therefrom. After reviewing the provisions of the employment contract, the court stated:

> The parties to the contract doubtless entertained the hope and expectation that it would be to the mutual advantage of all concerned that the plaintiff should continue indefinitely to discharge

66. Bixby v. Wilson & Co., 196 F. Supp. 889, 898 (N.D. Iowa 1961).
67. 125 Ga. 184, 53 S.E. 1013 (1906).
68. *Id.*, 53 S.E. at 1014.

> the duties of superintendent of the factory, invest his money in the venture, and co-operate with the defendants in their efforts to make it a financial success. But the fact remains that the defendants did not bind themselves to employ the plaintiff, nor did he obligate himself to remain in their services for any definite period beyond the first month of hiring. . . . An executory contract of service for no fixed period of time is obviously too indefinite to be capable of enforcement: an offer of employment at so much per month will in the absence of anything further indicating the period of employment, be treated as meaning employment for a term of one month.[69]

The court found the additional considerations supplied by plaintiff to be of no effect because the contract was too indefinite to be capable of enforcement. Though the facts did indicate persuasively that the parties contemplated an enduring relationship to their mutual benefit, the court could not bring itself to "arbitrarily" assign a duration to the contract when an express provision to that effect was lacking.[70]

Forrer v. Sears, Roebuck & Co.,[71] demonstrates a further problem in proving the existence of a contract for an extended period of employment. Plaintiff was employed by defendant for 18 years but was forced to resign due to ill health. After he began operating a farm, he was induced by defendant to return to work as manager of the hardware department, and was subsequently promised permanent employment if he would give up his farm. Plaintiff obligingly disposed of the farm and livestock at a loss, and shortly thereafter was discharged by defendant without cause. Plaintiff brought suit based on a theory of promissory estoppel,[72] abandoning any claim based on classical contract grounds. The court readily dispensed with the promissory estoppel argument, but by way of dicta, stated that plaintiff could have proven the contract if he had shown the presence of "additional consideration."[73] However, the court found:

> [U]nder circumstances where an employee has given consideration of benefit to the employer, additional to the service of employment, a contract for permanent employment is valid and enforceable and not against public policy and continues to operate as long as the employer remains in business and has work for the employee, and

69. *Id.* at 189, 53 S.E. at 1015-16.
70. *Id.*
71. 36 Wis. 2d 388, 153 N.W.2d 587 (1967).
72. *See* notes 114-29 *infra* & accompanying text.
73. 36 Wis. 2d at 395, 153 N.W.2d at 591.

> the employee is willing and able to do his work satisfactorily and does not give cause for his discharge. . . . We do not deem that the detriment to the plaintiff herein in giving up his farming operations at a loss constituted such additional consideration. . . . A permanent employment contract is terminable at will unless there is additional consideration in the form of an economic or financial benefit to the employer. A mere *detriment* to the employee is not enough.[74]

Since the only benefit to the defendant was plaintiff's rendering of services, the court found that there was no additional consideration.

Allegations of additional consideration have also been rejected by courts in cases where an employee has given up a job in response to an offer for permanent employment,[75] where expenses have been incurred in moving to a new place of employment,[76] where the employee has rejected other offers,[77] and where the employee has sold or disposed of property at a loss.[78] The rationale behind these cases is that the employer has received no extra economic or financial benefit, and that it was only natural that the new employee had to incur expenses, dispose of property, or turn down other opportunities in order to obtain a new job.[79]

A contrary result was reached in *Stauter v. Walnut Grove Products.*[80] That court had no problem finding additional consideration where, as an incident to the employment contract, plaintiffs were induced to sell their business to defendants.[81] The court saw this as additional consideration which would allow enforcement of the contract for permanent employment, as it resulted in a financial benefit accruing to defendant. The consideration differs from the preceding two cases only to the extent that the financial benefit is obvious and immediate. The consideration in *Stauter* was an existing, profitable business; in both *Odum* and *Forrer* the consideration was only a financial detriment to the plaintiffs. By obtaining the valuable skills of

74. *Id.* at 394, 153 N.W.2d at 590 (emphasis added). *See also* Wright v. C.S. Graves Land Co., 100 Wis. 269, 75 N.W. 1000 (1898).

75. Edwards v. Kentucky Util. Co., 286 Ky. 341, 150 S.W.2d 916 (1941). *Contra,* Riefkin v. E.I. DuPont de Nemours & Co., 290 F. 286 (D.C. Cir. 1923).

76. Rape v. Mobile & O.R.R., 136 Miss. 38, 100 So. 585 (1924).

77. Meredith v. John Deere Plow Co., 261 F.2d 121 (8th Cir. 1958).

78. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

79. *See, e.g.,* Arentz v. Morse Dry Dock & Repair Co., 249 N.Y. 439, 164 N.E. 342 (1928).

80. 188 N.W.2d 305 (Iowa 1971).

81. *Id.* at 306-07.

otherwise reluctant workmen, however, the defendants in *Odum* and *Forrrer* had in fact received an economic benefit which without their promises would have been unavailable. After receiving the economic benefit, the defendants discarded their employees and erected the barriers of "indefiniteness" and "lack of consideration" to defeat the contract.

A more difficult problem was presented to a California court in *Drezewiecki v. H. & R. Block, Inc.*[82] A contract of employment was entered into between a corporation operating a tax service and an employee who was hired to manage the business in virgin territory. The contract, in addition to providing the employee with a substantial share of the profits, expressly stipulated that the employment was renewable on a year-to-year basis, unless either party gave 90 days written notice. The employer was to give such notice "only in case [the employee] improperly conducted the business."[83] When defendant's business proved more successful than anticipated, it attempted to modify the profit-sharing agreement, but plaintiff refused and his employment was terminated. At trial, the court, with a noteworthy simplicity in its reasoning, found that the contract was enforceable and could not be terminated by defendant except for cause. A substantial verdict was returned for plaintiff. On appeal, defendant argued that the contract was in actuality a contract of permanent employment, and that because there was no evidence to show that it was based upon some consideration other than the services to be rendered, it was terminable at the will of either party.[84]

The appellate court reasoned, however, that merely repeating the above rule and applying it to a set of facts would "confuse form with substance," and would almost always result in finding a contract terminable at the will of the employer.[85] The erroneous application of this theory would lead to the conclusion that double consideration was necessary (*i.e.*, the employee's services to maintain the employment at will, and some further consideration to maintain the employment for any extended period of time) in the absence of which no contract could be shown. Quoting *Littell v. Evening Star Newspaper*,[86] the court emphasized that

82. 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972).
83. *Id.* at 700, 101 Cal. Rptr. at 171.
84. *Id.* at 701, 101 Cal. Rptr. at 173.
85. *Id.* at 702, 101 Cal. Rptr. at 173.
86. 120 F.2d 36 (D.C. Cir. 1941).

> [i]f it is their purpose, the parties may enter into a contract for permanent employment—not terminable except pursuant to its express terms—by stating clearly their intention to do so, even though no other consideration than services to be performed is expected by the employer or promised by the employee.[87]

Absent the express term, the general rule concerning permanent employment could be invoked. Such reasoning recognized that this situation did not, in effect, call for permanent employment, but rather "employment for only as long as, certain [*sic*] state of facts exists, *i.e.*, that the employee properly conducts the business."[88] Although there is no mutuality of obligation, nor additional consideration, an express provision to terminate only in good faith converted this otherwise at-will contract into one that substantially protected the employee from arbitrary or capricious discharge. The decision avoided the unfortunate term "permanent," and instead redefined the durational expectations of the parties. The court rejected any mechanical application of contract "rules," such as the requirement of additional consideration, which would have produced a result contrary to the parties' manifest intent.

The preceeding sections demonstrate that a worker whose employment is characterized as "at will" is afforded little or no protection from abusive discharges by his employer. To establish his employment as something other than at will, however, poses a formidable task to the discharged employee. He must be able to prove that his contract, either expressly or impliedly, has a definite duration. In situations where the employment relationship was contemplated by the employee to last for a lifetime, permanently, or for an otherwise extended duration, he must show that he has supplied an additional consideration to bind the employer for such time, or that an express provision clearly shows the parties' intention to make the employment relationship endure for such time. Failing this, the contract is terminable at will by the employer, with or without cause, and no right of action for a wrongful discharge will lie despite the nature of the dismissal. Where there is no definite term of employment, and where

87. Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 702-03, 101 Cal. Rptr. 171, 173 (1972).

88. *Id.* at 702, 101 Cal. Rptr. at 173.

the employee is not covered by any relevant statute, he is defenseless against arbitrary or abusive discharge.[89]

III. Methods of Limiting the Employer's Right to Discharge

A. *Requirement of Good Faith Discharges*

Perhaps the most substantial right to be won by demonstrating that the employment is not at the will of the employer is the right to be discharged only for good cause. A New York court outlined the requirement in *Carter v. Brodlee,*[90] a depression era case where plaintiff was discharged from a two-year contract, renewed under various circumstances for over 30 years, because he would not take a substantial reduction in pay. The contract contained a provision which bound the employee, while allowing the employer to terminate at will:

> This agreement is made for two years from November 1st, 1925, but it is understood and agreed that we retain the right to terminate the agreement and to discharge you at anytime, should we feel called upon to do so for any reason.[91]

The trial court believed that this provision did, in fact, allow the employer to dismiss at any time. On appeal, a contrary result was reached:

> Such a construction would make the contract merely one at defendants' will, though by its terms it was for two years. *A construction will not be given to a contract, if possible, that would place one of the parties at the mercy of the other.* . . . Under the clause in question, we are of opinion that any discharge before the expiration

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> [I]t is evident that neither the common law nor statutory law, nor [employer] practices thereunder afford employees any protection from the arbitrary and capricious exercise by the employer of his power to discharge, lay off, demote or transfer, change their jobs, rates of pay, or any other term or condition of employment for good cause, bad cause, or no cause at all, and without notice to or consultation with anyone, so long as there is no discrimination because of union activities, race, color, sex, or age.

Lecture by Ruth Weyand, Twenty-second Annual Conference on Labor, June 10, 1969, in Proceedings of New York University Twenty-second Annual Conference on Labor 185-86 (T. Christensen ed. 1970).

In 1968, only 23 percent of the labor force were union members. The majority of the employees in the United States have little in the way of legal protection of their jobs. U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, 1971 Handbook of Labor Statistics, table 143, at 307.

90. 245 App. Div. 49, 280 N.Y.S. 368 (1st Dep't 1935).

91. *Id.* at 50, 280 N.Y.S. at 370.

> [date] should have some "reasonable" ground and that the reason must be attended with good faith.[92]

The maxim often formulated and generally followed, is that an employment contract for a stated term may not be terminated by the employer without a "cause sufficient in law which would justify an employer in discharging an employee."[93] As might be expected, the source for much of the litigation in this area is found in the determination of whether the cause is sufficient. "Good cause" has been defined as a "failure of an employee to perform his duties in the scope of his employment in such manner as a person of ordinary prudence in the same employment would have performed under the same or similar circumstances."[94] Such good cause would almost certainly include inefficiency,[95] dishonesty,[96] failure to perform any part of his duties,[97] and, in certain circumstances, his disability.[98] However, refusal to accept a new position has been held not to be good cause.[99] In any event, whether the employer has "good cause" to terminate the employment is a question of fact for the jury.[100]

A requirement that discharge may be effected only in good faith clearly acts as a strong deterrent to arbitrary or abusive discharge. When an employee has a contract of definite duration the employer either expressly or impliedly promises not to discharge his employee except for good cause.[101] The employee, in turn, expressly or impliedly promises to perform satisfactorily.[102] The employee-at-will also promises to perform satisfactorily, but receives no return promise

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92. *Id.* (emphasis added).

93. Vogel v. Pathe Exch., Inc., 234 App. Div. 313, 318, 254 N.Y.S. 881, 886 (2d Dep't 1932); *see* Parsil v. Emery, 242 App. Div. 653, 272 N.Y.S. 439 (2d Dep't 1934); Ward v. Consolidated Foods Corp., 480 S.W.2d 483 (Tex. Civ. App. 1972).

94. Ingram v. Dallas County Water Control & Improvement Dist., 425 S.W.2d 366, 367) Tex. Civ. App. 1968); *accord,* Mr. Eddie, Inc., v. Ginsberg, 430 S.W.2d 5, 10 (Tex. Civ. App. 1968).

95. Lowenstein v. President & Fellows of Harvard College, 319 F. Supp. 1096 (D. Mass. 1970).

96. Texas Employment Comm'n v. Ryan, 481 S.W.2d 172 (Tex. Civ. App. 1972).

97. Clem v. Bowman Lumber Co., 83 N.M. 659, 495 P.2d 1106 (1972).

98. Fisher v. Church of St. Mary, 497 P.2d 882 (Wyo. 1972).

99. Lanier v. Alenco, 459 F.2d 689 (5th Cir. 1972).

100. Ward v. Consolidated Foods Corp., 480 S.W.2d 483, 486 (Tex. Civ. App. 1972).

101. Dallas County Water Control & Improvement Dist. v. Ingram, 395 S.W.2d 834, 837 (Tex. Civ. App. 1965).

102. *See* Hooser v. Baltimore & O.R.R., 177 F. Supp. 186, 194 (S.D. Ind. 1959), *aff'd,* 279 F.2d 197 (7th Cir. 1960).

of release only for good cause and in good faith. The arguments which serve to sustain this disparity are of questionable force in the labor market of today.

B. *Statutorily Restricting the Right to Discharge*

In the United States, the employee-at-will has few statutory protections for his job.[103] The National Labor Relations Act prohibits dismissal for union organization activities;[104] Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in employment.[105] Additional enactments protect the worker from discrimination based on age,[106] and returning veterans are assured their former employment.[107] The employee-at-will who is fired for a capricious or abusive reason, however, has no legislative protection.

By comparison, Great Britain, which generally subscribes to the same common law notions of employment at will as the United States, was the scene of an attempt to alleviate the harshness of the termination doctrine through a statutory scheme proffered by the International Labor Organization:

> Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.[108]

Though not yet the law in England, there is considerable movement towards recognizing this type of job protection.[109]

There has been no equivalent proposal in the United States, nor has there been any discernible pressure to enact such a measure. There are, however, contractual relationships analogous to employ-

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103. *See* Lecture, *supra* note 89 at 174-75.
104. 29 U.S.C. § 158(a)(3) (1970).
105. 42 U.S.C. §§ 2000(e)-(e)(2) (Supp. 1972).
106. Age Discrimination, in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970).
107. Universal Military Training and Service Act, 50 U.S.C. § 459(c) (1970).
108. INTERNATIONAL LABOR CONFERENCE 1919-1966, Recommendation No. 119, § 2(1), at 1060-63 (1967).
109. *See* Clayton, *A Proprietary Right in Employment,* 1967 J. BUS. L. 139: Recent legislation in the form of the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965 marks a first hesitant step in giving legal recognition that an employee has a proprietary interest in his job rather than a purely contractual interest. These acts "provide statutory regulation of the so-called freedom of contract in the employer-employee relationship." *Id.*

ment at will—franchises, distributorships, manufacturer's representatives, and automobile dealerships—which have also experienced the problem of abusive and capricious terminations. Leaders in these fields are painfully aware of the legal implications of contractual relations which exist at the will of the parties. In at least one field, automobile dealerships, legislative enactments have eased the impact of the termination doctrine.[110]

Many automobile dealer agreements customarily provided for termination at will by the manufacturer. Where dealers had expended considerable time and money in developing their businesses, termination without cause resulted in great hardships. A few courts attempted to alleviate the dealers' plight by forbidding termination for a reasonable time, thereby allowing the dealers to recoup their expenses.[111] The dealers found most courts to be unresponsive to their problems, however, and were eventually forced to seek protection through various legislative proposals.[112]

It is here that the similarity between franchise dealers and discharged employees ends. The dealers are a fairly cohesive group, with shared goals, professional organizations, and a large lobby.[113] Individual employees, on the other hand, are neither likely to band together to petition a legislature, nor presently capable of wielding significant political power as a group, notwithstanding their large numbers. It would not be surprising to find union opposition to any statutory scheme to restrict termination, as such a measure would erode a large part of labor's traditional appeal to unprotected workers. Furthermore, attempts to impose strict statutory schemes may obtain only at the price of increased rigidity in employment relations. For these reasons the plight of the abusively dismissed employee can be better alleviated through judicial solutions.

C. *Enforcing Employment Contracts Through Promissory Estoppel*

The emergence of promissory estoppel has provided the courts with a significant means of enforcing promises which would be un-

110. *See* Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System,* 1965 WIS. L. REV. (pts. 1-2) 483, 740.

111. *See* Allied Equip. Co. v. Weber Engineered Prods., Inc., 237 F.2d 879 (4th Cir. 1956); Gibbs v. Bardahl Oil Co., 331 S.W.2d 614 (Mo. 1960).

112. Automobile Dealers Franchise Act, 15 U.S.C. §§ 1221-25 (1970). *See also* Schnolbel v. Volkswagen of America, Inc., 185 F. Supp. 122 (N.D. Iowa 1961).

113. *See generally* Macaulay, *supra* note 110.

enforceable under traditional contract principles. The doctrine has been invoked in a variety of situations, but generally its use is triggered when a court is faced with outrageous or unjust results if a party's promise is not made binding. The emerging willingness of courts favorably to consider promissory estoppel arguments makes the doctrine an interesting alternative in causes of action based on breach of an employment contract where it is necessary to somehow find adequate consideration to place the employer under an obligation not to discharge without good cause.

Section 90 of the Second Restatement of Contracts states the generally accepted rule of promissory estoppel:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[114]

Though promissory estoppel[115] has been identified by several courts as a "recognized species of consideration,"[116] or as supporting contracts without any consideration,[117] the doctrine was not formulated in the Restatement as either a kind of consideration or as an element in the bargain type of contract. In most contracts the bargain theory still controls. Such agreements arise from an exchange in which the consideration is mutually arrived at by the parties.[118] The consideration is usually viewed as a benefit to the promisor and a detriment to the promisee.[119] Promissory estoppel, on the other hand, is applied in situations where no contract in fact exists, such as gratuitous promises. Section 90 was not intended to apply to cases of bargained-for reliance which the Restatement clearly treats as constituting consideration. Despite the limited role envisioned for this section, the courts have often equated unbargained-for reliance with consideration, and in effect have allowed such reliance to enforce contracts which lack the

114. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1969).

115. *See, e.g.*, Bixby v. Wilson & Co., 196 F. Supp. 889, 903 (N.D. Iowa 1961).

116. Porter v. Commissioner, 60 F.2d 673, 675 (2d Cir. 1932). *See also* Miller v. Lawlor, 245 Iowa 1144, 1152, 66 N.W. 2d 267, 272 (1954).

117. Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 168 (Mo. Ct. App. 1959), *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1969).

118. *See* Note, *Protection of Aesthetic Interest*, 41 IOWA L. REV. 296, 298 (1956).

119. Lynas v. Maxwell Farms, 279 Mich. 684, 688-89, 273 N.W. 315, 317 (1937); Industrial Bank & Trust Co. v. Hesselberg, 195 S.W.2d 470 (Mo. 1946).

elements of a traditional exchange. In this view, "justifiable and substantial reliance upon a promise, which must be enforced if injustice is to be avoided, *creates* an informal contract without mutual assent or bargained-for consideration, since the reliance is not the thing that induces the promise."[120]

Whether a court uses Section 90 in its original form, that is, as supporting unbargained-for promises which have been relied upon, or whether it is used to impose liability without regard to consideration, will be pivotal in determining the measure of damages. In the first instance, the injured party may recover his "reliance" damages, or the value of what he has given up in the past. In the second instance, the injured party will be allowed recovery for the full value of the promised performance, thus substantially altering the extent of recovery.

Indications are that courts are increasingly willing to view Section 90 in the expanded form, thus enforcing contracts in appropriate situations without regard to the presence or absence of consideration. The applicability of this doctrine still depends, however, on the elements most commonly associated with the section: (1) a clear and definite oral promise; (2) reasonable reliance by the plaintiff on said promise; and (3) injustice which can be avoided only through the enforcement of the promise.[121] Thus, in cases where no bargain exists in fact, Section 90 offers a theory which can be used to protect the promisee.[122]

The theory of promissory estoppel has often been applied in the employee area but the cases have met with only limited success. Though the court ultimately sidestepped the issue, *Hardin v. Eska*[123] demonstrates the utility of the doctrine. There, plaintiff obtained an exclusive territory in which to sell defendant's products. Without giving any return promise, plaintiff incurred costs in advertising and promoting the product, and in soliciting salesmen. Defendant terminated the agreement without cause, and began selling in the territory on its own. Defendant subsequently claimed that the contract was not binding because of lack of mutuality and an absence of considera-

120. *See* Note, *supra* note 118 at 300.

121. *See* Jackson v. Kemp, 211 Tenn. 438, 365 S.W.2d 437 (1963); 1A A. CORBIN, CONTRACTS § 204, at 232 (1963).

122. Ted Spangberg Co. v. Peoples Natural Gas, 305 F. Supp. 1129 (S.D. Iowa 1969) (emphasis added). *See also* Shell Oil Co. v. Kelinson, 158 N.W.2d 724 (Iowa 1968).

123. 256 Iowa 371, 127 N.W.2d 595 (1964).

tion, as it did not bind the plaintiff to do anything. The court found for the plaintiff, stating the promissory estoppel notion that when the promise contemplates that the promisee will do certain things, and these things have been done, "justice and authority both require that compensation be made."[124] The court's decision, however, relied heavily on the fact that the plaintiff was seeking only expenses actually incurred, and not future profits.[125] This approach avoids the real question of whether a valid contract existed. It became unnecessary to discuss whether consideration and mutuality were present, and no attempt was made to determine whether promissory estoppel could serve as a form of consideration.

Agreements which arise separately from or in addition to a contract have created complex problems of determining the existence of sufficient consideration. *Byerly v. Duke Power Co.*[126] is one example of how these agreements confuse and frustrate contractual expectations. The employees of defendant corporation had secured a collective bargaining agreement, but in addition to such agreement they were given attractive fringe benefits. Defendant wished to sell the company, and asked the employees to assist in the orderly transfer of control. The employees, however, were faced with the possible, though not certain, loss of the fringe benefits when the company was sold. Defendant then promised that if the employees would aid the company in transferring the business it would continue the fringe benefits in the event that they were terminated. In reliance thereon, plaintiffs continued to work for the defendant. When the transfer was completed the benefits were terminated. Defendant refused to reinstate them in spite of employee objections, and the matter proceeded to trial. The court acknowledged the promissory estoppel "exception" to the consideration requirement in simple contracts, but felt that the facts of this case did not fall within its terms. First, the company's promise was not given in exchange for any act, forebearance, or promise on behalf of plaintiffs, but was voluntary and gratuitous.[127] Second, the fact that they remained with the company was immaterial since they were fully paid for their services. Most importantly, the court found

124. *Id.* at 375, 127 N.W.2d at 597.
125. *Id.* at 373, 127 N.W.2d at 596.
126. 217 F.2d 803 (4th Cir. 1954).
127. *Id.* at 807.

the situation lacked a manifestation of the "injustice" it deemed necessary to the application of Section 90.[128]

One dissenting judge urged a contrary result, believing the sole issue to be whether the defendant's promise was void for lack of consideration. Plaintiffs were faced with the loss of valuable benefits if the sale was consummated. In exchange for plaintiff's promise to assist in the orderly transfer of the company, defendant's promise to provide the benefits in the event they were subsequently lost was sufficient to bind the contract. The employees were not bound to continue their service to the company, but were they to do so the promise would constitute sufficient consideration.[129]

Feinberg v. Pfeiffer Co.,[130] is a leading case defining the scope of promissory estoppel in employment situations. The court applied Section 90 to avoid an obvious injustice. Plaintiff had served 40 years with defendant, but decided to retire when promised a pension. After paying the pension for two years the defendant revoked its offer and stopped sending the checks. The court found that, although intended as a gift, the promise was made enforceable by plaintiff's reliance on it. The last clause of Section 90, "if injustice can be avoided only by enforcement of the promise," brought these facts within its purview.

The above cases indicate the difficulty of using Section 90 as a substitute for consideration. When confronted with a promissory estoppel rationale the courts have generally fallen back upon the bargain theory and declared such contracts void for lack of consideration. Consequently, the success of a Section 90 argument is difficult to predict. Where outrageously unjust results would flow from the unavailability of the section, then such an argument may succeed. However, what is unjust to one court may seem nothing more than a bad bargain to another. In no area of contractual disputes is this more apparent than in the employment decisions.

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128. Byerly v. Duke Power Co., 217 F.2d 803, 807 (4th Cir. 1951).

129. The dissent met with Professor Corbin's approval:

> This treatise supports the reasoning of [the dissent]. If the continuance in service was in fact bargained for and given in exchange for the new promise, as might be inferred, it was a sufficient consideration satisfying the definition in the Restatement, Contracts § 75. If not so bargained for, the continued service was definitely alleged to have been "in reliance," and the defendant had reason to know that the promise would lead to that result. . . . [Service] was rendered by them in exchange for both the promised wages and the promised increase, or in reliance on both promises.

1A A. CORBIN, CONTRACTS § 206, at 257 n.73 (1963).

130. 322 S.W.2d 163 (Mo. 1959).

D. *Employment at Will and the Doctrine of Unconscionability*

The power to terminate employment at will, without cause, for an abusive or capricious reason, rests on the assumption that such power is an implied term of the employment contract.[131] Such a term surely could not have the employee's willing assent, and, at least from his point of view, is "unconscionable." An unconscionable contract or term of a contract has been described as one "which no man in his senses not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other."[132] Such agreements often arise where one party takes "advantage of the necessities and distress of the other."[133]

The doctrine of unconscionability, though readily identifiable with the Uniform Commercial Code,[134] has its beginnings at least as far back as the Roman Law.[135] Indeed, many subsequent legal systems have developed some notion of unconscionability in attempts to lessen the harsh effects of contracts formed out of compulsion or dire necessity, or in contravention of community standards of justice or morality. Although squarely in conflict with the principle of freedom of contract, unconscionability has been invoked in a wide variety of settings when needed to avoid results which were, in the eyes of a court, inequitable and unfair. *Ellsworth Dobbs Inc. v. Johnson,*[136] demonstrates the courts' increasing willingness to invoke the doctrine in appropriate situations:

> Although courts continue to recognize that persons should not be unnecessarily restricted in their freedom to contract, there is an in-

131. State *ex rel.* Lippert v. Sims, 143 W. Va. 542, 547, 103 S.E.2d 533, 537 (1958).

132. Hume v. United States, 132 U.S. 406, 410 (1889).

133. United States v. Bethlehem Steel Corp., 315 U.S. 289, 327-28 (1942) (dissenting opinion).

134. UNIFORM COMMERCIAL CODE § 2-302 reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

135. *See* Comment, *Unconscionable Contract Provisions: A History of Unenforceability From Roman Law to the U.C.C.*, 42 TUL. L. REV. 193 (1967).

136. 50 N.J. 528, 236 A.2d 843 (1967).

creasing willingness to invalidate unconscionable contractual provisions which clearly tend to injure the public in some way.[137]

In recent years, unconscionability has been used in a number of different contexts, supported by a variety of rationales. Although the doctrine arose from the common law, its frequent appearance today is a result of the Uniform Commercial Code, with its tendency to make flexible business arrangements more enforceable as contracts.[138] While the U.C.C. was intended solely for use in the law of sales, its principles have been found applicable in other situations such as leases,[139] real estate contracts,[140] bank deposit contracts,[141] loans to corporations,[142] and franchise contracts and distributorships.[143]

Although there has been no case directly on point, the analogous situation of franchise termination might serve to underscore the availability of the unconscionability doctrine in employment cases. As in the employment area, lack of mutuality and indefiniteness have been "main pillars of defense raised by franchisers against franchisees' wrongful termination suits."[144] Under these contracts, "the power to terminate [is] unqualified and not even good faith [is] required."[145] Franchise agreements are often made to reflect the dynamics of a particular business relationship, where economic factors and production schedules require flexibility. Employment at will has endured in our economic system for several reasons, including the fact that it allows an employer to be flexible in the face of uncertainties in his business and manpower requirements. Nevertheless, recent trends have indicated the willingness of the courts to approach contractual situations

137. *Id.* at 554, 236 A.2d at 857.

138. *See, e.g.*, UNIFORM COMMERCIAL CODE § 2-204(3), which provides that even though one or more terms are omitted or left open, a contract of sale does not fail for indefiniteness if the parties intended to make a contract and there is a "reasonably certain basis for giving an appropriate remedy."

139. Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc., 3 U.C.C. REP. 858 (N.Y. Sup. Ct. 1966).

140. Kaye v. Coughlin, 443 S.W.2d 612 (Tex. Civ. App. 1969).

141. David v. Manufacturers Trust Co., 59 Misc. 2d 248, 298 N.Y.S.2d 847 (Sup. Ct. 1969).

142. Whitestone Credit Corp. v. Barbary Realty Corp., 5 U.C.C. REP. 176 (N.Y. Sup. Ct. 1968).

143. Division of Triple T Serv. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1968); Sinkoff Beverage Co. v. Schlitz Brewing Co., 51 Misc. 2d 446, 173 N.Y.S.2d 364 (Sup. Ct. 1966).

144. Hewitt, *Termination of Dealer Franchise and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 BUS. LAW 1075, 1083 (1967).

145. Rubinger v. ITT, 193 F. Supp. 711 (S.D.N.Y. 1961).

more realistically with the goal of helping the parties realize their contractual expectations.[146]

In the franchise cases the courts approached arbitrary termination from several directions. As in employment contracts, some courts were reluctant to go beyond the terms of the express agreement,[147] while others were willing to do so and found implied promises. Among these were promises that the parties would terminate in good faith,[148] and that franchisers would terminate only after reasonable notice.[149] In addition, courts have found arbitrary terminations to be violative of state decisional law and have imposed liability despite express terms of the contract to the contrary.[150] Successful franchise termination suits have also been advanced under theories of promissory estoppel.[151]

By bringing cases under the U.C.C., terminated franchisees have attempted to apply the obligations of good faith, diligence, and reasonableness to their agreements. These obligations "may not be disclaimed, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."[152] If such principles were to be applied to termination provisions in franchise agreements (and, by analogy, to employment contracts), then arbitrary or capricious termination would not be allowed.[153] Section 2-302 of the U.C.C. relates unconscionability to the time at which the contract was made. For a franchisee who must invest substantial sums to secure and initiate his business, a provision allowing termination at will would be unconscionable. Even in this case, such a finding is far from certain, as *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*[154] demon-

146. *See* Hewitt, *supra* note 144, at 1079. *See also* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188 (1922).

147. E.I. DuPont de Nemours & Co. v. Clairborne-Reno Co., 64 F.2d 224, 233 (8th Cir. 1933).

148. Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 313 P.2d 936 (1957).

149. Mayflower Air Conditioners v. West Coast Heating Supply, 54 Wash. 211, 339 P.2d 89 (1959).

150. James W. Harrison & Sons, Inc. v. J.I. Case Co., 180 F. Supp. 243 (E.D.S.C. 1960).

151. General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

152. UNIFORM COMMERCIAL CODE § 1-102(3).

153. *See, e.g.*, Madsen v. Chrysler, 261 F. Supp. 488 (N.D. Ill. 1966), *vacated*, 375 F.2d 773 (7th Cir. 1967).

154. 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

strates. The beverage company sought an injunction against the brewer for unjustly terminating its franchise. A provision of the contract allowed for termination without cause, and an argument was made that such a term was unconscionable. The plaintiff claimed its right to a year's notice, which it deemed reasonable, relying on Section 2-309 (3) of the Code. That section states than an agreement dispensing with notification is invalid if its operation would be unconscionable. The court found that the doctrine of unconscionability should be directed against "one-sided, oppressive and unfairly surprising contracts, but not against the consequences of uneven bargaining positions or even simple old-fashioned bad bargains."[155] The court then looked to the time when the contract was made to see whether the termination clause was unconscionable, and said it could not be sure from the facts whether this clause was not in fact *beneficial to the establishment* of the relationship. No reasonable grounds thus existed to hold such a clause unconscionable.

Such analysis, however, negates the very purpose of the unconscionability doctrine. A franchisee would assent to do business on such terms only because of the unequal bargaining power which exists between the parties. He had to have the contract on those terms or not have the contract at all. The reasoning of the *Sinkoff* court is maddeningly obtuse; the unconscionable term cannot be unconscionable because without it no contract would have been formed at all.

Similarly, in the employment situation, the employer might not have hired his employee if he had not had the power to terminate for even abusive reasons, and in that sense such term was beneficial to the formation of the contract. In the employment-at-will situation, however, one might distinguish between the employment "contract" and the employment "relationship." The employment relationship may be viewed as a succession of contracts, which, during a lengthy term of service, is modified or reformed by promotions, raises, increased proficiency, or even by words of encouragement and praise by the employer. The "contract" which sustains the employment today is vastly different from one into which parties entered in the past. Such being the case, the earlier contracts which impliedly allowed

155. *Id.* at 448, 273 N.Y.S.2d 366.

the employer to terminate for an abusive reason would surely be unconscionable today.

The Code does not define unconscionability, thus allowing the courts wide discretion in fashioning remedies appropriate to the facts of a particular case. There appears to be no compelling reason to deny employment contracts the protection of the unconscionability doctrine. It would certainly be anomalous to deny these agreements protections that are afforded contracts of vastly less social significance.

CONCLUSION

The doctrine of employment at will serves the economically useful function of allowing an employer to tailor his work force to the exigencies of any business situation, and to remove from his employ any unproductive or incompatible employee. However, the rule that where no duration is mentioned in an employment contract, an employer may discharge his employee for any reason at all—no matter how unfair—is undesirable.[156] The social and economic insecurity which such a rule fosters is not justified by arguments which proclaim "freedom of enterprise" or "freedom of contract." To make an employee's livelihood depend on technical measurement of mutuality of obligation, or lack of consideration, is to ignore modern social realities in favor of antique legal constructs.

The inability of the traditional law of contracts to respond to essentially contractual problems has been frequently stated.[157]

> While "contracts" is a body of generalized rules that is supposed to serve any and all types of transactions, when any problem becomes socially significant it tends to be removed from the domain of generalized contract law and becomes the particularized law of say, "sales," "insurance," or "labor law."[158]

And yet, general contract law governs employment at will. One result of this is that an employee may be dismissed at any time without redress. An attempt might be made to dismiss the argument simply by

156. *See, e.g.*, Macaulay, *supra* note 110; Summers, *Collective Agreements and Law of Contracts*, 78 YALE L.J. 525 (1969).

157. Macaulay, *supra* note 110, at 486.

158. *Id.*

stating that the employee should have provided for a term of employment when he was hired. However, such a rationale does not recognize the great disparity of bargaining power that exists in the normal employment situation. The employee generally has to accept a contract terminable at will, or not be selected for the job. Fundamental fairness demands protection for him; this can only enhance individual dignity and economic security.

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