University of Michigan Journal of Law Reform

Volume 16 | Issue 2

1983

Challenging the Employment-At-Will Doctrine Through Modern Contract Theory

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CHALLENGING THE EMPLOYMENT-AT-WILL DOCTRINE THROUGH MODERN CONTRACT THEORY

Most American employees believe that competent work performance will secure job continuity in a stable economy.[1] This belief is often engendered by promises of job security and deferred benefits that employers use to recruit and maintain a cooperative work force.[2] Consequently, arbitrary discharge creates severe financial and emotional hardships for employees who have relied on express or implied assurances of job security.[3]

By legitimizing arbitrary discharge, the traditional rule of at-will employment allows employers to defeat employee reliance on promises of job security. Under the at-will doctrine, the employer may fire the employee for any reason, notwithstanding promises of just cause discharge.[4] To avoid arbitrary discharge, employees must provide their employers with consideration, such as a monetary contribution, property transfer, or other financial benefit, arising independently of their jobs.[5] Only after providing such "independent" consideration have

1. Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 56 CHI.[-]KENT L. REV. 697, 728 (1981) ("Where the employee has completed a task acording [sic] to his employer's standards, he has earned the right not to be discharged.") [hereinafter cited as Note, *Job Security*]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 363 (1974) ("An employee who is told by the employer that his or her work is satisfactory may reasonably expect job security.") [hereinafter cited as Note, *Implied Contract Rights*]; *see also* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 369 (1982) (noting that most employers promise non-unionized workers job security).

2. Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 619, 292 N.W.2d 880, 895 (1980) (presuming that employers use promises of job security to promote good morale and productivity); *see also* Murg & Scharman, *supra* note 1, at 370-71 (discharge for good cause encourages employee morale and workforce stability).

3. *See generally* WORK IN AMERICA: REPORT OF A SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE 8 (1973) (analyzing socio-economic consequences of unemployment) [hereinafter cited as WORK IN AMERICA]; Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967) (discussing personal ramifications of being discharged).

4. *See, e.g.*, Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884) (employer may discharge "for good cause, for no cause or even for cause morally wrong . . . ."). *See also* Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (holding that employer may discharge for any reason, good or bad); Jones v. Keogh, 409 A.2d 581 (Vt. 1979) (stating that employer may use bad faith, malice, or retaliation as reason of discharge). *See generally* Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 389, 390-94 (1983).

5. Traditionally the courts have viewed the employment relationship as a simple exchange

employees been able to enforce employer promises of job security.[6]

Most employees relying on employer promises of job security are unaware of the independent-consideration requirement.[7] Such employees simply rely on employers to honor these promises, and assume that satisfactory job performance will be rewarded with continued employment. In any other commercial setting these employer promises would create binding contractual obligations; in the employment setting, however, they have not been viewed as legally binding.[8] This anomaly exemplifies the injustice of the at-will rule.

This Note advocates an implied contract analysis that both satisfies contractual requirements and protects the reasonable expectations of employees and employers. Part I describes the various reliance interests that employees bring to their jobs, the employer inducements that cause this reliance, and the business benefits that accrue when employees rely upon these inducements. Part II examines in detail judicial reluctance to enforce either these reliance interests or employer promises as contract rights under the at-will doctrine. Part II also urges the increased use of modern contract theories such as promissory estoppel, quasi-contract, and implied contract to protect employee reliance interests and expectations of job security. This Note concludes that when an employer pursues business policies that encourage expectations of job security, a just cause guarantee should be enforced.

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of a day's work for a day's pay. *See* Murg & Scharman, *supra* note 1, at 337. To contract out of the at-will setting the employee had to exchange some consideration, beside mere labor, that would support a separate contractual obligation. *See, e.g.*, Chatelier v. Robertson, 118 So. 2d 241 (Fla. Dist. Ct. App. 1960) (barring the arbitrary discharge of an employee who sold his business to his employer in exchange for a promise of permanent employment); Carnig v. Carr, 167 Mass. 544, 46 N.E. 117 (1897) (upholding permanent employment contract where employee had given up his business to work for employer with identical business). *See also* Note, *Implied Contract Rights, supra* note 1, at 351 (Because nineteenth-century contract law viewed employees as exchanging "their labor and services for the salary they earned, if they wanted added job security, they had to pay the employer additional consideration to make their arrangement mutual and binding.") (citations omitted); Note, *supra* note 4, at 392. The indpendent-consideration requirement is discussed more fully *infra* notes 70-81 and accompanying text.

6. *See, e.g.*, Chatelier v. Robertson, 118 So.2d 241, 244 (Fla. Dist. Ct. App. 1960).

7. In a tight job market and with the inherent inequality of bargaining power that characterizes most employment relationships, *see infra* notes 12 & 42, it is hardly surprising that employees do not inquire extensively into the technical matters of the employment contract. *See* Blades, *supra* note note 3, at 1410-13.

8. In the context of commercial contracts, courts often imply terms requiring that a contract's duration be for some reasonble period or that it be terminated only in good faith . . . . The at will rule, however, creates the illusion that the employer and employee have already worked out the problems of job security in their mutual best interests before any dispute arises. It seems paradoxical that courts should take these assumptions for granted in the employment context but adopt a more flexible position when dealing with commercial contracts.

Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1832-33 (1980).

I. EMPLOYER INDUCEMENT OF EMPLOYEE RELIANCE AND EXPECTATIONS

American workers harbor a variety of expectations regarding their jobs. They typically expect fair treatment, adequate compensation, and a safe working environment. Some of these expectations are guaranteed by laws such as the civil rights legislation[9] and the occupational safety and health standards.[10] Job security, however, is one important expectation not yet guaranteed by law.[11] Unless a worker can contract out of the common law employment-at-will doctrine, the employer retains unfettered discretion to terminate the employment relationship.[12] Employers who strive to improve productivity by inducing employee reliance on express or implied promises of job security should not be allowed to practice arbitrary discharges simultaneously. An examination of these employer inducements and employee interests will illustrate injustices prevalent in at-will relationships.

A. Employee Reliance

American workers expect and rely upon continuous employment for a variety of reasons. Job security provides a multitude of benefits to employees, from economic stability and the opportunity to plan for the future, to self-esteem and a sense of order.[13] Occupation and employer affiliation are normally focal points of self-identity; working people often describe themselves in terms of their livelihoods.[14] The societal advantages of steady employment are also enormous, as work contributes to family and community stability.[15]

Although each of these interests is an important factor in promoting employee expectations of continuous employment, perhaps the most

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9. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

10. *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976).

11. *See generally* Note, *supra* note 4, at 394-403.

12. *See* St. Antoine, *You're Fired!*, 10 HUM. RTS. 32, 34 (Winter 1982) (Only a "handful" of employees have "knowledge or talents . . . so unusual and valuable that they have the leverage to negotiate a contract for a fixed term with their employer."); *supra* notes 4-5 and accompanying text.

13. *See* WORK IN AMERICA, *supra* note 3, at 3-10; *cf.* Blades, *supra* note 3, at 1413 (claiming that job loss results in mental anguish arising independently of economic concerns). *See generally* Note, *Implied Contract Rights, supra* note 1, at 339 (citing studies of employee self-esteem after discharge from employement).

14. *See* WORK IN AMERICA, *supra* note 3, at 6 ("The question, 'Who are you?', often elicits an organizationally related response, such as 'I work for IBM,' or 'I'm a Stanford professor.' Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.' ").

15. *Cf. id* at 5 (unemployment detracts from positive attitudes towards one's community and family).

influential factor is employer promises of job security. For instance, the mere availability of pensions, vacation pay, and related benefits implies that workers will remain with their employers long enough to realize these deferred benefits.[16] Employer promises thus engender long-term expectations among employees; consequently, employees often forego more immediate rewards.[17]

Deferring immediate rewards is only one of many ways that employees may rely to their detriment on employer assurances. For example, workers may leave present jobs in reliance on promises of a new job, and discover the new jobs no longer available.[18] They may surrender injury awards,[19] relinquish jobs,[20] or sell their homes and relocate[21] yet receive nothing in return. They may confer some extra benefit on their employers yet receive no guarantees of job continuity.[22] They may join pension plans at work, deferring present salary for future financial security, and get fired on the eve of vesting.[23] Ironically, many employers who defeat these reliance interests are themselves the source of the original expectations.

B. Employer Inducements and Business Benefits

Given the tenuous nature of employment in the at-will setting,

16. *See* Note, *Implied Contract Rights, supra* note 1, at 362 ("Under modern employment conditions, longevity often results in the accrual of rights to various fringe benefits that must be considered as part of an employee's compensation.").

17. *See id.* at 362 ("Fringe benefits can be analyzed in market terms: the employee bargains for lower present salary in exchange for the promise of future payments.").

18. *See, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (pharmacist resigned previous employment in reliance on a job offer from a health clinic but the clinic revoked the offer just prior to the starting date); Stern Co. v. Munniks, 101 A.2d 846 (D.C. 1957) (employee quit former position to accept new position but offer was rescinded before he began work).

19. *See, e.g.*, Adkins v. Kelly's Creek R.R. Co., 458 F.2d 26 (4th Cir.), *cert. denied*, 409 U.S. 926 (1972); Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955).

20. *See, e.g.*, Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (employee agreed to leave her employer of 17 years because competitor's representatives promised her permanent employement); Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463 (1961) (employee agreed to give up his work as independent sales consultant to join employer's sales department only because of permanent employment offer); *cf.* O'Neill v. ARA Serv., Inc., 457 F. Supp. 182 (E.D. Pa. 1978) (employee accepted an offer from his employer's competitor in reliance on promise of management position after two years).

21. *See, e.g.*, Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936). *But see* McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970) (allowing employee to recover for his move to Hawaii in reliance on defendant's job offer). *See generally* Foley v. Community Oil Co., 64 F.R.D. 561 (D.N.H. 1974) (discussing the question of fact presented when an employee moved his family at his employer's behest).

22. *See, e.g.*, Cederstrand v. Lutheran Bhd., 263 Minn. 520, 117 N.W.2d 213 (1962) (employee made a loan to the employer); Morris v. Park Newspapers of Georgia, Inc., 149 Ga. App. 674, 255 S.E.2d 131 (1979) (employee made substantial investment to facilitate her participation in employer's operations); Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941) (plaintiff developed highly lucrative advertising page for employer's benefit).

23. *See, e.g.*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (senior employee ar-

employee willingness to forego present compensation in lieu of unenforceable future promises seems ill-advised. Nevertheless, workers are often persuaded that arbitrary discharge, though technically available to the employer, is never used. Employers realize that the specter of random discharge can undermine employee morale and productivity.[24] Consequently, many employers agressively promote a facade of job security. This objective can be accomplished both explicitly and implicitly.

1. Employer Inducements— Express promises of job security are the most obvious inducements used by employers. They can take the form of recruitment lures or retention perquisites. For instance, in *Hope v. National Airlines, Inc.*,[25] an airline facing a crippling strike promised a pilot permanent employment in exchange for working during the strike.[26] He worked through the strike, incurring the anger of fellow employees, yet was fired after the strike ended.[27]

Some types of employer promises or policies only imply job security. Pension and other deferred benefits vest after a certain minimum period of continuous employment.[28] The mere availability of these benefits implies that satisfactory job performance will lead to continued employment and, ultimately, vested rights in these deferred benefits.[29] An employee who has contributed to a pension plan thus has considerable incentive to remain with the employer until the pension vests. The employer, conversely, may have a financial incentive to defeat the vesting of employee

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bitrarily discharged with less than eight months left for pension to vest); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (employee discharged arbitrarily one year prior to retirement).

24. *See* Murg & Scharman, *supra* note 1, at 372; Note, *Job Security, supra* note 1, at 732.

25. 99 So.2d 244 (Fla. Dis. Ct. App. 1957).

26. *Id.* at 245.

27. *Id.* at 246-47.

28. Under the 1974 Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (1976), employee pension rights need not fully vest until after the employee has been with the employer for a certain number of years. Three qualified vesting schedules exist under ERISA. One plan calls for 100% vesting after the employee has worked for 10 years. *See* I.R.C. § 411 (a)(2)(A) (1976). The second calls for gradual vesting over a 15 year period, generally 25% vesting at 5 years, 50% at 10 years, and 100% vesting after 15 years. *See id.* § 411 (a)(2)(B). The third type, "Rule of 45" vesting, computes the sum of the employee's age and length of qualified service; when that is at least 45 *and* the employee has completed at least five years of service, there is a vested right to 50% of the accrued benefit. *See id.* § 411 (a)(2)(C). All three schedules, however, require 50% vesting by the tenth year, and 100% by the fifteenth year.

Employees who quit or are discharged prior to the end of the vesting period are reimbursed for any contributions they made to the plan. *See id.* § 411(2)(1); Treas. Reg. § 1.411(a)-(1)(A)(2) (1981); *see also* Rev. Rul. 69-277, 1969-1 C.B. 116 ("Upon 30 days advance notice to the trustee, participants are allowed to withdraw their voluntary contributions together with the accumulated interest thereon."). Rights to employer contributions, however, are forfeited. *See* Rev. Rul. 74-254, 1974-1 C.B. 91; Rev. Rul. 56-213, 1956-1 C.B. 194. ERISA does not distinguish between employees discharged arbitrarily and those who quit of their own volition.

29. *See* Blades, *supra* note 3, at 1420 (noting that pension benefits induce employees to remain with their employers).

pensions[30] through arbitrary discharge[31] and stringent forefeiture provisions.[32]

2. Business Benefits— Assurances of job security are excellent recruiting aids for employers seeking a competitive edge in hiring.[33] Job candidates may predicate their applications on such assurances, turning down other offers lacking similar guarantees.[34] Employers intent on enticing skilled employees away from competitors also use promises of permanent employment to assuage employee apprehension regarding mid- or late-career job change.[35]

Job security also minimizes labor turnover.[36] Many employers incur significant expense recruiting, selecting, orienting, and placing employees.[37] Most employers, therefore, have a great incentive to protect their financial outlays through promises of job security.

The occasional arbitrary discharge of an employee is unlikely to jeopardize the benefits emanating from collective employee reliance on job security. Other employees are likely to regard the firing as aberrant and insignificant when a just cause discharge policy otherwise prevails.[38] Unless the firing

30. Employers often use actuarial formulas to estimate the percentage of employees that will remain until their pensions vest. Although employers cannot remove contributions that they have paid into a plan, they can redistribute funds forfeited by any arbitrarily discharged employee. By arbitrarily discharging employees prior to vesting, employers can manipulate termination decisions in a way that lowers employer contributions. *See* Maldonado, *How to select acceptable actuarial methods for defined benefit pension plans*, 57 J. TAX'N 14, 14-18 (1982).

31. *See, e.g.*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (senior employee discharged arbitrarily with less than eight months left for pension to vest); Schneider v. McKesson & Robbins, Inc., 254 F.2d 827, 829 (2nd Cir. 1958) (upholding the arbitrary discharge of three senior employees and the forfeiture of their pension benefits, maintaining that the pensions were "payable only to participants [and] appellants ceased to be participants when they were discharged."); *cf.* Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967) (termination of a large group of employees may have been motivated by their employer's desire to quash their pension benefits).

32. *See, e.g.*, Robinson v. United Mine Workers Health & Retirement Funds, 640 F.2d 416 (D.C. Cir. 1981) (denying health benefits to widows of employees who died before applying for retirement benefits or before the slated time for retirement) Guay v. The Master Mates & Pilots Pension Plan, 432 F. Supp. 135 (1977) (executors of employee who was not retired at time of death held without title to his pension benefits). *See also* Edwards, *They're bereft of both spouse and pension*, Detroit Free Press, March 22, 1983, at C1, col. 1 ("About 70,000 women face the prospect of losing benefits if the working spouse dies too early, before retirement age, according to the Pension Rights Center.").

33. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 619, 292 N.W.2d 880, 895 (1980); Murg & Scharman, *supra* note note 1, at 373; Note, *Job Security, supra* note 1, at 732.

34. *See, e.g.*, Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (employee turned down four other job offers to accept employment that offered job security); McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980) (employee forfeited higher paying job offer in exchange for employer's promise of permanent employement).

35. *See* cases cited *supra* note 20.

36. *See* Note, *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security*, 72 YALE L.J. 162, 166-67 (1962).

37. *Id*; *see also The Employment-At-Will Issue*, 111 LAB. REL. REP. (BNA) No. 23, at 25 (Nov. 22, 1982) (costs for terminating and replacing lower-level supervisors range from upwards of $1,000) [hereinafter cited as BNA REPORT].

38. Employees do not like to think about being fired, thus they do not dwell on the possibility

adversely affects employee relations, the cost to the employer of an occasional arbitrary discharge is negligible.[39]

II. CONTRACT-RELATED PROTECTION FOR AT-WILL EMPLOYEES

Most courts have been reluctant to find any contractual obligation of just cause discharge in an at-will employment setting, despite employee reliance on express or implied promises of job security. Unless a discharged employee can show independent consideration, proffered in a traditional mutual bargaining context, no just cause understanding will be enforced.[40] Unionized and other organized workers can meet these judicial requirements and contract out of the at-will rule through collective bargaining negotiations.[41] White-collar and other non-unionized workers, however, rarely have this opportunity.[42] Until the courts become more receptive to protecting reasonable reliance interests or finding an enforceable agreement in the implied terms of employment, at-will employees will remain subject to discharge regardless of their performance. The outdated contract technicalities of the at-will doctrine should be discarded in favor of modern contract theories that protect the reasonable expectations of employers and employees alike.

A. Traditional Contract Law Protection in the At-Will Setting

The employment-at-will doctrine evolved in a pre-industrial era, when temporary labor was a pragmatic response to seasonal agricultural production.[43] Rapid technological change, however, demands radically

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of termination. *See* Note, *supra* note 8, at 1831. Employers also contribute to employee misperceptions of job security by promulgating inaccurate or inconsistent policies. *Id.* Accordingly, employees may believe they have a contractual right to job security even in the face of an express disclaimer to the contrary. *See, e.g.*, Novosel v. Sears, Roebuck & Co., 495 F. Supp 344 (E.D. Mich. 1980); Hanna v. R.C.A. Serv. Co., 336 F. Supp 62 (E.D. Pa. 1971); Kari v. General Motors Corp., 402 Mich. 926, 282 N.W.2d 925 (1978); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981).

39. *See* Blades, *supra* note 3, at 1413. *But see* Brown, *Limiting Your Risks in the Russian Roulette—Discharging Employees*, 8 EMPLOYEE REL. L.J. 380 (1982) (citing recent cases where wrongful-termination suits resulted in millions of dollars in damages).

40. *See infra* notes 43-68 and accompanying text.

41. *See* 2 COLLECTIVE BARGAINING: NEGOTIATIONS & CONT. (BNA) 40:1 (Dec. 28, 1978). It is interesting to note how important job security was to union workers during the early 1980's auto recession. The United Auto Workers union traded billions of dollars in wage and benefit concessions in return for greater job security for its members. *See Labor Relations in an Economic Recession: Job Losses and Concession Bargaining*, 110 LAB. REL. REP. (BNA) No. 23, at 9 (July 19, 1982).

42. *See, e.g.*, Blades, *supra* note 3, at 1411-12 ("Only the unusually valuable employee has sufficient bargaining power to obtain a guarantee that he will be discharged during a specific term of employment only for 'just cause.' "); *accord* St. Antoine, *supra* note 12, at 34.

43. *See generally* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976).

different employment patterns.[44] Because a stable, skilled work force is more conducive to productivity than a changing one, employers now recruit and train with permanency in mind.[45] Consequently, employers encourage employees — both tacitly and explicitly — to regard their jobs as permanent when satisfactorily performed.[46]

The employment-at-will rule, however, evolved to withhold contractual force from assurances of job security.[47] Under this analysis, mere detrimental reliance or implied promises will not support a contract action to enforce just cause guarantees. Rather, employees must prove the traditional contract requirements of independent consideration and mutuality of obligation, or mutually enforcible promises.

1. Mutuality of Obligation— Under the traditional at-will analysis, employees can quit whenever they want and employers can fire them whenever they wish.[48] Courts are reluctant to deviate from this theoretically equitable arrangement due to the practical implications of a mutual just cause standard. Although employers can be required to discharge only for just cause, employees cannot be required to continue working against their will.[49] Nevertheless, judicial equation of a just cause standard with involuntary servitude misinterprets the mutuality of obligation requirement.

Mutuality of obligation does not require the exchange of *identical* promises.[50] It merely precludes judicial enforcement of gratuitous or donative promises in which one party exacts a benefit from another party without providing anything in return.[51] An employer, therefore, can both promise compensation and guarantee just cause discharge though receiving only employee services in exchange.[52] Because both

44. *See* Note, *supra* note 4, at 391-94; *see also* Blades, *supra* note 3, at 1405.

45. *See* Note, *Job Security*, *supra* note 1, at 338-39.

46. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980).

47. *See* Note, *supra* note 8, at 1824 ("Towards the middle of the nineteenth century, however, these customary obligations [between master and servant] were recast in terms of the emerging theory of contract. The principle consequences of this conceptual change was a drastic limitation in the employer's duties to her employee."); *see also* Note, *Job Security*, *supra* note 1, at 706 ("Early in the twentieth century the economy was stable and American business was transformed from the small shop into the giant industrial complex. The power of the employer over the at-will employee became awesome.").

48. *See supra* note 4 and accompanying text.

49. *See, e.g.*, Gollberg v. Bramson Publishing Co., 635 F.2d 224, 228 (7th Cir. 1982) (holding that the principle of mutual reciprocity dictated that because the plaintiff-employee could not be made to stay with the defendant-employer — the court considered that "specific performance" and thus "a form of involuntary servitude" — the employer could not be forced to keep the plaintiff in its employ).

50. *See, e.g.*, Riccardi v. Modern Silver Linen Supply Co., 45 A.D.2d 191, 356 N.Y.S. 2d 372 (1974). *See generally* A. CORBIN, CORBIN ON CONTRACTS § 152 (1963 & C. Kaufman Supp. 1982).

51. *See* A. CORBIN, *supra* note 50, § 152.

52. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 925 (1981) ("There is no analytical reason why an employee's promise to render services, or his ac-

parties have given consideration for the benefits received, and because general contract principles discourage judicial inquiry into the adequacy of consideration,[53] the mutuality of obligation requirement would be fulfilled.[54]

Although employers cannot prohibit employees from quitting, they can exact greater consideration from employees in exchange for guarantees of just cause discharge. Employers can contract for damages which reflect the monetary losses generated by the voluntary departures of employees.[55] The employer's right to reasonable reimbursement costs would then parallel the monetary remedy available to arbitrarily discharged employees.[56] Although these promises still would not be coextensive — the employee could insist on reinstatement but the employer could not require the employee to return to work — the employer would not be without a remedy.

2. Independent consideration— Although mutuality of obligation requires neither equal nor independent consideration, most courts regard independent consideration and mutuality of obligation as coexistent requirements in at-will relationships. Under this traditional analysis, independent considerations serve an evidentiary function in establishing mutual bargaining, which in turn implies mutuality of obligation.[57] For example, prospective employees who confer independent consideration on their employers before the relationship commences presumably have bargained for a benefit beyond compensation, namely, just cause discharge.[58]

Employees who have not given independent consideration to support their reliance on personnel policies and handbook provisions have usually been unsuccessful in proving an implied contractual right to these promises. In *McQueeney v. Glenn*,[59] the employer's handbook featured

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tual rendition of services over time, may not support an employer's promise both to pay a particular wage (for example) and to refrain from arbitrary dismissal.").

53. *See generally* A. CORBIN, *supra* note 50, § 127.

54. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 924-25 (1981) (holding that the independent-consideration requirement "is contrary to the general contract principle that courts should not inquire into the adequacy of consideration").

55. *See, e.g.*, Wilson v. Clarke, 470 F.2d 1218, 1223 (1st Cir. 1972).

56. *See* ABA COMM. ON DEV. THE LAW OF INDIVIDUAL RIGHTS AND RESP. IN THE WORK PLACE, 2 ABA SEC. LAB. & EMPLOYMENT LAW 19.

57. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981) (describing the evidentiary function and noting that "it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service"); *see also* Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 221-26 (1973).

58. *See, e.g.*, Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941) (holding that where an employee promises not only services but also some "additional consideration," this "may be sufficient . . . to show the intent of the parties to enter into a contract for permanent employment"); *accord* Chatelier v. Robertson, 118 So.2d 241, 244 (D.C. Fla. 1960).

59. 400 N.E.2d 306 (1980), *cert. denied*, 449 U.S. 1125 (1981).

a provision detailing pre-discharge procedures.[60] When an employee was discharged in violation of these procedures, the court held that the employer was under no contractual obligation to comply with the handbook.[61] Because no mutual bargaining over the handbook terms had occurred, the employer's right to discharge arbitrarily remained intact.[62]

When courts fail to give any contractal force to such handbook provisions,[63] they ignore employer intentions in proffering written and oral assurances to prospective employees. At-will employers make these promises for the same reasons that other employers enter into collective bargaining agreements — to prevent recurrent haggling over compensation and other terms of employment.[64] Only employers with a limited number of personnel can spare the time to bargain individually with prospective applicants. For large employers, mutual bargaining is cost-effective only when recruiting extremely talented, highly compensated individuals.[65]

Most modern employment relationships are initiated in accordance with pre-existing terms. Employers delegate hiring to personnel managers and recruiters who standardize the hiring process through reference to these terms.[66] Employee acceptance of unilaterally decided terms spares employers the expense and uncertainty of bargaining by allowing them to calculate the terms even before the contract is entered. Employees indicate their acceptance of these terms simply by rendering their services.[67]

Judicial insistence on individualized employer-employee bargaining undermines the efficiency found in these arrangements. Nevertheless continued enforcement of the at-will rule ignores modern notions of detrimental reliance and unilateral contract. By applying these modern

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60. *Id.* at 810.

61. *Id.* at 811.

62. *Id.*

63. In the absence of independent consideration, or mutual bargaining, most courts regard personnel policies and handbooks as unilateral statements lacking in mutuality of obligation. *See, e.g.*, Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982) (dictum); Weiner v. McGraw-Hill, Inc., 83 A.D.2d 810, 442 N.Y.S.2d 11 (1981).

64. *See* Note, *Job Security, supra* note 1, at 726-27; *see also* Note, *supra* note 8, at 1830 ("[I]ndividualized bargaining is impractical because negotiating with a large number of employees in a firm and maintaining adequate records of job security terms involve high administrative costs.").

65. *See supra* note 42.

66. *See* Note, *supra* note 8, at 1830-31.

67. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 630, 292 N.W.2d 880, 900 (1980) ("[T]he typical employment agreement is unilateral in nature. Generally, the employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based. The employer's promise constitutes, in essence, the terms of the employment agreement . . . .").

contract doctrines and eschewing the artificial analysis often found in the independent-consideration cases,[68] courts could protect workers from arbitrary discharge while avoiding the inefficiency of individual bargaining.

B. Emerging Contract Law Protection in At-Will Setting

A variety of modern contract approaches can be used to protect employees in at-will settings. Reasonable reliance losses, not sufficient to support a contract, can be recouped under promissory estoppel. Employers unjustly enriched by retaining the vested benefits of discharged employees can be forced to relinquish such windfalls in quasi-contract actions. Finally, job security promises made by employers for business reasons can be enforced as implied contract terms that abrogate the at-will rule.

1. Promissory estoppel—Under the equitable doctrine of promissory estoppel a promisor who has induced reasonable reliance may not deny that a contract was made when the non-enforcement of the promise would cause injustice to the promisee.[69] Although bargained-for consideration is a traditional contractual prerequisite, unbargained-for reliance frequently is regarded as the equivalent of consideration under a promissory estoppel analysis.[70]

Promissory estoppel has gained limited judicial acceptance in arbitrary discharge cases.[71] Courts endorsing this doctrine have set certain guidelines for its application in at-will relationships. For instance, an employee's subjective expectation of discharge for just cause will not constitute the necessary unbargained-for reliance.[72] An employer must have known or reasonably expected that its promise would induce a substantial change of position by the employee.[73]

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68. Courts and commentators have recognized the unjustifiable results that stem from the overly wooden mutuality of obligation requirement. *See, e.g.*, Drzewiecki v. H. & R. Block, Inc., 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169, 174 (1972) (urging courts to "avoid mechanical and arbitrary tests" in the employment setting and to focus on the intentions of the parties and the circumstances under which the agreement was made); Note, *Job Security, supra* note 1, at 705 (noting that mutuality of obligation is being displaced by closer attention to consideration and that the definition of consideration in § 75 of the *Restatement (Second) of Contracts* has been entended to unilateral and bilateral promises such as often arise in the employment setting).

69. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1970).

70. *Id.*; *see also* A. CORBIN, *supra* note 50, §§ 193 & 196A.

71. *See* Fuchs, *Promissory Estoppel and Employment Agreements*, 49 N.Y. ST. B.J. 386, 390 (1977) (noting the haphazard application of the doctrine, "especially when dealing with employment agreements"); Comment, *supra* note 57, at 235 (noting that uneven application of § 90, particularly in employment decisions, often occurs because "what is unjust to one court may seem nothing more than a bad bargain to another").

72. *See* Schwartz v. Michigan Sugar Co., 106 Mich. App. 471, 308 N.W.2d 459 (1981); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977).

73. *See* Fuchs, *supra* note 71, at 390.

For example, in *Grouse v. Group Health Plan, Inc.*,[74] a pharmacist resigned his previous employment in reliance on a job offer from a health clinic.[75] When the clinic revoked its offer just prior to the starting date, the pharmacist sued for damages resulting from his detrimental reliance on the offer.[76] The clinic argued that an employee terminated a day before work is scheduled to begin should not be able to claim promissory estoppel when this doctrine is not available to an employee terminated the day *after* work begins.[77] The court rejected this defense, maintaining that promissory estoppel may be operative even after employment has begun.[78]

The estoppel doctrine is particularly adaptable to employment-at-will because it measures damages in the absence of explicit contractual terms.[79] If the employee would have been hired at will, damages ought to be limited to financial outlays or opportunity costs incurred in detrimental reliance on the employer's assurances.[80] If, however, the employer's practices imply just cause protection for its employees, the court should futher include a measure of lost wages in its calculation of reliance damages.[81]

2. Quasi-contract— Unjust enrichment is a quasi-contractual remedy that requires one who has wrongfully procured services or money at the expense of another to make restitution.[82] Because certain fringe and deferred benefits constitute compensation under the at-will rule,[83] courts have allowed arbitrarily discharged employees recovery in quasi-contract.[84] Under this theory, employers who cause the forfeiture of these benefits through the arbitrary discharge of the intended recipients

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74. 306 N.W.2d 114 (Minn. 1981).

75. *Id.* at 115.

76. *Id.* at 116.

77. *Id.*

78. *Id.*

79. *See* Stern Co. v. Munniks, 101 A.2d 846, 847 (D.C. 1954) (Employee quit former position to accept new job but offer was rescinded before he began work. Although the contract did not specify term of employment, the court awarded the employee one month's salary, asserting that "the parties contemplated at least one month's employment."); *see also* Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (1979) (Employee left long-standing job to accept new job offer but was fired two days before the end of a probation period of which he had not been informed. To avoid injustice to the employee the court interpreted the probation period as a term of employment.).

80. *See, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) ("Since . . . the prospective employment might have been terminated at any time, the measure of damage is not so much what [the employee] would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.").

81. *See generally* Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L.J. 207 (1980-81).

82. *See* A. CORBIN, *supra* note 50, § 19.

83. *See* Note, *Implied Contract Rights, supra* note 1, at 362; Note, *supra* note 36, at 166.

84. *See, e.g.*, Fredericks v. Georgia-Pac. Corp., 331 F. Supp. 422 (E.D. Pa. 1971).

are unjustly enriched and must return their undeserved gains.[85]

Promises of just cause discharge have not been upheld in quasi-contract. Courts have allowed employees to recover deferred benefits but simultaneously have denied them damages resulting from arbitrary discharge.[86] The disparate treatment of these respective promises reflects the at-will notion that the employer owes the employee only compensation.[87] It also reflects the difficulty of quantifying the fiscal benefit that an employer receives as a result of a discharged employee's *past* reliance on a just cause discharge policy. Moreover, mere unjust enrichment, in the absence of any bilateral intent to contract, cannot support a formal contract.[88] Accordingly, quasi-contract is effective only when recovery of deferred benefits is the desired goal.

3. Implied contract terms— An implied contract analysis recognizes that a contractual obligation may exist between two parties even in the absence of a formal or written contract.[89] In at-will relationships, however, most courts will not imply contractual intent for terms other than compensation in the absence of independent consideration.[90] This judicial rationale is based on the presumption that an employer would not promise compensation and guarantee just cause discharge unless the employee provided some beneift in addition to services rendered.[91] Employers can, however, realize independent consideration of their own design through the unilateral formulation of optimal terms.[92] Due to their unequal bargaining power, employees cannot negotiate these terms.[93] Nevertheless, by accepting employment and rendering services, employees demonstrate their acceptance and consequent reliance on these terms.[94]

Employers who induce reasonable employee reliance with express or implied promises of job security should not be entitled to assert lack of independent consideration as a defense to implied contract actions. Recognizing the benefits that at-will employers gain from illusory promises, some courts have held that an employer's express or implied policies may constitute an implied contract for just cause discharge.[95] This implied contract remedy better comports with contract law than

85. *See* Note, *supra* note 36, at 167.
86. *See, e.g.*, Gram v. Liberty Mut. Ins. Co., 81 Mass. Adv. Sh. 2287, 429 N.E.2d 21 (1981).
87. *See supra* note 5.
88. *See* A. CORBIN, *supra* note 50, §§ 19-19A.
89. A. CORBIN, *supra* note 50, § 18.
90. *See supra* notes 57-68 and accompanying text.
91. *See supra* notes 57-58 and accompanying text.
92. *See supra* notes 64-67 and accompanying text.
93. *See supra* notes 42 and accompanying text.
94. *See supra* notes 67 and accompanying text.
95. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980).

a superficial determination based solely on the presence or absence of independent consideration.[96] This approach thus represents an essential judicial reform.

Under an implied contract analysis, employees need not provide additional consideration through their own initiative. For example, in *Toussaint v. Blue Cross and Blue Shield of Michigan*,[97] the Michigan Supreme Court vindicated an employee's reliance on oral and written assurances that satisfactory job performance would ensure continuity of employment *Toussaint* acknowledged the benefits the employer, Blue Cross, enjoyed through its calculated promise of job security.[98] Blue Cross sought to procure not only Toussaint's services, but the *continuity* of his services.[99] Because Blue Cross intentionally induced Toussaint's reliance on the job security promise, the court found an implied contract of just cause discharge.[100]

The California courts have acknolwedged that an employer's promise of just cause discharge can be supported by an employee's performance of services over time.[101] Employers who arbitrarily discharge in contravention of such promises violate an "implied-in-law covenant of good faith and fair dealing."[102] The arbitrary discharge of an employee with eighteen years of service breached this covenant in *Cleary v. American Airlines, Inc.*,[103] because the employer's de facto policies evidenced a promise to terminate only for just cause.[104] California also has recognized "implied-in-fact" promises of just cause discharge on the basis of employer communications of job security, longevity of employment, and discharge policies common to the industry of the employer.[105]

The Supreme Court also uses the "common law of the job" as an evidentiary standard in breach of implied contract actions.[106] Although this standard traditionally has been used to imply terms missing from

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96. *See supra* note 68 and accompanying text.

97. 408 Mich. 579, 292 N.W.2d 880 (1980).

98. *Id.* at 619, 292 N.W.2d at 895.

99. *Id.*

100. *Id.* at 614-15, 292 N.W.2d at 892-93.

101. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980).

102. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980); *see also* Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976); Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972); Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1976).

103. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

104. *Id.* at 456, 168 Cal. Rptr. at 729.

105. *See* Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982); *see also* cases cited *supra* note 119.

106. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 602 (1972).

collective bargaining agreements,[107] the Court has applied it to at-will relationships. In *Perry v. Sinderman*,[108] the Court analyzed a professor's assertion of a contractual right to tenure with reference both to the employer's handbook provisions and de facto policies.[109] *Perry* is a landmark employment contract decision because it acknowledged that an employer's de facto policies may give rise to contractually enforceable employee rights.[110]

The Court's analysis in *Perry* did not indicate which evidentiary standard should prevail when a disclaimer and de facto policy of just cause discharge exist contemporaneously. Nevertheless, some federal and state court decisions have held that de facto policies may negate the effect of written disclaimers designed to insulate employers from contractual liability.[111] In light of these decisions and the Supreme Court's endorsement of the "common law of the job" as an evidentiary standard, employers can no longer exercise arbitrary discharge with complete impunity. Only when such discharges coincide with de facto policies should they be upheld. Because most employers value successful recruitment, employee morale, and reduced turnover more than the occasional exercise of arbitrary discharge,[112] widespread abandonment of just cause policies is unlikely.[113] Moreover, implied contract does not infringe on employer autonomy to unilaterally promulgate and enforce such standards in accordance with productivity goals; it simply prevents employers from breaking express or implied promises.

Employers who seek to reduce their liability for breach of implied contract should incorporate reasonable grounds for discharge, rather

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107. *See* Note, *Implied Contract Rights, supra* note 1, at 360-61. *See also* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959).

108. 408 U.S. 593 (1972).

109. *Id.* at 600.

110. *Id.* at 602. *See generally* Note, *Implied Contract Rights, supra* note 1, at 347-50, 356-61.

111. *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969); Kari v. General Motors Corp., 402 Mich. 926, 282 N.W.2d 925 (1978); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981).

112. *See* Murg & Scharman, *supra* note 1, at 372; Note, *Job Security, supra* note 1, at 732; *see also* BNA REPORT, *supra* note 37, at 20.

113. Some employers arguably need to retain the right to discharge arbitrarily. An employer that subcontracts out the services of its employees to clients needing domestic, clerical, or security services will not want to retain employees who, for whatever reason, fail to meet the client's specifications. *See* Note, *Implied Contract Rights, supra* note 1, at 359. An employer whose economic viability depends upon quick capitalization on popular consumer fads may need a constant influx of new employees for new ventures. An employer in a high turnover industry, with easy access to new employees, may have no economic reasons to promote worker continuity. *See* Fleeson, *At fast-food chains, the help is low priced, too*, Philadelphia Inquirer, Jan. 17, 1983, at 1, col. 3 (discussing the 300% annual turnover in fast food and the relative ease of hiring trainable replacements).

If an employer values the right of arbitrary dicharge over a stable work force, an express disclaimer of job security should be held valid. Because the nature of such businesses is not conducive to a de facto policy of just cause discharge, the disclaimer will not mislead the employee.

than disclaimers, in employee handbooks.[114] Those who comply with these standards will then have an evidentiary advantage in defending against employee lawsuits.[115]

CONCLUSION

Continued judicial adherence to the employment-at-will doctrine ignores the complexity of modern employment relationships. In addition to compensation, most employers promise job security, deferred benefits, and other incentives that facilitate the recruitment and retention of employees. Employees accept these promises by rendering their services and any subsequent employee reliance on these terms should be protected. The most efficient method of protecting such employees would be through judicial application of promissory estoppel, quasi-contract, and unilateral contract.

Courts should regard arbitrary discharge as a breach of implied contract for just cause discharge when de facto employer policies indicate an employer's intent to induce and benefit from employee reliance on job security promises. By adopting employer policies as the evidentiary standard in breach of implied contract actions, courts can safeguard reasonable employee expectations without infringing on employer autonomy to unilaterally define the employment relationship. More importantly, by eschewing superficial determinations based solely on the presence or absence of independent consideration, courts will eliminate some of the injustices that modern contract theories were intended to reform.

—Clare Tully

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114. *See* BNA REPORT, *supra* note 37, at 20 (claiming that employers could "establish 'a wide array' of just cause or good cause reasons for discharge and state these reasons in personnel publications"); Note, *supra* note 8, at 1841 ("[L]egitimate grounds for discharge might include incompetence or continued unsatisfactory job performance after warnings and training; clear violations of reasonable work rules of which the employee was or should have been aware; unauthorized absences; and insubordination.").

115. *See* BNA REPORT, *supra* note 37, at 20 ("The availability of a grievance mechanism, along with progressive discipline, would offset the probability of employee suits and 'at the very least would assist an employer in arguing in court that it has dealt fairly with employees.' ") (quoting Charles G. Bakaly, Jr.); *cf. id.* at 21 ("[A]n employee who has received more than one disciplinary action prior to dismissal has very little chance of success in court . . . .") (paraphrasing Ralph Baxter); Note, *supra* note 12 at 1842 ("[T]he development of . . . what constitutes an unjust discharge will encourage out-of-court settlement of the claims that do arise.").