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PUBLIC POLICY AND CONTRACTUAL EXCEPTIONS TO THE EMPLOYMENT AT-WILL DOCTRINE

1. Employment At-Will

The traditional doctrine of at-will employment permits an employer to terminate an employee for a good reason, bad reason, or no reason at all. However, there are several exceptions to the at-will doctrine. These exceptions include: public policy theories (including statutory and constitutional) and contract theories (including express and implied-in-fact contracts and promissory estoppel).

2. Exceptions Based On Public Policy

Although legislatures and courts differ as to what constitutes "public policy," there is a general agreement that employers should not be allowed to discharge employees for reasons that are contrary to a clearly established policy of the state. Public policy theories most commonly arise in cases involving claims of discharge in retaliation for the employee's exercise of a legal right, fulfillment of a legal obligation, reporting a statutory violation, or refusing to violate a statute.

1. Sources Of Public Policy

Most jurisdictions require that public policy claims be based on policies articulated in constitutional or statutory provisions. In some jurisdictions, however, public policy claims may be based on administrative regulations or other substantial and fundamental non- statutory proclamations.

1. Constitution Or Statute

Case Example: ***Strozinsky v. School District of Brown Deer, 237 Wis. 2d 19 (2000):*** A former employee who was responsible for preparing a public school district's payroll at its central office stated a claim or wrongful discharge in violation of public policy based on the provisions of a state statute proscribing false reporting in business dealings and federal tax statutes establishing penalties for failing to withhold payroll taxes and falsifying tax records.

The defendant employed the plaintiff as a payroll clerk. In her capacity as a payroll clerk, the plaintiff was responsible for bookkeeping and payroll duties, and she determined the federal and state tax withholdings for all payroll checks issued to the defendant's employees. The plaintiff resigned from her position after a disagreement with her superiors about the tax withholdings from a bonus check. The plaintiff filed a lawsuit contending that the defendant had forced her to resign because of her efforts to comply with the public policy articulated in a Wisconsin statute proscribing false reporting in business dealings and federal tax laws. The trial court granted the defendant's motion for summary judgment on the ground that the plaintiff did not satisfy the public policy exception to the employment at-will doctrine. The Court of Appeals reversed and the defendant appealed.

The Wisconsin Supreme Court held that the wrongful discharge claim was actionable under the narrow public policy exception to the employment at-will doctrine because the plaintiff had identified a fundamental and well defined public policy in the Wisconsin statute proscribing false reporting in business dealings and federal tax laws. The Wisconsin Supreme Court also held that the constructive discharge doctrine applies to a claim for wrongful discharge in violation of public policy.

2. Administrative Regulation

Case Example: *Green v. Ralee Engineering Co., 19* Cal. *4th 66 (1998):* A claim for wrongful termination in violation of public policy may be based on the public policy stated in federal safety regulations promulgated to address important public safety concerns.

The defendant manufactured parts for civilian airplane manufacturers such as Boeing and military aircraft manufacturers such as Northrop. The plaintiff worked for the defendant as a quality control inspector on the night shift. On numerous occasions, the plaintiff complained to his supervisors, managers and the company president that the defendant was shipping defective airplane parts to the various manufacturers. As a result of the plaintiffs complaints, the defendant modified its shipments to Northrop; however, it continued to ship allegedly defective parts to Boeing. The plaintiff then photocopied inspection reports and other reports concerning the allegedly defective parts in order to provide proof of the ongoing practice. Shortly thereafter, the defendant shut down its night shift, citing a downturn in orders for parts. The defendant discharged a number of night shift employees, including the plaintiff. At the same time, however, the defendant retained several night shift inspectors, including some who had less experience than the plaintiff.

The plaintiff sued for wrongful termination, alleging that the defendant terminated him in retaliation for his complaints about inspection practices. He also claimed that he was entitled to wrongful termination tort damages because his complaint served a broad public policy favoring aviation safety, as embodied in the Federal Aviation Act as a whole.

The California Supreme Court held that a plaintiff may base a wrongful termination claim on the public policy articulated in federal regulations promulgated to enforce the Federal Aviation Act:

> In California, administrative agencies routinely adopt quasi-legislative regulations under express statutory authority. For such regulations to be valid in this state, they must be consistent "with the terms or intent of the authorizing statute." A valid regulation must also be "reasonably necessary to effectuate the statutory purpose" of its authorizing legislation. Federal law is similar. It therefore follows that if a statute that seeks to further a public policy objective delegates the authority to adopt administrative regulations to an administrative agency in order to fulfill that objective, and the agency adopts regulations that are within the scope of its statutory authority and effectuate the statutory policy, then those regulations may be manifestations of important public policy.

Because the Federal Aviation Administration adopted the federal air safety regulations at issue in order to effectuate the statutory policy of air safety, those regulations were sufficient to anchor the plaintiffs public policy tort claim.

A. Terminations For Exercising A Legal Right

1. Wage Garnishment

Case Example: ***Phillips v. Gemini Moving Specialists,*** *63* **Cal. App. 4th** *563 (1998):* Terminating an employee in retaliation for complaining about an improper deduction from wages violates public policy.

The plaintiff was an employee of one of the defendants, Gemini. The plaintiff was terminated after complaining that Gemini and its paymaster, Mark Luni, improperly deducted, from his paycheck, the costs of having a company van towed. The plaintiff sued Gemini and Luni for wrongful discharge in violation of public policy, alleging that his termination violated the public policy favoring prompt payment of employment compensation for the economic benefit of the worker. The plaintiff alleged that the deductions violated the California Labor Code and constituted an illegal setoff of debts. The plaintiff also alleged that he was terminated for seeking to protect his statutory rights to employment compensation by questioning the defendants about their right to make the payroll deduction and objecting to the manner in which the deduction was made. The trial court sustained the defendants' demurrers and dismissed the plaintiffs claim.

The Court of Appeal reversed the trial court as to the plaintiffs employer, Gemini, and held that the plaintiff had properly stated a claim for wrongful termination in violation of public policy. The Court of Appeal reasoned that "[T]here is in this state a fundamental and substantial public policy protecting an employee's wages, and that protection includes freedom from setoffs such as the one Plaintiff has alleged in his complaint." Accordingly, the Court of Appeal found that the plaintiff had stated a cause of action for wrongful discharge in violation of public policy.

The Court of Appeal affirmed the trial court's decision regarding Luni because Luni was not the plaintiffs employer, and thus, could not be held liable for wrongful discharge in violation of public policy.

2. Consulting With An Attorney

Case Example: ***Simonelli v. Anderson Concrete Co.,*** **99 Ohio App. 3d 254 (1994):** The act of firing an employee for consulting with an attorney could serve as the basis for a public policy exception to the employment at-will doctrine.

After the defendant gave the plaintiff a final disciplinary warning, the plaintiff contacted an attorney who faxed a letter to the defendant demanding that the warning be removed from the plaintiffs file. Thereafter, the defendant terminated the plaintiffs employment. The plaintiff sued the defendant for wrongful discharge in violation of public policy, alleging that her employment was terminated because she engaged the services of an attorney. The defendant moved for summary judgment on the ground that plaintiff failed to allege a violation of a specific statute. The trial court granted the defendant's motion for summary judgment.

The Court of Appeals reversed and held that the act of firing an employee for consulting an attorney could serve as the basis for a public policy exception to the employment at-will doctrine. In so holding, the Court of Appeals relied on the reasoning of *Thompto v. Coborn's Inc., 871 F. Supp. 1097 (N.D.* Iowa *1994),* in which that court found a public policy exception based on a number of factors, including the legislative recognition of the state judiciary to regulate the legal profession, the Iowa Supreme Court's adoption of the Code of Professional Responsibility, and the fact that Congress has recognized the importance of consultation and employment of legal counsel to vindicate civil rights through federal statutory provisions awarding attorneys' fees to prevailing plaintiffs.

3. Workplace Safety

Case Example: ***Cabesuela v Browning Ferris Indus. of Cal.,* Inc., 68 Cal. App. 4th 101 (1998):** An employee stated causes of action for wrongful termination in violation of public policy and in violation of labor statutes by alleging he was terminated for making a complaint about unsafe working conditions.

At a meeting to discuss health and safety issues, the plaintiff questioned the health and safety risks involved in the truck drivers' extended working hours of more than 12 hours per day and more than 60 hours per week. Sometime before this meeting, an employee had killed another employee and then committed suicide. After the plaintiff expressed his concerns at the meeting of the safety hazard, another employee said to trust in the company. The plaintiff responded, "Trust you? Over trust we just had a killing." The plaintiffs manager told the plaintiff that she took the plaintiffs words at the meeting to be a threat of physical violence against her. The manager suspended the plaintiff that day, and the following week, the plaintiff was terminated.

The plaintiff brought suit alleging wrongful termination in violation of public policy and in violation of labor statutes, fraud and deceit, interference with civil rights, defamation, and intentional infliction of emotional distress. The district court sustained defendant's demurrer without leave to amend as to one cause of action and with leave to amend as to the others.

On appeal, the court held that the plaintiff (1) stated causes of action for wrongful termination in violation of public policy and in violation of labor statutes by alleging he was terminated for making complaints about unsafe working conditions; (2) did not state a cause of action for interference with the exercise of a constitutional or statutory right; (3) did not adequately allege publication in defamation claim; and (4) stated a claim for intentional infliction of emotional distress. Specifically, the court found that the defendant had terminated the plaintiff because he had exercised his right under California Occupational Safety and Health Administration to discuss the homicide-suicide as affecting the health and safety of the plaintiff and other employees and had complained of the long hours the drivers were required to work, which the plaintiff believed to be a health and safety hazard. The court found that public policy requires that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe.

B. Satisfying A Legal Obligation

1. Reporting Elder Abuse Or Neglect

Case Example: ***Hausman v Saint Croix Care Ctr., 214 Wis.* 2d 655 (1997):** An employer who discharges an employee for fulfilling a legal obligation to prevent abuse or neglect of nursing home residents can be liable for wrongful termination.

The plaintiffs were former employees of the defendant which was a nursing home. The plaintiffs made repeated complaints to management regarding what they perceived to be inappropriate care of the elderly patients at the nursing home. When management took no action in response to the plaintiffs' complaints, the plaintiffs contacted the state officer in charge of complaints made by or on the behalf of providers of nursing home care. Shortly thereafter, one of the plaintiffs was terminated for alleged misconduct and the other one was terminated due to alleged "budgetary constraints."

The plaintiffs filed a lawsuit for wrongful termination in violation of public policy. They alleged that they were terminated in contravention of an express statute prohibiting a nursing home from retaliating against an employee who provides information regarding abuse or neglect to a state official. Additionally, the plaintiffs cited a state statute conferring a duty to report abuse or neglect on persons

employed in nursing care facilities. After their suit was dismissed by the circuit court for failure to state a claim upon which relief could be granted, the plaintiffs appealed. The Court of Appeals affirmed, holding that the plaintiffs did not meet the requirements of Wisconsin's public policy exception, which applies only when an employer commands or requests that an employee violate an express public policy.

The Wisconsin Supreme Court reversed the decision of the trial court and held that the plaintiffs had stated a claim for wrongful termination in violation of public policy because the plaintiffs' compliance with a Wisconsin statute requiring them to take action to prevent abuse or neglect of nursing home residents comported with the public policy exception to the employment at-will doctrine. The Court reasoned that "where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action." The Court stated that in such instances, the employee may purse a wrongful termination in violation of public policy action regardless of whether the employer has made an initial request, command, or instruction that the reporting obligation be violated.

C. Reporting A Statutory Violation

a. Whistleblowing To A Regulatory Authority

Case Example: *Flenker v. Williamette Industries, Inc.,* 266 Kan. 198 (1998): An employee who is discharged for reporting safety violation to the Occupational Safety and Health Administration may state a claim for wrongful discharge in violation of public policy.

The plaintiff filed a complaint with the Occupational Safety and Health Administration alleging violations concerning the safety of the defendant's equipment. Shortly thereafter, the defendant terminated the plaintiffs employment allegedly because the plaintiff had failed to obey the teens of a Rehabilitation Agreement he had signed under the Alcohol and Drug Use Policy. The plaintiff filed a lawsuit in which he alleged that his employment was terminated because he reported unsafe working conditions to the OSHA. The defendant removed the action to federal court.

The Tenth Circuit certified a question to the Kansas Supreme Court which the Kansas Supreme Court restated as: "Does the remedy provided by OSHA § 11(c) for employees who allege that they have been discharged in retaliation for filing complaints under the statute preclude the filing of a Kansas common law wrongful discharge claim under Kansas' public policy exception to at-will employment?"

The Kansas Supreme Court answered the certified question in the negative. The Court reasoned that OSHA did not provide an adequate alternative remedy.

b. Whistleblowing To The Public

Case Example: *Frederick v. Simmons Airlines, Inc.,* 144 F. 3d 500 (7th Cir. 1998): An employee stated a claim for wrongful termination in violation of public policy where he alleged that his employer, an airline company, terminated his employment in retaliation for his public criticism of the airline's safety record.

The plaintiff was a pilot who worked for Defendant Simmons Airlines, which was owned by Defendant AMR corporation ("AMR"). The plaintiff was critical of the safety record of the AMR aircraft Simmons used on many of its flights. Following a crash of an AMR airplane, the plaintiff distributed leaflets about the airplane and appeared on "Good Morning America" to discuss his safety

concerns. The plaintiffs employment was subsequently terminated and he alleged that the defendants caused the revocation of his medical certification by the Federal Aviation Administration, rendering him unable to work as a pilot.

The plaintiff sued for tortious interference with prospective economic advantage against all the defendants and retaliatory discharge against Simmons. The defendants filed a motion to dismiss. The court, applying Illinois law, rejected the defendants' arguments that a retaliatory discharge claim could not be maintained. The court stated that it was "not willing to hold that Illinois has no public policy interest in the safety of the aircraft that fly into and out of Illinois airports." It further stated that, in the context of a motion to dismiss, it would not preclude the plaintiff from asserting a retaliatory discharge claim for an employee taking his concerns directly to the public instead of to the employer or a governmental authority. It noted that the Illinois Supreme Court had not addressed such a case, but that one appellate court case supported the conclusion that a retaliatory discharge claim could be based on dissemination of information to the public.

D. Refusing To Violate A Statute

Case Example: *Lins v. Children's Discovery Centers of America, Inc.,* 95 Wash. App. 486 (1999): An employee's refusal to follow the orders of her superior to fire other employees because they intended to file workers' compensation claims was protected by public policy.

The plaintiff and five of the defendant's other employees were injured in an auto accident that occurred during the course and scope of their employment with the defendant. A week or two after the accident, the plaintiffs superior told her to fire the five other employees because two of them were consulting attorneys and contemplating suing the defendant and the superior did not trust them or the other three employees not to sue the defendant. The plaintiff refused to terminate the employment of the five employees. Shortly thereafter, the plaintiffs superior gave her a poor performance appraisal and put the plaintiff on probation. A few weeks later the plaintiffs superior terminated the plaintiffs employment.

The plaintiff sued the defendant alleging that she had been wrongfully discharged "in violation of the public policy of the state of Washington which mandates that an employee may not be terminated for refusing to perform an illegal act." The defendant moved for summary judgment arguing that although it could not fire an employee for filing a workers' compensation claim, it could lawfully fire an employee for refusing to obey an unlawful order to fire other employees because the others had filed workers' compensation claims. The trial court granted the defendant's motion.

The Court of Appeals reversed and held that public policy prevents an employer from retaliating against an employee for the employee's refusal to carry out the employer's clearly unlawful order. The Court of Appeals reasoned that if an employer could fire an employee for refusing to fire another employee for filing a workers' compensation claim, then the public policy against firing an employee for filing a workers' compensation claim would be jeopardized whereas if the employee's refusal to carry out a clearly unlawful order is protected, then the public policy stated by the legislature and the Supreme Court would be served.

I. Exceptions Based on Contract Theories

A. Express Contracts

Case Example: ***Rooney v Tyson, 91 N.Y.* 2d *685 (1998):*** Oral contract for employment to last as long as a professional boxer's career is for definite duration and not at-will.

The plaintiff agreed with the defendant's legal guardian to train the defendant without compensation until he became a professional boxer and, when the defendant became professional, the plaintiff would be his trainer for as long as the defendant fought professionally. The plaintiff then trained the defendant for 28 months without compensation. After the defendant turned professional, he authorized his manager to publicly state that the plaintiff would be his trainer for the duration of his professional fighting career. A few years later, the parties had a falling-out and the defendant terminated the boxer-trainer relationship with the plaintiff.

The plaintiff filed suit in federal court for breach of the oral agreement. A jury found in favor of the plaintiff and awarded him $4,415,615. The trial judge then granted the defendant's post-trial motion for judgment as a matter of law, based on the defendant's argument that the agreement was for indefinite duration and was, therefore, an at-will employment relationship under New York law. The plaintiff appealed to the Second Circuit, which certified the question to the New York Court of Appeals "whether an oral personal services contract between a fight trainer and a boxer to last 'for as long as the boxer fights professionally' provides a definite legally cognizable duration."

Under New York law, if an agreement contains no term of definiteness or no express limitation, there is a rebuttable presumption that the employment is at-will. Amorphous terms, such as "permanent," "indefinitely" and "yearly," have been found to be indefinite. The at-will presumption, however, does not apply to a contract for a definite duration.

The Court of Appeals held that the agreement at issue was for a definite duration and, therefore, did not fall within the at-will framework. It stated that a definite calendar date was not a requirement for finding a definite duration in a contract. Even though the duration of the agreement at issue was not precisely calculable, the court found that it was understood by the parties and ascertainable by objective benchmarks. In rendering its decision, the court noted the narrow issue that was before it. It reiterated that the decision did not alter the principles of commercial agreements and noted that the oral nature of the agreement was not an issue before the court.

B. Implied-in-Fact Contracts

1. Totality of Circumstances

Case Example: ***Guz v Bechtel Nat'l, Inc., 24*** **Cal. 4th 317 (2000):** Twenty-two year employee did not create issues of fact on implied contract, breach of covenant and age discrimination claims.

The plaintiff, age 49, was employed by the defendant for twenty-two years before he was placed on holding status and eventually terminated. During his employment, he received six major promotions, seventeen merit raises, a performance award in 1992, and positive performance reviews. In late 1992, the defendant began implementing a transition plan whereby it consolidated the plaintiff s work group into another group, and then disbanded it because of a downturn in workload. The plaintiff was placed on holding status awaiting possible reassignment for four-and-a-half months before being terminated. He received no offers for other employment from the defendant.

The plaintiff sued, alleging causes of action for breach of an implied contract not to be terminated without cause, breach of the implied covenant of good faith and fair dealing, and age discrimination under the California Fair Employment and Housing Act. The defendant moved for summary judgment, which the trial court granted, finding that the plaintiff was an at-will employee and that he had failed to establish a prima facie case of age discrimination. The Court of Appeal reversed, and the California Supreme Court granted review.

The California Supreme Court held that (1) the defendant had an absolute right to eliminate the plaintiffs work unit and to transfer the unit's responsibilities to another company entity; (2) based on the evidence before it, the plaintiff did not have a claim for breach of an implied contract; (3) the plaintiff did not have an independent claim for breach of the implied covenant of good faith and fair dealing; and (4) the plaintiff failed to show that the defendant discriminated against him on the basis of his age.

With respect to the breach of implied contract claim, the California Supreme Court reasoned that "absent other evidence of the employer's intent, longevity, raises, and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves,* additionally constitute a contractual guarantee of future employment security." The California Supreme Court recognized, however, that "over the period of an employee's tenure, the employer can certainly communicate, by its written and unwritten policies and practices, or by informal assurances, that seniority and longevity *do* create rights against termination at will."

The California Supreme Court stated that if there was any significant evidence that the plaintiff had an implied contract against termination at will, that evidence flowed exclusively from the defendant's written personnel documents. The Court ultimately concluded that based on those documents, the Court of Appeal erred in finding that the plaintiffs implied contract claim was triable.

With respect to the plaintiffs implied covenant claim, the California Supreme Court held that the trial court correctly dismissed that claim. The Court reasoned that to the extent that the claim seeks to impose limits on the defendant's termination rights beyond those to which the parties actually agreed, the claim is invalid and to the extent that the claim seeks to invoke terms to which the parties did agree, it is superfluous of the breach of contract claim. The Court stated that the plaintiffs remedy, if any, for the defendant's alleged violations of its personnel policies would depend on proof that they were contract terms to which the parties had actually agreed.

2. Written At-Will Employment Contracts And An Employer's Oral Assurances

Case Example: *Halvorsen v Aramark Uniform Serv, Inc.,* 65 Cal. App. 4th 1383 (1998): A written employment contract providing for at-will employment precludes the existence of an implied contract requiring good cause for termination. Alleged statements by employee's superiors were insufficient to modify written at-will agreement. Managers have an absolute privilege to induce a company to terminate an at-will employee.

The defendant Aramark employed the plaintiff as a district manager under a written employment contract which provided that the plaintiff would be employed for at least three months, and then could be terminated upon two weeks notice. Co-defendant Peter Scianna was the plaintiffs immediate superior. When Aramark's management criticized the plaintiff for purchasing linens for a customer without securing a long-term contract, the plaintiff stated that Scianna had approved the purchase. Shortly thereafter, Scianna accused the plaintiff of lying and the company fired the plaintiff for performance reasons.

The plaintiff sued for breach of contract and breach of the implied covenant of good faith and fair dealing. He also sued Scianna for intentional interference with contractual relations. Aramark moved for summary judgment on the grounds that the plaintiff was an at-will employee and could be terminated without cause. Scianna demurred on the grounds that his actions were privileged. The trial court granted both Aramark's motion for summary judgment and Scianna's demurrer. The plaintiff appealed.

The Court of Appeal affirmed. With regard to the plaintiffs implied contract claim, the Court of Appeal stated that the plaintiffs written contract with Aramark constituted an agreement that he would be employed at-will. The Court of Appeal held that an express at-will agreement "preclude[d] the existence of an implied contract requiring good cause for termination." The Court of Appeal reached this conclusion despite the plaintiffs argument that the contract had been modified because his two superiors prior to Scianna had repeatedly told him that if he "just kept his sales numbers up that is all that Aramark cares about" and "we don't care about anything except numbers." The Court of Appeal stated that this alleged modification was ineffectual because the terms of the alleged oral contract were too vague and uncertain. The Court of Appeal held that the plaintiffs claim for breach of the covenant of good faith and fair dealing failed because "the covenant of good faith and fair dealing 'cannot be used to imply an obligation which would completely obliterate a right expressly provided by a written contract.'"

The Court of Appeal affirmed the trial court's dismissal of the plaintiffs claim against Scianna for intentional interference with contractual relations. The Court held that Scianna, as an agent of Aramark and the plaintiffs supervisor, was entitled to an absolute privilege with regard to his termination of an at-will employee.

3. Employee Manuals Or Handbooks

Case Example: *Bobbin v. The Orchard, Ltd.,* 603 So. 2d 356 (1992): An employee manual created an obligation on the part of the employer to follow its provisions in discharging an employee.

The defendants terminated the plaintiffs employment for insubordination. The plaintiff filed a lawsuit for wrongful termination in which she alleged that the defendants had completely ignored the employment manual in discharging her. The defendants contended that because the plaintiffs contract of employment was terminable at will, the manual imposed no legal obligation that the defendants follow the manual before discharging the plaintiff, and moved for summary judgment on that basis. The trial court agreed and granted the defendants' motion.

The Supreme Court of Mississippi reversed and held that when an employer publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in the event of an employee's infraction of the rules, and there is nothing in the employment contract to the contrary, then the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual. The Court held that because the defendant gave the manual to all employees it became part of the contract, and the defendant was obligated to follow it. The Court stated that although the manual did not give employees "tenure" or create a right to employment for a definite length of time, it did create an obligation on the part of the defendant to follow its provisions in reprimanding, suspending, or discharging an employee for infractions specifically covered in the manual.

4. Good Cause

Case Example: *Cotran v. Rollins Hudig Hall Int'l, Inc.,* 17 Cal. 4th 93 (1998): In implied-in fact contract cases, the role of the jury in determining whether the employer had good cause to terminate an

employee for misconduct is to assess whether the employer acted reasonably and in good faith in deciding to terminate, and not to determine whether the employee actually committed misconduct.

Two female employees claimed they had been sexually harassed by the plaintiff, Ralph Cotran, a senior vice president of the employer, Rollins Hudig Hall International, Inc. ("Rollins"). Upon learning of the complaints, Rollins conducted an investigation. Rollins informed Cotran that two employees had accused him of exposing himself in the office, masturbating in front of them and making obscene phone calls. Rollins also learned that Cotran had been accused of similar conduct by a woman at a prior employer. Cotran denied each of the accusations.

Rollins conducted an extensive investigation, interviewing twenty-one other persons who had worked with Cotran, including five employees Cotran requested be interviewed. At the conclusion of its investigation, Rollins determined that "it was more likely than not" that sexual harassment had occurred and terminated Cotran. Cotran then sued for wrongful termination, claiming he had an implied agreement requiring good cause for discharge and that, since he did not harass the women, no good cause existed. At trial, Cotran claimed for the first time that he had been involved in consensual sexual relations with both of the women who complained he had harassed them.

Although Rollins argued that the case turned on its good- faith belief at the time it terminated Cotran's employment, and not on whether the acts of sexual harassment actually occurred, the jury was instructed to determine whether the harassment had occurred. Answering that question in the negative, the jury awarded Cotran $1,783,549 in lost compensation. The Court of Appeal reversed and remanded, stating that "[w]here, as here, we are dealing with charges of sexual harassment, we believe the most we can reasonably ask of employers under these difficult circumstances is that they act responsibly and in good faith."

The California Supreme Court affirmed and held that the proper balance between an employer's interest in running its business efficiently and an employee's interest in maintaining his or her employment allows an employer to be wrong about whether misconduct actually occurred, as long as the termination decision was objectively reasonable and made in good faith. The Court reaffirmed that employers are entitled to exercise substantial discretion in personnel decisions and generally should be free from the threat of a jury second-guessing their business judgment, particularly in handling high-ranking, managerial employees. Accordingly, the California Supreme Court held that the proper role for the jury is to "assess the objective reasonableness of the employer's factual determination of misconduct ... under the circumstances known to the employer at the time."

At the same time, the California Supreme Court cautioned that employer discretion is not absolute and that an employer's factual determination must be a "reasoned conclusion ... supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." The Court declined to describe more specifically the essential elements of an adequate investigation, instead leaving the matter to a subsequent, case-by-case analysis. The Court did not specify what role, if any, the jury would have in deciding whether the employer's proffered reasons for termination were legally sufficient to constitute good cause.

C. Promissory Estoppel And Detrimental Reliance

1. Present Employee

Case Example: *Marfia v. T. C. Ziraat Bankasi, 147* F. 3d 83 (2nd Cir. 1998): An employee's detrimental reliance on an employment manual specifying disciplinary procedures overcomes at-will presumption.

The plaintiff worked for the defendant as Vice President for Money Markets. Shortly after he was hired, he partially completed an application for employment, which contained a disclaimer that he could be terminated without notice. After the plaintiff was hired, the defendant gave him its "Administrative and Personnel Procedures Manual" and informed him that it was to be applied "quite sternly and firmly." The manual contained provisions for employee discipline and stated that discipline would be "administered only for just and good cause." Over two years after the plaintiff commenced employment, he received a job offer from another bank. The plaintiff accepted the offer and submitted his resignation to Ozer Ozman, the General Manager for the defendant. Ozman assured the plaintiff of "lifetime employment" with the defendant and asked him to re-think his resignation. Ozman promised the plaintiff that he would receive advancement with the defendant. The plaintiff decided to continue to work for the defendant and was eventually promoted to Senior Vice President. The defendant then fired the plaintiff, claiming that he engaged in what were considered "intolerable acts" under the employment manual.

The plaintiff filed suit in federal court for breach of implied contract and obtained a jury verdict in his favor. The Second Circuit vacated the judgment and remanded the case for a new trial. On retrial, the jury again found in favor of the plaintiff on his breach of contract claim and awarded him $377,077 in back pay. The defendant appealed the judgment, as well as the trial court's calculation of pre-judgment interest.

Viewing the evidence in the light most favorable to the plaintiff, the Second Circuit affirmed the verdict in the plaintiffs favor. The presumption of at-will employment can be rebutted when an employee can prove: (1) the existence of an "express written policy;" and (2) detrimental reliance on the policy. In making its determination, the trier of fact is to consider all circumstances. The Second Circuit concluded that, while the evidence to rebut the employment at-will presumption was not overwhelming, it was sufficient to support the verdict. The written policy contained a statement that discipline would only be administered for just and good cause; Ozman assured the plaintiff of lifetime employment, which had evidentiary significance to the plaintiffs "good cause" argument. The plaintiff was informed of the importance of the employee-manual; and he could have relied on the manual in turning down the job offer he received. The Second Circuit found that the employment application the plaintiff partially filled out did not preclude the jury finding in favor of the plaintiff because it did not provide that the plaintiff could be terminated for any reason and was only one piece of evidence examined by the jury.

2. Potential Employee

Case Example: *Goff-Hamel v. Obstetricians* & *Gynecologists, P.C.,* 256 Neb. 19 (1999): An employee's detrimental reliance on a promise of employment entitled her to reimbursement from the employer for damages incurred as a result of the promise of employment.

The plaintiff had worked for Hastings Family Planning for 11 years. The plaintiff met with the defendant regarding the possibility of employment. The plaintiff had initially declined an offer from the defendant regarding potential employment one month earlier because of commitments to Hastings Family Planning. The defendant called her back one month later and asked her to reconsider. The plaintiff told the defendant that she would be interested in hearing details and an interview was scheduled. The plaintiff attended the interview and was offered a job. The plaintiff gave notice to Hastings Family Planning, in August, that she would be resigning to take a job with the defendant, in October. Subsequently, the defendant provided the plaintiff with uniforms and a copy of her schedule for the first week of work. The day before, the plaintiff was supposed to begin work with the defendant, the defendant told her not to report to work and that a wife of one of the defendant's part owners opposed the defendant hiring the plaintiff. The plaintiff brought an action against the defendant, seeking damages for

breach of an alleged oral employment contract or, in the alternative, damages for detrimental reliance on a promise of employment.

The plaintiff and the defendant moved for summary judgment. The trial court granted the defendant's motion and denied the plaintiffs motion. The trial court concluded that, as a matter of law, because the plaintiffs employment could have been terminated after one day with the defendant incurring any liability, logic dictated that her employment could also be terminated before without incurring any liability.

The Nebraska Supreme Court stated that the trial court correctly determined that, as a matter of law, the plaintiff could not bring a claim for breach of contract. The Court ruled, however, that under the facts of the case, promissory estoppel could be asserted in connection with the offer of at-will employment and that the trial court erred in granting the defendant summary judgment. The Court reasoned that the plaintiff acted to her detriment in order to avail herself of the promised employment and held that the trial court should have granted her motion for summary judgment. The Court reversed and remanded the case for a determination on the issue of the amount of damages. The Court noted that the promissory estoppel doctrine provides for damages as justice requires and does not attempt to provide the plaintiff with damages based on the benefit of the bargain. Thus, the Court concluded that the damages would not be based upon the wages the plaintiff would have earned in the prospective employment because the employment was terminable at will.