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# Restating Employment Remedies Symposium: Assessing the Restatement of Employment Law: Essay

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# ESSAY

## RESTATING EMPLOYMENT REMEDIES

Charles A. Sullivan†

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### INTRODUCTION

As with any Restatement, *Employment Law*<sup>1</sup> reflects a tension between faithfully reflecting the prevailing law and improving that law by choosing the better rule. Perhaps more than most Restatements, however, *Employment Law* was resisted at the outset precisely because of concerns that it *would* faithfully reflect at least the dominant themes of the current law, thereby tending to “freeze” the law in undesirable forms. That was because, in the view of the opponents, the case law was overly deferential to employers.<sup>2</sup> At the end of the project, perhaps no better example of this prediction being borne out is the

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† Professor of Law, Seton Hall Law School. B.A., Siena College, 1965; LL.B., Harvard Law School, 1968. I want to thank Steve Willborn for raising some of the problems I discuss and for a number of insightful comments on earlier drafts. Thanks also to my research assistants, John G. Dumnich and Angela R. Raleigh, Seton Hall class of 2016.

<sup>1</sup> Often referred to throughout the consideration process as the “Restatement (Third) of Employment Law” (as a part of the American Law Institute’s third series of Restatements), the final product’s official title will simply be the “Restatement of Employment Law,” thus avoiding the awkward question of why first and second versions do not exist.

<sup>2</sup> The Labor Law Group was generally hostile to restating employment law. See generally Kenneth G. Dau-Schmidt, *A Conference on the American Law Institute’s Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL’Y J. 1, 10–12 (2009). In 2007, a petition from the Group to the American Law Institute, signed by more than sixty academics, including many of the leading lights of the discipline, argued:

[T]he whole thrust of the project [was] misplaced. We submit that the velocity and direction of legal change in the employment relationship is incapable of being addressed by a *Restatement*; that the *Restatement* method, if it

chapter on Privacy: although it is actually more progressive than most of the decided cases, the Restatement nevertheless reflects a very grudging view of employee privacy rights that will, if influential in the courts, continue to subordinate employee privacy interests to employer business concerns.<sup>3</sup> But privacy is only the most obvious manifestation of the tension between, on the one hand, faithfully counting judicial noses and, on the other, adopting some better view—often as expounded in the law reviews and by a few courts that are more employee friendly than most.

That debate, however, is now over, and we are no longer concerned with whether we should have had an *Employment Law* Restatement, or at least *this* Restatement of Employment Law. Rather, as litigators like to say, “It is what it is,” and we can sit back and assess the final product from both the perspective of its relationship to the law in the courts and to the social ends the project serves.<sup>4</sup>

proves influential (as the Institute would surely wish it to be), *will stultify legal experimentation and growth.*

*Id.* at app. 2 (reproducing the text of the Labor Law Group’s petition to the ALI Council).

Although that effort was unsuccessful, the Labor Law Group convened two conferences where the same theme emerged, but now in the context of analyzing and criticizing the project as it wound its way through the laborious processes of the Institute. In summarizing the contributions to the first conference (held at Hastings College of Law in 2009) Professor Kenneth G. Dau-Schmidt, Chair of the Group, noted the critique of several commentators that restating a rapidly evolving area would “freeze” or have a chilling effect on employment-law doctrine. Some participants were explicit about their concern that the current state of the case law was far too deferential to employers. *Id.* at 10. *See also* Matthew W. Finkin, *A Consumer Warning for the Restatement of Employment Law: Read Carefully Before Applying*, 70 LA. L. REV. 193, 194 (2009) (arguing that, at critical junctures where courts are divided on the law, the then-draft of the Restatement chose an employer-friendly approach).

By the time of the second conference (held in conjunction with the American Bar Foundation at Northwestern and Loyola in 2011), it was clear that the Restatement would be completed, and there was less focus on the desirability of the enterprise than on what were still seen as serious problems with some of the provisions. *See, e.g.*, Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL’Y J. 413, 417–49 (2012) (arguing that the then-current draft of the Restatement’s approach to the duty of loyalty restricts employees’ job mobility and is thus anticompetitive); Michael Selmi, *The Restatement’s Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL’Y J. 395, 398–99, 404–11 (2012) (arguing that, as then drafted, the Restatement could change the common-law understanding of the duty of loyalty by presenting it as a catch-all provision that could displace the need for noncompete agreements or statutory trade-secrets protection).

Unconnected to the Labor Law Group, the Fourth Annual Colloquium on Current Scholarship in Labor & Employment Law, hosted at Seton Hall Law School in 2009, offered sessions on the Restatement’s “Privacy” chapter and its “Other Torts” chapter at which Reporters engaged with their critics. *See* Colloquium, *Fourth Annual Colloquium on Current Scholarship in Labor & Employment Law*, (Sept. 25, 2009), [http://law.shu.edu/About/News\\_Events/labor\\_employment/upload/program\\_schedule\\_speakers.pdf](http://law.shu.edu/About/News_Events/labor_employment/upload/program_schedule_speakers.pdf).

<sup>3</sup> *See generally* Steven L. Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423 (2015).

<sup>4</sup> I will typically describe the end result as either employer friendly or employee friendly, a characterization the reporters resist because they believe their mission was

Such an assessment should be undertaken across the nine chapters that comprise the Restatement of Employment Law. My task, however, is more modest: what is the remedial structure of the Restatement; what does it say about the law's view of the employment relationship; and how faithful is that vision to the cases it purports to restate? Most of my treatment of the Restatement's remedies is confined to Chapter 9, but other chapters bear on remedial questions and will be noted where appropriate.

One note before commencing. In May 2014, the American Law Institute basically approved the document before it, denominated the "Proposed Final Draft."<sup>5</sup> Such approval, however, is subject to editorial adjustments by the Reporters, and a number of changes have since been made. Therefore, citations to "the Restatement of Employment Law" refer to the current, truly final version, although when comparisons are drawn between that version and the ALI-approved document, they are so noted.

## I

### THE RESTATEMENT'S REMEDIAL STRUCTURE

In contrast to, say, the Restatement (Second) of Contracts, which devotes some forty-one sections to various aspects of contract remedies,<sup>6</sup> the *Employment Restatement* is remedy-lite, containing only ten sections, perhaps reflecting the narrower ambit of this effort. Six of these sections deal with employer breaches of duty and four with employee breaches. Both are divided between contract- and tort-based breaches of duty.<sup>7</sup>

#### A. Employee Remedies

Three employee-remedy sections provide for damages for three kinds of contract breaches. Two deal with damages for termination: one for "breach of an agreement for a definite or indefinite term of employment or of a binding employer promise of employment"<sup>8</sup> (section 9.01) and a second for "breach of a binding policy statement"<sup>9</sup> (section 9.02); the third contract-based section deals with employee

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predominantly to simply reflect the law as it exists and not to make policy judgments. I certainly agree that capturing current doctrine is the major thrust of this, and of all, Restatements but would note that this does not immunize the final product from the critiques either that it replicates a too employer-friendly judicial perspective or that, where the case law is thin on the ground or pretty evenly divided, this Restatement sometimes reinforces that slant.

<sup>5</sup> RESTATEMENT OF EMP'T LAW (proposed final draft April 12, 2014).

<sup>6</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 344–85 (1981).

<sup>7</sup> See RESTATEMENT OF EMP'T LAW §§ 9.01–9.10 (2015).

<sup>8</sup> *Id.* § 9.01.

<sup>9</sup> *Id.* § 9.02.

damages for “employer breach other than termination”<sup>10</sup> (section 9.03). A fourth section concludes contract remedies by dealing with injunctive relief against the employer for breach of contract<sup>11</sup> (section 9.04).

The fifth and sixth sections deal with employee remedies for employer “breach of a tort-based duty,”<sup>12</sup> with section 9.05 addressing damages and section 9.06 dealing with injunctions.

## B. Employer Remedies

The four sections for employer remedies are similarly divided between contract and tort and between damages and injunctive relief. The first two deal with contract breaches, with section 9.07 providing for damages for employee breach of an agreement and section 9.08 dealing with injunctive relief for a contract breach. Section 9.09 then turns to employee breach of “a tort-based duty or fiduciary duty”<sup>13</sup> and deals with damages remedies while section 9.10 concludes with injunctive relief for such a breach.

## II

### COMPARING AND CONTRASTING

The following discussion will consider the various remedies provided for in *Employment Law* and then analyze the extent to which these remedies map onto the relevant case law.

## A. Injunctive Relief for Contract Breaches

First, although two separate sections deal with “injunctive relief” for contract breaches, the Restatement has in mind only prohibitory injunctions since neither employer nor employee gets specific enforcement of any promise.<sup>14</sup>

Although *Employment Law* is seemingly evenhanded in permitting both employees and employers to obtain prohibitory injunctive relief

<sup>10</sup> *Id.* § 9.03. The version of the Restatement approved by the Institute in 2014 was unclear as to the remedies provided for breaches under Chapter 7. The final version clarifies this by providing that “[a]n employee discharged in violation of the autonomy protections of § 7.08, which is treated as a violation of contract, is covered by the remedies provided in § 9.01(b). Damages for employer violations of the privacy protections in §§ 7.01–7.07, as with other employer torts, are covered in § 9.05.” *Id.* § 9.01, cmt. n.

<sup>11</sup> *Id.* § 9.04.

<sup>12</sup> *Id.* §§ 9.05, 9.06.

<sup>13</sup> *Id.* § 9.09.

<sup>14</sup> Section 9.04(a) does qualify this by the ubiquitous “[e]xcept as otherwise provided by law,” but the reference is not so clear. The most obvious situation in which an order of reinstatement or reinstatement will issue is to enforce statutory rights under, say, the National Labor Relations Act or the antidiscrimination laws. But these would not be embraced within the contract theories referenced by the Restatement in any case.

(so long as they satisfy “traditional requirements”<sup>15</sup>), the equivalency is deceptive. That is because the structure of section 9.04<sup>16</sup> suggests that there will be few occasions for injunctive relief against employers for their misconduct whereas section 9.08<sup>17</sup> will often provide such relief for employee breaches.

Unavailability for employees follows both from the “traditional requirements” of equity, most obviously the adequacy of damages as an alternative remedy, and from the unlikelihood of any appropriate injunctive relief once specific performance is ruled out.<sup>18</sup> It is true that the Restatement seems to envision some kinds of mandatory injunction by speaking of “enforc[ing] positive decrees that do not require unduly burdensome judicial supervision (e.g., ‘pay the compensation owed’),”<sup>19</sup> but courts of equity do not typically order the payment of money since, by definition, the remedy at law (a judgment for that amount) is deemed adequate.<sup>20</sup> In short, it is not clear what injunctive relief an employee may obtain once specific performance is barred.<sup>21</sup>

In contrast, section 9.08, while ruling out specific performance of an employee’s promise to work, authorizes “injunctive relief to enforce any other obligation expressly stated in the employment agreement if the employer satisfies the traditional requirements for obtaining equitable relief.”<sup>22</sup> This would generally permit a prohibitory injunction to enforce a valid noncompetition (or nondisclosure

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<sup>15</sup> *Id.* §§ 9.04, 9.06, 9.08, 9.10.

<sup>16</sup> *Id.* § 9.04(b) (“An employee may obtain injunctive relief to enforce any other term of an employment agreement (§ 2.03), binding employer promise (§ 2.02, Comment *c*), or binding employer policy statement (§ 2.05) if the employee satisfies the traditional requirements for equitable relief.”).

<sup>17</sup> *Id.* § 9.08(b) (“An employer may obtain injunctive relief to enforce any other obligation expressly stated in the employment agreement if the employer satisfies the traditional requirements for obtaining equitable relief.”).

<sup>18</sup> Injunctions may be viewed as prohibitory or mandatory, with specific performance being a kind of mandatory injunction. What, exactly, an employer breaching a contract would be either ordered to do or prohibited from doing (putting instatement and reinstatement aside) is unclear.

<sup>19</sup> *Id.* § 9.04, cmt. b.

<sup>20</sup> *See* DAN B. DOBBS, *LAW OF REMEDIES* § 2.6(1) (2d ed. 1993). Of course, some monetary payments are viewed as equitable, such as back pay awards under Title VII, but the award of earned compensation would generally be viewed as damages for which legal relief is adequate.

<sup>21</sup> Illustration 3 to section 9.04 posits specific enforcement of a promise to pay retirees their medical benefits until they become eligible for Medicare. It does not explain, however, why a judgment for the cost of such benefits is not an adequate remedy. It has also been suggested that nondisparagement agreements and contracts providing, say, for maintenance of an employee’s telephone and e-mail may be specifically enforced. That seems like a logical possibility but one that is vanishingly unlikely in the real world—both because injunctive relief is unlikely to be sought for such breaches and because courts are likely to find a damage remedy available.

<sup>22</sup> RESTATEMENT OF EMP’T LAW § 9.08(b) (2015).

or nonsolicitation) agreement; indeed, that is the most common and obvious application of the principle.<sup>23</sup>

In short, the Restatement of Employment Law provides for injunctive relief for employers in most situations when they might want it and, in substance, denies such relief to employees, except in the rarest of cases. The overall assessment: very employer friendly.

But to what extent is this tilt in the Restatement simply a reflection of the case law? Denial of specific performance to both employees and employers for contract breaches breaks no new ground,<sup>24</sup> nor does the application of traditional requirements for equitable relief. So long as employees' contractual expectations are generally limited to their compensation,<sup>25</sup> it will be a rare case in which a court would award injunctive relief to an employee. And current law often enforces post-employment restraints by a prohibitory injunction.<sup>26</sup> In short, at the 30,000-foot level, *Employment Law* maps pretty well onto current case law.

Some qualification to this statement might be appropriate when we look more deeply. Section 8.08, which could easily have been placed in the "Remedies" chapter, deals with noncompetition agreements that are unenforceable as written because they impose restraints that are unnecessary to satisfy the employer's legitimate interests.<sup>27</sup> The Restatement's remedy is not invalidation but, rather, to allow a court to issue an otherwise-appropriate injunction after judicial modification to address the overreaching:

A court may delete or modify provisions in an overbroad restrictive covenant in an employment agreement and then enforce the covenant as modified unless the agreement does not allow for modification or the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable.<sup>28</sup>

Again, this seems a very employer-friendly stance,<sup>29</sup> but is it one that faithfully reflects the extant case law?

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<sup>23</sup> It might also reach prohibitory "enforcement" of a contract to work for the employer during its term; that is, a court will not order specific enforcement but may order the employee not to work for someone else during the term of the contract. *See infra* note 125.

<sup>24</sup> *See* DOBBS, *supra* note 20, §§ 12.21(4), 12.22(2).

<sup>25</sup> *See infra* note 39 and accompanying text. The availability of consequential damages may alter this in a few cases.

<sup>26</sup> *See e.g.*, *Firstenergy Solutions Corp. v. Flerick*, 521 F. App'x 521, 526–30 (6th Cir. 2013) (affirming district court's granting of preliminary injunction to enforce noncompete covenants against former employee); *Arthur J. Gallagher Serv. Co. v. Egan*, 514 F. App'x 839, 843 (11th Cir. 2013) (affirming district court's granting of preliminary injunction to enforce nondisclosure and noncompetition covenants against former employee).

<sup>27</sup> *See* RESTATEMENT OF EMP'T LAW § 8.08 (2015).

<sup>28</sup> *Id.*

<sup>29</sup> One comment suggests that the alternative of "only a binary 'enforce or reject' choice can also lead over time to a legal regime that provides employers with an incentive

Here, the answer is not so clear.<sup>30</sup> It is true that most courts adopt some version of this rule (sometimes called a “liberal blue pencil” rule<sup>31</sup>), but a number of jurisdictions refuse to modify covenants at all or follow a “strict blue pencil” rule, which would modify covenants only if the overbroad portion can be stricken without affecting the grammatical sense of the restraint.<sup>32</sup> In short, current standards for when to modify an overbroad restraint are conflicting, and the Restatement chose the one favoring employers, although, admittedly, that is probably also the majority rule.

Or at least that is one reading. The Restatement attempts to counterbalance its approval of modification by requiring a reasonable and good-faith basis for the employer’s belief that the covenant is enforceable.<sup>33</sup> This is a step forward because it is not clear whether the courts now allowing partial enforcement are concerned primarily about the intent of the employer in drafting the clause.<sup>34</sup> In addition, the provision goes on to specify that lack of such a basis “may be manifested by [the restraint’s] gross overbreadth alone, or by overbreadth coupled with other evidence that the employer sought to do more than protect its legitimate interests,”<sup>35</sup> which may provide useful guidance. Further, the current practice of employers using off-the-shelf noncompetition clauses across either their whole workforce<sup>36</sup> or at least a wide swath of management positions without regard for any

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to draft overly broad covenants that employees will similarly regard as enforceable, due to judicial unwillingness to completely reject a covenant that is partially valid.” *Id.* § 8.08, cmt. a. Although this is a logical possibility, I know of no evidence that it is more likely than the contrary possibility: that fear of invalidity will lead employers to draft narrower covenants.

<sup>30</sup> See generally Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 77 OHIO ST. L. J. 1127 (2009).

<sup>31</sup> See Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1935 (2012).

<sup>32</sup> See generally *id.* (discussing courts’ three different approaches to treating unreasonable covenants: all-or-nothing, strict blue pencil, and liberal blue-pencil approaches).

<sup>33</sup> THE RESTATEMENT (SECOND) OF CONTRACTS § 184(2) (1981) would allow a court to “treat only part of a term as unenforceable . . . if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.”

<sup>34</sup> While “good faith” does appear in a number of cases dealing with “blue pencil” issues, it does not appear in most of the opinions. “Blue pencil” appeared in 841 federal and state cases; either “good faith” or “bad faith” appeared in only 156 of those decisions (search conducted on Lexis Advance, Mar. 21, 2015). Of course, it is possible that the courts are applying some version of good faith without using that term.

<sup>35</sup> RESTATEMENT OF EMP’T LAW § 8.08 (2015). The section places the burden on the employer of showing good faith once overbreadth is established. *Id.* § 8.08, cmt. a.

<sup>36</sup> See Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. TIMES (Oct. 14, 2014), <http://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html> (“[E]mployers are now insisting that workers in a surprising variety of relatively low- and moderate-paid jobs sign noncompete agreements.”).



possible threat to unfair competition by any given individual might lead a court to rely on the literal language of the Restatement to strike down such clauses on a wholesale basis.

With that caveat, the end result is that both the Restatement and the current law are employer friendly, and, to the extent that there was a division in the jurisdictions on relevant issues, the Restatement chose to come down on the employer side of the split—which, admittedly, was also the majority view.

## B. Damages for Contract Breach

The Restatement takes an evenhanded approach to contract-based damages for both employers and employees, with the most recent revisions addressing some inadvertent problems with the Proposed Final Draft.<sup>37</sup> Thus, the Restatement now both makes clear that restitutionary remedies are available when otherwise appropriate<sup>38</sup> and provides that the basic damages remedy for contract-based harm is lost compensation (less mitigation), regardless of whether the breach is of a term agreement<sup>39</sup> or a binding policy statement,<sup>40</sup> and regardless of whether the harm is from wrongful termination or other employer breach.<sup>41</sup> Further, the Restatement recognizes that “reason-

<sup>37</sup> See RESTATEMENT OF EMP'T LAW §§ 9.01–9.10 (proposed final draft April 2014).

<sup>38</sup> See RESTATEMENT OF EMP'T LAW § 9.01, cmt. m (“Restitutionary relief ‘off the contract’ may be available in certain circumstances. . . . For instance, if an employee is discharged in violation of an oral agreement that is not enforceable for lack of a writing under the applicable statute of frauds, the employee may recover in quantum meruit for the reasonable value of services rendered.”), and related Reporters’ Notes (2015). As the Restatement suggests, recovery would be measured by the reasonable value of services rendered, not limited by the contract price. See DOBBS, *supra* note 20, § 12.21(3).

The Restatement also does not generally address restitutionary recovery by an employer, although it does address the faithless servant rule in section 9.09. See *infra* note 159. Restitution is sometimes a remedy for material breaches of contract, requiring the return of any benefit that was paid to one party unjustly enriching him. See Fort Wash. Res. v. Tannen, 901 F. Supp. 932, 943–44 (E.D. Pa. 1995) (awarding as “damages” the compensation paid the employee, although such a recovery would more properly be viewed as restitution).

<sup>39</sup> Section 9.01(a) states:

An employer who lacks cause for terminating the employment of an employee with an unexpired agreement for a definite term (§ 2.03-2.04) is subject to liability to the discharged employee for (1) all compensation that the employee would have received under the remaining term of the agreement, less mitigation of losses (such as the compensation earned and that reasonably could have been earned from comparable alternative employment during the remaining term), (2) reasonably foreseeable consequential damages, and (3) the expenses of reasonable efforts (whether or not successful) to mitigate losses.

RESTATEMENT OF EMP'T LAW § 9.01(a) (2015) (cross-references omitted); see also *id.* § 9.01(b) (substantially the same rule for breach of “an agreement for an indefinite term requiring cause for termination”).

<sup>40</sup> *Id.* § 9.02.

<sup>41</sup> *Id.* § 9.03.

ably foreseeable consequential damages” are also available for any contract breach.<sup>42</sup>

With respect to consequential damages, the blackletter is reinforced by the comments, which treat consequential damages under two headings. The more restrictive, comment *j*, is entitled “Noneconomic damages,” and rejects liability for either harm to reputation or emotional distress.<sup>43</sup> This is clearly in line with current law, although, as Professor Hyde has argued, current law woefully undercompensates wrongfully discharged employees, considering the emotional and psychological costs often accompanying loss of employment.<sup>44</sup>

Comment *k*, then, deals with consequential damages more generally.<sup>45</sup> It cites the Contracts Restatement’s version<sup>46</sup> of the *Hadley v. Baxendale* foreseeability rule<sup>47</sup> and provides three illustrations. One would allow medical expenses that would have been covered by employer-provided health insurance had plaintiff not been wrongfully fired.<sup>48</sup>

The second Illustration of the Restatement, however, takes a step back from the Proposed Final Draft. The prior version would have allowed recovery of medical expenses even if the employer did not provide insurance when the employee’s discharge left him unable to pay for coverage: the employer would have had “reason to foresee [these losses] as the probable result of the breach when the contract was made.”<sup>49</sup> The final Restatement marks a major retreat from this, rejecting such recovery with the explanation that “expenses caused by breach of an obligation to pay money are deemed covered by interest

<sup>42</sup> *Id.* §§ 9.01(3), 9.02(3), 9.03.

<sup>43</sup> *Id.* § 9.01, cmt. *j*. This is consistent with general contract law, which rarely allows recovery of emotional distress. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); see also *Bowers v. Campbell*, No. 00-60317, 2001 U.S. App. LEXIS 31705, at \*11–12 (5th Cir. Feb. 21, 2001) (no emotional distress damages for anxiety and humiliation caused by employer’s termination of employee); *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 147 (3d Cir. 2000) (no emotional distress damages for depression caused by employer’s breach of contract). *But see Walker v. Bd. of Trs.*, 69 F. App’x. 953, 961–62 (10th Cir. 2003) (emotional distress damages recoverable under Colorado law for “willful and wanton” contract breach of pension plan’s promises).

<sup>44</sup> See Alan Hyde, *What Should the Proposed Restatement of Employment Law Say About Remedies?*, 16 EMP. RTS. & EMP. POL’Y J. 497, 499–501 (2012); see also Sachin S. Pandya, *Presuming Damages for Unemployment Distress*, 19 EMP. RTS. & EMP. POL’Y J. 85, 87–89 (2015) (arguing that under existing state contract and tort law, wrongfully discharged employees rarely recover damages for “unemployment distress” in part because of the uncertainty of metrics and suggesting an approach to address that problem).

<sup>45</sup> See RESTATEMENT OF EMP’T LAW § 9.01, cmt. *k* (2015).

<sup>46</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

<sup>47</sup> (1854) 9 Ex. 341, 156 Eng. Rep. 145.

<sup>48</sup> RESTATEMENT OF EMP’T LAW § 9.01, illus. 15 (2015).

<sup>49</sup> RESTATEMENT OF EMP’T LAW § 9.01, cmt. *k* (proposed final draft April 12, 2014) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981)).

on any judgment obtained and are generally not recoverable as consequential damages.”<sup>50</sup> The Reporters’ Notes to this provision recognize the general rule about recovery for promises to pay money while raising a question as to whether it should apply where the claim at issue is “an effort to recover the lost job, not in the first instance the lost income from that job”;<sup>51</sup> they also cite several cases which “edg[e] away” from the full implications of the general rule but do not “directly challenge[ ] that rule.”<sup>52</sup> Given the authority in the employment context favoring the employee in this situation, the about-face of the final Restatement on this issue is inexplicable. Further, at least where the terminated employee lacks the funds to obtain such insurance,<sup>53</sup> application of the general rule seems more a legal fiction than an effort to apply the foreseeability principle to the facts on the ground.<sup>54</sup>

The third Illustration dealing with consequential damages for an employee would deny an employee recovery “for lost professional opportunities unless [plaintiff] can show that the breach of contract caused the loss of identifiable opportunities.”<sup>55</sup> This seems to confuse foreseeability with ascertainability but, in any event, would allow recovery, so this comment is, unlike Illustration 16, employee friendly.

In sum, *Employment Law* generally tracks general contract law as to foreseeable consequential damages, but arguably misapplies that law to the employee’s disadvantage in the health insurance example, with regrettable potential consequences not just in that scenario but in any case in which the otherwise foreseeable consequences of the employer’s breach can be viewed as stemming from the loss of income.

As for *employers’* remedies, *Employment Law* seems to break new ground in employees’ favor by limiting damages liability only to “any obligation that is clearly stated in the employment agreement to be a

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<sup>50</sup> RESTATEMENT OF EMP’T LAW § 9.01, illus. 16 (2015).

<sup>51</sup> *Id.* § 9.01, Reporters’ Notes, cmt. k.

<sup>52</sup> *Id.*

<sup>53</sup> If such funds were available, the duty of mitigation would presumably bar recovery for losses that could have been insured. Illustration 15 thus allows recovery for “the costs of alternative health insurance covering that illness if available.” *Id.* § 9.01, illus. 15.

<sup>54</sup> One might also question whether Illustration 16 is consistent with Illustration 15 in any but the most formal of terms. If the employee promises insurance, Illustration 15 allows recovery of the costs of medical expenses; if there is only a promise of salary, Illustration 16 denies such recovery. In one case, the Restatement makes the employee whole; in the other it does not.

<sup>55</sup> *Id.* § 9.01, illus. 17. The illustration is based on *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 893–94 (1st Cir. 1988), where plaintiff’s discharge in violation of her contract also caused her loss of a specific second engagement. *Cf.* *Ericson v. Playgirl, Inc.*, 140 Cal. Rptr. 921, 926 (Ct. App. 1977) (loss of publicity value from cancelled contract for a model on a magazine cover was too speculative).

basis for damages liability.”<sup>56</sup> It also attempts to limit such liability by requiring the express agreement to be in an “agreement,” not a “unilateral employer policy statement or other promulgation.”<sup>57</sup> The Restatement, however, does not address whether such an “agreement” can be similar to formal acknowledgements of at-will status typically executed at the outset of employment, which would permit employers to largely evade the thrust of the provision.<sup>58</sup>

Assuming an express provision for liability for damages, the blackletter states that the employer’s remedies for employee contract breach extend to the full scope of “foreseeable economic loss that the employer could not have reasonably avoided.”<sup>59</sup> This phrasing might permit recovery for the excess costs of hiring a replacement,<sup>60</sup> which is the most obvious “general damages”<sup>61</sup> an employer suffers when an employee breaches by departing, but it obviously embraces consequential damages for the employer in all cases.

This employer recovery, however, is limited in two respects. First, if an adequate replacement is immediately available, most “foreseeable economic loss” can be avoided, but that, of course, is true for employees also. Second, the Restatement provides that such economic loss “does not include lost profits caused by the employee’s breach.”<sup>62</sup> That exception would seem to largely negate the breadth of the rule, but it, in turn, is essentially negated by the qualifying language: “[U]nless the agreement expressly provides for such recovery or the employee knew or should have known that the employee would be held responsible for lost profits caused by the employee’s breach.”<sup>63</sup>

<sup>56</sup> RESTATEMENT OF EMP’T LAW § 9.07(a) (2015). This is reinforced by the illustrations to section 9.07. Thus, Illustration 1, which allows liability for the costs of a replacement but specifies an express provision to that effect, while Illustration 2 denies such liability absent such a provision. *But see id.* § 9.07, illus. 5 (making the breaching employee liable for costs of a replacement with no indication of an express assumption of such liability although exonerating her from liability for lost profits).

<sup>57</sup> *Id.* § 9.07, cmt. c, illus. 3, 4.

<sup>58</sup> As noted in the text accompanying *infra* note 162, employers rarely sue their employees since discharge is typically a more effective remedy. Thus, the law on employee liability in damages is underdeveloped. However, the case upon which Illustration 1 is premised, *Handicapped Children’s Education Board v. Lukaszewski*, 332 N.W.2d 774, 778–79 (Wis. 1983), imposed upon the breaching employee the costs of a replacement without any express undertaking by her to assume such liability.

<sup>59</sup> RESTATEMENT OF EMP’T LAW § 9.07(a) (2015).

<sup>60</sup> Illustration 5 to section 9.07 does allow the recovery of the excess costs of a replacement. Illustration 1 to section 9.07 also so provides but seems to do so only because the breaching employee has signed an agreement expressly making her liable for the reasonable costs of securing a replacement.

<sup>61</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351, cmt. b (1981) (definition of “general damages”).

<sup>62</sup> RESTATEMENT OF EMP’T LAW § 9.07(b) (2015).

<sup>63</sup> *Id.*

In other words, employers can require employees to agree to the recovery of consequential damages in the form of lost profits,<sup>64</sup> and, even lacking such an agreement, lost profits are recoverable by employers when they are a foreseeable consequence of the breach, i.e., that the employee “knew or should have known that the employee would be held responsible for lost profits.”<sup>65</sup> Because foreseeability is always a prerequisite to recovery of consequential damages, it is not clear what the point of the convoluted phrasing is.

The overall damages remedies conform to general contracts remedies even if *Employment Law* does not conform to the structure of the Restatement (Second) of Contracts. Traditional contracts doctrine generally vindicates the injured party’s expectation interest, which means giving her a sum that will put her in the position she would have occupied had the contract been performed.<sup>66</sup> To compute this, the Restatement (Second) of Contracts divides damages into (1) the loss of value of the denied or defective performance<sup>67</sup> and (2) “any other loss, including incidental or consequential loss.”<sup>68</sup> From the sum of these damages, the injured party must deduct any loss avoided by not having to perform.<sup>69</sup> Further, all damages have to be foreseeable to be recoverable,<sup>70</sup> although some losses—such as loss in value from not receiving the other party’s performance—easily pass this test. Finally, no damages are recoverable that “the injured party could have avoided without undue risk, burden or humiliation.”<sup>71</sup>

As applied to the employment setting, this approach would provide the wrongfully terminated employee with the agreed compensation (loss in value because of the other party’s nonperformance)<sup>72</sup> minus amounts earned or earnable in mitigation. The employee may or may not suffer consequential damages from the breach, but the Contracts Restatement would allow them so long as they were

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<sup>64</sup> This seems very problematic. As framed, the employee’s agreement would seem to permit the employer to recover lost profits no matter how unforeseeable they were at the time the agreement was entered into. Given the ability of many employers to extract from most employees whatever agreements they desire, the Restatement at least creates the opportunity for lost-profit recoveries as a matter of course.

<sup>65</sup> *Id.*

<sup>66</sup> RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981).

<sup>67</sup> *Id.* § 347(a).

<sup>68</sup> *Id.* § 347(b).

<sup>69</sup> *Id.* § 347(c).

<sup>70</sup> *Id.* § 351.

<sup>71</sup> *Id.* § 350.

<sup>72</sup> “Compensation” is defined broadly enough to match what more general contract analysis would call “contract price.” See DOBBS, *supra* note 20, at 478 (§ 12.21(2)) (“An employee wrongfully discharged in violation of contract may recover damages measured by the contract price, less replacement income under the avoidable consequences rules, plus recoverable consequential damages.”).

foreseeable.<sup>73</sup> There would be no loss avoided to deduct.<sup>74</sup> In short, as far as employees are concerned, the Employment Restatement seems to end up at more or less the same place as the Contracts Restatement, with the notable limitation on recovery of any consequential damages flowing from loss of income.

With respect to the employer, *Employment Law* seems more convoluted than the Contracts Restatement but also seems to end up in the same place. The latter would view the employer's loss in value as any additional cost of hiring a replacement for the breaching employee—that is, any amount higher than the breaching employee's contracted-for compensation.<sup>75</sup> It would allow consequential damages when foreseeable, ascertainable,<sup>76</sup> and not avoidable, and *Employment Law* does the same.<sup>77</sup>

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<sup>73</sup> This is somewhat of a term of art since the courts generally deem certain damages almost per se not foreseeable, such as emotional distress or reputational harm. See *supra* note 43 and accompanying text. However, the courts have found a number of economic harms recoverable when the injured party is able to establish that the economic harms were both foreseeable and ascertainable. See *O'Toole v. Northrop Grumman Corp.*, 305 F.3d 1222, 1226–27 (10th Cir. 2002), *later proceedings*, 364 F. App'x 472, 476–78 (10th Cir. 2010) (multiple items of consequential damages recoverable for failure of the employer to pay promised relocation expenses); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 893–94 (1st Cir. 1988) (recovery allowed for loss of “identifiable professional opportunities”); *Chrabaszcz v. Johnston Sch. Comm.*, 474 F. Supp. 2d 298, 316 (D.R.I. 2007) (holding that the jury could reasonably have found that damages for failure to obtain one of two identified other positions were caused by employer's breach); *Medical Assocs. of Clinton, P.L.C. v. Martin*, No. 13-1358, 2014 Iowa App. LEXIS 707, at \*18–20 (Iowa Ct. App. July 16, 2014) (awarding mortgage payments and other costs of maintaining former residence until its sale as a foreseeable consequence of the employer's breach where a noncompetition clause precluded the plaintiff physician from working within fifty miles of his former practice); see also *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448, 455 (5th Cir. 2012) (backpay in a Title VII suit does not include a loss in honoraria earnings because honoraria were paid by third parties, not by the employer, and were not required under the terms of employment; recovery for such losses may nevertheless be had as compensatory damages), *vacated on other grounds*, 133 S. Ct. 2517 (2013); cf. *Rice v. Cmty. Health Ass'n*, 118 F. Supp. 2d 697, 701–04 (S.D. W.Va. 2000) (plaintiff could not recover for reputational harms per se and did not adequately establish specific lost opportunities).

<sup>74</sup> While the employee gains leisure from the breach where she cannot mitigate by finding alternative employment, no court has deducted any value of such leisure from an employee's recovery. But see *Mitchell L. Engler, Pay for Play: The Compensated Leisure Flaw of Contract Damages*, 22 *Geo. Mason L. Rev.* 297, 322 (2015) (arguing for avoiding overcompensation of employees who gain leisure when an employment contract is breached).

<sup>75</sup> See *RESTATEMENT (SECOND) OF CONTRACTS* § 347, cmt. a (1981) (an injured party can recover damages “where the injured party has simply had to pay an additional amount to arrange a substitute transaction”).

<sup>76</sup> See, e.g., *R.K. Chevrolet v. Hayden*, 480 S.E.2d 477, 481 (Va. 1997) (lost profits in used-car department of auto dealership following defendant's departure may be recoverable where neither the new-car department nor the industry as a whole had similar declines during that period).

<sup>77</sup> See *supra* notes 59–60 and accompanying text. Not all courts allow such recovery. For example, *Willis v. Rehab Solutions, PLLC*, 82 So. 3d 583 (Miss. 2012), although a somewhat convoluted opinion, seems to reject any recovery for an at-will employee's mere negligence in performing his duty, suggesting that the sole remedy is discharge. See *id.* at

In sum, at this level, *Employment Law* seems largely to track the Contracts Restatement. As with injunctive relief, however, a deeper dive into the Proposed Final Draft suggested that *Employment Law* was less balanced than it first appeared and not as well grounded in the common law as it would seem. To the credit of the Reporters, the most recent revisions go a long way toward addressing these concerns—although some problems remain.<sup>78</sup>

As we have seen, employee recovery is subject to the mitigation principle although it is sometimes framed in terms of damages that could not have been “reasonably avoided” rather than “mitigation.”<sup>79</sup> Formally, the principle is framed neutrally because it also applies to employer recovery.<sup>80</sup> In short, the Restatement blackletter seems to subject both sides to the same rule.

While there is rarely a problem with subtracting actual earnings in substitute employment,<sup>81</sup> issues arise as to what positions should count as reasonable mitigation when the employee fails to seek or obtain such employment. In general, *Employment Law* follows the common law or, indeed, takes a more employee-friendly approach to what an employee is required or allowed to do to mitigate.<sup>82</sup> In one respect, however, it takes a decidedly less hospitable view, which might have serious adverse consequences should courts follow the Restatement’s lead.

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588–89 (holding that negligence was not “a viable cause of action when an at-will employee fails to do his or her job” and that unjust enrichment was not available for recovering an employee’s past wages absent “some type of special agreement providing such relief,” seemingly implicitly rejecting the more intuitive contract-breach claim for foreseeable damages).

<sup>78</sup> One is the explicit provision that permits the parties to “specify in the agreement a reasonable amount to be paid by the employer for termination with or without cause in lieu of the measure of damages stated in [this section].” RESTATEMENT OF EMP’T LAW § 9.01(c) (2015). Three illustrations provide some gloss on this. One suggests that an employer may, in effect, waive its right to employee mitigation, *id.* § 9.01, illus. 10, and another approves of a reduction in damages if reasonable efforts are not made to mitigate losses, *id.* § 9.01, illus. 11. Although such clauses are common in many contractual contexts, they are a relatively new feature of employment contracts and, given the stronger economic positions employers typically hold, can be expected to negate much of the default remedies provisions in the entire Restatement. Illustration 12 does say that a \$1,000 limitation on recovery would not be enforceable as a reasonable liquidated-damages clause. *Id.* § 9.01, illus. 12. Thus the Restatement envisions some limitations on employers obtaining employee agreement to limitations on recovery.

<sup>79</sup> *Id.* §§ 9.07(a), 9.09(a).

<sup>80</sup> *See id.* §§ 9.01(a)–(b), 9.02.

<sup>81</sup> *See DOBBS, supra* note 20, at 480 (§ 12.21(2)) (“[T]he defendant is entitled to a credit for any income the plaintiff actually earns in lieu of the employment income.”). The “in lieu of” principle suggests that income that would have been earned had the employer not breached, say, in a moonlighting job, does not count as mitigation.

<sup>82</sup> *See* RESTATEMENT OF EMP’T LAW § 9.01, Reporters Notes, cmt. f (2015) (discussing the Restatement’s treatment of the mitigation requirement).

Although the cases use various terms to describe what employment will count as mitigation (“comparable,” “substitute,” “of similar rank or status,” “not inferior,” and “in the same geographic area”),<sup>83</sup> the blackletter of *Employment Law* speaks only of “comparable alternative employment.”<sup>84</sup> That is broadly consistent with the case law, but the Restatement’s comments and illustrations reflect somewhat conflicting views, some not so employee friendly.

Thus, comment *f* to section 9.01 speaks of limiting recovery to “damages that could not have been ‘avoided without undue risk, burden or humiliation,’” citing the Restatement (Second) of Contracts section 350(1).<sup>85</sup> If the employee does take affirmative steps to mitigate, *Employment Law* is deferential to the employee’s judgment. Illustration 6 generally finds the duty satisfied by efforts that seem reasonably likely to yield income, even if they fail to do so or if the new employment is different from the prior employment. Thus, it approves both a move to another state and starting a new business as reasonable mitigation: “E’s return to California [from Florida] was reasonable because that was where E lived and worked prior to accepting the job offer from X. The business that E started involved a skill set comparable to the skill set involved in his prior employment with X.”<sup>86</sup> In contrast, Illustration 7 finds mitigation not reasonable when plaintiff moves to a state where he had not previously lived, starts in “a completely different line of business,” and, after it fails, does not seek other employment.<sup>87</sup> These examples suggest that a plaintiff will be *allowed* to do much in mitigation so long as there is a reasonable expectation of earnings but do not cast much light on what the plaintiff is *required* to do.

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<sup>83</sup> The Reporters’ Notes, *id.*, cite a number of cases with such formulations, including: *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231–32, 235–36 (1982) (“substantially equivalent” job and plaintiff “need not go into another line of work, accept a demotion, or take a demeaning position”); *Kern v. Levolor Loentzen, Inc.*, 899 F.2d 772, 778 (9th Cir. 1990) (“‘comparable, or substantially similar,’ employment” (citing *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689, 692 (Cal. 1970) (en banc)); *Flanigan v. Prudential Federal Sav. & Loan Ass’n*, 720 P.2d 257, 264 (Mont. 1986) (no “inferior employment”); *see also West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003) (“A plaintiff’s efforts to mitigate need not be successful but must represent an honest effort to find substantially equivalent work.” (internal citations omitted)).

<sup>84</sup> RESTATEMENT OF EMP’T LAW §§ 9.01(a)-(b), 9.02 (2015).

<sup>85</sup> *Id.* § 9.01, cmt. f (citing RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981)).

<sup>86</sup> *Id.* § 9.01, illus. 6; *see Jackson v. Host Int’l, Inc.*, 426 F. App’x 215, 222 (5th Cir. 2011) (self-employment may be mitigation); *Sericchio v. Wachovia Sec., LLC*, 606 F. Supp. 2d 256, 264 (D. Conn. 2009) (plaintiff mitigated damages by establishing a tanning salon start-up with his wife).

<sup>87</sup> RESTATEMENT OF EMP’T LAW § 9.01, illus. 7 (2015). While it may be correct that the plaintiff in this scenario did not make reasonable efforts to mitigate, the Illustration would be wrong if it suggests that such proof is sufficient to reduce his recovery: such proof should not carry the employer’s burden without further proof that, had such efforts been made, they would have been successful. *See infra* note 104 and accompanying text.



That issue is addressed in the next two illustrations. Illustration 8 essentially recapitulates the well-known facts of *Parker v. Twentieth Century-Fox Film Corp.*,<sup>88</sup> in which the court approved a finding of no failure to mitigate despite the refusal of an actress (Shirley MacLaine) to take a substitute starring role when the film for which she was originally hired was cancelled.<sup>89</sup> Although the dissent in *Parker* argued that the majority was too deferential to the employee's view of suitable substitute employment,<sup>90</sup> the Restatement approves of the result: "A's requirement to reasonably mitigate losses does not require her to accept the 'Big Country' [substitute] offer. In the circumstances of this case, considering the reputational costs to A in appearing in a different type of motion picture for which she was not known and which required work in a different part of the world, the 'Big Country' film did not constitute comparable alternative employment."<sup>91</sup>

In contrast, Illustration 9 involves "a well-known stunt man used in motion-picture musicals and dramas" who is terminated in breach of contract for the same film; unlike the "famous cinema actress" in Illustration 8, the stunt man may not recover damages that could have been avoided by accepting alternative employment doing the same kind of work in the same geographic area.<sup>92</sup> Presumably, this plaintiff would have no reputational costs, and, because the substitute is otherwise comparable, it would have been reasonable mitigation.

The illustrations, then, provide one benchmark for determining comparability—reputational consequences—but do not otherwise yield much in the way of guidance. However, because they draw a distinction between working "in a different part of the world"<sup>93</sup> and

<sup>88</sup> 474 P.2d at 689.

<sup>89</sup> See *id.* at 693–94; RESTATEMENT OF EMP'T LAW § 9.01, illus. 8 (2015).

<sup>90</sup> *Parker*, 474 P.2d at 697 (Sullivan, J., dissenting).

<sup>91</sup> RESTATEMENT OF EMP'T LAW § 9.01, illus. 8 (2015). Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1403 (2009) (quoting Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 WIS. L. REV. 1051, 1052 (1998)), recognizes that "[t]he conduct countenanced in *Parker* might be quite wasteful. MacLaine did no work for fourteen weeks at a time when she 'was one of the biggest female stars in Hollywood.'" He nevertheless justifies the decision:

Had MacLaine taken the role, she would have been denied damages for her artistic, political, or reputational loss, as any estimate of the loss would be speculative. The only way MacLaine could avoid suffering an uncompensated loss was to do what she did, which was to reject the role in *Big Country*, *Big Man* and get a judgment for the contract price.

A famous article, Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1114–25 (1985), suggests that MacLaine might have been driven by ideological, i.e., feminist, concerns, in taking the role in the cancelled film. Deprivation of that benefit would broaden Gergen's "reputational" analysis by introducing yet another "damage" that contract law cannot measure and therefore cannot compensate but which would factor into the mitigation analysis.

<sup>92</sup> RESTATEMENT OF EMP'T LAW § 9.01, illus. 9 (2015).

<sup>93</sup> *Id.* § 9.01, illus. 8.

working in the same geographical area, we might infer that that is an important factor. That and the repeated reference to “comparable alternative employment”<sup>94</sup> suggest that *Employment Law* more or less tracks the case law and is generally employee friendly.

This deference to the employee’s view of reasonable alternatives, however, is undercut—to what degree remains to be seen—by the Restatement’s comment *g*, entitled “*Reasonable mitigation over time.*” It would allow a discharged employee to initially (“[s]oon after termination, and for a reasonable period thereafter”) “seek only work involving comparable skill and working conditions,” but it would also require the employee to become less particular over time: when a search for such comparable work is not successful, “at some point it becomes reasonable to take similar work that is available, even if not as desirable as the previous employment.”<sup>95</sup> This is a version of the “lowered-sights” doctrine, which has been adopted in some federal settings<sup>96</sup> and at least one state court,<sup>97</sup> but it is far from the majority rule. The Restatement’s “not as desirable” alternative is limited to “similar” work<sup>98</sup> (apparently less alike than “comparable”), which might suggest no huge change is intended, but there are other indications that the reporters mean to adopt a robust version of the demanding “lowered-sights” doctrine.<sup>99</sup> Thus, comment *g* goes on to

<sup>94</sup> *Id.* §§ 9.01(a)–(b), 9.02.

<sup>95</sup> *Id.* § 9.01, cmt. *g*.

<sup>96</sup> The Reporters’ Notes also cite cases that apply such a principle in statutory contexts: *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 456 (3d Cir. 1992) (“But the duty to lower one’s sights arises only after a reasonably diligent search for employment similar to that lost has been made. Doubts as to whether or when a discriminatee must lower his or her sights are resolved against the employer.” (paraphrasing *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321 (D.C. Cir. 1972), and *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1134 (D.C. Cir. 1999))). RESTATEMENT OF EMP’T LAW § 9.01, Reporters’ Notes, cmt. *g* (2015). The Supreme Court noted, without endorsing, this approach in the NLRB context. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.16 (1982) (“Some lower courts have indicated, however, that after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position.”).

<sup>97</sup> New Jersey uses a “lowered sights” rule for mitigation under its Law Against Discrimination. *E.g.*, *Goodman v. London Metals Exch., Inc.*, 429 A.2d 341, 352 (N.J. 1981) (“If, after a reasonable amount of time, an employee has been unable to secure closely comparable employment, available employment may be determined by expanding the type of service sought, provided he is suited, or by reducing the salary demanded, or by enlarging the geographical area in which the individual should accept employment.”); *O’Lone v. Dep’t of Human Serv.*, 814 A.2d 665, 672 (N.J. App. Div. 2003) (applying the “lowered sights” doctrine in a Law Against Discrimination case).

<sup>98</sup> RESTATEMENT OF EMP’T LAW § 9.01, Reporters’ Notes, cmt. *g* (2015).

<sup>99</sup> Illustration 2 to section 9.05 criticizes jury instructions regarding future economic loss on precisely this ground. In that case, plaintiff has been fired at age 51 and seeks recovery of lost compensation until age 65. The jury is instructed:

In considering what were E’s post-trial economic damages as a result of the termination of E’s employment on April 15, 2011, you should deduct from E’s likely earnings at X, had he remained at X, only such income that E could have obtained in equivalent work during his work expectancy. If E

state that “as courts have become more receptive to claims of reasonably certain economic loss, courts should evaluate the reasonableness of mitigation efforts over time.”<sup>100</sup> That is undoubtedly true, but does not explain why the standard used should be lowered. In any event, to the extent any change is envisioned, the Restatement is less solicitous of employees than the case law, which rarely articulates any such rule and sometimes explicitly rejects it.<sup>101</sup> It would be preferable to simply continue the current majority rule, which would apply the same standard to whether mitigation was required regardless of how much time passes. Such a rule would also be more consistent with the Shirley MacLaine illustration.<sup>102</sup>

The Proposed Final Draft had several notable omissions concerning mitigation, but the reporters are to be applauded for addressing these in the final version. Thus, the Restatement now not only endorses placing the burden of proving a failure to mitigate on the employer<sup>103</sup> but also makes clear that the burden cannot be met by mere proof that the employee failed to make reasonable efforts; the employer must also show “that such efforts would have succeeded.”<sup>104</sup>

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could not obtain equivalent work during this period, your award should reflect only the earnings E could be expected to have received at X had he remained there through normal retirement age.

*Id.* § 9.05, illus. 2. Any verdict based on this instruction is called:

[S]ubject to challenge . . . because by limiting reasonable avoidable loss to “equivalent work,” the instruction takes too restrictive a view of the avoidable losses appropriate in assessing future economic loss over such an extended period of time. . . . The “equivalent work” aspect of the instruction understates E’s obligation to make reasonable mitigation efforts. E is *not required to accept lower-paid or other noncomparable employment for a reasonable period of time* to allow E to find employment comparable in earnings and status to the position E had with X. *Beyond such reasonable time, E cannot refuse all other work for 14 years and collect full compensation for those years from X.*

*Id.* (emphasis added) (cross-references omitted).

<sup>100</sup> *Id.* § 9.01, cmt. g (cross-references omitted).

<sup>101</sup> See *EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997) (“We also reject Pape’s argument that after a period of looking for work unsuccessfully, Waters was obligated to ‘lower his sights’ in order to procure employment.”); *Karl v. City of Mountlake Terrace*, No. C09-1806RSL, 2011 U.S. Dist. LEXIS 40561, at \*6 (W.D. Wash. Apr. 4, 2011) (“Neither the Ninth Circuit nor the Supreme Court has adopted the lower sights doctrine. . . . Because the higher courts have not adopted the principle, this Court declines to do so.”); *Elder v. Mike Dorian Ford*, No. 244530, No. 244798, 2004 Mich. App. LEXIS 3149, at \*16–17 (Mich. Ct. App. 2004) (finding no error in failing to instruct the jury as to a lowered sights doctrine).

<sup>102</sup> See *supra* note 88–90 and accompanying text.

<sup>103</sup> RESTATEMENT OF EMP’T LAW § 9.01, cmt. f (2015); see, e.g., *McAleer v. McNally Pittsburgh Mfg. Co.*, 329 F.2d 273, 275 (3d Cir. 1964) (placing burden of proving failure to mitigate on employer); *Pratt v. Bd. of Educ. of Uintah Cnty. Sch. Dist.*, 564 P.2d 294, 297–98 (Utah 1977) (same).

<sup>104</sup> RESTATEMENT OF EMP’T LAW § 9.01, cmt. f (2015). This is consistent with most case law. See *DOBBS, supra* note 20, § 12.21(2) (“The claim is reduced . . . only if suitable substitute employment was available . . .”); see also *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864

There is, however, some tension between this statement and Illustration 7 to section 9.01, which concludes that E “did not make reasonable efforts to mitigate losses” and might be read to suggest that a deduction is appropriate without a further showing that such efforts, if made, would have been successful.<sup>105</sup>

Another omission in the Proposed Final Draft that the Reporters are to be complimented for addressing in the published product is the collateral-source rule. As it is usually stated, income from certain “collateral” sources does not count as mitigation. Although this rule has had a checkered history in tort law,<sup>106</sup> it has generally been applied in the employment context when a discharged employee receives unemployment compensation, with most courts focusing on this issue holding that such benefits are treated as collateral sources.<sup>107</sup> The Restatement now notes that “[c]ollateral source’ income from private or social insurance is generally not deducted from damages.”<sup>108</sup>

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(3d Cir. 1995) (“To meet its burden, an employer must demonstrate that 1) substantially equivalent work was available, and 2) the Title VII claimant did not exercise reasonable diligence to obtain the employment.”). In the Title VII arena, however, some courts have equated proof of failure of reasonable efforts with proof that such efforts would have resulted in substantially equivalent employment. *See e.g.*, *Broadnax v. City of New Haven*, 415 F.3d 265, 270 (2d Cir. 2005) (the employer need not show comparable employment was available so long as it carries its “burden on the issue of whether the plaintiff made no reasonable efforts to seek alternative employment”); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 15–16 (1st Cir. 1999) (reaching the same conclusion as the *Broadnax* court). The Restatement is to be praised for rejecting this view.

In an economy with persistent high unemployment, the employer’s futility showing will often not be easy to satisfy. *See Stremple v. Nicholson*, 289 F. App’x 571, 574–75 (3d Cir. 2008) (plaintiff made reasonable attempts to mitigate in light of (a) the highly specialized nature of his former position, (b) his unsuccessful applications for chief of surgery in the few suitable hospitals in the area, and (c) the prohibitive costs of malpractice insurance given his financial position; plaintiff’s ceasing to maintain his license was a financial necessity and not a disqualifying factor with respect to the award).

<sup>105</sup> RESTATEMENT OF EMP’T LAW § 9.01, illus. 7 (2015). Illustration 9 does not pose this problem because the employee in that example turns down proffered substitute work. However, its phrasing—“B has not reasonably mitigated his damages”—might imply that Illustration 7 was dealing only with the employee’s duty to make reasonable efforts. *Id.* § 9.01, illus. 9.

<sup>106</sup> *See generally* Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 McGEORGE L. REV. 965 (2012) (discussing the effect tort legislation and the increased use and application of subrogation have had on the collateral-source rule).

<sup>107</sup> *See* the cases collected in the Reporters’ Notes to RESTATEMENT OF EMP’T LAW § 9.01, cmt. f (2015). *See generally* John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 CALIF. L. REV. 56, 70 (1983) (rejecting decisions that claim that the collateral-source rule is limited to torts and inapplicable to contracts); Joseph M. Perillo, *The Collateral Source Rule in Contract Cases*, 46 SAN DIEGO L. REV. 705, 713–14 (2009) (stating that the great weight of authority applies the collateral-source rule to unemployment benefits, a result that is justified by viewing those benefits as an insurance policy paid for by the employee’s providing her services).

<sup>108</sup> RESTATEMENT OF EMP’T LAW § 9.01, cmt. f (2015).

Before I end this comparison of damages remedies for breach of contract, however, it is appropriate to interject a dose of reality into this discussion of an employer's remedies. Employees are, by and large, judgment proof.<sup>109</sup> Damage remedies, therefore, are more theoretic than real; as a practical matter, the ability of an employer to fire a worker—either at will or for cause where the employee enjoys some form of job security—is often the most meaningful “remedy” available.

Thus, the Restatement's approach to employee remedies is considerably more important in practical terms than its approach to employer remedies, and the shortcomings of the Restatement on this point are the more important. That said, however, there are two situations in which the reach of employer remedies is important. First and most obvious is the case of highly compensated employees against whom a claim for substantial damages, including lost profits, may be plausible. We will encounter this possibility again in connection with employer remedies against employees for torts. Second is employer deployment of counterclaims against employees suing for violation of statutory rights.<sup>110</sup> Such counterclaims, if plausible, can affect the settlement value of a lawsuit by reducing the probable recovery for a plaintiff.

### C. Injunctive Relief for Torts

*Employment Law* limits employee rights to an injunction “only in cases of continuing torts,”<sup>111</sup> a term not otherwise defined and seemingly with little application to the torts the Restatement imagines an employer committing against an employee—defamation, wrongful interference, and misrepresentation.<sup>112</sup> Since an injunction would, of

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<sup>109</sup> *E.g.*, *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 505 (Colo. 1989) (employee was judgment proof); *cf.* *Majano v. United States*, 545 F. Supp. 2d 136, 145 n.7 (D.D.C. 2008) (stating that many courts “apply the scope-of-employment test very expansively, in part because doing so usually allows an injured tort plaintiff a chance to recover from a deep-pocket employer rather than a judgment-proof employee”).

<sup>110</sup> *See, e.g.*, *Sanders v. Madison Square Garden, L.P.*, 06 Civ. 589 (GEL), 2007 U.S. Dist. LEXIS 48126, at \*12 (S.D.N.Y. July 2, 2007) (“faithless servant” counterclaim brought against plaintiff suing for sexual harassment by MSG executive Isiah Thomas); *see generally* Charles A. Sullivan, *Mastering The Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 Wis. L. REV. 777, 779 (2011) (“[S]ome see a growing risk that the [faithless servant] doctrine is being asserted to discourage employees from bringing anti-discrimination or other claims against their employers.”).

<sup>111</sup> RESTATEMENT OF EMP'T LAW § 9.06(a) (2015). The term is sometimes used to avoid a statute of limitations by, for example, focusing on the continuing operation of a nuisance rather than the original creation of it. *See* *Arcade Water Dist. v. United States*, 940 F.2d 1265, 1267–68 (9th Cir. 1991) (discussing continuing nuisance doctrine); *see also* *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1043 (11th Cir. 2014) (“[W]e believe that Florida law recognizes a continuing violation principle when restrictive covenants are violated by ongoing, separate acts.”).

<sup>112</sup> *See* RESTATEMENT OF EMP'T LAW ch. 6 (2015).

course, not be available other than to challenge continuing conduct, the limitation on such relief seems most aimed at the tort of wrongful discharge in violation of public policy tort,<sup>113</sup> but the Restatement explicitly provides that “courts will not reinstate employees to their lost employment.”<sup>114</sup> In short, the Restatement basically confines employees who are the victims of torts to damages relief only.<sup>115</sup>

This approach to employee remedies for the public-policy tort is of debatable consistency with the decided cases. Although scholars have questioned the effectiveness of reinstatement, even under statutory regimes where it is explicit remedy,<sup>116</sup> a number of jurisdictions would, in theory at least, permit reinstatement for a discharge in violation of public policy.<sup>117</sup> However, it is true that, even among these, most cases seem to offer the plaintiff front pay in lieu of reinstatement.<sup>118</sup> To the extent that the reinstatement remedy is mainly a

<sup>113</sup> *Id.* § 5.01.

<sup>114</sup> *Id.* § 9.06(b). This is qualified by “unless specifically authorized by law,” which would seem to apply only to statutes so providing.

<sup>115</sup> The list of cases in the Reporters’ Note to section 9.06, mostly relating to statutory claims, does not require any reconsideration of this conclusion.

<sup>116</sup> See, e.g., Robert Covington, *Remedies Doctrines in Employment Law: Ready to Be Restated, or in Need of Remedial Attention?*, 16 EMP. RTS. & EMP. POL’Y J. 511, 520 n.23 (2012); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 28–40 (looking to empirical studies documenting the ineffectiveness of reinstatement even in labor law cases where unions are typically involved and arguing that reinstatement is likely to be even more ineffective without a union to police the employer’s subsequent conduct).

<sup>117</sup> E.g., *Skirpan v. United Air Lines, Inc.*, No. 83 C 0447, 1989 U.S. Dist. LEXIS 8637, 8 (N.D. Ill. July 20, 1989) (“Although we have found no Illinois case law which explicitly states that reinstatement is proper in a retaliatory discharge case, we hold that reinstatement is a natural remedy for this tort which was created to prevent wrongful discharge. No other remedy can fully compensate an employee for the wrongful loss of his or her job.”); *Redemske v. Romeoville*, 406 N.E.2d 602 (Ill. App. 1980) (affirming an order requiring the village to reinstate the plaintiff who had been wrongfully discharged for participating in a political parade); *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 331 (Tenn. 1996) (“[V]irtually all courts agree that the clearest way to make the plaintiff whole is to supplement the back pay award with reinstatement to the job . . . .”); *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 811–12 (W. Va. 2009) (“[R]einstatement has evolved into an accepted remedy for the tort of retaliatory discharge.”); *Kempfer v. Automated Finishing*, 564 N.W.2d 692, 701 (Wis. 1997) (“[T]he circuit court must first determine whether reinstatement is feasible. If the circuit court concludes that reinstatement is not feasible then the court rather than the jury should determine the amount of front pay, if any, that is necessary to make the wronged employee whole.”).

<sup>118</sup> See *Coffey*, 929 S.W.2d at 331–32 (“Perhaps the most common circumstance rendering reinstatement infeasible is ‘where the employer has demonstrated such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible . . . .’ Where reinstatement is not feasible, the court may order front pay . . . .” (citation omitted)); *Peters*, 680 S.E.2d at 812 (“Not all cases, though, present the right circumstances for an employee’s reinstatement. When the wrongful discharge is precipitated by or results in a hostile relationship between the employee and the employer, reinstatement is not appropriate. In such circumstances, we have recognized front pay as an acceptable substitute for reinstatement.”); see also *Macglashan v. ABS LINCOS KY, Inc.*, 448 S.W.3d

pass-through for a damage remedy which *Employment Law* deals with in a separate section,<sup>119</sup> it may be simplifying the law rather than changing it to employees' disadvantage.

On the other hand, although it allows such damages recovery, the Restatement stresses the difficulties of establishing "reasonably certain future economic loss,"<sup>120</sup> and providing front pay will sometimes reduce these difficulties. Thus, front pay may be awarded either for deferred reinstatement (as when another employee is currently occupying the position plaintiff will be awarded when it is vacant) or in lieu of reinstatement (when that remedy is simply not feasible, as where there is mutual hostility). Front pay for delayed reinstatement obviously narrows the time line and thus reduces the computational problems although "in lieu of" front pay poses the same difficulties as damages for future economic loss. In at least some cases, reinstatement may well be the preferred remedy and, by ruling it out, the Restatement removes an arrow from the wrongfully discharged employee's quiver.<sup>121</sup>

As for employer equitable relief, section 9.10, authorizing injunctive relief for an employee's breach of a "tort-based duty, including a fiduciary duty," contains no limitation, other than a reminder that the employer "must satisfy the traditional requirements for obtaining equitable relief."<sup>122</sup> Comment *a* indicates that the section applies to a breach of an obligation enforceable under Chapter 8,<sup>123</sup> but presumably only to breaches of the duty of loyalty while employed or misappropriation of trade secrets (since enforcement of noncompetition clauses would fall under section 9.04 for violation of a contract-based duty<sup>124</sup>).

Chapter 8, in turn, suggests that injunctive relief will be available to address violations of the duty of loyalty. While there are other applications,<sup>125</sup> perhaps the most common instance is an order

792, 794–95 (Ky. 2014) (interpreting a state whistleblower statute to authorize front pay between the judgment and reinstatement or in lieu of reinstatement).

<sup>119</sup> See *infra* beginning at note 146 and accompanying text.

<sup>120</sup> RESTATEMENT OF EMP'T LAW § 9.05, cmt. e (2015) (determining "future (i.e., post-trial) lost earnings" poses an inquiry that is "much more difficult" than determining lost earnings to the point of trial).

<sup>121</sup> One could argue that reinstatement might be preferable for *employers* to lost future earnings since the latter could be a substantial award for which the employer receives no benefit in terms of services. But an employer will often be able to avoid any award for lost future earnings by offering plaintiffs their jobs back, thus triggering their duty to mitigate. See *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

<sup>122</sup> RESTATEMENT OF EMP'T LAW § 9.10(a) (2015).

<sup>123</sup> *Id.* § 9.10, cmt. a.

<sup>124</sup> See *id.* § 9.04(b).

<sup>125</sup> The common law would historically enforce the "negative" promise not to work for anyone else that was implicit in a promise to work for the plaintiff for a period of time, but it would do so only when the employee's services were especially valuable and when the

enjoining an employee's or former employee's use or disclosure of the employer's trade secrets (defined in section 8.03).<sup>126</sup> The Restatement approves of such injunctions in the face of actual or threatened disclosure, but it emphatically rejects a broader doctrine called "inevitable disclosure."<sup>127</sup>

When there was a sufficient basis to believe that a former employee intended to use or disclose information determined to be a trade secret, equity has long enjoined such action.<sup>128</sup> But the inevitable-disclosure doctrine would go further to bar subsequent employment by a competitor firm when such employment would necessarily require the former employee to use such secrets, and it would do so absent any meaningful proof of any intent to disclose.<sup>129</sup> The effect is to convert trade-secret protection into protection against competition and to do so absent any agreement not to compete.<sup>130</sup>

*Employment Law* rejects any injunction unless "there has been actual use or disclosure of the prior employer's trade secrets or a high likelihood, based on the employee's statements or conduct, that the employee will disregard his or her obligations not to use or disclose such information."<sup>131</sup> This comes down firmly on the side of employees although the Reporters' Notes, perhaps influenced by the contributions of Professor Alan Hyde during the process, make clear that

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new employer was in competition with the plaintiff. See *Lumley v. Wagner*, 1 De G. M. & G. 604, 42 Eng. Rep. 687, 694–95 (1852). This use of injunctions continues where its restrictive conditions are met. *E.g.*, *Bryan McDonagh S.C. v. Moss*, 565 N.E.2d 159, 161 (Ill. App. Ct. 1990).

<sup>126</sup> RESTATEMENT OF EMP'T LAW § 8.03 (2015).

<sup>127</sup> *Id.* § 8.05, cmt. a.

<sup>128</sup> See, e.g., *Baxter Intern Inc. v. Morris*, 976 F.2d 1189, 1193 (8th Cir. 1992) (noting that Missouri courts generally "will grant equitable protection for an employer's interest in trade secrets").

<sup>129</sup> The seminal case is *Pepsico, Inc. v. Redmond*, 54 F.3d 21 1262 (7th Cir. 1995), which the Reporters' Notes suggest "could have been decided on the narrower theory of threatened disclosure." RESTATEMENT OF EMP'T LAW § 8.05 (2015) (citing Alan Hyde, *The Story of Pepsico, Inc. v. Redmond: How the Doctrine of the Inevitable Disclosure of the Trade Secrets of Marketing Sports Beverages Was Brewed*, in *EMPLOYMENT LAW STORIES* 130–31 (Samuel Estreicher & Gillian Lester eds., 2007)).

<sup>130</sup> RESTATEMENT OF EMP'T LAW § 8.05, cmt. b & illus. 2 (2015).

<sup>131</sup> *Id.* § 8.05, cmt. b. The comment goes on:

[A]n injunction here requires a demanding showing including that: (1) the former and current employers are direct competitors; (2) the employee's new position is sufficiently similar to the old position, so that (3) the employee could not fulfill the new responsibilities without using or disclosing the former employer's trade secrets; and (4) the former employee has expressly threatened such use or disclosure, or the employee's conduct demonstrates a pattern of deceit or misappropriation of trade secrets and other confidential information indicating that ethical constraints and a court injunction barring the disclosure or use of trade secrets would, standing alone, be inadequate to protect the former employer's legitimate interests.



there are very few cases adopting an inevitable-disclosure principle that would apply without regard to threatened disclosure.<sup>132</sup>

#### D. Damages for Torts

Employee tort damages are robust under the Restatement. Section 9.05(a) subjects the employer to liability in damages “for foreseeable harms caused by the wrong,”<sup>133</sup> subject, of course, to mitigation.<sup>134</sup> These damages “include past and reasonably certain future economic loss, noneconomic loss, the expenses of reasonable efforts to mitigate damages, and reasonably foreseeable consequential damages.”<sup>135</sup> Further, an employee “may also recover punitive damages if the employer was sufficiently culpable, or nominal damages if no actual damages are proven.”<sup>136</sup> There is little to quarrel about in the blackletter.

Below the 30,000-foot level, however, the Restatement provides relatively little guidance on what these various types of damages might be. For example, with respect to punitive damages, comment *g* essentially repeats hornbook law that requires “conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”<sup>137</sup> It notes, but does not take any position, with respect to “several jurisdictions [that] restrict punitive awards where the underlying conduct is not committed by a corporate officer or managerial agent,”<sup>138</sup> or “require that punitive awards bear a reason-

<sup>132</sup> See *id.* § 8.05, illus. 2. The Reporters’ Notes reject liability in “the starker situation” lacking “any showing of deception or other improper behavior by the employee. The courts generally deny relief in this situation. . . .” *Id.* § 8.05, Reporters’ Notes, cmt. b.

<sup>133</sup> RESTATEMENT OF EMP’T LAW § 9.05(a) (2015).

<sup>134</sup> *Id.* at cmt c.

<sup>135</sup> *Id.* § 9.05(b).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 9.05, cmt. 5 (citing RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).

<sup>138</sup> *Id.* § 9.05, cmt. g. The Reporters’ Notes quote section 217C of the Restatement (Second) of Agency as establishing a principal’s liability for punitive damages for the acts of its agents “if, but only if”:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF AGENCY § 217(c) (2008). According to the Notes, the Restatement (Second) of Torts § 909 and the Restatement (Third) of Agency § 703, Comment *e*, adopt a similar approach.

Section 217C has been influential, but not dispositive, in federal decisions and therefore the Restatement’s approval may or may not lead state courts to follow their path. *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999), looked to section 217C to determine when a corporate employer may be liable. According to the Court, to recover a punitive award, the plaintiff must prove that the agent who discriminated against her was an “important” manager. *Id.* at 543. If plaintiff carries her burden on that issue, however, she

ble relationship to the size of compensatory awards.”<sup>139</sup> It also cautions that federal constitutional constraints may limit punitive awards.<sup>140</sup>

With respect to “economic loss,” the comments divide the universe into such loss “at the time of trial” and “reasonably certain future economic loss.”<sup>141</sup> The former is treated in comment *d*, which somewhat oddly looks to the Restatement (Second) of Torts section 924(b) as recognizing “loss or impairment of earning capacity” as “a compensable element of *harm to the person*.”<sup>142</sup> While an employer

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does not necessarily prevail. Believing that literally applying section 217C would create perverse incentives by punishing an employer who attempts to comply with the law, the *Kolstad* Court rejected vicarious liability even for the discrimination of managerial agents “where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” *Id.* at 545. See *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 438–39 (7th Cir. 2012) (punitive award was appropriate because the employer’s sexual harassment policy was insufficient when it could be understood to discourage complaints, it was not made available in writing to employees and could be accessed only with management’s approval, and the employer did not educate managers or workers about sexual harassment and how to handle complaints).

<sup>139</sup> RESTATEMENT OF EMP’T LAW § 9.05 cmt. g (2015). This is an interesting, albeit uncertain, area. At the federal level the question has arisen as to whether a punitive award can be made if there is no supporting compensatory award (or a backpay award). Some courts have held yes. See *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 153 (4th Cir. 2008) (agreeing with sister circuits that no compensatory damages are necessary for a punitive award and rejecting proportionality analysis when nominal damages are awarded); *Abner v. Kan. City S. R.R. Co.*, 513 F.3d 154, 160 (5th Cir. 2008) (“[A] punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages. We base our holding on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII.”), but other courts require either compensatory damages or backpay to support for an award of punitive damages. See *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 14 n.10 (1st Cir. 1999). The debate is largely independent of the constitutional question of the ratio between punitive and compensatory damages, perhaps because Title VII’s cap on damages pretermits what might otherwise be a constitutional question.

<sup>140</sup> RESTATEMENT OF EMP’T LAW § 9.05 cmt. g (2015) (“Constitutional principles, under the federal due-process clause, also require that the size of a punitive-damages award be reasonably related to the size of the compensatory-damages award in a given case, and that appellate courts engage in meaningful review of punitive awards across cases.”). The reference is to cases such as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (a punitive damages award that is “grossly excessive” violates due process), and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (setting a presumptive constitutional cap on punitive damages by limiting them to a single-digit ratio to compensatory damages). See generally Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473 (2012) (proposing an analytical framework for analyzing punitive damages in cases brought under Title VII); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701 (2010) (describing the analytic red herrings that may confuse courts conducting an excessiveness review to illustrate fundamental flaws with such review and suggesting ways to minimize mistakes); Sandra F. Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227 (2009) (describing three problematic analytical mechanisms that cause judicial preemption of punitive damages and the distinct harms associated with each).

<sup>141</sup> RESTATEMENT OF EMP’T LAW § 9.05, cmts. d, e (2015).

<sup>142</sup> RESTATEMENT OF EMP’T LAW § 9.05, cmt. d (2015) (emphasis added); RESTATEMENT (SECOND) OF TORTS § 924(b) (1979).

may commit such a tort with respect to its workers, the basic torts dealt with by the Restatement are dignitary or economic and so looking to a source dealing with harm to the person is somewhat strange although not objectionable. Nevertheless, the comment approves the employee's right to recover "the amount of earnings he has been prevented from acquiring up to the time of the trial. This amount is the difference between what he probably could have earned but for the harm and any lesser sum that he actually earned in any employment" or what he would have earned by reasonable mitigation.<sup>143</sup> This seems like a somewhat long-winded way of allowing recovery for the compensation that would have been earned but for the tort (minus mitigation). But the comment also approves of recovery of "[o]ther economic losses," such as "reasonable relocation, medical, and other expenses."<sup>144</sup>

Comment *e* then turns to "Reasonably certain future economic loss" and, as the title suggests, recognizes more difficulties in ascertaining "future (i.e., post-trial) lost income" than determining past lost earnings.<sup>145</sup> For example, the fact that a former employee has been unable to find comparable alternative employment up to the time of trial does not necessarily mean that she will be unable to do so for the rest of her working life. Nevertheless, the comment provides:

This Section adopts the view . . . that ordinarily the trier of fact should be allowed to consider whether claims of future economic loss are well-founded by assessing the injured party's probable compensation over his likely work expectancy minus earnings the employee would, or could (through reasonable effort), obtain had he not been injured. [The courts taking this view] do not require expert vocational testimony in all cases but do insist on a reasonable factual basis for awarding damages for future economic loss.<sup>146</sup>

Illustration 1 would permit an employee wrongfully discharged at age 51 to recover an amount measured by a 14-year work expectancy at an average annual future income of \$42,642, "a figure that falls between the highest salary E earned at X (over \$50,000) less the \$20,000 E earned the year following his termination."<sup>147</sup>

Although the jury award it approves may be sustained, this example is over-simplistic and perhaps deceptive.<sup>148</sup> First, the 14-year work

<sup>143</sup> RESTATEMENT (SECOND) OF TORTS § 924(b) (1979).

<sup>144</sup> RESTATEMENT OF EMP'T LAW § 9.05, cmt. d (2015).

<sup>145</sup> *Id.* § 9.05, cmt. e.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* § 9.05, illus. 1.

<sup>148</sup> One problem is mitigation. The Illustration supposes a jury award of \$597,000, reflecting a yearly average lost earnings of \$46,642, multiplied by 14 years of working life. But the plaintiff earned \$20,000 the year after his termination from a job paying \$50,000, suggesting that his recovery, for that first year at least, was only \$30,000. *Id.*

expectancy seems to envision the plaintiff retiring at 65; while the comment notes that that is conceded to be the plaintiff's anticipated retirement date, nothing in the law that would require such a concession in a real case.<sup>149</sup> An employee, depending on the job and his health and financial situation, may have a longer or shorter projected working life.

Second, the calculation does not address either inflation<sup>150</sup> or reduction to present value.<sup>151</sup> While the Introductory Note to Chapter 9 cautions that the "Illustrations offered below ignore complications such as reducing future awards to present value, adjusting for projected inflation"<sup>152</sup> it might have been better to repeat that caution in connection with these discussing future economic loss where they are most likely to arise. Thus, if X's salary was \$50,000 the year before his discharge, even modest inflation over a 14-year period would dramatically increase the annual lost income toward the end of the period.<sup>153</sup> And the possibility of "real wage" increases—raises above inflation—should have been noted.<sup>154</sup> Similarly, reducing the recovery to present value would be a normal adjustment in tort law.<sup>155</sup>

Finally, as to "noneconomic loss," the comments are singularly unhelpful. Comment *f* provides that "[d]amages for emotional harm are normally available for intentional torts like assault, battery, false imprisonment, intentional infliction of emotional distress, invasion of privacy, and defamation."<sup>156</sup> Presumably, a discharge in violation of the public policy tort would be an intentional tort triggering a right to mental distress damages, and, although an explicit reference would have been better, the Reporters' Notes cite several such cases.<sup>157</sup> Nor

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<sup>149</sup> See *id.*

<sup>150</sup> See, e.g., *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 538 (1983) (noting that "ours is not an inflation-free economy. Inflation has been a permanent fixture in our economy for many decades . . .").

<sup>151</sup> See, e.g., *Dennis v. Blanchfield*, 428 A.2d 80, 85 (Md. 1981) (reversible error "to refuse to instruct the jury in a personal injury action that they are to reduce to present value any damages awarded for the loss of future earning capacity").

<sup>152</sup> RESTATEMENT OF EMP'T LAW, Introductory Note to Chapter 9 (2015). The Note also indicates that the illustrations do not "account[ ] for pre- and post-judgment interest where available under applicable law." *Id.*

<sup>153</sup> For example, a 3% inflation rate would yield a final year salary in excess of \$75,000.

<sup>154</sup> DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 209 (2010).

<sup>155</sup> See, e.g., *Dennis*, 428 A.2d at 85 (reversible error "to refuse to instruct the jury in a personal injury action that they are to reduce to present value any damages awarded for the loss of future earning capacity"). Sometimes inflation and reduction to present value are both ignored in the expectation they will offset each other, but this is very problematic. LAYCOCK, *supra* note 154, at 208–09.

<sup>156</sup> RESTATEMENT OF EMP'T LAW § 9.05, cmt. f (2015).

<sup>157</sup> *Id.* § 9.05, Reporters' Notes, cmt. f (citing *Wiskotoni v. Mich. Nat'l Bank-W.*, 716 F.2d 378, 388–89 (6th Cir. 1983); *Scott v. Otis Elevator Co.*, 572 So. 2d 902, 903 (Fla. 1990); *Phillips v. Butterball Farms Co.*, 531 N.W.2d 144, 148–50 (Mich. 1995)).

is there any reference to the kinds of proof that may be needed to establish emotional distress.<sup>158</sup>

The Restatement's expansive view of an employee's tort recovery is matched by an expansive view of the employer's recovery when the employee is the tortfeasor. Section 9.09 begins by replicating the employee's tort recovery.<sup>159</sup> The comments to this section cross-refer to those for section 9.05,<sup>160</sup> so the parallelism is obvious. While *Employment Law* does not note it, the same principles will often differ in their application in the two contexts. For example, where the employee—a single human being—is the tortfeasor, the agency concerns with

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<sup>158</sup> In the employment-discrimination context, courts have tended to require expert medical evidence to justify substantial awards under this heading. While emotional-distress damages are recoverable under antidiscrimination laws, there is less agreement as to how such distress can be proved. While some courts find the plaintiff's uncorroborated testimony sufficient, *McInerney v. United Air Lines, Inc.*, 463 F. App'x 709, 723–24 (10th Cir. 2011) (plaintiff's testimony about the stress of losing her job, in tandem with testimony about the stress of caring for her premature son and recovering from pregnancy complications sufficient for granting compensatory damages); *Tucker v. Hous. Auth.*, 229 F. App'x 820, 826–27 (11th Cir. 2007) (trial court within its discretion to refuse a new trial or remittitur when plaintiff testified as to his depression, anxiety, loss of sleep, digestive problems, and humiliation, including pretending to go to work to avoid alarming his young daughter); *Farfara v. Citizens Bank & Trust*, 433 F.3d 558, 566 (7th Cir. 2006) (upholding \$100,000 pain-and-suffering award since medical testimony not necessary to prove emotional injury in a Title VII case), several circuits have found uncorroborated testimony by the plaintiff of her emotional harm a basis for finding damage awards grossly excessive. *E.g.*, *Trainor v. HEI Hospitality, LLC*, 699 F.3d 19, 32–33 (1st Cir. 2012) (despite plaintiff's and his wife's testimony, a \$500,000 award for emotional distress was grossly excessive where there was no evidence of medical treatment or counseling; "While evidence from a physician or other mental health professional is not a sine qua non to an award of damages for emotional distress, the absence of such evidence is relevant in assessing the amount of such an award."); *Akouri v. Fla. Dep't of Transp.*, 408 F.3d 1338, 1345–46 (11th Cir. 2005) (\$552,000 compensatory damages award properly overturned when plaintiff presented no evidence of emotional distress except for mentioning "he was rejected the three times he applied for promotions that he believed he deserved"); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) ("Forshee suffered no physical injury, she was not medically treated for any psychological or emotional injury, and no other witness corroborated any outward manifestation of emotional distress."). Accordingly, an expert's testimony is at least helpful and may be necessary. *See Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 408–10 (7th Cir. 2010) (upholding remitted award of \$250,000; although the employee suffered only a mild adverse employment action, the award was supported by a clinical professional counselor's testimony that the employee was suffering from adjustment disorder, depression, and anxiety based on work-related stress and fear of losing his job).

<sup>159</sup> RESTATEMENT OF EMP'T LAW § 9.09 (2015) provides:

(a) An employee who breaches a tort-based duty or any fiduciary duty the employee owes the employer (Chapter 8) is subject to liability for foreseeable harm to the employer caused by the breach . . . less damages that the employer could reasonably have avoided.

(b) Available items of damages that may be obtained under (a) include past and reasonably certain future economic loss and noneconomic loss, punitive damages, reasonably foreseeable lost profits, and reasonably foreseeable consequential damages.

There is an obvious overlap between these categories.

<sup>160</sup> *Id.* § 9.09, cmts. b, e.

imposing liability on the principal are inapplicable.<sup>161</sup> Further, where, as will usually be the case, the employer is a business entity, “noneconomic loss” in the form of mental distress will be unavailable.

Finally, again not mentioned by the Restatement, there will be serious causation and ascertainability issues, present in many cases where the employer sues, that are not applicable where the employee is the plaintiff. For example, when a worker is wrongfully discharged, the lost compensation is typically easily ascertainable (even if mitigation and the length of such loss introduce complications). In contrast, where the employee breaches, the employer will often find it difficult to prove causation of damages or to quantify the harm caused to the sufficient degree of certainty.<sup>162</sup>

These problems of proof may in large part explain the remainder of section 9.09, which provides employers with two kinds of recoveries beyond traditional damages:

(c) . . . [A]n employer may deny any compensation owed, and recover any compensation paid, to an employee who breaches the employee’s fiduciary duty of loyalty owed the employer (§ 8.01), where

(1) the employee’s compensation cannot be apportioned between the employee’s disloyal services and the employee’s loyal services, and

(2) the nature of the employee’s disloyalty is such that there is no practicable method for making a reasonable calculation of the harm caused the employer by the employee’s disloyal services.<sup>163</sup>

If the employee’s compensation can be reasonably apportioned between the employee’s loyal and disloyal services, then the employer may deny any compensation owed, and recover any compensation paid, for the disloyal services.

(d) If an employee personally profits from a breach of fiduciary duty, the employer can recover those profits from the employee.<sup>164</sup>

These paragraphs deal with what is sometimes called the “faithless servant” rule, which I have discussed at length elsewhere.<sup>165</sup> For present purposes, it is enough to note that the additional remedies—disgorgement of compensation paid and payment of profits earned—are much more draconian than contract law usually provides. Nevertheless, the Restatement did not invent the faithless servant rule,

<sup>161</sup> See *supra* text accompanying note 139.

<sup>162</sup> See *Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1011 (N.Y. 1993) (permitting former employer to recover lost profits from breaching employee because they could be proven with reasonable certainty).

<sup>163</sup> RESTATEMENT OF EMP’T LAW § 9.09(c) (2015). This paragraph is qualified by “[e]xcept to the extent the employer would obtain double recovery for the same loss, and subject to applicable state wage-payment law or other law. . . .” *Id.*

<sup>164</sup> *Id.* § 9.09(d).

<sup>165</sup> Sullivan, *supra* note 110, at 779.

which has deep roots in agency and fiduciary law. Indeed, although the rule was mostly applied to high-level employees, the Restatement does a service by explicitly attempting to narrow the application of any such rule in the employment context. It does this in section 8.01 by dividing the duty of loyalty into two parts:

Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment. [E]mployees . . . may, depending on the nature of the employment position, owe an implied contractual duty of loyalty to the employer in matters related to their employment.<sup>166</sup>

Section 9.09, however, is explicit that only those who owe a fiduciary duty (not those who have an “implied contractual duty of loyalty”) may be liable for the remedies in paragraphs (c) and (d).<sup>167</sup> Finally, the Restatement does a genuine service in making clear that disgorgement and forfeiture apply only when reasonable apportionment of faithful and faithless service is not possible.

In summary, as compared to current law, the Restatement is employee friendly with regard to the faithless servant rule, both by confining it to fiduciaries and by preferring apportionment when possible. It nevertheless remains a very draconian remedial structure for employees with no parallel for employer harms.

#### FINAL ASSESSMENT

As far as Remedies is concerned, the new Restatement is very much a mixed bag. Perhaps the most obvious conclusion is one we did not need a Restatement to know: the law’s remedial scheme generally favors employers although this may largely stem from the reality that most employees are judgment proof or at least not worth pursuing for whatever money might be collected. That is, this may largely explain the law’s slant towards injunctive relief for employers. As for enhanced monetary remedies against faithless servants, the explanation is probably more historical than logical, stemming from an ill-defined “fiduciary” notion that transitioned from trust law through various confidential relationships into what we now know as employment law.<sup>168</sup>

The Restatement, however, does not often tilt the playing field further towards employers and sometimes makes modest efforts to level it. Its disapproval of the inevitable-disclosure rule comes to mind. Further, some of its innovations—a new test for modifying

<sup>166</sup> RESTATEMENT OF EMP’T LAW § 8.01(a) (2015).

<sup>167</sup> See *id.*

<sup>168</sup> See, e.g., Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 802–08 (1983) (discussing the modern extension of fiduciary law in general).

overbroad restrictive covenants—might be of some utility in this regard. Nevertheless, other policy choices—the lowered-sights doctrine and the rejection of reinstatement for employees discharged in violation of public policy—seem very dubious. As for its reformulation of the rules about enforcing restrictive covenants, the blackletter might or might not do some good in curtailing the unconsidered spread of such covenants. Finally, in some respects *Employment Law* failed to address issues of potential importance where it could have made some improvements or at least offered useful guidance.



