EMPTY PROMISES OF EMPLOYMENT-AT-WILL[1]

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It is morality in the law that makes law worthy of our intelligence and our interest.[2]

I. INTRODUCTION

Julie Goff-Hamel worked for Hastings Family Planning for eleven years. She had full benefits including paid maternity leave, vacation, holidays, sick days, education reimbursement, and medical and dental insurance coverage. George Adam, a part owner of Obstetricians & Gynecologists, P.C. (O&G), twice requested that Goff-Hamel quit her current employment to come and work for his company. Following a meeting with Adam, the office manager of O&G, and an O&G personnel consultant, Goff-Hamel accepted an offer that included a salary of $10 per hour, paid vacation, holidays, uniforms, and an educational stipend. Retirement benefits would start after the end of the second year; health and dental insurance was not included in the offer. Goff-Hamel gave notice to her current employers telling them that she would be taking a position with O&G. She was given O&G uniforms and her first week work schedule, but the day before she was to report to work she was told that she would not be hired. The wife of one of the part owners had objected. It took her nearly two years to obtain a comparable position, but the Nebraska court did not permit her to recover for breach of contract.[3]

This case illustrates the issue that will be explored in this article: When is an employer liable for withdrawing a job offer for an employment-at-will position before the employee actually starts working? Following a brief background section on the doctrine of employment-at-will, this article will review and analyze cases which have considered, under various theories, whether a prospective employee, who was made an offer of employment to commence at a certain time, had a cause of action against an employer who withdrew the offer before the prospective employment commenced. Some courts have held that prospective employees have a cause of action against employers even though they would have had no remedies if terminated immediately after commencing employment. Prospective at-will employees have recovered based on both contract and tort liability. Contractual liability has been based on breach of

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[1] This title is a phrase from DAVID J. WALSH, EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE 203 (2007).
[2] Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1569 (2007).
[3] Goff-Hamel v. Obstetricians & Gynecologists, P.C., 256 Neb. 19, 588 N.W.2d 798 (1999).

contract, when the promise to employ was separate from the employment contract itself, and on promissory estoppel. Tort liability has been based on misrepresentation, fraud in the inducement, and promissory fraud.

In addition, the case law will be analyzed with respect to its jurisprudential implications. Is the rule of employment-at-will eroding? Are jurists increasingly concerned with the morality of law? When reviewing the court decisions regarding pre-employment terminations, it is not immediately clear why the courts have made particular determinations. There is no apparent pattern over time or geographic area. The authors' hypothesis is that the outcomes of the cases are determined by the jurists' interpretation of what they believe is the right, just, fair thing to do. The only way to make sense of the case law is to consider the legal philosophies underlying the decisions.

II. EMPLOYMENT-AT-WILL

A departure from the common law of England, "[t]he employment-at-will doctrine has a peculiar and unique American flavor to it."[4] In eighteenth-century England, employment was presumed to be yearly; only reasonable cause terminations were permitted. American courts followed the English rule until an American treatise writer misinterpreted the rule, concluding that a hiring for an indefinite period was a hiring at-will.[5] His misinterpretation was widely accepted (possibly because of the laissez-faire economics of the time) and became the employment-at-will doctrine as we know it today.

> The employment-at-will doctrine avows that, when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all.[6]

Every jurisdiction in the country had adopted the employment-at-will doctrine into its common law;[7] however, legislation was introduced in several states when both employers and employees became alarmed by its consequences. Montana is the only state that has eliminated employment-at-will.[8] The Montana Wrongful Discharge from Employment Act benefits employees by clearly listing their rights not to be terminated for refusal to violate public policy, for less than good cause after they have completed the probationary period, and for a reason that is in violation of the employer's written personnel policy. *Good cause* means "reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[9] Employers also benefit from the Act because it limits their liability for wrongful discharge actions in several ways:

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[4] Daniel J. Herron & Patricia Pattison, *Natural Law and Contracts: A Time for Redefinition?*, 34 AM. J. JURIS. 199, 225 (1989).
[5] *Id*.
[6] Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3.
[7] Herron, *supra* note 4 at 226.
[8] Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 et seq. (2005).
[9] *Id*. § 39-2-903.

1. Claims under the Act must be filed within one year of the date of discharge;
2. Damages must be limited to lost wages and benefits for a period of four years from the date of discharge;
3. Actual fraud or malice must be shown before punitive damages will be awarded; and,
4. If companies have internal appeals procedures, those procedures must be completely exhausted before a lawsuit can be filed.

Although Montana is the only state that has abolished employment-at-will, the doctrine is under attack in every state. States may not have discarded the rule, but they have created a very large number of exceptions.[10] Contemporary American legal scholars have been critical of the doctrine and have documented its perceived erosion.[11] Three major categories of exceptions, both common law and statutory, that undermine and erode employment-at-will have been identified[12]: public policy (43 states), implied contract (38 states), and covenants of good faith and fair dealing (11 states).[13]

A. THE PUBLIC POLICY EXCEPTION

The public policy exception,[14] which holds that an employee is wrongfully discharged when the termination is contrary to a public policy of the state, is the most widely accepted. Some states only recognize the exception when the policy is explicit and well-established by state constitutions and statutes,[15] while others also include "broader notions of public policy and civic duty."[16] For example, California courts found that "the definition of public policy, while imprecise, covered acts that had a 'tendency to be injurious to the public or against the public good.'"[17] Examples of public policy exceptions include terminations: that violate worker compensation statutes, that are based on employee refusals to lie for the employer, that are based on performance of public duties such as jury service, that are based on employees urging employers to comply with legal requirements, and for whistle blowing.

B. THE IMPLIED CONTRACT EXCEPTION

The implied contract exception is generally made when the employer represents (orally or in writing) that the employee has job security or is protected from termination procedures. Employee handbooks have been commonly cited as the basis for an implied contract action.[18] They frequently imply that employees will be disciplined or

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[10] *See* Muhl, *supra* note 6, at 3.
[11] *See* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine,* 37 AM. BUS. L. J. 653 (2001).
[12] *See* Muhl, *supra* note 6, at 4 updating to Oct. 1, 2000 the data originally collected in David J. Walsh and
Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (summer 1996).
[13] *Id.* The only states that have recognized all three categories are Alaska, California, Idaho, Nevada, Utah, and Wyoming.
[14] *Id.*
[15] *Id.* at 5.
[16] *Id.*
[17] *Id.* (quoting Petermann v. International Brotherhood of Teamsters, 174 Cal. App.2d 184 (1959)).
[18] *See* Muhl, *supra* note 6, at 4.

terminated only for just cause and outline specific procedures to be followed. Human resource managers and supervisors also have created implied contracts when they assured employees that their employment would be continued as long as they continued to satisfactorily perform their duties.[19]

C. THE COVENANT OF GOOD FAITH AND FAIR DEALING EXCEPTION

A small number of states have made an exception based on the covenant of good faith and fair dealing.[20] Courts in eleven states have determined that the covenant is present in every employment contract.[21] Those states prohibit both employer personnel decisions that are subject to a *just cause* standard, and terminations made in bad faith or motivated by malice. The most significant departure from the traditional employment-at-will doctrine, "this exception reads a covenant of good faith and fair dealing into *every* employment relationship."[22] The first glimmer of this exception was seen in a 1910 New York employment case.[23] A New York appellate judge coined the phrase "instinct with an obligation," which was later made famous by Justice Cardozo.[24] Although it certainly sounds inspirational, almost a hundred years later no one seems sure what "instinct with an obligation" means. It has been roughly equated with the term *good faith*, but "[g]ood faith today remains one of employment law's most nebulous concepts."[25] It has been interpreted in many ways, including: the benefit of the bargain, an act that is not in bad faith, honesty in fact, too vague to discuss, I know it when I see it, a lack of bad faith or malice, and community standards or business practice.[26] These broad and vague definitions, plus the tendency to intermingle this exception with the public policy exception, have impaired the development of the good faith exception to the point that it is now applied only in cases where an employer improperly denies employment benefits.[27]

III. EMPLOYMENT PROMISES AND CONTRACT

In the previous section, cases of terminated at-will employees were discussed. The three exceptions—public policy, implied contract, and the covenant of good faith and fair dealing—were applied when existing employment was terminated. In contrast, this section will discuss only prospective employees, those who were terminated before the employment ever began. The issue before the courts was whether there was liability based on breach of a contract or on promissory estoppel.

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[19] Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980).

[20] Muhl, *supra* note 6, at 4.

[21] Robert C. Bird, *An Employment Contract 'Instinct with an Obligation": Good Faith Costs and Contexts,* LUCY, LADY DUFF GORDON SYMPOSIUM (Oct. 18, 2007), available at http://ssrn.com/abstract+1033041.

[22] *Id.* at 10.

[23] McCall Co. v. Wright, 117 N.Y.S. 775, 779 (App. Div. 1909), aff'd 91 N.E. 516 (N.Y.1910).

[24] Wood v. Lucy, Lady-Duff Gordon, 118 N.E. 214, 214 (N.Y.1917).

[25] Bird, *supra* note 21, at 5. *See also*, Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach,* 73 U. CIN. L. REV. 517, 559 (2004) and J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 359-60 (1995).

[26] Bird, *supra* note 21, at 5. In employment cases there are at least eight definitions. *See* Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1249-58 (1992).

[27] Bird, *supra* note 21, at 7.

A. BREACH OF CONTRACT

Only 15 states have considered breach of contract a viable action when an offer for employment-at-will is withdrawn before the prospective employee begins the job.[28] Ten of these fifteen states will not permit prospective at-will employees to recover for breach of contract; five have determined that there was a pre-employment contract, separate from the employment-at-will agreement.

1. CASES THAT HAVE NOT PERMITTED RECOVERY FOR BREACH OF CONTRACT

The courts in ten states have held that the employer was not liable to a prospective employee for breach of contract for an indefinite period when the offer was withdrawn before the employment began. Generally, the courts found no difference between a revoked pre-employment offer for employment-at-will and a termination after the employee had started work. Some courts determined that in order for a breach of contract action to be successful, there would have to be an exception to the employment-at-will doctrine. Others viewed the employment offer and acceptance as a separate contract, not part of the employment-at-will agreement. In those cases, consideration in exchange for the promise of employment (actions taken in reliance on the promise) or another "distinguishing feature" would have to be present.

In 1961, a Missouri court reasoned that "if an employee, under an oral contract for an indefinite period, would be without remedy when fired without reason, one day or one week after commencing employment, it would not be logical to hold that he was entitled to damages if the employer refused to allow him to commence employment at all under the agreement."[29] Twenty-seven years later, another Missouri court agreed, almost exactly quoting the earlier opinion: "[T]he liability would not exist if the at-will employee were discharged without reason one hour, one day, or one week after commencing employment."[30]

In Texas[31] and Pennsylvania,[32] employers prevailed on suits brought for anticipatory repudiation. The prospective employees were not able to overcome the at-will presumption by presenting evidence that the employment was something other than employment-at-will. The courts would not hold that a contract was breached because that would result in an implication that at-will employees could not be terminated until after they were given opportunities to perform.[33]

It is difficult to determine the applicable rules in Michigan. Although an earlier case permitted recovery for breach of contract,[34] two later cases distinguished the earlier one and disallowed actions for breach.[35] Both courts agreed that, absent a claim of additional consideration, an offer for at-will employment was not enforceable. Even though one of the employees had terminated his previous position and had moved his

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[28] The states are California, Florida, Georgia, Illinois, Indiana, Idaho, Louisiana, Missouri, Nebraska, New York, Pennsylvania, Texas, and Virginia. Appendix A is a table of cases that provides the citations for each state.

[29] Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961).

[30] Bower v. AT & T Technologies, Inc., 852 F.2d 361 (8th Cir. 1988) (applying Missouri Law).

[31] Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561 (Tex. App. El Paso 1983).

[32] Browne v. Maxfield, 663 F. Supp. 1193 (E.D. Pa. 1987) (applying Pennsylvania law).

[33] Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561 (Tex. App. El Paso 1983).

[34] Hackett v. Foodmaker, Inc., 69 Mich. App. 591, 245 N.W.2d 140 (1976).

[35] Cunningham v. 4-D Tool Co. 182 Mich. App. 99, 451 N.W.2d 514 (1989); Milligan v. Union Corp., 87 Mich. App. 179, 274 N.W.2d 10 (1978).

family, the court did not find this reliance on the employer's promise to constitute consideration for a pre-employment contract.[36]

In agreement with the two Michigan cases, Indiana courts have rejected reliance as consideration to support an action for breach of contract,[37] but Indiana has permitted prospective employees to recover for promissory estoppel based on detrimental reliance on the employment offer. The Indiana cases will be discussed in the following section on promissory estoppel.

2. Cases That Have Permitted Recovery for Breach of Contract

Few states have been willing to hold that employer liability is supportable for breach of contract actions. Courts that have allowed employees to recover for breach of contract have found that there was a pre-employment agreement that was supported by consideration. Steps taken in reliance on the promise to employ took the contract outside employment-at-will. A frequently cited California case offers an illustrative example of a pre-employment agreement.[38] The employer made an offer of employment, but made it contingent on three things: the prospective employee had to pass a physical, resign his current job with only one-week notice, and relocate. In exchange, the employer offered to assign the prospective employee work and salary on a specific date. In reliance on the promise of employment, the employee satisfied all the conditions. Since the court found a pre-employment contract existed, it was immaterial whether the ultimate employment would have been at-will.

Indiana,[39] Minnesota,[40] and Wisconsin[41] have all recognized that a prospective employee can have a cause of action based on breach of contract when an offer for at-will employment is withdrawn before the job begins. The Indiana court specifically noted that when the prospective employee had held a permanent position with another employer and only agreed to accept the new position if it was also permanent, the reliance on the employment offer was consideration to support a contract. With these few cases existing as exceptions, courts generally have not been willing to find that the detriment suffered when an employee leaves one position for another is sufficient consideration to support a pre-employment contract.

Even when potential employees are permitted to recover for broken promises, usually courts will only permit prospective employees to recover the damages incurred in reliance on the employment offer. Some courts have held that the proper measure of damages is the benefit of the bargain—the wages the prospective employee would have earned had the promise not been withdrawn. Of course the prospective employee would still have a duty to mitigate damages by seeking other employment.

B. Promissory Estoppel

Prospective employees have been slightly more successful when suing for promissory estoppel than for breach of contract. Many courts that were not willing to

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[36] Cunningham v. 4-D Tool Co. 182 Mich. App. 99, 451 N.W.2d 514 (1989).

[37] Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 4th Dist. 1983); Pepsi-Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 4th Dist. 1982).

[38] Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (applying California law).

[39] Satyshur v. General Motors Corp., 38 F. Supp. 2d 744 (N.D. Ind. 1999).

[40] Alfano v. AAIM Management Ass'n, 770 S.W.2d 743 (No. Ct. App. E.D. 1989).

[41] Cronemillar v. Duluth Superior Milling Co., 134 Wis. 248. 114 N.W. 432 (1908).

allow a suit for breach of contract have allowed prospective employees to recover for promissory estoppel when they relied on the employment offer to their detriment.

1. CASES THAT HAVE NOT PERMITTED RECOVERY FOR PROMISSORY ESTOPPEL

A Missouri court[42] rejected the theory of promissory estoppel in pre-employment situations on the ground that it would produce the illogical result that a prospective employee terminated before employment began could recover, while an employee terminated one day after employment began could not.[43] The prospective employee had argued that at the time he accepted the offer of employment the employer knew, or should have known, that he had to resign from his current position. He unsuccessfully asserted that the resignation constituted detrimental reliance. Because he only alleged reliance on employment-at-will, he did not make a valid case of promissory estoppel. This case follows a line of Missouri cases. In a 1961 case, the court determined that by invoking the doctrine of promissory estoppel, the prospective employee was trying to *outflank* the decisions; the Missouri court held that no action could be maintained for wrongful discharge where the employment was to be for an indeterminate period.[44] To allow recovery would overrule a long line of decisions supporting the proposition that when there is no mutuality of obligation, employers should not be held liable for withdrawing offers of employment.[45] In agreement, a Louisiana court held that, as a matter of law, it is unreasonable for a prospective employee to rely on an offer of at-will employment.[46] To hold otherwise would undermine employment-at-will, and would result in employers waiting until employees start work before terminating the employment.

2. CASES THAT HAVE PERMITTED RECOVERY FOR PROMISSORY ESTOPPEL

Only three states—Colorado, Indiana, and Minnesota—have held that prospective employees had a cause of action based on promissory estoppel when employers refused to honor their promises of employment. In nearly all the cases, the prospective employees had terminated other positions to accept the offers of employment.[47] After the offers were withdrawn, the prospective employees suffered financial injuries when they were unable to obtain comparable employment. However, in all three states, the plaintiffs' damages were limited to expenses incurred in reliance of the employers' promises.

In one case,[48] the prospective employee was not required to terminate a current position; instead, he relocated to Florida when his current employer offered him a position there. When he was not given the new position he sued for reimbursement for moving expenses, wages lost, and other expenses incurred in reliance on the employer's

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[42] Rosatone v. GTE Sprint Communications, 761 S.W.2d 670 (Mo. Ct. App. E.D. 1988).

[43] *See* Tracy A. Bateman, Annotation, *Employer's State-law Liability for Withdrawing, or Substantially Altering, Job Offer for Indefinite Period Before Employee Actually Commences Employment*, 1 A.L.R.5TH 401 (2007).

[44] Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961).

[45] *Id*.

[46] May v. Harris Management Corp., 928 So. 2d 140 (La. Ct. App. 1st Cir. 2005).

[47] *See* Covert v. Allen Group, Inc., 597 F. Supp. 1268 (D. Colo. 1984) (applying Colorado law); Pepsi-Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 4th Dist. 1982); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).

[48] Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 4th Dist. 1983).

promise. The court held that promissory estoppel was an appropriate cause of action when:

> (1) [T]he employer made a definite promise of employment to the employee, which promise alone induced him to move to Florida in reliance thereon; (2) this move to Florida was a substantial change; (3) the employer reasonably expected (or should have expected) that the employee would take such action; and (4) injustice could be avoided only by reimbursing the employee.[49]

IV. EMPLOYMENT PROMISES AND TORT

The courts have, to varying degrees, accepted the use of tort as an alternative theory of recovery to that of promissory estoppel. In the context of this article, estoppel and the tort of fraud rely on the same basic premise: the good faith belief by the prospective employee in statements made by the employer during employment negotiations. But whereas estoppel may be the result of an innocent mistake or a simple change of circumstances, these contractually related torts, sometimes referred to as *contorts*,[50] largely entail either disregard of a perceived minimum requirement of care or honesty, or intentional deceit. Culpability resulting from the employer's knowledge—either actual or imputed—of the deceit inherent in their statements offers opportunities differing from that of contract theory, including the avoidance of the statute of frauds, parole evidence rule, and the availability of enhanced damages.

The application of tort to the same transactional framework as that of contract may create a perception of taking the oft-referenced *second bite of the apple.* Asserting liability for misrepresentation in negotiations may seem, at first, inapplicable if there has been no promise upon which a breach of contract can be sustained. The issues become particularly thorny when the underlying agreement incorporates an assertion of an employment-at-will contract. Ideologically, the employment-at-will concept that an employee may be terminated at any time without cause, and without liability attaching to the employer, serves as an antithesis to liability for pre-employment misrepresentation to the employee. The employer, when confronted with a tort claim arising from pre-employment representations in such cases, would likely agree that a "fraudulent-inducement claim is really no more than an effort to create a new tort theory of wrongful discharge, and . . . should be treated as an improper attempt to 'end run' the employment-at-will doctrine."[51]

It is not the authors' objective to provide an exhaustive examination of the application of tort law as an ancillary method of contractual enforcement. Rather, this section is intended to provide a glimpse of the varied views of the effect of employer misrepresentation in the employment-at-will setting. For those interested in detailed examinations of the application of tort to employment-at-will, there are numerous articles examining the area, ranging from general reviews[52] to advocacy.[53]

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[49] *Id.*

[50] The use of the term *contort* is generally attributed to GRANT GILMORE, THE DEATH OF CONTRACT, Ohio State University Press (2d. ed., 1995).

[51] Richard N. Pena, *Deceitful Employers: Intentional Misrepresentations in Hiring and the Employment-At-Will Doctrine*, 54 U. KAN. L. REV. 587, 589 (2006).

[52] *Id. See also, e.g.,* Scott A. Moss, *Where There's At-Will, There are Many Ways: Redressing The Increased Incoherence of Employment At-Will,* 67 U. OF PITT. L. REV. 295 (WINTER 2006); P.G. Guthrie,

A. MISREPRESENTATION IN CONTRACT

As applied to pre-employment misrepresentations, an employer courting a prospective employee, particularly one of unusual desirability, may be tempted to give assurances which exceed the bounds of truth. The perceived deceit may be that which gilds the current or future prospects of the job or employer, or provides assurances of security to the employee. The result of such misrepresentations is often an allegation of fraud, rendering the base question: do the representations or assurances rise to the level of fraud, and, if so, will the employment-at-will status supersede any damage claim?

1. FRAUD

Identifying the term to be used in relation to misrepresentations made in negotiations is problematic. Misrepresentations made in negotiations (employment or otherwise) seem to have as many categorizations as there are ways for individuals to lie to, trick, deceive, or swindle their fellow beings. The simple characterization of conduct as *fraud* is often employed to encompass any deceit, whether past or present. Deceit (with or without knowledge or intent) in the pre-employment context is perhaps more specifically categorized as fraud in the inducement, intentional misrepresentation, or negligent misrepresentation. For the purpose of clarity within this article, *fraud in the inducement* seems the phrase best suited to describe pre-employment factual deceit. This descriptive phrase is here intended to share the same attributes of fraud in other settings:

> To establish fraud, the plaintiff must show that the defendant made a false representation of a *material fact*, knowing that representation to be false; that the person to whom the representation was made was ignorant of the falsity; that the representation was made with the intention that it be acted upon; and, that the reliance resulted in damage to the plaintiff.[54]

However, it should be noted that other more expansive definitions of fraud include statements such as "anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture."[55] Adding further confusion are pronouncements such as that from Michigan which defined *fraud in the inducement* as specifically relating to future events rather than past or present facts:

> However, Michigan also recognizes fraud in the inducement, a claim that appears to be based in contract law rather than tort. . . . "Fraud in the inducement occurs where a party materially misrepresents

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Annotation, *Employer's Misrepresentation as to Prospect, or Duration, of Employment as Actionable Fraud*, 24 A.L.R. 3d 1412 (1969).

[53] IAN AYRES AND GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT, Yale University Press, (2005).

[54] Coors v. Security Life of Denver, 112 P.3d 59, 66 (Colo. 2005).

[55] Moser v. DeSetta, 527 Pa. 157, 163, 589 A.2d 679, 682 (1991). *See also* Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 524 (Tex. 1998) (requiring "a material representation" but omitting the requirement of a present or past fact).

> future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon."[56]

Certainly every element of the tort alleged will be challenged, especially the element of misrepresentation of a material *fact*.[57] In the employment setting, predictions of future events, or "vague allusions to potential benefits" such as stock preferences in pre-employment discussions,[58] and statements to the effect that the job is secure[59] have been held to be insufficient to constitute fraud since they did not involve a current or past fact. The closely allied concept of *negligent misrepresentation* has further been held to require that the "false information contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a promise of future conduct."[60] When statements relating to longevity and employment benefits are made in an employment-at-will setting, one can imagine the additional difficulty since any such assertion runs counter to the employer's right to terminate employment at any time.

Undoubtedly, application of the employment-at-will concept can create "seemingly harsh consequences."[61] In *Petite v. DSL Net, Inc.*,[62] the Appellate Court of Connecticut specifically dealt with an employment-at-will offer which was withdrawn prior to actual employment, but after the employee had terminated his previous employment. The court found that negligent misrepresentation would not apply. Reliance by the employee was deemed to be unjustified as a matter of law where the offer of employment expressly stated that "this letter is not a guarantee of employment [and that] your employment will be 'at-will,' which means that either you or the company can terminate your employment at any time for any reason, with or without cause."[63] Essentially, the court determined that when an offer is clearly conditioned as only offering employment-at-will, reliance on the offer as a guarantee of employment is inappropriate. The trial court observed that, although the treatment of the employee may have been shoddy or dishonorable, it was not tortious.[64]

2. PROMISSORY FRAUD

In employment-at-will contracts, the underlying agreement is obviously that of the anticipated employment. If fraud is defined as a misrepresentation of a past or present fact, there is no misrepresentation made when the employer simply does not carry through with promises for the future. The concept that breach of promise equates with breach of contract, it is argued, should preclude tort as a theory for recovery. However, the expansion of theories to redress perceived social or public policy wrongs has given rise to the concept of *promissory fraud*. Although the definitions of fraud utilized by the courts are sometimes seemingly broad enough to include promissory

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[56] Eby v. A&M Custom Built Homes, Inc., WL 672141 (Mich. App. 2001) (citing Samuel D Begola Services, Inc. v Wild Bros, 534 NW2d 217 (1995)).
[57] 37 AM.JUR 2D, *Fraud and Deceit*, § 60.
[58] Nelson v. Gas Research Institute, 131 P.3d 340, 345 (Colo. App. 2005).
[59] *See* Whelan v. Careercom Corp., 711 F. Supp 198 (MD Pa. 1989).
[60] Allied Vista Inc. v. Holt, 987 S.W. 2d 138, 141 (Tex. App.–Houston [14th Dist] 1999).
[61] Petite v. DSL Net, Inc, 925 A.2d 457, 459 (Conn. App. 2007).
[62] *Id.*
[63] *Id.* at 464.
[64] *Id.* at n. 1 (quoting the trial court).

misrepresentations,[65] the more particular theory of promissory fraud has reputedly gained acceptance[66] and come to refer to those circumstances in which a promise is made without the intent to perform.[67] Promissory fraud has been observed to be "a subspecies of the action for fraud and deceit" wherein "[a] promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud."[68]

Lazar v. Superior Court of Los Angeles and Rykoff-Sexton, Inc.[69] provides a clear example of possible promissory deceit by an employer in pre-employment negotiations. In *Lazar*, the employee was induced to leave employment as the owner of a successful family-owned restaurant equipment business in New York for a position as general manager with the defendant employer. Representations made by the new employer's agent during the negotiation process included those of job security, significant pay increases, and advancement. Further, the employer's agent maintained that the employer was financially strong and in a growth cycle. As a result of the employer's assurances, the employee moved his family to Los Angeles, California, and began employment. After approximately two years, the employee was terminated. He was told the termination was not due to deficient performance, but was for cause. The employee asserted that the employer's financial condition was not strong at the time of the initial negotiations, and that if an operational merger under consideration took place, the employer knew at the time that the employee's position would be eliminated. The employee further asserted that at the time of the employer's assurances that the employee's job would be secure, the employer actually considered the employee an at-will employee. The California Supreme Court in deciding *Lazar*, although not making a decision on the merits but reviewing a demurer by the employer, approved the theory of promissory fraud, holding that, if the employee's allegations were true, promissory fraud would apply.[70]

It has been observed that promissory fraud recognizes the intent of the defendant—the defendant's state of mind—as a fact upon which a claim of fraud can be based.[71] A distinction has been drawn in the literature, however, as to the intent involved. Do people contracting make promises that they intend to keep, or merely promises in which they recognize two alternatives: keep the promises or pay damages?[72] Should such promises be held to the tort standard of intentional non-

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[65] *See* Mañon v. Solis 142 S.W. 3d 380, 387 (Tex App.–Houston [14th Dist] 2004) (providing that: "To recover on an action for fraud, a party must prove: (1) a material representation was made, (2) the representation was false, (3) when the speaker made the representation, he knew it was false or made it recklessly without knowledge of the truth as a positive assertion, (4) the speaker made it with the intention that it should be acted upon by the party, (5) the party acted in reliance upon it, and (6) the party thereby suffered injury").

[66] In their book *Insincere Promises* (*supra* note 53, at 6), authors Ayers and Klass report that forty-four states have recognized the theory of promissory fraud between 1922 and 2002. However, Pena (*supra* note 51, at 590), in considering the use of tort in employment-at-will cases, determined that the majority of courts that have considered the issue found the use of tort incompatible in employment-at-will cases.

[67] AYRES AND KLASS, s*upra* note 53, at 5.

[68] Lazar v. Superior Court of Los Angeles and Rykoff-Sexton, Inc., 909 P.2d 981, 985 (Cal. 1996) (hereinafter referred to as *Lazar*). *See also* Spoljaric v. Percival Tours, Inc. 708 S.W. 2d 432 (Tex. 1986).

[69] *Lazar*, 909 P.2d 981.

[70] *Id.* at 985.

[71] *See* Ian Ayres and Gregory Klass, *New Rules for Promissory Fraud*, 48 ARIZ. L.R. 957 (Winter 2006).

[72] Ayres and Klass, s*upra* note 53 at 5.

performance or the contract standard of breach of a material promise?[73] Proponents of the theory of promissory fraud maintain that "[t]oday courts generally assume that because the promisor must have known her own intent, any misrepresentation of that intent was necessarily a knowing, or intentional, misrepresentation."[74] If correct, such an assumption essentially negates the necessity of showing scienter.[75] The assumption ignores the fact that broken promises may have causes other than an initial intent not to perform; "that the promisor does not intend not to perform—that is, she is not entering the contract planning breach."[76]

In the discussion of the theory of promissory fraud, Illinois deserves special note. Although generally not recognizing actions resulting from a single act of promissory fraud,[77] Illinois has taken the position that it will allow recovery if the promissory fraud is due to a pattern or scheme to defraud another out of their property.[78] Under Illinois decisions, to prevail on promissory fraud, it is necessary to show not only intentional misrepresentation of the intent to perform, but also a plan to carry out the fraud.[79] A single broken promise will not suffice, but instead there must be "repeated false promises" to support the concept of a scheme to defraud.[80]

V. POTENTIAL DAMAGES IN THE AT-WILL SETTING

Since misrepresentation by employers in pre-employment negotiations necessarily involves contractual issues, the question of what damages will be available, and in what circumstances, becomes vital. In recent years, the application of the economic loss doctrine has had an effect on the availability of tort as a cause of action when contract is also involved. Growing out of the product liability area, the economic loss doctrine generally holds that if the loss associated with a contract is solely economic, recovery based on tort will not be allowed.

> [The] courts have taken three approaches when fraud is used to induce one to enter into a contract and solely economic losses are incurred. The first approach is to ignore the fraud and the defrauded party's remedy is solely contract, not tort. The second approach is a broad exception that recognizes the fraud as a tort in all cases of fraudulent inducement. The defrauded party is free to seek a remedy in tort. Seven states have adopted the broad exception, and federal courts have indicated that thirteen other states will likely adopt it. . . . The third approach is a narrow exception that recognizes the fraud as a tort only where the fraud is not interwoven with the quality or character of the goods or otherwise involves performance of the contract. In other words, the fraud is actionable

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[73] *See* Lee v. Hippodrome Oldsmobile, Inc. 1997 WL 629951 (Tenn. App. 1997). Although not a decision on the merits, the court in its opinion recognized the availability of an action for promissory fraud even if a breach of contract claim is not viable.

[74] Ayres and Klass, s*upra* note 71 at 959.

[75] *Id. See also, Lazar*, 909 P.2d at 984.

[76] Ayres and Klass, s*upra* note 71 at 958-959.

[77] Luttrell v. Wyatt, 137 N.E. 95 (Ill. 1922).

[78] Roda v. Berko, 81 N.E. 2d 912, 915 (Ill. 1948).

[79] *See* Roger L. Price and Mark L. Johnson, *Understanding the "Scheme to Defraud" Exception to Promissory Fraud in Illinois*, 90 ILL. B. J. 536 (2002).

[80] *Id*. at 540.

> as a tort only if it is extraneous to the subject matter of the contract. Wisconsin, Florida, and arguably Michigan are the only states to adopt the narrow exception.[81]

The seven states which have adopted the broad exception are noted to be Alabama, California, Colorado, Hawaii, Illinois, Nebraska, and Texas.[82] The thirteen states reported to be likely to move to the broad exception are Iowa, Massachusetts, Maryland, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, South Carolina, South Dakota, Utah, and Virginia.[83]

Obviously, if the economic loss doctrine is strictly applied, the ability to recover for damages associated with promissory fraud and fraud in the inducement largely disappears. The damages resulting to an employee from alleged wrongful termination of an employment-at-will contract are apt to be economic losses, as compared to personal injury, and therefore confined to contract recovery. Any such deceived employee will be relegated to state contract law and, with the application of employment-at-will principles, will likely find the probability of recovery sharply reduced.[84] However, if the tort of fraud is recognized in relation to employment agreements, the entire range of tort damages, including exemplary damages, may be available.[85] In *Lazar*,[86] the California Supreme Court allowed the employee to pursue recovery for pre-employment expenses and losses due to the misrepresentations made by the employer, such as the cost of moving and the loss of his former employment.[87] The *Lazar* court made special mention, however, that any recovery for loss of income due to wrongful termination would have to be remedied through contract and that the use of tort would not be allowed to facilitate double recovery.[88]

Building on *Lazar*, *Helmer v. Bingham Toyota Isuzu*[89] involved pre-employment misrepresentations by the employer of longevity, that the employee could likely *finish out his career* with the employer, as well as promises of income to the employee. The resulting jury verdict resulted in liability for both economic and non-economic damages primarily derived from promissory fraud principles. Of note in the *Helmer* decision is the allowance of losses due to future loss of income. The court in *Helmer* specifically held that loss of income is not confined to "wrongful termination or breach of contract cases."[90] No conflict with contract law was found because the loss of income damages were not those associated with termination of the promised employment, but rather

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[81] Ralph C. Anzivino, *Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 MARQ. L. REV. 921 (2007), 931-933.

[82] *Id.* n. 66.

[83] *Id.* n. 67. Nebraska is included as both having adopted and considering adopting the broad exception.

[84] *See* Fry v. Mount, 554 N.W. 2d 263 at 266 (Iowa 1996) (denying recovery for misrepresentations in made by the employer in negotiations because to do otherwise "would permit an at-will employee . . . to potentially recover in tort on the same factual grounds on which the law would deny him recovery in contract").

[85] *See* Spoljaric v. Percival Tours, Inc. 708 S.W. 2d 432 (Tex. 1986) (although remanded for additional findings, approved both actual and punitive damages based on fraudulent misrepresentation claims stemming from promises of a bonus plan.) *See also Lazar*, 909 P.2d 981.

[86] *Lazar,* 909 P.2d 981.

[87] *Id.* at 992.

[88] *Id.*

[89] Helmer v. Bingham Toyota Isuzu , 129 Cal.App.4th 1121, 29 Cal.Rptr.3d 136 (Cal. App. [5th Dist] 2005).

[90] *Id.* 129 Cal.App.4th at 1130, 29 Cal.Rptr.3d at 143.

with income which was lost due to leaving prior employment.[91] Noting that promissory fraud is more egregious behavior than merely failing to perform a promise, the court reasoned that it would not be sensible to allow damages based on promissory estoppel and deny damages predicated on promissory fraud.[92]

VI. JURISPRUDENTIAL ISSUES

A. CHANGES IN EMPLOYMENT RELATIONSHIPS

For hundreds of years there has been a tension between jurists who follow the Natural Law school and those who are aligned with Positive Law.[93] The central question in this conflict is: Should the law be concerned with virtue, or should it focus on rights and obligations? The traditional employment-at-will doctrine focused on rights and obligations, the Positive Law approach. It was based on the idea that the employment relationship was mutual; employers and employees had reciprocal rights to terminate the employment. They both enjoyed the freedom to contract.

However, when the employment relationship began to change, courts chose to take a Natural Law approach, emphasizing the apparent lack of virtue in the employment-at-will doctrine. Recognizing that large corporations were conducting specialized operations that required their employees to become more specialized and less marketable, courts began to reject the mutuality theory. Mutuality and freedom of contract require that the employer and employee be on equal footing and have comparable bargaining power. When this mutuality ceased to exist, courts responded by making exceptions that create a "proper balance . . . between the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood and society's interest in seeing its public policies carried out."[94] Reflecting Natural Law considerations, courts have recognized that:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all their income is something new in the world. For our generation, the substance of life is in another man's hands.[95]

B. NATURAL LAW

Natural Law is a crucial factor in understanding contemporary common law exceptions to employment-at-will. It is difficult to define and fully appreciate the current impact of Natural Law without first reviewing its historical background. Most civilizations, through their philosophies, religions, art, music, literature, and law, have searched for the Truth. This Natural Law Truth exists "outside of and distinct from

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[91] *Id.* 129 Cal.App.4th at 1131, 29 Cal.Rptr.3d at 143.
[92] *Id.* 129 Cal.App.4th at 1130, 29 Cal.Rptr.3d at 143.
[93] *See* Herron, *supra* note 4.
[94] Palmateer v. International Harvester Company, 85 Ill.2d 124, 421 N.E.2d 876, 878 (1981).
[95] Kmart Corporation v. Ponsock, 732 P.2d 1364 (Nev. 1987).

human creation or even interpretation."[96] The Truth does not change over time or geographic area. What was true 100 years ago is still true today. What is true on the other side of the world is also true here. Cicero eloquently defined the essence of Natural Law:

> Of all these things respecting which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting . . . it is not allowable to alter this law or deviate from it. Nor can it be abrogated.[97]

St. Thomas Aquinas provided additional thought. He held the position that the question of the existence and validity of a law cannot be separated from its moral acceptability.[98] Specifically he said, "[a] law that is not just seems to be no law at all."[99] Natural Law concentrates on the relationship between law and morals. A more current, understandable, and workable definition of Natural Law is:

> [T]he sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimation for the binding force of positive law. Natural Law has thus been the collective term for those norms which owe their legitimacy not to their origin from a legitimate lawgiver, but to their immanent and teleological qualities.[100]

The exceptions to employment-at-will become much easier to explain in light of Natural Law theories. As it was first conceived, in a time of *laissez-faire* economics, the doctrine of employment-at-will seemed fair and equitable. But, as the employment relationship changed, the Natural Law jurisprudential inclination encouraged jurists to start making exceptions. Because our legal society generally articulates a Positive Law philosophy, jurists were less willing to totally eliminate employment-at-will.

C. POSITIVE LAW

Understandably, the Natural Law philosophies generated debate and inquiry. Rejecting the theoretical/theological approach of Aquinas, Machiavelli offered a practical/applied approach to jurisprudence and provided the groundwork for Positive Law.[101] He argued that "laws are essentially amoral, deriving their legitimacy solely from the power of the sovereign."[102] Positive law concentrates on what the law is, not what it should be. Law is merely a command from a superior that binds inferiors to a

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[96] Herron, *supra* note 4, at 200.
[97] CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 8 (Archon Books 1969) (1922).
[98] *See* Herron, *supra* note 4, at 201.
[99] AQUINAS, SUMMA THEOLOGIAE, Ia2ae, 95,2 (Blackfriars, in conjunction with McGraw-Hill 1963).
[100] MAX WEBER, ON LAW IN ECONOMY AND SOCIETY, (Edward Shils trans., Max Rheinstein, ed., Simon and Schuster 1954).
[101] Herron, *supra* note 4, at 203.
[102] *Id*. *See* NICCOLO MACHIAVELLI, THE PRINCE, (W.K. Marriott, trans., Everyman's Library 1992) (1515).

certain course of conduct.[103] Employment-at-will is a doctrine that was created by superiors, the judiciary, who had the power to enforce it. Although it is a common law creation, fashioned by the judiciary, many contemporary jurists have held that only the legislature should modify the doctrine.

VII. CONCLUSION

Employment agreements and their crucial impact on employees provide a fertile environment for Natural Law proponents. As noted previously, the concept of the employee and employer having equal bargaining positions is largely a thing of the past. While anyone may choose to work for themselves, or choose not to work for any particular employer, individuals wishing to advance themselves, achieve greater income, or move up the career ladder will likely be presented with limited choices. In contrast, employers have the entire workforce from which to choose and, unless they require specific individuals or attributes, are less likely to be significantly harmed by the loss of an employee.

Moreover, our societal mores mitigate against falsehoods, at least insofar as those falsehoods involve promises of significance. A promise upon which important life decisions are based, such as employment, would seemingly be significant. Therefore, broken promises of employment touch us on a fundamental level. But the questions remain, should we rely upon the bare promise of someone who is essentially a stranger? Should lay people, the everyday citizens, be expected to know and understand the concept of employment-at-will and its true impact on their employment rights? Further, even assuming relatively strict application of the employment-at-will doctrine, should employers' pre-employment falsifications be available to the employee to, in a sense, overcome any contract remedy limitations?

No answer is certain. Our system mandates that we pay homage to freedom of contract. We are told that we are each an individual, endowed with self determination. Therefore, if we choose to enter into an employment-at-will agreement, any poor result is our responsibility. But when the employer oversteps the judicial system's bounds of honesty or integrity, judges are inclined to fashion an exception. The desire of courts to provide a remedy when a wrong is committed, associated with the concept of natural law, continues to nibble at the foundations of employment-at-will. Even the most ardent positivist's dedication to the at-will doctrine, when faced with the promises, representations, and employer actions in the more abusive cases, would be likely be strained not to provide relief to the deceived employee.

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[103] *Id*. at 204.

Appendix: Contractual Liability

State	Breach of Contract		Promissory Estoppel	
	Employer	**Employee**	**Employer**	**Employee**
CA		Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (applying California law).		
CO				Covert v. Allen Group, Inc., 597 F. Supp. 1268 (D. Colo. 1984) (applying Colorado law).
FL		Crawford v. David Shapiro & Co., P.A., 490 So. 2d 993 (Fla. Dist. Ct. App. 3d Dist. 1986). Knudsen v. Green 116 Fla. 47, 156 So. 240 (1934).		
GA	Darlington Corp. v. Evans, 88 Ga. App. 84, 76 SE2d 73 (1953).			
IL	Schoen v. Caterpillar Tractor Co., 103 Ill. App. 2d 197, 242 N.E.2d 31 (3d Dist. 1968).	Hostettler v. Mushrush, 194 Ill. App. 58 (4th Dist. 1915).		
ID	Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 4th Dist. 1983). Pepsi-Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 4th Dist. 1982).	Satyshur v. General Motors Corp., 38 F. Supp. 2d 744 (N.D. Ind. 1999).		Eby v. York-Division, Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 4th Dist. 1983). Pepsi-Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. Ct. App. 4th Dist. 1982).
LA	Smith v. Pollock, 3 La App 125 (1925).		May v. Harris Management Corp., 928 So. 2d 140 (La. Ct. App. 1st Cir. 2005).	
MI	Cunningham v. 4-D Tool Co. 182 Mich. App. 99, 451 N.W.2d 514 (1989). Milligan v. Union Corp., 87 Mich. App. 179, 274 N.W.2d 10 (1978).	Filcek v. Norris-Schmid, Inc., 156 Mich. App. 80, 401 N.W.2d 318 (1986). Hackett v. Foodmaker, Inc., 69 Mich. App. 591, 245 N.W.2d 140 (1976).		

Appendix cont'd

State	Breach of Contract		Promissory Estoppel	
	Employer	**Employee**	**Employer**	**Employee**
MN		Alfano v. AAIM Management Ass'n, 770 S.W.2d 743 (No. Ct. App. E.D. 1989).		Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).
MO	Alfano v. AAIM Management Ass'n, 770 S.W.2d 743 (No. Ct. App. E.D. 1989). Bower v. AT & T Technologies, Inc., 852 F2d 361 (8th Cir. 1988) (applying Missouri Law). Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961).		Rosatone v. GTE Sprint Communications, 761 S.W.2d 670 (Mo. Ct. App. E.D. 1988). Bower v. AT & T Technologies, Inc., 852 F2d 361 (8th Cir. 1988) (applying Missouri Law). Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961).	
NE	Goff-Hamel v. Obstetricians & Gynecologists, P.C., 256 Neb. 19, 588 N.W.2d 798 (1999).			
NY	Monaco v. Saint Mary's Hosp. of Troy Inc., 184 A.D.2d 985, 585 N.Y.S.2d 589 (App. Div.3d Dep't 1992).			
PA	Browne v. Maxfield, 663 F. Supp. 1193 (E.D. Pa. 1987 (applying Pennsylvania law).			
SC			White v. Roche Biomedical Laboratories, Inc., 807 F. Supp. 1212 (D.S.C. 1992) (applying South Carolina law).	
TX	Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561 (Tex. App. El Paso 1983).			
VA	Sartin v. Mazur, 237 Va. 82, 375 S.E.2d 741 (1989).			
WI		Cronemillar v. Duluth Superior Milling Co., 134 Wis. 248. 114 N.W. 432 (1908).		