The Inevitable Demise Of The Implied Employment Contract

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By Jonathan Fineman*

I. INTRODUCTION

Can courts use implied contract doctrine to impose workplace norms of fairness on employers? Not long ago, the answer appeared to be 'yes,' but more recent case law has dimmed the once-bright prospect of using implied contract rights to redress and deter unfair terminations, as a contrast between two prominent California cases illustrates.

In a case tried in the mid-1980s, Robert McLain successfully sued his employer for wrongful termination in violation of contract.1 Under the “at-will” employment system which rules American employment law, unless the decision violated a specific statute or public policy, McLain’s employer should have been able to terminate his employment for any reason or no reason at all. Indeed, if McLain had brought his lawsuit ten years earlier, it undoubtedly would have been dismissed for exactly this reason. However, beginning in the early 1980s, California (followed by many other states) began applying the general contract law principle of implied contract to employment cases. McLain’s suit demonstrates the early promise, and success, of this effort.

Under the at-will rule, unless the parties agree otherwise, courts presume that employment is at the independent will of both employer and employee, and therefore terminable

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by either at any time for any reason.\(^2\) In addition to this presumption, McLain’s employer, Great American Insurance Companies, relied upon an application form signed by McLain that read: “I agree that my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Great American Insurance Company or myself.”\(^3\)

In spite of the at-will rule and the application form, at trial the jury found that there was an implied contract between McLain and Great American whereby McLain could only be terminated for good cause. The jury’s decision was supported by the following evidence: (1) Great American’s personnel manual provided for progressive discipline before employees could be terminated for minor offenses or poor performance, and specifically listed the more serious offenses for which termination was an appropriate initial response; (2) Great American managers testified that the company had a policy and practice of firing only for cause; and (3) McLain was told that he would be a “permanent employee” after his initial probation period and was informed about long-term advancement opportunities.\(^4\) The Court of Appeal affirmed the jury’s decision in 1989.\(^5\)

*McLain* offers a textbook example of how the courts intended the implied contract remedy to be applied. Courts seemed troubled when employers informally expressed their intent to follow a particular policy of job security, such as progressive discipline or firing only for good cause, and then, after years of service by an employee who believed she would receive those protections, fired the employee in contravention of these expectations. In some such situations,

\(^2\) This doctrine was set forth in 1877 in a treatise written by Horace G. Wood entitled *A Treatise on the Law of Master and Servant*. By contrast, the common law of England presumed that employment was for a one-year term if the parties did not specify otherwise. Early American rules followed the English precedent until displaced by Wood’s formulation of employment at-will. See generally, J. Feinman, “The Development of the Employment At Will Rule,” 20 Am. J. Legis. Hist. 118, 119-20 (1976).

\(^3\) *McLain*, note 1 supra, at 1480.

\(^4\) *Id.* at 1486-87.

courts have held that an employer’s policies and practices, together with the employee’s reasonable expectation that those policies would be followed, constituted an enforceable implied contract.\(^6\)

Twenty years later, this approach to employment law has been considerably curtailed. Brook Dore did not fare as well in his breach of contract claim against his employer, Arnold Worldwide, Inc., in 2006.\(^7\) Like McClain, Dore signed a piece of paper (this time an offer letter) acknowledging that his employment was at-will. Dore sought to establish an implied contract that he could only be fired for cause. Specifically, he offered evidence that he was given assurances in his hiring interviews that he “would play a critical role in growing the agency,” that in filling the position the company “needed a long-term fix, not a Band-Aid,” and that the company had a “family atmosphere.”\(^8\) In addition, there was evidence of an informal policy or practice under which the previous holders of the position, as well as managers in general at the company who were long-term employees, were fired only for cause.\(^9\) Also relevant at the lower court level was the fact that Dore was required to sign non-compete and non-disclosure agreements, suggesting that the parties intended a lengthy relationship.\(^10\)

The Court of Appeal determined that this evidence was sufficient to create an issue of material fact regarding the existence of an implied contract, and therefore reversed the trial court’s summary judgment in favor of Arnold Worldwide.\(^11\) However, the Supreme Court disagreed and reversed, holding that the at-will provision in the offer letter constituted a written contract between the parties that could not be overcome by evidence of an implied contract.

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\(^6\) An implied contract can arise from among other things: oral representations, terms in manuals and handbooks or by the past practices of the employer or the mandates of the type of employment, including custom in the trade or industry. Rothstein \(\text{et al.}, \text{Employment Law, Third Edition at 764.}\)


\(^9\) \textit{Id.} at *7.

\(^10\) \textit{Id.} at *6.

\(^11\) \textit{Id.} at *7.
requiring good cause. The court further held that any evidence of contrary representations, policies, or practices was barred by the parol evidence rule because the at-will language of the offer letter was unambiguous. Furthermore, even if the evidence were admissible, the court concluded that it could not reasonably have supported a belief that Arnold Worldwide did not mean what it said in the offer letter.

What explains why McLain and Dore fare so differently with their claims? Certainly their cases raise the same basic questions of employment law and identical concerns about fundamental fairness and equity in the employment context. This article will answer this question by discussing the evolution of the implied contract doctrine in employment cases and the practical and legal implications and effects that ensued when courts used this theory to address fairness concerns.

Although courts did not use the rhetoric of “norms” popular in academic discourse today, their actions were in fact an attempt to enforce workplace norms through contract law. Over the last century, employers developed and largely followed a system of job protection policies, often including policies of progressive discipline and termination for good cause. By following these policies, employers increase worker loyalty and productivity, decrease costs, and obtain other tangible benefits. Courts originally applied implied contract doctrine to prevent a particular type of employer opportunism whereby certain employers received the benefits of representing that

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12 Dore, supra, note 7 at 389.
13 The common law parol evidence rule assumes the entire agreement between the parties is contained in a written contract and prohibits introduction of evidence outside the four corners of the contract when its terms are clear. In California, the rule is codified in section 1856 of the Code of Civil Procedure, which provides: “Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.”
14 Dore, supra, note 7 at 392-93.
they followed job protection policies, and then, after years of loyal service by an employee, terminated that employee in violation of those same job protection policies.\(^\text{15}\)

What happened when courts began giving job-security workplace norms the force of law? I argue that the results were not what the courts intended. After the first few cases were decided, there was an immediate reaction on the part of employers, who did not want their voluntary policies considered enforceable contracts. Employers began restructuring their employment documents, policies and practices to avoid liability. Through a process of trial and error, employers eventually were able to find a way basically to immunize themselves against implied contract claims. With careful drafting of personnel documents, employers now have little fear of implied contract lawsuits. As a result, many employees are arguably now worse off than they were in the 1970s. Not only are implied contract claims essentially impossible to win, most employees no longer have the benefits of the voluntary, but formalized system of job protections that were previously in place but subsequently abandoned to avoid liability.

I argue that the failure of contract law was inevitable. To the extent that contract law’s objective is to enforce the intent of the parties, contract law is not well-suited to address the kind of fairness and equity concerns that originally motivated the courts to act. Absent extraordinary circumstances, contract law is reluctant to ascertain and then impose outside values on the relationship the parties themselves structure. Contract law is also relatively inattentive to power imbalances and since in the typical modern employment context, the employer is often in almost complete control of contract formation, it can constantly adjust the terms and formalities of the

\(^{15}\) See, e.g., *Pugh v. See’s Candies*, 116 Cal. App. 3d 311 (1981). The prevalent theory is that a unilateral contract has been formed when an employer issues statements limiting its prerogatives, such as the application of at-will, and the employee commences work. The language must be clear enough so that an employee can reasonably believe that he or she has been offered employment under its terms. The offer must be disseminated to the employee. The employee must accept the offer by commencing or continuing work. There is no further consideration required, hence no mutuality of obligation requirement. See generally, Rothstein, *supra* note 6 at 750; see also section III(A) *infra.*
contract to its advantage.\textsuperscript{16} In this respect, the implied contract remedy is fundamentally different than other “exceptions” to the at-will rule. Unlike antidiscrimination statutes that impose upon the parties certain unavoidable obligations based on public policy, implied contract doctrine does not import external values into the employment relationship.

Conceptualizing the employment relationship as one of private contract, the terms of which as a practical matter are established solely by employers, means we will always end up with employment contracts that benefit employers. As long as individual employers are able to define the scope of their own obligations shielded by the nature of contract law, efforts to instill more structured, effective and binding workplace norms will be unsuccessful. We need to look beyond traditional contract law if we wish to enforce more equitable workplace norms.

Finally, I build on some existing proposals and suggest directions for future work in this area that resist traditional contract law’s reliance on the individual parties’ intent. To successfully enforce workplace norms, we must remove employers’ unilateral ability to restructure the employment relationship to avoid liability.\textsuperscript{17} I suggest looking beyond the relationship between the particular employee and employer to broader-based norms prevalent in the industry, applicable to the type of job position at issue, or generally accepted on a society-wide basis. Essentially, I argue that employers should not be able to opt out of the norms followed by similarly-situated employers dealing with similarly-situated employees. This aggregate norm approach would allow greater flexibility for employers than contract obligations but still protect reasonable employee expectations. Ironically, as the conclusion argues, looking

\textsuperscript{16} Of course, some employees have substantial bargaining power. Where employees are in high demand, employers do not have the same sort of control over the terms of the relationship. Similarly, collective bargaining may lessen employers’ control. That is why job protection provisions are still seen in union workplaces and in contracts for high-demand jobs.

\textsuperscript{17} This is accomplished in some European countries by making the government a party to industry wide employment contract negotiations. It can also be accomplished through laws that regulate the conditions of the workplace more generally, which is what happens in the United States in the context of prohibited discrimination or health and safety regulations. See infra, notes 22-24.
beyond the dictates of private contract in this way may actually set the stage for conditions of more equitable bargaining and negotiation between employers and employees.

II. The Complex Workplace – Norms and Regulation.

The basic presumption of employment since the late 19th Century has been the “at-will rule.” The term at-will describes a conceptual approach to employment whereby, unless there are specific terms to the contrary, each party is unilaterally and equally able to walk away from the relationship. Because each party is able to terminate the relationship at any time, each may also unilaterally change the terms of their side of the relationship at any time. An employer is entitled to make unilateral changes because this would be the logical and legal equivalent of firing the employee and then immediately offering her the same position under different terms. The position of an at-will employee is one of inherent instability – her employer may terminate her for a reason wholly unrelated to her job performance or merit.

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18 In recent years there has been a great deal of academic criticism directed at the at-will rule, particularly the premise of egalitarianism upon which it is based. Within an at-will world, if either party is dissatisfied with the continuation of the relationship, whether based on the performance or conduct of the other or on mere whim and hubris, the remedy is termination of the relationship. But the implications of that termination are decidedly different for a typical employee in contrast to a typical employer. Commentators have discussed in detail the actual unequal nature of the respective positions of the parties to the relationship, asserting that the at-will rule both obscures and enables exploitation of vulnerable employees.

19 In California an employer may unilaterally modify the terms of the employment relationship even in the rare instances where those terms are memorialized in a written contract between the parties. The rationale is explained in Digiacinto v. Ameriko-Omserv Corp., 59 Cal. App. 4th 629 (1997). In that case, the parties entered into a written employment agreement whereby Victor Digiacinto would receive $23.97 per hour to work as a supervisor. The contract also specified that employment could be terminated at any time with or without cause. Id. at 632. Five months later, he was informed that as a cost cutting measure, his pay would be reduced to $18.00 per hour. The court held that an employer may unilaterally change the compensation agreement without breaching the contract. According to the court, “with respect to an at-will employee, the employer can terminate the old contract and make an offer for a unilateral contract under new terms.” Id. at 636. As a matter of law, “an at-will employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.” Id. at 637.

20 See generally, Feinman, supra note 2.
A. The Construction and Effect of Workplace Norms.

The at-will rule has not alone governed the employment relationship, which is recognized as one of the most complex and important relationships in modern society. State and federal legislatures have adopted statutes that limit employers’ discretion in some respects. For example, concern over the welfare of employees motivated the establishment of some standards applicable to most workplaces with respect to minimum wages and occupational safety and health. Other statutes are directed at benefiting or protecting the employee in service of some transcending policy objective, such as preventing discrimination on the basis of gender, race, religion, disability, or age.

In addition, most states constrain employer action when it would adversely affect the states’ public policies or general laws. For example, in almost all jurisdictions it is unlawful to fire an employee for refusal to perform an unlawful act. Whistle-blowing generates an exception in a majority of states, particularly when it involves a matter of public concern brought to the attention of authorities. It is important to note with these exceptions that technically the

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21 Developments like civil service protection for public employees and the ascendancy of organized labor after the National Labor Relations Act was passed in 1935 meant that “just cause” requirements applied to much of the labor force, perhaps setting the stage for reconsideration of the at-will rule in private employment contexts in the latter half of the century.


26 There are wide variations among states when it comes to whistle blowing exceptions. One area of dispute is whether internal whistle blowing situations are covered in the same way as external cases. If someone has only complained to internal management and not to public authorities a court may feel this reflects no more than an internal disagreement between the employee and those decision makers within the company and is not sufficient to be deemed a wrongful discharge. See House v. Carter-Wallace, Inc., 232 N.J.Super. 42, 556 A.2d 353, certification denied, 117 N.J. 154, 564 A.2d 874 (1989). Contra, Belline v. K-Mart Corp., 940 F.2d 184 (7th Cir. 1999). Federal legislation is found in the Sarbanes-Oxley Act of 2002, 18 U.S.C.A §§ 1514A and the False Claims Act, 31 U.S.C.A. §§ 3729-3730; 18 U.S.C.A. § 287. Federal employees are further protected under the Civil Service Reform Act and the Whistleblower Protection Act.
at-will rule is not displaced by these rules. Rather, public policy exceptions merely identify certain motivations on the part of the employer that will give rise to a wrongful discharge claim on the part of the employee. \textsuperscript{27} Even with these exceptions providing some remedy, the at-will rule prevails and in most circumstances, the logic of private contract unmediated by public policy remains the primary mechanism to describe the legal implications of the relationship between employers and employees.\textsuperscript{28}

Notwithstanding the legalities, in the absence of comprehensive regulation by the state, employers established their own, often informal, rules and practices. For example, beginning in the late nineteenth century many American employers began restructuring their workplaces, instituting hierarchical job ladders, specific job classification systems, seniority systems, and employee retention policies.\textsuperscript{29} Collectively, these practices have been referred to as establishing the “internal labor market.”\textsuperscript{30} They provide a structure for employee advancement and some degree of job stability.

Although these rules were constructed “in the shadow” of the at-will rule, they often operated in practice to contain exercise of the unbridled discretion afforded to employers under

\textsuperscript{27} Rothstein [et al], supra note 6 at 774.
\textsuperscript{28} It is curious that the law largely treats employment as a matter of private concern considering the significant effects that employment decisions can have not just on employees, but also on society as a whole. Studies have shown that employees who are fired from their jobs have an increased likelihood of suffering from depression, substance abuse, illness and suicide. Their families also suffer, with evidence that spouses also suffer similar effects. In addition, unemployment is linked to increased levels of divorce, child abuse, and infant mortality. Unemployment also contributes to poverty and crime. For every 1% increase in unemployment, there are increases of 5.7% in homicides, 4.1% in suicides, and 1.9% in heart, liver, and stress-related diseases and disorders. See generally, Robert C. Bird, “Employment as a Relational Contract,” 8 Univ. of Penn. Journal of Lab. & Emp. Law 149, 162 (Fall 2005) (citing John J. Peregoy & Connie T. Schliebner, “Long-Term Unemployment: Effects and Counseling Interventions,” 13 Int’l Journal for Advancement Counseling 193 (1990); Connie T. Schliebner & John J. Peregoy, “Unemployment Effects on the Family and Child: Interventions for Counselors,” 72 Journal of Counseling & Development 368 (1994); Lea E. Waters & Kathleen A. Moore, “Predicting Self-Esteem During Unemployment: The Effect of Gender, Financial Deprivation, Alternate Roles, and Social Support,” 39 Journal of Emp. Counseling 171 (2002); Thomas Keefe, “The Stress of Unemployment,” 29 Soc. Work 264 (1984); Vonnie C. McLoyd, “Socialization and Development in a Changing Economy: The Effects of Parental Job and Income Loss on Children,” 44 Am. Psychologist 293, 299 (1989); Philip Harvey, “Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century,” 20 Berkeley Journal of Emp. & Lab. Law 677, 679-80 (2000)).


\textsuperscript{30} \textit{Id.} at 51-53.
the law. Of particular importance to employees, many of these workplace practices and procedures take the form of job security protections. Common examples were the stated policies indicating that: 1) an employee will only be fired when there is good cause to do so; 2) the employee will undergo progressive discipline practices that provide for warnings and other interim steps before termination; 3) there will be fair investigation and hearing procedures for allegations of misconduct; and 4) there are internal placement opportunities for employees terminated for non-performance related reasons.

In addition to specific representations, established practices within a workplace may structure and shape an employer’s negotiations with potential employees. New employees will, after all, join an existing workforce with established procedures and processes. If they are treated better than current employees it will cause dissention. If they are treated worse, they are likely not to join or to leave when they realize their disadvantage.

The promise of some semblance of job security provided by such practices is believed to be attractive to potential employees, potentially considered as important as more traditional wage or benefit provisions.\textsuperscript{31} Job security policies can be communicated in a number of ways. They may be general in nature, set out in employee handbooks or other personnel documents. In addition, there may be more specific, individualized representations set out in offer or acceptance letters. These may also be made orally. Further, general practices may be well established about which everyone knows even if they are unwritten.

Specific industries might have additional, more tailored policies and practices that are generally adhered to. An example of this is the understanding that sales figures will be judged on a monthly or annual basis, thus preventing a salesperson’s performance from being judged on the basis of one week of poor sales.

\textsuperscript{31} Stone, \textit{supra} note 29 at 53-54.
These protective practices and policies although they are directed at employees, also benefit employers.\textsuperscript{32} Otherwise, one suspects that they would not be fashioned and implemented in the first place. Indeed, the management experts who first devised these practices were explicit in describing their purposes and benefits. The policies were designed to improve employee morale, foster employee loyalty and motivation, and encourage training and sharing of knowledge.\textsuperscript{33} Internal labor markets were touted as reducing employee turnover, saving the employer recruitment, screening and training costs, and increasing the value of the workforce by facilitating training.\textsuperscript{34}

Studies show that employers who have loyal, committed employees receive significant competitive advantages over those who do not. Direct benefits of a committed workforce include better employee retention, attendance, effort, and job performance.\textsuperscript{35} Committed employees provide their employers with indirect rewards such as better customer service, better investor loyalty, more sales, and better cost control.\textsuperscript{36}

Important in regard to these innovations, no matter how they are generated, is the fact that employers participate in the creation of these protective policies and practices against the backdrop of autonomy that the at-will rule provides all employers. The at-will rule is more than a legal presumption; it also has served for generations as the background understanding for the

\textsuperscript{32} In fact, the idea that the employer benefited from the handbook representations was the basis of Michigan Supreme Court finding independent of contract theory that the manuals are binding because of the benefits the employer received. \textit{Toussaint v. Blue Cross & Blue Shield}, 408 Mich 579, 292 N.W.2d 880 (1980).

\textsuperscript{33} Stone, \textit{supra} note 29 at 47-48.

\textsuperscript{34} \textit{Id.} at 53.


\textsuperscript{36} \textit{Ibid.} These benefits explain why employers were eager to try to hold onto the handbooks and other representations of beneficial policies even when their existence resulted in findings of implied contract that threatened to undermine the at-will prerogative. See discussion at sections IV(A-B).
entire employment relationship.\textsuperscript{37} Employers have relied on the right they have had under the rule to terminate employees’ employment, regardless of any representations about job protection policies to the contrary made in manuals or orally. When it suited their needs, employers wanted, and courts typically have allowed them, to be able to break the rules and norms they themselves established and revert to their at-will prerogative.

\textbf{B. Voluntary Adherence to Workplace Norms.}

One of the reasons that internal labor market practices were developed in the first place was to decrease the likelihood that employees would unionize or engage in radical collective activity. After the 1930s, labor unions actively policed the rules of internal labor markets.\textsuperscript{38} Non-union employers had incentive to establish and then play by these rules. Otherwise, aggrieved employees might well turn to unions in attempts to force employers to fashion and follow job protection policies.\textsuperscript{39}

Outside of the union context job security practices and standards, whether individual employer or industry proposed, do not have the force of law in any formal sense. However, they may operate to establish aspirations and expectations for employees that far exceed legally mandated standards. Given that these restrictions serve important institutional functions, it is reasonable to conclude that at least in the mind of the employee they help shape the terms of the

\textsuperscript{37} Although it has been widely suggested, the only state to change the at-will rule by statute is Montana. The Montana Wrongful Discharge From Employment Act of 1987 created a cause of action for employees who, after a probationary period, were fired without good cause. Mont. Code Ann. §§ 39 -2 – 904 (2) (2005). See also the similar provisions in the Model Employment Termination Act of 1991, § 3(a), 4(c), which has not been adopted by any state.

\textsuperscript{38} Stone, supra note 29 at 60-63. Not only did unions enforce the rules on behalf of their own members, they had a chilling effect on opportunist behavior at non-union workplaces.

\textsuperscript{39} Ibid. As union strength waned generally, non-union employers worried less about their employees unionizing and therefore had less incentive to follow their job protection policies. Many employees were left without recourse when their employers breached their job protection policies. Employees eventually turned to the courts to try to force employers to follow their policies. As this article will demonstrate, the courts were ill-equipped to handle this challenge.
employment contract. Therefore, it is not quite accurate to say that individual employers have been free in practice to structure their relationship in any way they see fit.

Employers must at least pay lip service to general workplace norms if they are to attract and retain employees. In turn, employees expect employers to act within the confines of those same norms, even though the employer may have no legal obligation to do so.40 In addition, the expectations shape employee behavior, as employees conform to their understanding of the workplace norms and practices endorsed by the employer.41 In fact, in practice it appears that employers widely follow many basic workplace norms, including terminating employees for good cause.42

Employers benefit from progressive discipline, “good cause,” and other job security policies because they serve to ensure the conditions necessary to create a productive, loyal workforce which believes the employer acts fairly.43 However, any illusion of symmetry is misleading given the unequal position of employers and employees with regard to ability to ignore or frustrate a policy or standard. Employers acting voluntarily in establishing such job security policies, while they may well embrace the benefits they confer, do not necessarily want their handbooks, policies, and practices to dictate every action they take. They may want to retain the benefits of the at-will rule and, with it, the ability to alter or even abandon the policies in a specific case or type of case.44

40 Judge Richard Posner indicated that one function of the handbook was to convey useful information to employees. In addition, even if not legally binding, the promises “placed the employer under a moral obligation, or more crassly gives him a reputational incentive, to honor those promises. Workman v. United Parcel Services, Inc., 234 F.3d 998 (7th Cir. 2000) at 1001. The idea is that workplace norms are self-enforcing, even if not legally binding. See also, Edward B. Rock & Michael L. Wachter, “The Enforceability of Norms and the Employment Relationship,” 144 U. Pa. L. Rev. 1913 (1996).

41 Ibid.

42 Jesse Rudy, “What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe they Possess Just Cause Protection,” 23 Berkeley J. Emp. & Lab. L. 307, 342-43 (2002) (citing estimates that an employee has a less than one percent probability of being disciplined or dismissed for a reason that would violate a union just cause standard).

43 See generally, Stone, supra note 29.

44 See discussion at section VI, infra.
Employers certainly have reasons to resist giving these voluntary progressive policies the force of law if doing so provides the bases for lawsuits by employees when they are not followed. One reasonable fear is that giving workplace policies the force of law could open the door to frivolous lawsuits.\(^{45}\) Employers may also be wary because they fear that decision makers such as juries or judges may not possess the necessary expertise or experience to determine when a personnel decision was warranted.\(^{46}\) In addition, the fear may be that juries in particular will be biased in favor of employees. Such employer concerns need to be addressed. But employee concerns and fears must also be part of the equation and an equitable balance must include a measure of both sets of concerns, fears, aspirations, and expectations.

III. Early Implied Contract Cases in California.

The development of the law in California illustrates how courts were initially motivated to implement the implied contract doctrine, struggling in keeping with the sense of fairness they perceived underlying employee claims based on employer representations. The development of the case law in California presents the opportunity to study the evolution of a strain of doctrine over time, appreciating how courts react to and are constrained by previous holdings.

California is the logical jurisdiction for this type of case study for a number of reasons. California was a trendsetter state in the area of implied contract (as in many other doctrinal areas), being one of the first to allow such claims in the employment context.\(^{47}\) Second, partly because of its trendsetter role, California is recognized as a particularly “employee-friendly”

\(^{45}\) Indeed, frivolous lawsuits are common in the employment context, probably because most employees erroneously believe that the law protects them from discharge without cause. See discussion in part VI, infra.

\(^{46}\) It is true that courts and juries generally are not experts in the workplace practices prevalent in any specific industry. Accordingly, this article suggests mediation or arbitration as an alternative that allows for decision-making by more knowledgeable people. See discussion in part VI, infra.

\(^{47}\) Petermann, supra note 25.
state in terms of its statutory and common-law employment rules. Indeed, as this article will discuss, California courts have perpetuated this image and long resisted employers’ attempts to avoid implied contractual liability through the use of disclaimers. In this respect, California was more liberal than other states that quickly disclaimed any such strategy. Third, the implied contract doctrine has been extensively developed through litigation in California, which has a comparatively large number of reported decisions. As a result of this extensive litigation, we are able to trace the development of employer and judicial responses to the doctrine.

In addition, and perhaps most importantly, implied contract litigation has reached an “end game” in California. Through trial and error, employers eventually came up with a court-approved strategy for effectively avoiding liability for implied contract claims. The ensuing discussion of the limits of implied contract under California law applies equally well in any state that recognizes such claims, even if there are some state-based distinctions in how the struggle has played out.

### A. The Law Evolves.

California courts have long recognized some overlap between implied contract principles and employment law. Early decisions primarily dealt with employees’ right to receive promised benefits that they had already earned. For example, in a 1955 case, the Court of Appeal held that

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48 California courts have responded to issues of fairness and equity. See discussion at notes xx supra.
49 See Dore, supra note 7.
50 Thirteen states have not recognized implied contract employment claims: Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia. However, Delaware and Massachusetts recognize employment-related claims for breach of the covenant of good faith and fair dealing. Montana statutes prevent employers from firing employees without good cause, which makes implied contract claims largely superfluous. To the extent that other states have attempted to enforce implied contract claims, they have either already run into the same problems as California, or it can reasonably be predicted that they will eventually reach the same result.
an employer’s policy to pay severance benefits could be enforced as a contract. This type of implied contract remedy was a relatively small step for the courts. They simply had to enforce the traditional payment-for-work bargain in situations where the employer attempted to avoid payment for work already performed.

The situation of “implied contract” discussed in this article refers to a larger, more modern conceptual leap for the courts in which they are holding employers to representations and promises about job security, not part of the compensation bargain. Historically these are conditions that employers would otherwise be free to change or discard at any time. The most common examples of modern implied contract claims are: 1) an implied agreement that employees cannot be fired absent good cause; and 2) an implied agreement that employers will follow some form of progressive discipline or investigative procedures before terminating an employee.

California is an at-will state, but both the courts and the legislature have created exceptions to the rule, such as public policy claims and antidiscrimination statutes. In the early 1980s, these exceptions emboldened the courts to address the perceived unfairness when employers do not follow their own policies. In doing so, California courts were motivated by a sense of fairness. As described in Section II, supra, employers receive numerous benefits from fostering the belief that employees can only be fired for good cause. It would not be fair to allow

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52 California’s at-will rule is codified in Labor Code section 2922, which provides: “An employment, having no specified term, may be terminated at the will of either party on notice to the other.”
54 The same fairness concerns can be found even where the employee signed an express contract providing for employment at-will. See, e.g., Wagner v. Glendale Adventist Medical Ctr., 216 Cal. App. 3d 1379, 1388 (1989) (“When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny the relying party the benefit of the other party’s apparent modification of the written contract.”).
employers to receive these benefits and then fire employees without cause after years of loyal
service.55

The California Supreme Court has acknowledged the “widespread support among
scholars and practitioners in the field of human resources management for the position that
employee discipline should be governed by basic principles of due process.”56 The court
specifically noted four benefits that employers receive from job security protections: “1) a more
productive, responsible work force committed to the enterprise; 2) avoidance of union
interference; 3) avoidance of litigation based on statutory civil rights laws or common law
wrongful termination claims; and 4) the provision of incentives to retain current employees and
attract new ones.”57 Employees, in turn, may rely on their beliefs about job security in deciding
whether to accept employment or forego other job opportunities. It would not be fair to allow
employers to receive the benefits of this arrangement and then allow them to disregard it
whenever they see fit.

In the 1980 case Cleary v American Airlines,58 California courts first addressed the issue
of what to do when an employer’s exercise of its ability to terminate an employee under the at-will rule conflicts with its own job protection policies. Cleary is often overlooked as the first such case in favor of the more famous decision Pugh v. See’s Candies,59 reported four months later. This is probably due to the Court’s characterization of the claim as one of breach of good

55 Other jurisdictions have based their implied contract remedies on the same fairness considerations. Leikvold v. Valley View Community Hosp., 141 Ariz. 544 (1984) (employer may not treat job protection provisions in official policies as illusory even with a disclaimer if employees are encouraged to rely on the protections); Woolley, 491 A.2d at 1271 (“[i]t would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renge.”); Small v. Springs Indus., Inc., 292 S.C. 481 (1987) (as a matter of equity, employers cannot provide employees with policies and then choose to deviate from them whenever they see fit.); Swanson, 826 P.2d at 677 (an employer cannot “make extensive promises as to working conditions – promises which directly benefit the employer in that the employees are likely to carry out their job satisfactorily with promises of assured working conditions – and then ignore those promises as illusory.”).
57 Ibid.
58 Cleary, supra note 53.
59 Pugh, supra note 53.
faith and fair dealing, rather than implied contract, *per se*. This approach was later rejected as discussed more fully *infra*.

Regardless of the framing of the claim, however, *Cleary* is an instructive case for examining what motivated courts to seek a remedy for opportunistic conduct by employers. Cleary alleged that he was discharged after eighteen years of employment with American Airlines because he was involved in union organizing.\(^6^0\) He further alleged that American failed to comply with its self-adopted regulations, which provided that employees be allowed to protest their discharge though a “fair, impartial and objective hearing” and a “fair, impartial and objective review” of that hearing by a Review Board.\(^6^1\)

The trial court dismissed the case for failure to state a claim based upon the employer’s invocation of the at-will rule. The Court of Appeal reversed, holding that the plaintiff’s longevity at the company, together with the company’s adoption of regulations that detailed a specific procedure to be followed before termination, “compels the conclusion that this employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to all of its employees.”\(^6^2\) These two factors were considered to “operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause.”\(^6^3\)

The Court of Appeal in *Cleary* was concerned with possible harsh consequences that would result from allowing the employer to rely on the at-will rule.\(^6^4\) The court focused on the unequal position of the parties, with the employer enjoying more options and choices in a practical sense:

\(^{60}\) *Cleary*, supra note 53 at 447.

\(^{61}\) *Id.* at 447-48.

\(^{62}\) *Id.* at 455.

\(^{63}\) *Id.* at 456.

\(^{64}\) *Id.* at 448-51.
The absolute power conferred … on an employer to discharge the at-will employee without cause is founded on the contractual concept of mutuality of obligation. The reasoning is that, since an employee may terminate the employment relationship when he wishes to do so, the employer is also entitled to terminate the relationship at his pleasure. However, when viewed in the context of present-day economic reality and the joint, reasonable expectations of employers and their employees, the freedom bestowed by the rule of law on the employee may indeed be fictional.65

The court explicitly recognized that policy interests were at stake, noting there was a continuing trend toward recognition by the courts and the Legislature of certain implied contractual rights to job security. These were deemed necessary in the court’s opinion to ensure social stability.66 The court quoted with approval an academic critique of the at-will rule,67 which advocated implied contract rights for employees. Particularly persuasive to the court seemed to be the article’s assertion that in situations of conflict between an employee’s right to job security and an employer’s right to fire, the resolution should reflect a judicial balancing of the competing equities.68

A mere four months later, Cleary’s approach and its choice of remedies are recast by the Court of Appeal for a different district in Pugh v. See’s Candies, Inc.69 The plaintiff in Pugh shared some of the characteristics found compelling in favor of the plaintiff in Cleary. He was terminated after 32 years of exemplary service with See’s Candies because he objected to a

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65 Id. at 448-49.
66 Id. at 455.
68 Ibid.
69 Pugh, supra note 53.
“sweetheart deal” between his employer and a labor union. See’s had a “practice of not terminating administrative personnel except for good cause,” and the president of the company frequently told plaintiff that if he was loyal to See’s and did a good job, his “future was secure.”

Like in Cleary, the Pugh court noted the general trend toward limiting employers’ absolute right to terminate employees under any circumstances. Rather than build on the good faith and fair dealing language of Cleary, however, the court developed another limitation. There could be an agreement, express or implied, that employment will continue indefinitely unless there is some event giving rise to the employer’s dissatisfaction with the employee’s services or other cause for termination. The court outlined factors to consider in determining whether such a contract exists, and these have remained relatively unchanged: The personnel policies or practices of the employer were important, as was the employee’s longevity of service, and any actions or communications by the employer reflecting assurances of continued employment. Also relevant were the practices of the industry in which the employee is engaged.

Pugh, like Cleary, reflected the willingness of the court to take a liberal view of contract law in order to afford employees a remedy under certain circumstances. The employer’s

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70 Id. at 316-19.
71 Id. at 317.
72 The court discussed and rejected challenges to the formation of an implied contract based on the traditional contract doctrines of mutuality of obligation and independent consideration, holding that an employee’s continuing services are sufficient consideration to support an agreement for indefinite employment. Id. at 325-26.
73 Id. at 324-25. Guz v. Bechtel Nat’l, Inc., 24 Cal.4th 317 (2000), determines that longevity of service, promotions, positive performance reviews, salary increases and similar indicia of positive performance do not by themselves imply an employer’s contractual intent to give up its at-will rights — these events are “consequences of well functioning employment relationship” and are not alone indicative of employer’s intent. Id. at 341-43.
74 Id. at 327. The last factor, industry custom, is referenced in all of the cases but does not seem to have gained much traction. Few plaintiffs argue industry custom, and no published decision has relied on this factor.
75 The Plaintiff in Pugh lost on remand. The appellate court indicated that the trial court should not interfere with subjective management decision making, and the jury returned a verdict for the Defendant after hearing evidence that the Plaintiff was “rude, belligerent, and uncooperative,” as well as “disrespectful ... disloyal ... and uncooperative.” Pugh v. See’s Candies, Inc. (Pugh II) 250 Cal. Rptr. 195, 214 (Ct.App. 1988).
challenges to the finding of an implied contract doctrine were based on the traditional doctrine of mutuality of obligation, which requires shared consideration. The court rejected the argument that there could be no limits placed on the power of the employer with respect to the reasons for termination unless there were equivalent limits placed upon the power of the employee to quit his employment. The court held that if the basic requirement of consideration was met, there would be no additional requirement, such as some form of equivalence in the values exchanged or mutuality of obligation imposed.\(^\text{76}\)

Importantly, in setting out on the implied contract path, the *Pugh* court distanced itself from *Cleary’s* good faith and fair dealing remedy. In *Pugh*, the court determined that it need not go so far as to recognize a general duty of good faith and fair dealing limiting employers’ ability to discharge long-serving employees. The court in *Pugh* interpreted *Cleary’s* holding limiting the employer’s authority to fire as based on two independent grounds. The first ground was the breach of the duty of good faith and fair dealing created by the plaintiff’s long tenure. The second was the employer’s adoption of specific policies and practices for dealing with employee grievances.\(^\text{77}\)

Even though *Cleary* clearly described both grounds in terms of the duty of good faith and fair dealing, *Pugh* separated out the second and held that attention to the established grievance procedure was “equally explicable in traditional contract terms.” The court found that the employer’s conduct in this regard gave rise to an implied promise that it would not act arbitrarily in dealing with its employees.\(^\text{78}\) By pulling back on the duty of good faith and fair dealing and recasting *Cleary*, the *Pugh* court essentially constrained future plaintiffs to remedies founded on implied contract.

\(^{76}\) Id. at 325-26.  
^{77}\) Id. at 328-29.  
^{78}\) Ibid.
B. The Supreme Court Speaks.

Seven years later, in 1988, the California Supreme Court for the first time entered the scene and examined the issue of implied contract claims in the employment context. Basically, it adopted the Pugh, rather than the Cleary approach, separating tort from contract and favoring the latter. The plaintiff in Foley v. Interactive Data Corp. was terminated after seven years of employment. Plaintiff was fired after he informed management that his immediate supervisor was under investigation by the Federal Bureau of Investigation for embezzling from his former employer. Apparently, Interactive Data believed that plaintiff was trying to oust his supervisor. He pursued both an implied contract claim under Pugh and a good faith and fair dealing claim under Cleary. The plaintiff argued that Interactive Data maintained written policies setting forth express grounds for discharge. There was also a mandatory seven-step pre-termination procedure. He alleged that based on these policies, he reasonably believed that he could not be fired without good cause.

The Supreme Court embraced the implied contract approach. Furthermore, the court was clear that it was applying the modern perception of contract to these cases. Finding that Pugh correctly applied general and basic contract principles in the employment context, the court acknowledged that previously, special rules had been

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79 The California Supreme Court might have been motivated, at least in part, to limit recoveries in general by removing the possibility of tort-based recovery and relegating the employee to a contract remedy. The size of the awards being given under the combined theories in Cleary and Pugh were reported by Jung and Harkness to average $220,000 in the late 1980’s. Jung & Harkness, “The Facts of Wrongful Discharge,” 4 Lab Law. 257, 261 (1988).
80 47 Cal.3d 654 (1988).
81 Id. at 663. The court dismissed plaintiff’s claim for wrongful discharge in violation of public policy because the only interests at stake were private, rather than public, in nature. Id. at 665-70.
82 Id. at 662.
83 Id. at 664.
84 Id. at 676.
applied to employment contracts. In the past, promises of employment security were not enforced without evidence of independent consideration and an express agreement.

Noting that these rules were created in the late 19th Century, a time when courts were generally reluctant to look beyond explicit promises of the parties to a contract,\textsuperscript{85} the court took a more “modern” approach. Announcing that in regard to these contracts courts should seek to enforce the actual understanding of the parties, the court indicated the appropriateness of an inquiry into the parties’ conduct to determine if it indicated an implied contract.\textsuperscript{86}

The stated commitment to modern contract principles in \textit{Foley} was clear. The court recognized that there may be some historical basis for imposing formalistic limitations on employment security agreements, but concluded that any such basis has been eroded by the development of modern contract law. Consistent with that observation, it concluded that defendant’s suggested limitations were inappropriate for the modern employment context.

Interestingly, the court approached the employment situation as comparable to other contractual arrangements, discerning no basis for departing from otherwise applicable general principles.\textsuperscript{87} The court assumed that if there was an implied contract, it would have the same implications and force as an express contract.\textsuperscript{88} The court also reaffirmed \textit{Pugh}’s list of factors for determining whether an implied contract existed.\textsuperscript{89}

\begin{flushleft}
\footnotesize
\textsuperscript{85} \textit{Id.} at 678-79.
\textsuperscript{86} \textit{Ibid.}
\textsuperscript{87} \textit{Id.} at 678.
\textsuperscript{88} \textit{Id.} at 677-78.
\textsuperscript{89} These factors are “the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.” \textit{Id.} at 680.
\end{flushleft}
The embrace of general and modern contract approaches by the court had wide-ranging implications, including enabling the court to avoid formalistic challenges to the plaintiff’s claim. For example, the defendant employer in Foley had cited earlier precedent\textsuperscript{90} to argue that the alleged implied contract was barred by the statute of frauds. This argument had been a successful strategy at the intermediate appellate level, where the court had reasoned that if there was a contract prohibiting an employer from terminating an employee without good cause, then the employee had a reciprocal obligation to remain employed for at least a year.

This conclusion led to the Court of Appeal’s further determination that because the contract could not be performed within a year, it was barred by the statute of frauds unless it is in writing. In the spirit of more modern contract logic, the Supreme Court rejected this formalistic approach, admittedly resorting to its own bit of formalism with the holding that even a contract for “permanent employment” could possibly be performed within a year because the employee can quit or the employer can discharge for cause.\textsuperscript{91}

As forward-looking as it was in terms of contract, Foley severely restricted potential remedies under the Cleary good faith and fair dealing approach. In the first instance, the court held that good faith and fair dealing claims in the employment context arise from a contractual relationship and are fundamentally contractual in nature, thereby limiting prevailing plaintiffs to only contract, not tort, damages.\textsuperscript{92} This approach makes good faith and fair dealing claims largely redundant. A good faith and fair dealing claims adds to a lawsuit only where the employer acts in bad faith without actually breaching the contract – where the contract is also breached, the employee may obtain the same damages through a breach of contract action. But

\textsuperscript{90} Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440 (1984).
\textsuperscript{91} Foley, supra, 47 Cal. 3d at 672-73. This is the approach of “most modern courts.” See Mark A. Rothstein [et al], Employment Law, Third Edition (2005) at 762-63
\textsuperscript{92} Foley, supra note 80 at 683-99.
because the default at-will rule gives employers the contractual right to act unilaterally in any way that does not violate the contract, bad faith is all but limited to breaches of the contract itself. 93

The court went even further in curtailing the potential utility of good faith and fair dealing claims for employment plaintiffs, however. A realistic reading of Cleary could support the argument that every employment contract (at least for long-term employees) created a duty of good faith, whereby the employer could not terminate the relationship without cause. Foley repudiated this idea, stating that such an interpretation would have the effect of transmuting all at-will contracts into contracts requiring good cause for termination. The court pointed to Labor Code section 2922, which codified the at-will rule, noting that if Cleary was so interpreted it would be eviscerated. 94

Thus after Foley, in the employment context the covenant of good faith and fair dealing protects only the parties’ rights to receive the benefits of the contract. It cannot be the source of substantive duties that are not contained in or are contradicted by the contract itself. 95 Thus reduced in potential, the court was able to render the covenant meaningless in the face of the at-will rule. If the right to good faith and fair dealing protects only the parties’ right to receive the benefit of their agreement and their agreement is one that creates an at-will relationship, then there is no agreement to terminate only for good cause. The court declined to read the implied covenant standing alone as imposing such a duty. 96

93 A minority of states permit the use of this covenant to challenge employer actions, such as discharge. Generally the fear is that it will be used to undermine employer prerogative and that it is really an attempt to impose a just cause requirement. Rothstein [et al], supra note 6 at 765-66. Rothstein further argues that use of the covenant typically does not involve job security provisions, but prevents employers from depriving employees of benefits already earned. Ibid.

94 Foley, supra note 80 at 698, fn 39.

95 Ibid.

96 Ibid.
In keeping with a contractual understanding of the nature of the employment relationship, California courts after *Foley* were to look to the intent of the parties to determine whether there is an alleged implied contract and whether it is enforceable. The public policy implications of the employment situation were subsumed by the private nature of the bargaining process. This resonates in the rationale of contract:

[W]hile courts have engaged in a balancing of interests when defining the scope of common law tort duties, when the action is in contract, we defer to the parties themselves to balance the costs and benefits of adopting particular contractual terms – or in the case of implied employment contracts, to the employers determination of what rights and benefits it will voluntarily offer to its employees.”\(^97\)

In other words, it is up to the employer to define the terms of its relationship with its employees.

It is interesting to note that the decisions also incorporate the idea that implied contracts are enforceable because of employees’ reasonable expectations.\(^98\) The courts often frame the question as whether the employee could reasonably believe, based on the employer’s actions and policies, that she was entitled to certain job protections.\(^99\) This is potentially a different inquiry than whether the employer’s actions and polices express an intent by the employer to offer the job protections. An employee could have a reasonable belief that she is entitled to job protections even where there is a clear, unambiguous written statement of employer intent to the contrary. In fact, as this article discusses, employers may take advantage of employees’ beliefs about job security, deliberately fostering a perception that job protection policies apply even though they do not intend to follow the policies in all cases.

\(^{97}\) *Scott, supra* note 56 at 471.

\(^{98}\) See, e.g., *Scott, supra* note 56; *Pugh, supra* note 53.

\(^{99}\) *Scott, supra* note 56.
However, the courts have not developed the difference between employer intent and employee expectation inquiries or the potential inherent in looking at expectations. Courts consider whether an employee’s expectations are reasonable by referencing the same set of factors – whether the employee could reasonably believe that the employer’s actions and policies express an intent to offer job protections.\footnote{For example, in \textit{Guz, supra} note 73 at 340, the California Supreme Court phrases the issue as “whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer’s statutory right to terminate the relationship at will.” However, employees' expectations are determined by employers’ conduct. “The issue is whether the employer’s words or conduct, on which an employee reasonably relied, gave rise to that specific understanding.” \textit{Id.} at 342 (emphasis in original).} I will return to the subject of employee expectations later.

### IV. Effects of the Implied Contract Doctrine.

#### A. Actions and Reactions – the Employers Act.

Not surprisingly, when employers were first faced with implied contract lawsuits, they attempted to alter the terms of the employment relationship to avoid liability. The first approach was to insert a legal disclaimer in the employment documents, often the employee handbook. A typical early disclaimer was simply a statement of the employer’s intent that employment be at-will.\footnote{One example of such a disclaimer can be found in \textit{Wilkerson v. Wells Fargo}, 212 Cal. App. 3d 1217 (1989).}

The initial judicial response to the disclaimers was negative. Courts retained their tendency to give a basically liberal interpretation of the employment contract and continued to express a concern with fairness to the employee. For example, in \textit{Wilkerson v Wells Fargo},\footnote{212 Cal. App. 3d 1217 (1989).} the Court of Appeal considered a discharge situation in which the Bank’s handbook and service and operations manual expressly set forth as a disclaimer a statement of the at-will rule. The
plaintiff asserted that two officers and an executive vice president had told him to the contrary that employees would only be fired for good cause.\textsuperscript{103}

The court first found that the disclaimer was no bar to arguments that there was an implied contract, rejecting the Bank’s assertion that the handbook served as an express contract. Further, the court also found the parol evidence rule was not applicable and refused to bar evidence of the alleged oral statements. Earlier cases in which there had been a specific, integrated written agreement precluding the use of such evidence were distinguished on those grounds. The disclaimer language was found to be not dispositive, but merely one of many factors to consider in determining whether there was an implied contract.

The Supreme Court was not as willing to completely defang disclaimers, instead viewing them as valid expressions of employer intent. In \textit{Guz v Bechtel National, Inc.},\textsuperscript{104} the Court clarified the rules regarding disclaimers and, in the process, gave employers a road map for making their disclaimers more effective.

Guz introduced evidence of three personnel policies which he claimed Bechtel violated: 1) termination for poor performance would be preceded by progressive discipline; 2) layoffs during workforce reduction would be based on objective criteria; and 3) employees laid off during workforce reduction would receive placement and reassignment assistance.\textsuperscript{105} In addition, a Bechtel executive offered corroborating testimony that company practice was to terminate only for good reasons and to reassign a laid off employee when possible.\textsuperscript{106}

In response, Bechtel offered into evidence its written at-will disclaimer statement that “employees have no agreements guaranteeing continuous service and may be terminated at

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 1225.
\item \textsuperscript{104} \textit{Supra}, note 73.
\item \textsuperscript{105} \textit{Id.} at 345-47.
\item \textsuperscript{106} \textit{Id.} at 345.
\end{itemize}
Bechtel’s option.” Consistent with the approach of the Court of Appeal in *Wilkerson*, the Supreme Court acknowledged that such an expressed disclaimer presents evidence of the intent of the parties but is not controlling, and affirmed that such provisions do not bar other evidence of the employer’s intent to enter into contractual obligations.\(^{107}\)

However, the Supreme Court went on to note that an implied contract assertion would be particularly likely to prevail and overcome an express disclaimer where other provisions in the personnel documents suggest explicit self-imposed limits on the employer’s termination rights.\(^{108}\) Although it had included a general disclaimer, Bechtel’s written policies also contained detailed procedures for terminating employees in specific situations. For example, the handbook provided that employees terminated as a result of workforce reduction were entitled to advance notice, job search assistance, and possible reassignment to another position at Bechtel.\(^{109}\) In addition, employees could only be fired for unsatisfactory performance after they had been advised of specific shortcomings and given an opportunity to improve their performance.\(^{110}\)

The court held that a reasonable trier of fact could find these specific provisions were enforceable despite the general disclaimer.\(^{111}\) In doing so, the court used a general principle of contract law: more specific provisions control over more general provisions. The court questioned whether employees could reasonably believe that the specific protections set forth were in fact overruled by the general, boilerplate language of the disclaimer found elsewhere in


\(^{108}\) *Id.* at 345-46.

\(^{109}\) *Id.* at 347.

\(^{110}\) *Id.* at 337.

\(^{111}\) *Id.* at 345-46.
the employee handbook.\textsuperscript{112} In adopting this approach, the court suggested that it was persuaded by general fairness concern and was not unaware of the actual nature of the employer/employee relationship.\textsuperscript{113} The language is revealing: “handbook disclaimers should not permit an employer, at its whim, to repudiate promises it has otherwise made in its own self interest, and on which it intended an employee to rely.”\textsuperscript{114}

Acknowledging the fact that there also were equities on the side of the employer, the court in a footnote conceded that the probative value of a disclaimer depended on its clarity, scope and prominence.\textsuperscript{115} Thus, it held out the possibility that a well-crafted disclaimer might suffice to conclusively determine that employment was at-will. The court balanced against the employers’ traditional freedom the likely employee understanding and expectations, suggesting that employee reliance was a significant factor. The burden on the employer was not minimal and it was apparent to the court that what should matter was the clarity and consistency of the language of the disclaimer, as well as its prominence, in handbooks, policy manuals, and memoranda disseminated to employees. The more explicit and detailed the disclaimer, the greater the likelihood that workers could not form any reasonable contrary understanding.\textsuperscript{116}

\textbf{B. Second Round – Employers Try Again.}

Unsurprisingly, employers sought ways to strengthen the at-will statements in their personnel documents. Underscoring again the significant benefits they perceived progressive policies to supply on the job market, employers did not immediately abandon job protection policies in their employee handbooks even as courts began to enforce them. Instead, employers

\begin{itemize}
\item \textsuperscript{112} Id. at 345-47
\item \textsuperscript{113} Id. at 340.
\item \textsuperscript{114} Ibid.
\item \textsuperscript{115} Id. at 340, fn 11.
\item \textsuperscript{116} Ibid.
\end{itemize}
tried drafting more clear and complete disclaimers. They also attempted various means to create an express contract of at-will employment with their employees without actually offering a complete employment contract. Reactions by the courts were confusing and often contradictory.

One strategy employers attempted was to insert into their personnel documents disclaimers stating that the documents are “not intended to give rise to contractual rights or obligations.”117 Employers hoped that by using this language, courts would be unable to find that the policies contained in their personnel documents constituted enforceable contracts. This strategy worked in some cases.118 However, in other cases it backfired. For example, in Reid v. Smithkline Beecham Corp.,119 the employer tried to rely on at-will disclaimers in its employment application and handbook to preclude evidence of an implied contract. However, both documents contained statements that they were not intended to be contracts. The court therefore held that there was no express at-will agreement between the parties which would preclude evidence of an implied contract. Plaintiff was allowed to present evidence of the employer’s practice of terminating only for good cause, thereby raising a triable issue of fact regarding the existence of an implied contract.120

Employers also added disclaimers to the specific sections of the handbook that set forth job protection policies. In Haggard v. Kimberly Quality Care, Inc.,121 for example, the employee handbook contained a progressive discipline policy. That section of the handbook also contained the following statement:

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118 Id. at 522. Haggard demonstrates a particularly efficacious use of this strategy. In that case, the employer disclaimed its handbook by stating that it is not intended to create contractual obligations, and at the same time had employees sign an agreement explicitly stating that employment is at-will. The court held that the handbook was not a modification of the express contract. Ibid. The use of express at-will agreements is discussed more fully infra.
120 Id. at 994-95.
121 Supra, note 117.
The company may utilize a system of progressive discipline, at its sole discretion, in cases of misconduct or unacceptable performance. The use of such a system does not waive either the company’s or your right to terminate employment at any time with or without cause.\textsuperscript{122}

The court found this handbook inconsistent with an intent by the employer to alter the at-will relationship between the parties.\textsuperscript{123}

At the same time employers were experimenting with disclaimers, they also explored another strategy to avoid implied contract claims – having employees sign a piece of paper including an express statement that employment is at-will. The paper could be an employment application, offer letter, acknowledgement of receipt of employee handbook, confidentiality agreement, or non-compete agreement. This strategy takes advantage of the general contract principle that there can be no implied contract that directly contradicts the terms of the express agreement between the parties.\textsuperscript{124}

The issue is often framed in terms of the parol evidence rule. Where there is an express contract, parol evidence is admissible only to prove an interpretation of the contract to which the express language is reasonably susceptible.\textsuperscript{125} In the employment context, this means that express at-will language prevails even where the employee can point to employee handbook provisions, employer practices, or oral assurances suggesting that the company intended to follow certain job protection policies.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item[122] Id. at 522-23.
\item[123] Ibid. The handbook also contained general disclaimers stating that employment was at-will.
\item[124] Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 482 (1984); Haggard, supra note 117 at 517-18.
\item[126] Halvorsen v. Aramark Uniform Serv., Inc., 65 Cal. App. 4th 1383, 1388 (1998) (personnel policies, employer practices, communications by the employer reflecting assurances of continued employment, and industry practices “have no relevance when there is an express contract of employment which sates the term of employment.”)
\end{enumerate}
\end{footnotesize}
Courts generally enforce express at-will language as long as it is included in a valid contract signed by the employee. However, employees were not left completely without remedy. Some courts held that an express at-will provision barred evidence of only prior or contemporaneous collateral agreements, not subsequent ones. Therefore, even if an employee signed an express at-will agreement, she could still rely on evidence that the employer later made promises or adopted a policy that limited its discretion.

To avoid the claim that the employer’s stated at-will policy was modified by subsequent policies, practices or oral representations, employers began adding language purporting to limit how the at-will relationship could be modified. For example, an employee handbook, offer letter, or other personnel document might contain language like:

I understand and agree, my employment is for no definite or determinable period and may be terminated at any time, with or without prior notice, at the option of either myself or the Company, and that no promises or representations contrary to the foregoing are binding on the Company unless made in writing and signed by me and the Company’s designated representative.

Where such language was included in a valid contract signed by the employee, it was often successful in precluding an implied contract claim based on subsequent employer actions.

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127 E.g., Camp v. Jeffer, Mangles, Butler & Marmaro, 35 Cal. App. 4th 620, 629-30 (1995). In Camp, plaintiffs signed an acknowledgement that their “employment is at will and can be terminated at any time with or without cause.” The court held that there “cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results,” even if the express term is not contained in an integrated contract. Id. at 629-30; see also, Haggard, supra note 117 at 517-18. Where the express at-will provision is not signed by the employee, it has no preclusive effect. Reid, supra note 119 at 994 (parol evidence may be admitted that contradicts express at-will policy in employee handbook where employee never signed acknowledgement that he received ad understood handbook provisions).


129 This disclaimer was part of the employee handbook at issue in Lenk v. Total-Western Inc., 89 Cal. App. 959, 966 (2001).

It may appear that employers had found a foolproof method for avoiding liability for implied contract claims – have employees sign an express agreement stating that employment is at-will and that the nature of the relationship cannot be altered except in another express agreement signed by senior management. Indeed, defense lawyers recommended these very strategies to employers. For instance, in a white paper discussing the impact of Guz, defense firm Morgan Lewis provided the following advice:

[E]mployers who intend employment to be terminable at will should convey that intent clearly and consistently in an express written agreement signed by the employee. Factors such as long-term employment, accolades and raises, and other conduct and employer polices, then will be insufficient to transform an at-will employment relationship into one terminable only for good cause. Of course, an at-will agreement should be carefully drafted to ensure that it covers all actions that the employer intends to be at its will and that it cannot be unwittingly set aside by agreements made later by subordinate officials and managers in the organization.”¹³¹

However, some courts were not willing to throw in the towel on implied contract claims. While courts could not dispute the well-settled rule that an implied contract cannot contradict the terms of an express agreement, they had some latitude in determining what constitutes a valid express contract. This area of the law features conflicting Court of Appeal decisions. Some decisions distinguished between an employment application and a contract signed after hiring, holding that the former was not an enforceable contract but rather a solicitation of an offer of

employment. Other decisions held that an employer could not rely on express at-will provisions contained in standardized forms that omitted key terms of the employment relationship. On the other hand, many courts held that any written agreement containing an at-will provision barred evidence of contrary implied contracts, even if the express agreement only had a single term, the at-will provision. Some courts held that an express at-will provision had no preclusive effect unless the agreement was integrated, while others excluded evidence at odds with non-integrated contracts. Other decisions used the doctrine of “partial integration” to determine that documents which were not integrated as to their other terms or omitted other material terms were integrated with respect to employees’ at-will status.

These conflicting Court of Appeal decisions resulted in employer confusion. The defense firm Seyfarth Shaw succinctly describes the decisions facing employers: “The temptation to soften ‘at-will’ language for various recruiting and HR purposes can be strong, but the risk is that plaintiff’s lawyers will attempt to capitalize on inconsistencies and ambiguities and this can lead to expensive litigation.” Clearly, certain strategies could significantly lessen employers’ exposure to implied contract claims. However, success was not guaranteed, as some courts were willing to let employees have their day in court despite clear disclaimers and express statements of at-will employment. Employers continued to worry about potential liability from following job protection policies. The strategies discussed in this section all involve employer efforts to clarify their stated intent to enter into a contract for employment at-will. At the same time, employers engaged in conduct designed to affect the other side of the courts’ analysis – the


134 Ibid.

135 Starzynski, supra note 130 at 38; Camp, supra note 127 at 630; Halvorsen, supra note 126 at 1388.


evidence which employees could introduce to show that they reasonably expected to benefit from a job protection policy. Those efforts are discussed in the next section.

C. Employers Abandon the Field.

After courts started enforcing implied contractual rights to job security, employers began taking steps to reduce the evidence on which an employee could rely to demonstrate the existence of an implied obligation. While courts’ intent in adopting the implied contract rule might have been to make employers live up to their promises, the result instead was to cause many employers to cease making any promises in the first place. Paradoxically, the use of the implied contract doctrine to protect employee expectations actually created an incentive for employers to act arbitrarily, avoiding promises of consistency and fairness in order to reduce liability. An employer who has previously discharged employees for no good reason has a stronger defense to an implied contract claim than one who has consistently based its discharge decisions on merit and followed certain established procedures.

The possibility of implied contract liability created competing incentives for employers in regard to the manuals. They were forced to decide whether retaining beneficial employment security policies was worth the risk of legal liability or the curtailment of their historic freedom. In an article directed at employers and published on a website for small businesses, a group of professors led by Patricia Borstorff summarizes these competing interests.138 The article notes that while employment at-will disclaimers may help avoid legal liability, they can have a negative impact on attracting and retaining talented, dedicated employees.139 “A manager is

139 Id. at 1.
faced with a judgment call between maximizing legal protection and presenting the corporate culture as one that is stiff, legalistic, and mistrustful.”

In the 1980s, after the first wave of implied contract claims, commentators noted that some management lawyers were advising their clients to avoid using employee handbooks, or at least to omit from them any provisions dealing with job security. Some observers questioned whether there would be a large-scale abandonment of employee handbooks. The original consensus was that the benefits from handbooks and other formal policies outweighed the increased risk of litigation. Predictions were that few employers would give them up.

In hindsight, this speculation proved to be incorrect. Unable to find a liability-proof disclaimer that would insulate them from all implied contract claims, some employers simply gave up on setting forth comprehensive voluntary progressive policies. They drafted vague, overly general statements from which no specific protections for employees could be implied, or ceased reducing policies to writing altogether.

The trend towards removing job protection policies from handbooks can be seen in the facts of California decisions. In *Wagner v. Glendale Adventist Medical Center*, for example, the court describes how the employee handbook changed over the years. In 1977, the handbook contained a general disclaimer that employment is “based on mutual consent,” meaning either party may terminate employment. Nevertheless, a section of the handbook dealing with “dismissal” predicated termination of employees only for poor job performance or misconduct. This section of the handbook was modified in 1983 to add the words “at-will” to the disclaimer language. In 1986, this section of the handbook was completely rewritten.

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140 *Id.* at 4.
142 *Id.* at 10.
143 *Supra*, note 128.
144 *Id.* at 1387-88.
Replacing the section detailing the reasons for dismissal was a new section regarding
"discipline," which provided that discipline “may consist of verbal warning, written warning,
suspension without pay, and/or discharge depending on the seriousness of the infraction.” No
longer does the policy limit the reasons for discharge. The same section of the handbook also
contains a disclaimer stating that employment is at-will and that the information contained
therein “is intended as a guideline and is not meant to create a contractual relationship.”

When the first implied contract cases were decided, employees could point to relatively
clear evidence showing that boilerplate expressions of the at-will rule did not accurately describe
the real agreement between the parties. Employers often disseminated written job protection
policies to employees. Managers and supervisors testified that they followed unwritten
policies and practices limiting their discretion under the at-will rule. Employers also made
explicit oral promises to employees regarding their length of employment.

In recent years, employers, reacting to those early cases, put into place devices that make
it unusual to find a case with the sort of strong, unequivocal evidence that supports applying an
implied contract exception to the at-will rule. In the few contemporary cases in which an
employees can point to specific written job protection policies, those policies will be
counteracted by prominent disclaimers. Managers are wary of representing that employers will

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145 Id. at 1392.
146 Ibid.
147 In Foley, supra note 80 at 664, for example, the employer maintained written guidelines that listed the acceptable
grounds for discharge and contained a mandatory, seven-step pretermination procedure. These procedures were in place during
the time of plaintiff’s employment, from 1976 to 1983. Id. at 663. Similarly, the plaintiffs in Scott, supra note 56 at 460-61
introduced evidence of the employer’s written policies mandating certain progressive discipline procedures. These procedures
were in place in 1989. Ibid.
148 See, e.g., Pugh, supra note 53. In Pugh, the president and general manager of the company admitted to following a
practice of firing administrative personnel only for good cause. Id. at 317. Pugh was terminated in 1973, before California
courts began enforcing implied employment contract claims. Ibid. See also, Scott, supra note 56 at 461 (Personnel Manager
testified that the company follows its progressive discipline policies, which were not discretionary).
149 For example, in Malmstrom v. Kaiser Aluminum & Chemical Corp., 187 Cal. App. 3d 299, 308 (1986), the employer
did not dispute that it made assurances during plaintiff’s pre-hire interview. Plaintiff was told by the person that hired him that
his job would continue as long as he performed his work satisfactorily, and that the company never terminated anyone except for
good cause. Id. at 308-09. This interview occurred in 1976. Id. at 308.
follow unwritten job protection practices or giving other indices of assurance. In contrast to many of the early cases, many recent implied contract plaintiffs rely on nothing more than vague statements and tenuous suppositions.\textsuperscript{150}

It is important to realize, however, that it is merely setting forth explicit policies that employers have abandoned, not necessarily the underlying practice of the norms which they reflect. Many employers still largely follow job protection policies; they merely act without formally announcing an intent to do so, thereby minimizing fear of implied contract suits but ensuring the benefits do not disappear.\textsuperscript{151}

In retrospect, the abandonment of recognized job protection provisions should not come as a surprise. After all, what are employers losing by walking away from their written policies and admitted practices? Employers may continue to provide most employees a system of progressive discipline, although with an unwritten, more informal practice than previously undertaken. If the practices are visible, employees will continue to perceive the employer as fair, so the employer generally will retain the benefits that would have come from their formalized policies, i.e., employer satisfaction and motivation.

However, if the informal practice is not followed, it will be substantially harder, if not impossible for an individual employee to bring a lawsuit founded on contract. Without a written policy, it is much more difficult for an employee to prove that her employer promised or intended to be bound to any specific practice or process.

It is therefore somewhat surprising how long employers held on to their written policies and the lengths they went to in order to try to craft a disclaimer that both attracted employees by

\textsuperscript{150} In the recent case *Kelly v. Stamps.com Inc.*, 135 Cal. App. 4th 1088 (2005), plaintiff asserted that she was protected by an implied contract that she could only be terminated for good cause. Her only evidence of such an implied agreement, however, was the fact that she was awarded a retention bonus in October 2000 and which had a second installment due in April 2001. *Id.* at 1102. While the bonus may have reflected a desire by the employer in October 2000 that plaintiff remain employed until April 2001, it was not a promise. *Id.* at 1102-03.

\textsuperscript{151} See generally, Rudy, supra note 42.
setting out progressive policies while not really ceding any of the traditional power enjoyed by
the employer under the at-will rule. This demonstrates that employers recognized the potential
value placed upon job protection policies by employees. A handbook, or any other written
texts of employer policy, is a unique way for employers to communicate with employees
and present a positive image. Handbooks function as a “symbol of stability and security” for
employees. The fact that policies are written down and distributed to employees makes them
seem more substantial and suggest a greater commitment by the employer.

There is one additional consideration. Aside from their role in recruiting employees,
employers may correctly perceive that there is an independent value in having written, rather
than informal, policies. There can be real benefits to employers in general in a workplace that
had written policies. For one thing, in formulating or implementing formal rules, individual
managers are encouraged to think about big picture and general policies while making decisions
about how to treat individual employees. The objective of uniformity is easier to achieve and
there is certain efficiency in resolving the bulk of situations by resort to formal policies, rather
than on an ad hoc basis with its potential for appeal and argument. The point is that non-legal
norms generated by and reflected in handbooks and practices and polices structure the workplace
even if not enforceable in courts of law.

Employers’ response to the implied contract doctrine may have lasting effects on the very
nature of the workplace. Loss of explicit job protection policies may mean less restraint and
many more violations of fairness and progressive norms that had been developing under an
employer’s voluntary approach to modification of the at-will employment contract. More ad
hoc, less standardized rules may mean less protection for individual workers and for workers in

152 Coombe, supra note 141 at 10-12.
153 Id. at 13.
general. What has been lost is the non-legal voluntary protection that employers were developing in response to industry and competitive pressures.

**D. The Courts Respond.**

Although many view the law in California regarding implied employment contract claims as a confusing morass of contradictory opinions, clear trends can be discerned from the supposed chaos. Over time, courts became increasingly likely to value employers’ express disclaimer or at-will provision over employees’ assertion that employers’ conduct gave rise to an implied understanding of job security. Similarly, courts were increasingly likely to use formalistic contract doctrines, such as the parol evidence rule and the partial integration rule, to hold as a matter of law that employees could not prevail on an implied contract claim.

What explains the courts’ reversion to more traditional contract principles? Such retreat is rooted in general contract doctrine, but it seems also evident that there is something about the nature of employment contracts that caused the courts to ultimately embrace the available formalistic, straightforward resolution methods.

Some commentators believe that California courts simply became more conservative over time. While a change in the makeup of the judiciary may have had some effect, we must also examine the shifting factual circumstances with which the courts had to deal. After all, courts do not make decisions in a vacuum, but respond to situations as they evolve. Actions and reactions generate unanticipated issues and must subsequently factor into the courts’ evolving approach to a series of situations. When placed in the context of employers’ changing behavior, the courts apparent retreat into conservatism is more appropriately understood as the product of complex factors and pressures.
As discussed supra, employers changed the landscape of the employment relationship, making it more difficult for employees to point to evidence that they intended to modify the at-will rule. In early cases, it was often relatively easy for the courts to find that employers’ express statements of at-will employment were ambiguous or even misleading because employees could point to specific handbook provisions, admitted practices, explicit policies, or oral promises to the contrary.154

Given these employer innovations, it has become more difficult for courts to emphasize employee expectations. In the face of employers’ increasingly well-drafted and unambiguous statements of their intention to make the employment relationship at-will, which are acknowledged by the employee, courts are left without recourse to contract principles which come into play where there is ambiguity and uncertainty. They may still be moved by the imbalance of position and suspect that the employee may not have been clear as to what exactly the disclaimer meant in real terms, but the disclaimers are specific and the counter evidence likely to be ambiguous. Even when the courts do look beyond employers’ written statements, the paltry evidence employees are able to muster under the dictates of contract law, embellished with the basic at-will premise for employment situations does not leave the courts much of an option.

The “chaos” created by divergent Court of Appeal decisions was significantly lessened by a 2006 decision by the California Supreme Court, Dore v. Arnold Worldwide, Inc.155 In that case, the employee received an offer letter describing his commencement date, salary and benefits, and initial probationary period. The letter also contained a paragraph stating that employment would be at-will and that “Arnold Communications has the right to terminate your

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154 See discussion at notes 147-149, supra.
155 Supra, note 7.
employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time.”

Plaintiff signed the letter, signifying his acceptance of the various employment terms. The Court affirmed that this express language alone was sufficient to bar an implied contract claim. The decision is significant because it gives the Supreme Court stamp of approval to a particular employer strategy for avoiding implied contract claims. In the future, employers know that if they include express at-will language in an offer letter signed by the employee, the parol evidence rule will bar the employee from making an implied contract claim. Although not explicit in the decision, Dore also implicitly settles some of the conflicts in the lower court. For example, the offer letter at issue did not have an integration clause, nor did it contain all of the material terms of the employment relationship. Apparently neither of these issues prevented the court from using the parol evidence rule.

Dore was immediately hailed by defense lawyers. According to a prominent California legal newspaper, the decision “is a boon for the business community and clarifies an area of the law that had gotten increasingly murky because of conflicting appellate court opinions in recent years.” Defense firm Jones Day expressed similar sentiments in a commentary posted on its website shortly after the decision. Jones Day called Dore “an important decision for employers” that “confirms that employers who include at-will language in their offer letters will be able to

156 Id. at 388.

157 Id. at 387-88.

158 Id. at 389. Some practitioners warn that Dore left the door open for implied contract claims through the doctrine of latent ambiguity. According to that doctrine, extrinsic evidence is admissible if it could reveal more than one possible meaning of a contractual term even though the term is unambiguous on its face. The Court determined that there was no such ambiguity in the present case, but reaffirmed the basic validity of the latent ambiguity concept. Id. at 391-92. However, the supposed ambiguity in Dore centered on the employer’s description of the at will relationship as one that can be terminated “at any time” without also stating that employment can be terminated “for any reason.” Id. at 391-93. Even if this were still an open question after Dore, employers can avoid any latent ambiguity argument by using language that specifically states that employment can be terminated at any time for any reason.

159 “Calif. High Court: No Mystery to Employee’s ‘At-Will’ Contract,” The Recorder (August 7, 2006).
defeat breach-of-contract and misrepresentation claims based on an employee’s allegations of assurances of long-term employment.”¹⁶⁰

Attorney Paul Siegel of the defense firm Jackson Lewis interpreted the decision even more broadly, asserting that the court “adopt[ed] a rule that provides solid legal ground for an unambiguous statement in an offer of employment that the parties agree to “at-will” status whereby the agreement may be terminated at any time and for any or no reason by either party.” He further stated that the “clear and succinct decision is a relief for California employers in helping to navigate the treacherous waters of defining the terms of employment.”¹⁶¹ The law firm Sedgwick, Detert, Moran & Arnold is similarly strong in its analysis: “In light of Dore v. Arnold, if an employer is careful to use at-will language in employment documents, employees will be hard pressed to pursue wrongful discharge claims premised on a breach of contract theory.”¹⁶²

As things currently stand, as long as employers are careful when drafting documents, there is now little chance that they will be liable for an implied contract claim.

**E. Control and the Need for Flexibility.**

After California courts granted employees the ability to assert implied contractual rights to job security, the courts struggled with the expansive potential of the remedy they created. Implied contract terms could potentially lock employers into obligations that might last for

years. While there were certainly valid policy reasons and fairness concerns that lent support to the idea of employee implied contract claims, there were also competing public policy and fairness interests that favored protecting employers’ discretion to manage the workplace in a flexible and efficient manner. As employees’ interests became more protected, cases began to reveal the extent to which employers felt threatened by erosion of their traditional prerogatives and sought ways to restore the balance of options in their favor. The courts’ responses to these employer arguments reflected their fundamental concession to the basic hierarchy of the employment relationship, favoring employers’ needs over a sense of fair play even when that went against the trends in the law itself.

The most obvious example of this phenomenon can be found in the so-called “modification” cases. In Asmus v. Pacific Bell, there was no question that the employer was bound by an implied contract, which prevented it from firing employees without good cause. The issue for the Court’s consideration in Asmus therefore was not contract formation, but whether the employer could unilaterally modify the implied contract in order to revert it back to an at-will employment arrangement.

The general principle governing contract law in California at that time was clearly articulated in the dissenting opinion of Chief Justice George: one party cannot unilaterally modify the terms of an existing contract. The dissent noted that the law was clear that a party wishing to modify a contract must both provide new consideration and obtain the acceptance of

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163 Courts must be careful when allowing parties to assert contractual rights, because once given, such rights are difficult to constrain. Courts have limited ability to balance equities in a contract case. Nor can a court easily decide that the terms of the contract are only enforceable under certain circumstances. In a traditional contract case, either there is a valid contract or there is not. If a valid contract exists, it imposes obligations on the parties that may be enforced through a breach of contract action. Generally, a contract is considered unenforceable only for extreme reasons under doctrines like unconscionability or illegality. Courts may also refuse to enforce a contract that violates public policy. Outside of these uncommon situations, a court has little choice but to enforce contractual right and obligations.

164 23 Cal.4th 1 (2000).

165 There is no legally significant difference between an implied and expressed contract term.
the other party in order to change its terms.\textsuperscript{166} The majority, however, sided with the employer, imposing no such limitations on the modification process in the employment context. Disregarding the generally applicable contract modification rule, the majority held that an employer could unilaterally modify an implied employment contract after giving reasonable notice of intent to do so and if such modification did not interfere with employees’ vested benefits.\textsuperscript{167}

It is worth noting the logic employed in the majority opinion preserving the employer’s dominant control over the workplace in the face of contract rules that seemed to dictate a different result. The majority first characterized the employment contract under consideration as unilateral in nature.\textsuperscript{168} In making this designation, the majority reached back decades into the formalistic history of contract law.

In early employment cases, courts originally cast agreements as unilateral contracts in order to avoid ritualistic employer challenges to employee claims that there was a contract. Employers sought to establish that employment agreements were bilateral in nature, arguing that if there was no “mutuality of obligation,” there was no consideration for the contract because the employee would be free to quit at any time with no penalty attaching. The unilateral contract framework developed by the courts at that time removed this argument and any requirement of provision of separate consideration by the employee. Under its terms, after a contract has been unilaterally proposed by one party, the other party’s performance of its terms constitutes an acceptance.

\textsuperscript{166} \textit{Asmus, supra} note 164 at 31-32.

\textsuperscript{167} \textit{Id.} at 6.

\textsuperscript{168} \textit{Id.} at 10.
The Restatement (Second) of Contracts\textsuperscript{169} further clarified the unilateral contract rule through the concept of partial performance. Under the Restatement, once the promisee begins performance, the offer becomes an option contract that cannot be revoked by the promisor even though the promisee can cease performing at any time without breaching the contract.\textsuperscript{170} This approach to the unilateral issue allows an employee through performance to establish acceptance and, thus, enforce the terms of an employment contract, while at the same time preserving his or her right to still leave the employment at any time.

After determining that the original contract was unilateral, the court held that the modification created a new unilateral contract. It found that the employees’ continued work and the employer’s provision of continued employment evidence acceptance of the new contract.\textsuperscript{171} The following passage illustrates the tortured logic the court undertook to reach this result:

The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required. The mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only. In the unilateral contract context, there is no mutuality of obligation. For an effective modification, there is consideration in the form of continued employee services. … Plaintiffs' continued employment constituted acceptance of the offer of the modified unilateral contract. … The corollary is also true. Just as employers must accept the employees' continued employment as

\textsuperscript{169} Rest. 2d Contracts § 25 (1981).
\textsuperscript{170} \textit{Ibid.} It is questionable what “full” performance means in the employment context. In some sense, an employment with an indefinite term cannot be fully performed until it is terminated, at which point the contract ceases to exist.
\textsuperscript{171} Asmus, supra note 164 at 14-15.
consideration for the original contract terms, employees must be bound by amendments to those terms, with the availability of continuing employment serving as adequate consideration from the employer. When Pacific Bell terminated its original MESP and then offered continuing employment to employees who received notice and signed an acknowledgement to that effect, the employees accepted the new terms, and the subsequent modified contract, by continuing to work.\footnote{Id. at 14-15.}

The most questionable conclusion within the court’s reasoning is that no new consideration is required for the modification of a unilateral contract.

It is important to distinguish between the consideration required for contract formation versus contract modification. Under established law, no consideration beyond performance is required on the part of the promisee in accepting a unilateral contract, which is an issue of contract formation. On the other hand, once such a contract is already in place, consideration should be required in order to modify its terms.\footnote{See generally, Sullivan, “Unilateral Modification of Employee Handbooks: A Contractual Analysis,” 5 Regent U. L. Rev. 261, 288-293 (1995).} Indeed, the whole logic underlying the doctrine relating to unilateral contracts, particularly the rule that the offer cannot be revoked once performance has begun, demands this result.

Apparently the Asmus majority realized, even though it does not directly address, this conceptual problem, which perhaps explains its extensive discussion of the issue of adequacy of consideration for the modification. However, the court’s conclusion that “the availability of continuing employment serves as adequate consideration from the employer” for the unilateral modification is just as nonsensical. According to the contract, the employer was already obligated to provide continuing employment consistent with the terms of the original agreement,

\footnote{Id. at 14-15.}
which in this case provided for termination only with good cause. In fact, if the question revolves around adequacy, the “new consideration” is even less than what the employees received before because the “availability of continuing employment” offered by the employer is now terminable at-will.174

Similarly distorting the factual circumstances and otherwise defying logic is the court’s further assertion that “plaintiffs’ continued employment constituted acceptance” of the modified contract.175 According to this logic, the employees in Asmus had only two options: 1) accept the contract modification by continuing in employment, or 2) terminate the contract by leaving employment. Faced with an offer to modify a contract a party should have the option to reject the proposed modification and continue with the contract as originally formed, an option suspiciously missing from the court’s opinion. The crux of plaintiffs’ claim was that the employer did not allow them to reject the proposed modification without having it result in termination of the contract. Given that there was a valid contract in place limiting termination to situations of good cause, its attempt to terminate that agreement should have resulted in the employer being found in breach of contract.

The majority’s resort to an antiquated and arguably improper application of the unilateral contract doctrine in Asmus is inconsistent with other developments, even within the employment context.176 In other situations it has been clear that mutuality of obligation is no longer required in employment contracts. According to modern case law, an employee’s continuation of work is

174 According to an Arizona court considering the same issue, “any other result brings us to an absurdity: the employer’s threat to breach its promise of job security provides consideration for the rescission of that promise.” Demasse v. ITT Corp. 194 Ariz. 500, 1145 P.2d 1138 (1999).
175 Asmus, supra note 164 at 16.
176 It is also inconsistent with the approach taken in a number of other jurisdictions. Brodie v. General Chem. Corp., 934 P.2d 1263 (Wyo. 1997) (continuing to work not sufficient for modification and additional consideration necessary when employer attempts to restore at-will status); Torosyan v. Boehringer Ingelheim Pharm., Inc. 234 Conn. 1, 18, 662 A.2d 89, 99 (1995) (continuing to work following issuance of a handbook that substantially interferes with employee’s legitimate expectations is not conclusive evidence of consent, but raises a question of fact); Demasse v. ITT Corp. 194 Ariz. 500, 984 P.2d 1138 (1999) (new handbook is merely an offer to modify existing handbook and requires consideration beyond continuing to work).
adequate consideration to support any number of promises by the employer.\textsuperscript{177} The \textit{Asmus} majority conceded that the distinction between unilateral and bilateral contract is exaggerated and also noted that the Restatement has abandoned the terms.\textsuperscript{178} Nevertheless, the majority chose to resurrect the concept of unilateral contract. Alluding to its utility in these cases, the court notes, “the use of unilateral contract analysis has been growing in recent years, particularly in employment cases.”\textsuperscript{179}

Also notable is the refusal to apply the rules regarding modification of an existing contract. The reason for the court’s evasive and illogical acrobatics in this case is not difficult to determine. The court is explicit in recognizing the policy considerations that underlie its decision. According to the court, the employment relationship is dynamic, and employers must be able to alter their policies to meet the changing needs of their business. In addition to flexibility considerations, the \textit{Asmus} court cites with approval decisions from other jurisdictions that indicate that preventing employers from modifying the terms of employment would undermine traditional employment principles, i.e., the at-will rule.\textsuperscript{180} The majority asserts that its holding allowing employers to unilaterally modify implied employment contracts after reasonable notice is the majority rule in other jurisdictions.\textsuperscript{181} But as the dissent notes, many of those other jurisdictions explicitly recognize that the rule is based on public policy grounds rather than traditional contract principles.\textsuperscript{182}

\begin{footnotes}
\footnotetext{177}{See \textit{Pugh, supra} note 53.}
\footnotetext{178}{The Restatement (Second) of Contracts criticizes and does away with the distinction between unilateral and bilateral contracts. The comment to section 25 expresses “doubt as to utility of the distinction” because it suggests there is a meaningful difference between the bilateral acceptance and performance and the unilateral performance without or before acceptance. There should be no distinction because there is an obligation for the promisor to perform in either case.”}
\footnotetext{179}{\textit{Asmus, supra} note 164 at 10, fn 4.}
\footnotetext{180}{This contention makes little sense. The at-will rule is a presumption, and does not imply where the parties agree to another type of relationship. Where the issue is modifying an already existing contract, the parties have chosen to supplant the at-will presumption. Therefore, the at-will rule should be irrelevant.}
\footnotetext{181}{\textit{Id.} at 11-14.}
\footnotetext{182}{\textit{Id.} at 33-34.}
\end{footnotes}
Ultimately, Asmus illustrates, and the next section addresses the fact that the problem in employment cases is that the limitations of a contract remedy make it both incompatible with the flexibility considered so important for employers at the same time as it is incompatible with fairness concerns centered on the needs and expectations of employees. Unless employers are allowed to modify implied employment contracts, they could be collared with contractual obligations lasting for the tenure of an employee who might remain with the firm for thirty years. On the other hand, employees who have invested decades in a firm, and followed all the rules expecting that performance gave them some protection against arbitrary termination have justifiable expectations that employers will live up to their promises. It is difficult for courts using contract to balance competing equitable considerations in deciding whether or not to enforce an employee’s contractual rights.\(^{183}\) Under contract principles, once rights are allocated to either employers or employees, that means they must consent to abandon those rights, and contracts cannot easily be modified to suit the needs of a changing workplace.

V. Private Contract Is the Wrong Remedy.

Given that the law conceptualizes employment primarily as a matter of private concern governed by contract, it is not surprising that courts initially turned to contract law to address the problem of employers failing to live up to their own workplace norms.\(^{184}\) Although other

\(^{183}\) The California Supreme Court explicitly recognized that it cannot use contract law to balance competing equities. In *Scott*, *supra* note 56, the court addressed the issue of whether implied contract claims could be extended to demotions as well as terminations. The employer argued that the court should engage in a balancing of the employer’s interest in managerial discretion with the employee’s interest against being treated wrongfully. According to PG&E, the employee’s interest in not being unfairly demoted is less than his interest in not being unfairly terminated. Therefore, employers’ interests outweigh employees’ interests in demotion cases, and courts should not enforce implied contracts providing protection against demotion without cause as a matter of public policy. The Supreme Court held that this argument fundamentally misunderstood contract law. “While courts have engaged in a balancing of interests when defining the scope of common law tort duties, when the action is in contract, we defer to the parties themselves to balance the costs and benefits of adopting particular contractual terms — or, in the case of implied employment contracts, to the employer’s determination of what rights and benefits it will voluntarily offer to its employees.” *Id.* at 471 (citations omitted).

\(^{184}\) Until the latter part of the twentieth century, it would have been unthinkable to use something other than contract doctrine to limit an employer’s power to terminate the employment relationship. In *Adair v. United States*; 208 U.S. 161 (1908),
“exceptions” to the at-will rule are overtly based on public policy considerations, in the case of frustrated employee expectations, even though equities are also at issue, courts have not looked beyond contract law. Perhaps the contract route initially seemed sufficient to address the more egregious general policy concerns about the inequities in the employment relationship. In fact, the implied contract remedy showed some initial promise when it was adopted, but the courts that followed this route were eventually left with an ineffective framework. Contract law, as it has been construed under the influence of the at-will rule, simply has not been a flexible and nuanced enough vehicle for monitoring fairness in the employment relationship.

A. The Limits of Contract.

Commentators have decried particular instances in which the courts have acted in ways that limit the efficacy of implied contract claims of potential benefit for employees. It is tempting to think that if the courts had only decided issue X or issue Y differently, employees would now be enjoying a robust contractual remedy that would uphold employers’ accountability under their voluntarily established workplace norms. But the problems inherent in the employment relationship as it is conceived in American law transcend contract’s ability to bring balance. In fact, it is the fact that the courts are tethered to the currently limited nature of

the Supreme Court invalidated the Erdman Act of 1898, which was enacted to prevent disruption of interstate commerce by labor disputes. It protected union members by prohibiting yellow dog contracts and the discharge or blacklisting of employees for union activity. An employer who discharged an employee for union membership challenged the constitutionality of the statute. Writing for the majority, Justice John Marshall Harlan posited equal bargaining power between employer and employee. He held the law to be an unreasonable invasion of personal liberty and property rights guaranteed by the due process clause of the Fifth Amendment. Relying on Fourteenth Amendment precedents, Harlan grafted the substantive conception of due process and freedom of contract onto the Fifth Amendment. He also found the act to be outside the scope of congressional commerce power. Ignoring the statute’s legislative history, he asserted there was “no legal or logical connection” between union membership and interstate commerce (Id. at 178). Justice Joseph McKenna, in dissent, called for judicial realism, whereas Justice Oliver Wendell Holmes echoed the position of restraint he had espoused in Lochner v. New York (1905): the legislature was the proper arbiter of public policy and could reasonably limit freedom of contract.

Conservatives extolled Adair for condemning “class legislation,” while Roscoe Pound thought it epitomized “mechanical jurisprudence,” the use of “technicalities and conceptualizations” to defeat the ends of justice. The precedent supported invalidation of state laws providing similar protections for unions (Coppage v. Kansas, 236 U.S. 1 (1915)) until the New Deal era revolutionized labor/management relations.

185 See notes 22-26, supra.
contract law itself in combination with the power imbalance inherent in the American workplace that prevents a truly effective remedy from being fashioned.

Although courts are often willing to liberally interpret contract theory to combat perceived unfairness in the employment relationship, this approach can only go so far. At the end of the day, any court applying contract law must follow the law’s basic principles. Specifically, the court must enforce the agreement between the parties absent some overriding unconscionability or public policy concern. As Asmus and the other modification cases discussed infra demonstrate, it is unlikely that courts will find such a policy interest that conflicts with the perceived need for employer flexibility and control of the workplace. Certainly courts may play with concepts such as ambiguity and intent, but at some point employers will draft an unambiguous contract, making their intent crystal clear and the court will have no choice but to enforce its terms.

Relevant in this regard, as many scholars have noted, the employment contract typically does not arise from an equal bargaining process. Most employees have little control over the terms and conditions of their employment. Instead, it is the employer who is in control of the relationship within the realities of the employment context and the unreality of the at-will assumptions. Employers have the practical ability to structure the relationship however they see fit.186

Employers generally draft all of the policies, contracts, and other written indicia of the relationship. Equally indicative of the one-sided nature of the relationship is that fact that employers are at liberty to alter existing documents at their sole discretion in order to avoid

186 Again, employers’ control of the workplace is not monolithic. Some employees have relatively more bargaining power and are able to dictate terms to their employers.
unwanted liability or eliminate practices deemed unnecessary or inefficient. These documents form the primary evidentiary tool from which courts must determine the intent of both of the parties and interpret the terms of the contractual relationship between them.

If a court decides to liberally interpret contract law to thwart employers’ aims, employers can simply rewrite their existing or future documents to close off that possibility, taking advantage of some other contract principle of interpretation. When the courts stretch contract doctrine to benefit employees, employers can use that same doctrine to guide their rewriting of the documents that make up evidence of the employment contract, minimizing those benefits. In addition, most starkly illustrative of the ineffectiveness of contract to bring fairness to these relationships, employers can simply retreat from providing those documents that might evidence contractual expectations altogether and simply find comfort and empowerment in the unaltered terms of an unembellished at-will rule.

We see this dynamic favoring employers played out in the disclaimer cases discussed above. In Guz, the court went to great lengths to preserve the implied contract remedy in the face of an explicit disclaimer that the employer did not intend to assume any contractual obligations or modify the at-will rule. Nevertheless, the court had to recognize bedrock principles of contract law and admit that employers could structure the relationship in such a way that employees could not possibly think that the intent was anything other than at-will. This concession to the primacy of intent, mandated by traditional contract principles, left the door open for employers’ innovation as to the wording and placing of disclaimers, an opening that allowed them to preserve the at-will prerogative intact. The nature of contract doctrine made it

187 See Asmus, supra note 164.
188 Some commentators believe that contract law can and should deal more effectively with fairness concerns. I agree with these criticisms and believe that contract law has untapped potential in this regard. This article characterizes contract law as primarily interested in enforcing the intent of the parties because that is how the law is interpreted and applied by courts.
189 Guz, supra note 73 at 340, fn 11.
inevitable that employers would eventually find a way to effectively avoid implied contract claims. Even if the courts rejected the strategy of having employees sign an acknowledgement that employment was at-will as a means of protecting employer initiative, employers could always either fashion some other device arising out of contract interpretation that would have eventually produced the same result, or abandoned the practices that threatened to undermine their prerogatives.

B. Contract Law is Value-Neutral.

Commentators often situate the implied contract doctrine in employment law as part of a larger trend towards erosion of the at-will rule. According to this widely-held view, for years courts and legislatures have been busy creating exceptions to the at-will rule. In addition to the implied contract doctrine, such exceptions are found in anti-discrimination statutes and public policy limitations. Many scholars see these combined changes as cumulative evidence that substantial portions of the judiciary and legislature are beginning to recognize the essential unfairness of the at-will rule. Some even believe that an increasing number of exceptions to the at-will rule is an intermediate stage in the process of ultimately doing away with the at-will rule altogether. In the literature, the cumulative effects of both implied contract and these other innovations have been described as modifying or limiting the at-will rule because although

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191 See notes 22-26, supra.


an employer may still terminate an employee for a good reason or an arbitrary reason, it may not do so for a “bad” reason.\textsuperscript{194} Bad is defined as a reason prohibited by statute or public policy. As the number of impermissible reasons grows through additional legislation or affirmations of public policy concerns, the at-will rule is in a very real sense eroded.

Consistent with this gradual erosion view, when a decision upholds an employer’s ability to contract around an implied contract claim, commentators react as though this represents a return to and retrenchment of traditional rules and as an undermining of the modern trend to limit the harshness of the at-will rule. While it is accurate to state that there has been a trend towards erosion of the at-will rule, it is misleading to lump together implied contract claims with the public policy and good faith exceptions that legitimately form the basis for this trend.

There are fundamental and qualitative differences between implied contract claims on one hand and antidiscrimination statutes or public policy claims on the other. Implied contract claims are at best neutral with respect to the underlying power and policy choices reflected in the at-will rule. By contrast, antidiscrimination and public policy claims are based on the introduction of other societal values into the employment relationship. For example, in passing the ADEA (and other laws with anti-discrimination and anti-retaliation provisions), Congress essentially determined that there is a public interest in preventing discrimination on the basis of age.\textsuperscript{195} Congress deemed this policy objective more important than any competing interest in employer freedom of action. The Act challenged the very logic of the at-will rule because it limits the employer’s unfettered discretion.

Implied contract claims, however, do not erode or even basically challenge employers’ exercise of discretion under the at-will rule. The at-will rule has always allowed for its effect to

\textsuperscript{194} See, e.g., Moss, At-Will, \textit{supra} note 192.

\textsuperscript{195} According to Congress, the intent of the statute is to remedy practices which disadvantage older workers and cause unemployment and deterioration of skill and morale. 29 U.S.C. § 621.
be overcome by the parties’ agreement to create a different type of contractual relationship. Where the parties have entered into a different form of contract, the at-will rule would no longer apply.\textsuperscript{196} Recent implied contracts decisions have not changed this basic dynamic. An employer may enter into an agreement whereby it agrees to place limits on its ability to terminate employees, but it is still at the employer’s discretion to enter into such an agreement at the first place.\textsuperscript{197} Unlike antidiscrimination statutes that are imposed independent of employer intent or desire, implied contract doctrine does not import external, overarching societal norms or values into the employment relationship.

Therefore, the \textit{Dore} decision, in protecting employers’ ability to use express contracts to avoid implied contractual liability, should not be seen as a retrenchment of at-will. The implied contract doctrine it employs was never a serious repudiation of the at-will rule in the first place. From the beginning and consistent with the concepts underpinning contract theory itself, courts have characterized the implied contract remedy as voluntary in nature and dependent upon the manifestation of employer intent through the establishment of policies to govern the workplace.\textsuperscript{198} It should come as no surprise that some employers would and could alter the documents used as outward manifestations of their intent by courts in order to avoid implied contract claims. Far from being a retrenchment of the at-will contract, this is a natural consequence of the way the remedy for its unfairness to the employee was framed.

Courts’ inability or unwillingness in the employment context to incorporate outside values into their contractual analysis seriously limits the efficacy of implied contract claims, at least for addressing the fairness concerns that originally motivated the courts. It is difficult to

\begin{footnotes}
\item[196] See generally, Feinman, \textit{supra} note 2.
\item[197] See, e.g., \textit{Asmus, supra} note 164 (characterizing job security protections as a unilateral contract with terms offered by the employer and accepted by the employee through performance).
\item[198] See, e.g., \textit{Guz, supra} note 73.
\end{footnotes}
use contract law to force employers live up to some outside ethical standard. It can be used to make employers follow their own agreements voluntarily entered into with their own employees. But since employers generally control those agreements, the contract principles that govern them and confer that very power are not an effective tool for changing employer behavior.

When courts first developed the implied contract remedy, it adequately addressed the concerns of the courts. It was only after courts started down the path of contract that its limitations became apparent. Now the issue is framed in terms of contract, it may be difficult to change direction. If courts had originally looked to public policy considerations, they may have had more flexibility to adjust the remedy to changing circumstances.

VI. Looking Beyond Contract.

A. What are the Real Problems?

One might ask what is wrong with the situation in which employers maintain the upper contractual hand through rules protecting unilateral modifications and the basic logic of the at-at-will rule. If the possibility for deceptive or misleading representations were removed by employers’ clearly indicating that they have made no promises of job security and intended only that the at-will rule prevail, then there is no problem. But this argument ignores workplace realities.

In fashioning the implied contract approach, the courts focused primarily on the intent of the employer, based on the content of handbooks and other formalized policies. But another important consideration is what employees could have reasonably expected based on the manifest day-to-day workplace operations. Those interactions exemplified the norms that
underlay the policies expressed in the handbooks and manuals. Based on practice and existing procedures, employees develop certain expectations about job security, expectations which can form regardless of the stated policies of their particular employer.

In fact, outside of the employment arena, modern contract principles are based on the observation that human expectations and understandings are shaped more by general norms and by the specific actions of others than by formal stated policies.\textsuperscript{199} Just as in other contract situations based on norms and practices, if employers generally follow for-cause standards and use progressive discipline, employees will expect those to prevail regardless of disclaimers to the contrary tucked away amidst myriad other rules and regulations in handbooks and manuals. Further, independent of particular employer actions, employee expectations can be based on prevailing norms in the larger industry, or even perceptions about what society demands of employers in general.

Empirical studies suggest that employees typically do not understand the nature of at-will employment, no matter how clear the disclaimer language or what notification documents they voluntarily sign. Professor Pauline T. Kim conducted the first detailed study designed to determine how well employees understood that they could be fired without cause.\textsuperscript{200} Her results clearly show that employees vastly overestimate their job-security protections. Indeed, her sample groups had an error rate averaging above 80\% when asked whether employers could terminate employees under various scenarios where employers are entitled to do so, such as for purely cost-saving reasons.\textsuperscript{201}

\textsuperscript{199} See, e.g., U.C.C. Art. 2 (providing that a manufacturer of consumer goods cannot disclaim implied warranties to consumers).


\textsuperscript{201} Id.
Professor Jesse Rudy followed up on Kim’s research a few years later. He replicated Kim’s study using a different sample population – Kim surveyed people at unemployment offices, while Rudy surveyed employed people in different states than those surveyed by Kim. Rudy’s results mirrored Kim’s, demonstrating a widespread misunderstanding of the rule.

Rudy summarizes the results of both studies as follows:

This strong pattern of over-estimation indicates that employees are more than unaware of their at-will status. Not only do they not know about or misapply the at-will doctrine, they hold beliefs about their current level of legal job security that are simply wrong. Employees erroneously believe that the law prevents employers from discharging them in a wide variety of situations where the law does not protect them.

Significantly, these studies also demonstrate that many employees do not understand typical at-will disclaimer language – when asked to apply a policy reserving the employer’s right to “discharge employees at any time, for any reason, with or without cause,” 74% of Kim’s respondents and 50% of Rudy’s respondents still incorrectly believed that it was unlawful for an employer to fire an employee for purely cost-saving reasons.

On the other hand, employers with access to lawyers, industry organizations, chambers of commerce, and other interest groups typically have a much greater understanding of legal rules and what they mean in this regard. This means that employers are likely to be able to take advantage of their superior access to knowledge to both receive the benefits of employee loyalty

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203 Id. at 317.
204 Id. at 326. For example, Kim’s respondents mistakenly believed that it was unlawful to terminate an employee because of personal dislike at a rate of 89%, and Rudy’s study found that 84% of respondents were incorrect regarding the same question. Ibid. 87% of Kim’s respondents and 85% of Rudy’s respondents incorrectly believed that an employer cannot terminate an employee who it mistakenly believes has stolen money. Ibid.
205 Id. at 330.
206 Id. at 335.
while still retaining the right to rely on the at-will rule. However, as Rudy argues, the existence of widespread misunderstanding about job protection likely means that employers follow job protection practices in most cases. If employers often fired employees without cause, employees would better understand that employers had the right to do so.

As these studies suggest, employees base their expectations on how employers act, not on their employers’ specific disclaimers or other written policies, no matter how clearly drafted. In addition, it appears that most employers follow workplace norms regarding job security regardless of what their formal policies or disclaimers might declare. Ultimately, it seems there is widespread agreement and understanding among both employers and employees as a whole that the workplace should be governed by norms of practice, not legalities of disclaimer, and that practice should follow some basic standards of due process. It was the breach of this historically shared understanding that led to the perceptions of unfairness to employees that the courts were originally trying to address in California and elsewhere through implied contract principles.

Since the empirical evidence indicates that there is widespread compliance with due process norms on the part of employers, employers could assert this shows there is no need for the law and courts to intervene. Employers could argue that there is sufficient incentive in the system for them to follow the policies they voluntarily establish. Given the shared perception of fairness, any employer that routinely flouted its own policies would, over time, cease to benefit

208 Rudy, supra note 42 at 340-41.
209 Rudy, supra note 42 at 342-43 (citing estimates that an employee has a less than one percent probability of being disciplined or dismissed for a reason that would violate a union just cause standard). See also, Rock & Wachter, supra note 40.
210 Fundamentally, the issue is not about disclosure. Employers may argue that the solution to the problem is to craft more effective disclaimers so that employees truly understand the nature of at-will employment. However, employees will never understand that employers can legally violate workplace norms until large numbers of employers consistently violate those norms. As discussed infra, many employers benefit from job security protections and choose to follow them most of the time even when not forced to do so by legal process
211 Rudy makes precisely this argument. Rudy, supra note 42.
in the recruitment and retention of employees from the perception of fairness that such practices and policies provide. Only an employer who followed its own policies most of the time would have the record in practice that would allow it to retain the benefits gained from establishing such practices in the first place.

One response to this argument is that it assumes perfect information on the part of potential employees, an assumption that might not prove valid even for current employees who would have more access to relevant information. This critique would be particularly appropriate in the context of larger workplaces. Even if knowledge of a termination is circulated, all details might not be evident and employees might be more likely to assume that someone who has been fired has been fired for a good reason and the expected processes followed. There would be no way to correct such a misperception if there is no centralized mechanism for gathering facts about such situations and conveying them to employees.

In any event, even if employers have an incentive to voluntarily follow the rules, if those rules do not have any legal force at best the incentive only insures that they will be followed most of the time. Countervailing incentives might intervene in individual cases, and the question of what, if anything, should happen in those situations where the employer acts inconsistently with the policies and practices remains. Just because employers have incentives to follow the rules in most cases does not mean we should ignore those situations in which they fail to do so.

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213 In a union shop, this mechanism for collection and dissemination of information is structured into the workplace through the role the union performs.

214 Moss, At-Will, supra note 192 (employers sometimes engage in “profitable cheating” in particular cases).
B. Leaving Individual Intent Behind.

The reality of asymmetric bargaining and power positions between employer and employee presents important policy concerns and questions. In particular, given the undeniable imbalance, should society act to curtail employers’ basically unfettered freedom to act in a unilateral manner outside of collective bargaining situations? Or, do the demands of the market mandate that we accept employers’ ability to act at will, with few externally imposed legal restraints protecting vulnerable employees?

Certainly the history of doctrinal development in California should convince us that these questions cannot be answered through resort to the language of agreement and bargaining alone. We need a solution that is not built totally around these notions, thus taking the policy questions out from under the limitations of contract analysis altogether.

Surveying the California history, we find that courts using contract to address these concerns ended up exactly where they started. Employers are free to imply that all sorts of protections might apply to employees, but unless those suggestions are also encapsulated in formal contractual terms, employers can easily avoid complying with them.\(^{215}\)

More importantly, not only did application of the implied contract doctrine in California not solve the problems originally identified, it has ended up having perverse and lingering negative results. For example, the original cases set up an incentive system that discouraged systematic and orderly employer innovations with progressive employment practices. There are indications that many employers have moved away from expressed formulation and communication of desirable employee protective processes. Attempts to use these processes to undermine the historically at-will employment relationship prompted some employers to stop

\(^{215}\) See Dore, supra note 7, and discussion at section IV supra.
making specific promises, thus avoiding the demoralizing possibility and the expense of litigation.\textsuperscript{216}

Employer reluctance to develop voluntary policies and reduce them to writing may result in a permanent pulling back from the positive trends in the structuring of the employment relationship that were emerging prior to the courts’ interventions. The impulse to draw up specific policies may not return regardless of whether employers now know that under current construction of the law such policies do not have to be followed. As the original cases on implied contract clearly illustrate, there is always the risk that courts looking at the equities years from now could decide differently and mandate that such voluntarily established progressive policies constitute part of the employment agreement even if there are explicit and comprehensive disclaimers.\textsuperscript{217}

This type of pullback and entrenchment by employers would be a loss to employees generally, as a class, and specifically, within an individual workplace or industry. For one thing, the failure to reduce rules to writing makes them more likely to be overlooked, misunderstood, or arbitrarily applied. Without explicit procedures and standards, each instance is likely to be addressed on an ad hoc basis with employees having to endure more idiosyncratic, less uniform procedures and rules applied to them.

In addition, employees as a class within an industry or location may be harmed as the interactive process of competition and communication among employers is frustrated by the lack of written policies to compare and contrast. Communication among employers or within organizations of employers will be impeded by the lack of written rules and practices. With individual workplace policies less likely to be made express there may be less competition

\textsuperscript{216} See discussion at section IV supra.

\textsuperscript{217} There is some evidence that employers hold erroneous beliefs about the degree to which they are likely to suffer lawsuits. Cynthia Estlund, “How Wrong Are Employees About Their Rights?” 77 N.Y.U. L. Rev. 21-27 (2002)
among workplaces, as well. The generative possibilities of using progressive workplace policies as lures in the competition for employees will be impeded, if not eliminated and there will be a corresponding lessening of opportunities for workplace norms to emerge across industries and within localities.

C. Moving Forward.

Once we realize that there is a real problem with the unfettered employer discretion that contract and the at-will rule allow in practice, the question becomes how to incorporate enforceable notions of fairness into the employment relationship. This section will discuss some of the proposals made by others and suggest directions for reform, as well as the need for future work on the issues as they are illuminated in this analysis of the California experience with implied contract and the at-will rule as it has been explicated thus far in this article.

1. Existing Proposals.

Scholars have proposed a variety of ways to increase the level of fairness in the employment relationship. Most far reaching for an American legal audience are those calls to abolish employment at-will and replace it with a system whereby employers may only terminate employees for “good cause.” Whatever the merits of such a change, it is unlikely to occur in our current employment and political contexts. Despite decades of academic condemnation, American employment law is no closer to adopting a generally applied just cause standard.218 If

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218 A number of commentators have attempted to explain why this much-maligned rule seems impervious to change. For example, Lawrence Blades argues that legislatures are not likely to enact statutes modifying the at-will rule because employees are too diverse and unorganized to form a strong lobby, while employers have strong, organized lobbying groups. Likewise, organized labor has no incentive to change the at-will rule because doing so would essentially give all employees one of the main benefits of a union contract without the need for unions. Blades therefore argues that any solution must stem from the courts. Lawrence E. Blades, “Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,” 67 Columbia Law Rev. 1404, 1433-34 (1967). On the other hand, Clyde Summers argues that courts are unwilling or unable to
we are to make progress towards increasing the level of fairness in the employment relationship, it must be done incrementally and through the process of seeking a middle-ground solution that rests between universal just cause on the one hand and the current system of unfettered employer discretion on the other.


One such middle-ground solution suggested early on in the debates about fairness is that of vigorous enforcement of the covenant of good faith and fair dealing. For example, Murray Tabb in 1987 proposed that this was the best vehicle for enforcing employees’ reasonable expectations of fairness. According to his proposal, employers would be liable for breach of the covenant of good faith and fair dealing if they fired employees in a “bad faith” manner. While he does not explicate what constitutes bad faith, one assumes that it would include more reasons than existing discrimination and whistleblower laws. Under Tabb’s proposal, employers would continue to be able to fire employees for an arbitrary reason or no reason at all.220

Tabb cast the issue in terms of the employee’s “expectancy interest in the employment contract.” He argued that while employees have no justifiable expectation of either continued employment or for a just cause standard for termination, employees expect not to be terminated for a bad faith reason.221 Although Tabb limits his article to termination, the same argument could be made for other types of employer conduct short of this if performed in bad faith.

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220 According to Tabb, his “proposed standard does not embrace the extreme position which would jettison the at-will contract in favor of a ‘just cause’ requirement for dismissal, nor the opposite extreme which would resist inroads or limitations on an employer’s freedom to fire employees.” Id. at 810.
221 Tabb, supra note 219 at 832. However, Tabb’s terms are not well defined. Tabb simply states that employees “should have a reasonable and protectable expectation not to be unfairly discharged for ‘bad cause.’” Tabb at 832. He does not explain what constitutes bad cause or where to look for a definition. In the absence of a concrete definition, one assumes that Tabb
In addition to the obvious problems with giving content to the idea of bad faith, the focus on the covenant of good faith and fair dealing seems misplaced in the hindsight afforded in 2007. Since Tabb’s article was published two decades ago, the success of arguments based good faith and fair dealing claims has proved short-lived. In fact, Tabb’s arguments are couched in commendations for specific California cases, most notably Cleary, which as we have seen was later overruled. The California Supreme Court effectively eviscerated the covenant of good faith and fair dealing as a general check on employer discretion. Indeed, currently no state applies the covenant of good faith and fair dealing in the manner that Tabb advocates.

What the courts universally recognize in those states that adhere to it is that the covenant of good faith and fair dealing is a creature of contract. As such, it arises from and is defined by the contract between the parties. This takes us back to the very concepts that proved limiting in the California context, specifically intent. The covenant of good faith and fair dealing is intended to “effectuate the intentions of private contracting parties in the performance of their agreement.”

As defined by the courts, a violation occurs where one party acts to deprive the other of the benefits to which he is entitled under the contract. Like implied contract, the covenant of good faith and fair dealing is intended to fill in the gaps left out of the formal contract so that the

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222 Tabb, supra note 219 at 835-846.
223 The covenant of good faith and fair dealing is applied differently to employment contracts in different jurisdictions. Some jurisdictions recognize the claim only where the employee is deprived of vested benefits such as already-earned pension or bonus payments. Other jurisdictions require a public policy violation, which renders the claim largely similar to an action for termination in violation of public policy. Some jurisdictions, like California, recognize the existence of the covenant of good faith and fair dealing, but hold that the covenant does not restrict employers’ ability to fire employees for any reason. Still other jurisdictions refuse to recognize any covenant of good faith and fair dealing in employment contracts because the concept of bad faith is too amorphous. Tabb, supra note 219 at 830 (citing case law).
224 Only ten states other than California recognize claims for the covenant of good faith and fair dealing: Alabama, Alaska, Arizona, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming.
parties receive the benefits of their intended agreement. The meaning of “good faith” is determined in each case by reference to the contract at issue and the intention of the parties in making that agreement. Ultimately, like implied contract, the covenant of good faith and fair dealing cannot be used to contradict the explicit terms of the agreement itself.226 Therefore the courts hold that where the clear agreement between the parties is employment at-will, the covenant cannot limit employer’s ability to terminate employees without good cause.227

Tabb tried to sidestep this result by arguing that there is a crucial distinction between good cause and good faith. An employer could fire an employee without cause yet still act in good faith. Only in those situations where there is an element of bad faith (for example, depriving an employee of vested benefits), would an employer’s termination without cause be actionable.228 Therefore, even if the employment contract specifies employment at will – i.e., termination with or without good cause – the covenant of good faith and fair dealing does not necessarily contradict the express terms of the agreement because cause and good faith are two separate issues. Unfortunately, Tabb does not adequately define good faith or explain how it differs from good cause in this context. The example of vested benefits adds nothing because it is a situation that would be prohibited in any case by other rules229 or by the far more limited conception of the implied covenant of good faith that some states do recognize.230

In light of the analysis of implied contract, it is not difficult to foresee the fundamental conceptual problems with Tabb’s approach. If the covenant of good faith and fair dealing were enforced as Tabb suggests, employers would simply change the express terms of the contract,

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226 See Foley, supra note 80.
227 Ibid.
228 Foley, supra note 80.
229 ERISA § 510, 29 U.S.C. § 1140 (barring termination to deprive employees of right to exercise vested benefits such as pensions).
just as they did after courts began enforcing implied contract claims. After some artful drafting, we would find that employees’ good faith and fair dealing claims did indeed expressly contradict the written terms of the agreement.

Tabb proposes in response to this dilemma that the duties of good faith and fair dealing be non-waivable by employers. However, this fundamentally changes the nature of the remedy. Instead of a doctrine that is intended to effectuate the intent of the parties as evidenced by their agreement, we would be trying to use the covenant of good faith and fair dealing to import and impose external values on the parties. While this external imposition of values is exactly what needs to occur, it will only add confusion and the possibility for misapplication if we resort to a contract-based remedy like the covenant of good faith and fair dealing to achieve the objective. If we want to enforce larger norms or values, we must be explicit about our intent and logically and doctrinally consistent about what we hope to accomplish and why and how we are going to do it. Only in this way will we be clear in defining the norms or values that we wish to enforce.

b. Relational Contract.

Professor Robert Bird has made a more recent proposal, one that clearly addresses the underlying norms sought to be established. In a 2005 article, Bird builds on the rich literature on relational contract theory, bringing it to the employment setting. The foundational realization in this endeavor is that the relationship between an employer and employee consists of much more than just the terms of the contractual arrangement between them.

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231 Tabb, supra note 219 at 864.
232 Bird, supra note 207. See also, Paul J. Gudel, “Relational Contract Theory and the Concept of Exchange,” 46 Buff. L. Rev. 763, 771-73 (arguing that voluntarily assumed obligations by an employer have been used by courts to give broader terms to employment contracts).
Like any long-term relationship, the employment situation cannot be understood without referencing the collection of established norms and informal relationships that have grown up between the parties. According to Bird, norms are often considered by employers and employees to be more important than legal rules.\textsuperscript{233} It is these norms and relationships constitute the relational contract between the parties and its comprehensive and complete terms should be enforced by law, not just the more limited set of express, or even implied, terms typically considered relevant under traditional contract law.

Bird argues that workplace norms are based in part on the “psychological contract” between employers and employees. The psychological contract is not based on a legal construction model of bargaining and agreement, but a set of expectations about the other party’s obligations within the ongoing relationship.\textsuperscript{234} An employee may perceive that her contributions to the employer (e.g., years of loyal and productive service) create reciprocal obligations on behalf of the employer (e.g., not to demote her arbitrarily). Such an employee may have the sense of an established psychological contract according to Bird, even though the same ideas about its terms, or even existence, are not shared by the employer.\textsuperscript{235} The employee’s expectations for him or herself, as well as for the employer are shaped by this contract. When the psychological contract is breached by the employer, employees lose trust and may reduce their commitment and effort on behalf of the employer.\textsuperscript{236}

Important to this idea of psychological contract is the point that norms can be based on the organizational culture of the employer.\textsuperscript{237} A corporate culture is a set of shared basic

\textsuperscript{233} Bird, supra note 207.
\textsuperscript{234} Id. at 165.
\textsuperscript{235} Id. at 167.
\textsuperscript{236} Id. at 168-70.
\textsuperscript{237} Bird points to a possible third source of workplace norms: corporate codes. A corporate code consists of documents expressing the employer’s values and the ethical rules it will follow. Bird states that current research fail to show a strong link
assumptions that affect how people behave in a particular workspace and can be likened to the personality of an individual.238 A firm’s organizational culture is predominately shaped by the intentional actions of the employer, particularly its managers and other leaders.239 According to Bird, a corporate culture has a profound impact on the relationship between employers and employees, contributing significantly to employees’ expectations about how they will be treated by their employer.

Relational contract theory argues that the law should prohibit relational opportunism by the employer. Relational opportunism arises in situations in which the employer is able to secure a benefit by violating the terms of the relational contract. To avoid the possibility of this type of opportunism, courts are urged to determine the duties owed by the employer under a relational contract and make them operative. In undertaking this determination courts should examine not only the promises made by the employer through explicit contractual terms, handbook policies, or promises by supervisors, but also the practices of the employer. The rationale is that these practices accomplish the same result in regard to the expectations of employees as the explicit promises.240

Examples of practices which may give content to a relational contract are: rituals that suggest the employer will act a certain way (e.g., continuous training for skills necessary for long term success, or allowing employees an opportunity to be heard before discipline); signals regarding workplace conduct (e.g., informal encouragement of employees or statements that the

between corporate codes and the treatment of employees – corporate codes are generally focused on other concerns. However, Bird notes that further research may reveal such a relationship. Id. at 177-78.

238 Id. at 181.
239 Id. at 183.
240 Id. at 200.
employee is valuable or needed); and symbols (e.g., providing a separate elevator and washroom for executives).  

Interestingly, Bird argues that relational principles have already been partially accepted by courts through the implied contract doctrine, and that his theory of relational opportunism “would represent a natural development of employment law.” In looking at the conduct of the parties in implied contract cases, courts have expressed a willingness to look beyond the four corners of the agreement to enforce the reasonable expectations of the parties. In effect, Bird argues for a more robust implied contract theory. He believes that employer’s promises and assurances should be enforced, but he looks to a broader range of employer action to determine whether such promises or assurances have been made.

The fundamental problem with using relational contract theory to address unfair treatment by employers is that it remains a theory tied to contract. As the analysis of the California cases on implied contract demonstrates, a contract remedy will ultimately fail if the objective is to introduce practices more equitable in regard to employees, correcting the power imbalance inherent in modern employment relations. This failure is unsurprising due to the nature of contract law, coupled with the employers’ near-total control of the employment relationship. Referring as it does to the practices and policies of employers, relational contract theory cannot avoid defeating employee expectations in the situation in which an employer attempts to avoid liability through disclaimers or other means.

At a minimum, for the relational contract model to be any more effective than the implied contract model in situations where an employer’s intent to follow the at-will rule is clear we would have to do away with the general contract principle that the express terms of an agreement

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241 Id. at 200-01.
242 Id. at 205-08.
243 Ibid.
Relational contract terms are built upon employer actions analogous to the statements, policies, practices, or other non-contractual representations offered in implied contract cases to contradict express written disclaimers.

Even assuming that this doctrinal hurdle is overcome and non-express promises were given equal weight in contract interpretation, the relational contract model is still limited – as a contract theory its focus remains the intent of the parties, which is now fleshed out by reference to conduct as well as express promises. The relational contract model, like traditional contract, seeks merely to enforce what the parties intended for their relationship and is not an easy vehicle for importing outside values or norms into that relationship.

Bird concedes this point when providing some instructive examples of how his relational contract proposal would be implemented:

An employee cannot transform a consistently applied arbitrary rule (e.g., no left-handed employees may hold supervisory positions) or malicious workplace practice (e.g., any workers reporting to management of another worker’s theft or embezzlement of company property are considered snitches and will be fired) into an actionable wrong just because that employee views that rule as unjust. If an employer chooses to establish such a climate and makes that climate a genuine practice, then the employee should expect the arbitrary treatment as part of the position.

Importantly, this relational contract model leaves the terms of the relational contract functionally in the hands of the employer. Without some structuring provided by broader-based norms, the

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244 Additionally, Rock and Wachter have argued that norms should not be used by courts because they are difficult to prove, costly to assess and, in any event, are generally self-enforcing. Edward Rock & Michael L. Wachter, “The Enforceability of Norms and the Employment Relationship,” 144 U. Pa. L. Rev. 1913, 1932-38 (1996).

245 Id. at 214-15 (parentheticals in original).
inquiry remains directed solely at determining the employer’s promises and practices, which are then definitive in setting forth the implications of that particular employment relationship.

As the examples quoted in the excerpt from Bird’s article on the implications of viewing employment as a relational contract demonstrate, an employer would still be free to structure the relationship in bizarre or unfair ways as long as its policies and practices are internally consistent. Just as it did under the implied contract model, this type of concession to individual employer prerogatives opens the door for them to avoid any liability other than the at-will default position. While they may not resort to such bizarre extremes, they can and will restructure their promises and practices to avoid giving workplace norms the force of law and incurring liability.

In fact, adoption of a relational contract model might increase the occurrence of bizarre incidents by providing a further distorted set of incentives. Employers would be rewarded for acting arbitrarily and inconsistently, since such behavior would be less likely to create actionable obligations. If, for example, an employer’s existing informal practice afforded an opportunity for employees to defend themselves before being disciplined, creation of an enforceable legal obligation to always provide this opportunity for all employees might pressure employers to cease the practice altogether and use more random and idiosyncratic methods, varying employee to employee. Random and idiosyncratic behavior could not be asserted to constitute a replicable pattern and practice of employment able to be enforced by courts.

Of course, relational contract theorists could argue that employers receive too many benefits from workplace norms for them to abandon them at the first hint of litigation. The same arguments about the deterrence of benefits realized versus the prospect of lost freedom and control were made in the early 1980s after courts began enforcing implied contract claims.246

While employers made some preliminary attempts to retain benefits while still holding onto

246 See, e.g., Coombe, supra note 141.
prerogatives, when choice was inevitable employers were more likely to opt for the freedom and flexibility they seemed to believe only the at-will scheme provides.

2. Charting the Future Directions: Aggregating Expectations and Norms to Govern the Employment Relationship.

Any viable framework for establishing and enforcing workplace norms that bring some more balance to the employment relationship must prevent employers from being able to solely define their own obligations. The recognition of broader-based norms is particularly important in light of the preceding analysis of implied contract doctrine and the critique of relational contract theory.

a. The Communities of Norms and Practices.

One way to achieve this objective of enforcing workplace norms is by focusing not only on the norms generated within a particular workplace, but also aggregating those arising out of a larger community, such as a specific industry, a geographical location or the skilled or professional nature of the position involved. In essence, this is an argument that a particular employer should not be able to “opt out” of a system of workplace norms that are being successfully followed by similar employers under similar circumstances.

To some extent, support for an industry-based and/or skilled professional approach can be mustered by looking to the relatively powerless position of the employee and arguing that her expectations must be afforded additional weight in the balance. One way to ensure that those
expectations are not unreasonable or frivolous is to anchor them in a larger consensus. She will be aware of workplace norms that are more general in nature, perhaps industry-specific or part of professional expectations for certain categories or classes of employees.

This approach, while giving attention to employee expectations also recognizes that it is important to balance this against employer needs and desire for efficiency and flexibility. It positions employee expectations in a larger context and helps to lessen any fear that a corresponding requirement for the employer is somehow irrational or inappropriate. After all, just as an employee’s reasonable workplace expectations are not based solely on the promises and practices of her own employer, an employers understanding of its responsibility in the aggregate is shaped by a larger context. Employers respond to this larger context through developing and advertising their competitive practices (benefits, salary, workplace environment, leaves, etc.) in the marketplace for employees. They should abide by those marketplaces norms when the fate of one of their successfully recruited individual employees is at issue sometime in the future.

Although it is possible that entire industries or professions would change their behavior in response to the threat of legal liability, thereby eviscerating the norms, this would be significantly more difficult to achieve. Certainly professional associations would have little incentive to undermine protections for their members. Since this proposal is not for recognition of unfettered employee expectations, but for recognition of those expectations that are reasonable in light of the contexts of an industry or profession, it should not unduly inhibit employer flexibility.

Employers may sometimes have a good reason to want to deviate from established norms, such as changes in business conditions. The industry would certainly recognize such
reasons and respond to their potential in establishing the standards to be imposed. What would change is the fact that the employer would have to justify the need for deviation if the industry-wide judgment was not that change was generally warranted. It is true that we want a system flexible enough to accommodate needed change, but this must be equitably balanced against the need to provide fundamental fairness for employees. An aggregate based norm system is most likely to achieve this balance.

In addition to the industry or skilled professional contexts, there may be non-workplace-related norms of behavior that may nonetheless impact the workplace and exert some influence over employer actions. To go back to Bird’s example, even though it is not “illegal” to prohibit left-handed individuals from becoming supervisors, such a ban would likely result in adverse publicity were it made public. Such an action obviously violates general norms, in addition to those of the workplace. Even in the absence of a workplace norm requiring good cause for discharge, most employees would feel that refusing to promote left-handed people demonstrates improper discrimination in violation of community norms. These sorts of broader-based norms shape expectations and thus it could be argued should be part of the consideration as to what are the appropriate limits of employer power within the employment relationship as well.

There remains a question of whether individual employers and employees could deviate from the more general standards. Of course, employers should always be free to offer additional job protections not offered by their competitors. The real question is whether and how they would be enforced absent express, clear terms susceptible to contract law. In addition, what would we do with attempts to negotiate lesser protections than the aggregate norms provide? In other words, should these broader aggregate norms be considered a floor below which none could fall even if there is agreement, or are they merely the default position, thereby supplanting
but not eliminating the at-will rule altogether? As my analysis of California law demonstrates, the answer to this question must be that aggregate norms be a floor rather than a default position. Otherwise, employers would have incentive to maneuver around the default rules.


One potential obstacle in developing and enforcing aggregate workplace norms is courts’ lack of expertise. Initially, there might be a flood of cases brought in efforts to clarify the aggregate norms in any industry or profession. While suggesting a detailed system for resolution of aggregate norm cases is beyond the scope of this article, it is important to note that existing practices, such as mediation and arbitration offer blueprints for effective and efficient determination of these cases also.247

One way to resolve some of these problems would be to defer decision making to the industries and professions themselves by establishing panels of experts (including employee representatives). Many industries and professions already have expectations reduced to writing or could easily do so. In addition, the industries and professional associations would be the logical course for decision makers if an arbitration or mediation structure is established for resolution of specific disputes. This type of structure would also help to reduce cost and facilitate oversight and enforcement.

Arbitration and mediation has recognized benefits over a court-based system in these types of cases. It is worth noting that these are the dispute resolution mechanisms that most employment contracts specify when that issue is part of contractual determination. These methods of resolution are more flexible than judicial procedures and better able to deal with the

incredible diversity in the American workplace. An associate at a law firm may have a much
different set of employment expectations than an employee in a fast food restaurant. If disputes
are mediated, an industry-specific panel would be able to apply norms relevant to the particular
industry or the type of worker.

In addition, as touted by many commentators, mediation may be less antagonistic than
litigation, allowing employers and employees to work out their differences about rights and
obligations without polarizing the workplace or effectively ruining the relationship between
particular employees and management.

Finally, the cost and expertise advantages of mediation might more easily allow
employees to challenge employment decisions other than termination. Not only would the
process itself be less cumbersome, one assumes that the panels and process established would
begin to generate conclusions as to what were the established norms in a given industry or
profession that could be used in non-litigious negotiation situations between individual
employees and their employees.

A key factor in the aggregate approach suggested in this article to determining the nature
of the employment relationship is that it brings into focus, consequentially affording more weight
to, employees’ reasonable expectations. Because the expectations are determined in the
aggregate by reference to the norms in the various contexts in which they arise, this approach
goes well beyond privileging intent or agreement of specific individuals, as in contract law
approaches.

Courts presently interpret employees’ reasonable expectations based on the terms of the
contract and the conduct of the employer. However, as argued supra, employees’ expectations

248 Some commentators suggest that arbitration alone might lead to employer creation of “minimal standard” in order to
avoid the risk that arbitrators might impose more stringent standards. Sid L. Molleo, “Birth of a Contract: Arbitration in the
often do not match employers’ legalistic language, and this allows employers to take advantage of employees. If this occasion for opportunism in the employment relationship is the problem, then the obvious focus of any solution should be to give employees’ reasonable expectations more definition and weight in articulating the rules in the employment context.

**VII. CONCLUSION**

Although it may seem somewhat counterintuitive, enforcement of aggregate workplace norms such as is suggested in this article might actually lead to greater predictability in the workplace. Individual employees and employers would be eager to clarify their specific rights and obligations in relation to more general norms. Assuming employers could not distance themselves from the aggregate workplace norms through contract means, they would have an incentive to create clear, detailed policies consistent with general norms and stick to them.

One example of this dynamic is found in the process of establishing policies in regard to workplace discrimination and harassment that was set in motion by enactment of Title VII of the Civil Rights Act of 1964. After the initial wave of discrimination and harassment claims during the 1970s and 1980s, employers created detailed policies regarding discrimination and harassment in order to avoid liability. These policies not only created clearer expectations for employers as well as employees, but also defined managers’ roles and responsibilities. Many employers established departments to screen and address workplace discrimination and try to resolve complaints before they deteriorated into a lawsuit. If properly handled, enforcement of aggregate workplace norms have the potential to effectively reverse the trend towards fewer and less detailed written policies engendered by enforcement of implied contract claims and make employers eager to specify the nature of their obligations.
Counter-intuitively, the use of more generalized aggregate norms, while moving away from contract, might actually result in establishing workplace conditions that are more conducive to bargaining and negotiation. Specifically, the labor market might begin to look more like a field in which employees can bargain more effectively than has been the case under the at-will rule, which conferred upon the employer most of the bargaining chips. If resort to industry or profession wide norms pushes the employer toward more specificity and greater transparency, it would become easier for the employee to assess one workplace against another. If the assumptions underlying the notion of a labor market and the employment contract were correct, righting the historic imbalance and transferring some leverage to employees will allow the process of negotiation to flourish, emphasizing workplace protections and policies that are the products of both competition and compromise.