Private Ordering of Employee Privacy: Protecting Employees’ Expectations of Privacy with Implied-in-Fact Contract Rights

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by 
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Abstract

With the growth of technology in the workplace, employee privacy is an increasingly significant legal issue. Employees, perhaps irrationally, often overestimate the amount of privacy they should expect in technological communication. A decision issued by the United States Supreme Court in June 2010, City of Ontario v. Quon, highlights the importance of privacy in the workplace and employees’ expectations of privacy. Employee privacy is protected by various constitutional, tort, and statutory causes of action; however, each of these theories has limitations, failing to protect some reasonable expectations of privacy. The implied-in-fact contract is a theory that has been recognized by some courts in the context of employment law, usually protecting job security, and it may become a valuable avenue for the protection of employee privacy. A court applying an implied-in-fact contract theory protecting employee privacy will determine whether the employer and employee reached an enforceable agreement, albeit an implied agreement, regarding the employee’s privacy rights by considering the totality of the circumstances and the employee’s reasonable expectations. Where other causes of action fail to protect an employee’s reasonable expectations of privacy in the workplace, such as in Quon where the Fourth Amendment claim failed, the implied-in-fact contract theory may be available. To align employer and employee expectations, employers should consider this potential cause of action when establishing polices and practices bearing on employee privacy issues.

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3 130 S. Ct. 2619 (2010).
I. INTRODUCTION

Technology continues to be an increasingly important part of American life inside and outside the workplace. Email is often the preferred form of communication between co-workers. In daily interactions, text messaging has taken over as a primary form of quick communication. Anyone familiar with technological communication, such as email and text messaging, may experience some inherent sense of privacy associated with these activities. Even within fora which people realize are accessible for public review, such as social networking sites, employees often do not consider that their employers and co-workers can readily gain access to this information. For example, if an employee working entirely from home maintains a social networking page on which his privacy preferences allow only certain people to view his information and that employee posts information to his page, is it reasonable for the employee to expect that this information will be kept private from his employer and co-workers that do not have access to his information? Certainly, the employee does not expect privacy with respect to the people that have access to his information. There is an innate tension between intentionally making information public and still feeling that the information is private; yet, with the expansion of social networking, growing use of technology in the workplace, and feeble boundaries between work and home, employees’ electronic privacy is a pressing legal issue. A recent United States Supreme Court Case, *City of Ontario v. Quon,* brings employee privacy issues to the forefront of important legal topics.

The employee’s reasonable expectation of privacy is a common theme in causes of action protecting employee privacy. When an employee accesses a password-protected email account or sends a text message on a cell phone, even a company-issued phone, it is understandable that the employee instinctively feels a sense of privacy in the content of the communication. But is it reasonable for an employee to expect privacy in the contents of emails sent while at work? It is reasonable to expect privacy if the employee is on company time but off the work premises? Or in text messages sent using a company phone? Is it reasonable for an employee to expect privacy in off-duty activities, such as the employee’s dating life? The circumstances of the workplace and the actions taken by the employer will dictate whether an employee’s expectation of privacy is reasonable. When an employee does have a reasonable expectation of privacy and

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4 130 S. Ct. 2619 (2010).
the employer breaches that expectation, the employee might assert a claim for breach of an implied contract right to privacy. Where constitutional, tort, and statutory causes of action fail to provide a remedy for an employer’s violation of an employee’s reasonable expectation of privacy, the implied-in-fact contract is available to fill the gaps left by these other causes of action.

For instance, if based on employer conduct and representations an employee has a reasonable expectation that the employer will not view emails sent by employees on private email accounts on a work computer and the employer does view such emails, then the employee may assert a breach of an implied contract right to privacy. Importantly, this breach of contract claim may be asserted irrespective of any adverse employment action being taken against the employee and irrespective of whether the employee is a public sector or a private sector employee.

Whether an employee has a reasonable expectation of privacy is important in several causes of action that an employee may assert against an employer when the employee claims a protectable privacy interest. Those causes of action, particularly the implied-in-fact contract, and the importance of the employee’s reasonable expectation of privacy will be discussed in the proceeding parts of this paper. Part II will explore the development of privacy issues in the workplace and the interaction of employee privacy rights with employment at-will. The implied-in-fact employment contract will be discussed in Part III as well as how such a contract may encompass privacy rights and create protectable employee privacy interests. Part III will also look at the related doctrine of the implied covenant of good faith and fair dealing that some courts have held is implicit in all employment contracts, including employment at-will contracts, and how this covenant might protect employee privacy. Part IV will explore the Fourth Amendment privacy rights of public employees, including the recent United States Supreme Court case *City of Ontario v. Quon*, and will suggest how Quon may have asserted a successful claim for breach of an implied-in-fact contract right to privacy. Finally, Part V will summarize the various sources of privacy rights in the employment context and will discuss the importance of private ordering.

II. CREATING PRIVACY RIGHTS IN AN AT-WILL WORKPLACE

With the growth of technology use in the workplace, employee privacy rights are an important legal concern for employers as well as employees. Before exploring any specific
causes of action for employee privacy, it is necessary to first understand how privacy fits within the law generally and specifically how it fits in the employment relationship. Privacy has become a common legal issue in various areas of the law, including employment law. The evolution of a right to privacy began with an 1890 article by Samuel Warren and Louis Brandeis, which urged courts to recognize a right to privacy that would protect citizens from intrusions by the press. Warren and Brandeis described this right to privacy as “the right to be let alone” derived from the right to life found in the due process clause of the Fifth Amendment to the United States constitution. Since then, privacy has evolved and expanded in the United States, and legal privacy rights can be based upon common law, constitutional law, or statutes. Under each of these sources of privacy protection, it is required that the proponent of the protection have a reasonable expectation of privacy. Thus, an employee asserting a legal right to privacy, regardless of the source of the right, will have to begin with showing a reasonable expectation of privacy.

Competing with an employee’s privacy expectation is the employer’s legitimate business interests, and these competing interests will be balanced against one another to determine whether an employer’s violation of an employee’s reasonable expectation of privacy was unwarranted or unreasonable under the circumstances. It has been recognized in academic

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5 See Michael Selmi, Privacy for the Working Class: Public Work and Private Lives, 66 L.A. L. REV. 1035, 1035, 1040 (2006) (calling privacy the “law’s chameleon, seemingly everywhere and nowhere at the same time” and suggesting that privacy has become a larger issue in employment law in part because lifetime employment facilitated trust, and lifetime employment has become increasingly unlikely in today’s employment environment); James A. Sonne, Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior, 43 GA. L. REV. 133, 137 (2008) (arguing that the demand that non-work related benefits, such as health care benefits, be supplied by employers has invited employer’s into workers’ private lives in order for the employer to ascertain whether the employee’s private activities are costing the employer money).


7 Id. at 196 (“Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency.”).

8 Id. at 193 (“Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone.”).


10 Id. (“Despite their various sources and differing priorities, there are two common themes to United States rights to privacy: (1) the home is given the greatest protection; and (2) all require an underlying expectation of privacy which can only be invaded by an unreasonable intrusion.”).

11 See id. at 113 (“[T]he determination of an employee's right to privacy in any given situation begins with the employee's expectation of privacy.”).

12 See id. (“Employee rights to privacy are subservient to an employer property-rights regime, protecting the employer's physical and intellectual property, as well as protecting the employer from potential liability.”).
literature that privacy in the workplace is “difficult to reconcile” with employment at-will, the default contract of employment. Therefore, to understand how privacy issues fit into employment law, it is essential to examine the employment at-will doctrine and its exceptions. Employees may contract for greater privacy in the workplace, and such a contract, express or implied, is an exception to employment at-will where the employer contracts not to terminate.

A. Employment At-Will and its Exceptions

The increasing willingness of courts to acknowledge exceptions to employment at-will, including the implied-in-fact contract for job security, indicates courts are likely to accept the implied-in-fact contract as a theory of protecting employee privacy. An implied-in-fact contract for employee privacy might be classified as an exception to employment at-will for an employee that is fired based on a breach of the employee’s reasonable expectations of privacy. It is a settled rule of law that employment at-will is the default contract of employment in the vast majority of the United States. The employment at-will rule has long been articulated as a contract for employment under which “either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law.” The Payne court, often credited with articulation of the at-will rule, also held that the cause could be morally wrong.

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13 Selmi, supra note 4 at 1036 (asking “how can an employee assert a right to privacy when he or she has so few rights to begin with?”).
14 See, e.g., Matthew W. Finkin, Shoring Up the Citadel (At-Will Employment), 24 Hofstra Lab. & Emp. L.J. 1, 3 (2006) (acknowledging the at-will employment rule as a “well established” default rule); Rachel Arnow-Richman, Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place, 13 Emp. RTS. & Employ. Pol’y J. 143, 154 (2009) (calling the fact that employment at-will is the default rule for employment contracts “a decided point” in employment law). Only one state, Montana, has legislated to deviate from the employment at-will doctrine. Montana Wrongful Discharge From Employment Act, Mont. Code Ann. § 39-2-904 (1987) (making it a wrongful discharge for an employer to terminate an employee without good cause provided that the employee has completed the employer’s probationary period of employment).
15 Payne v. The Western & Atlantic Railroad Company, 81 Tenn. 507, 517 (Tenn. 1884). The court further explains that “men must be left, without interference … to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.” Id. at 518-19. See also Deborah A. Ballam, Employment-At-Will: The Impending Death of a Doctrine, 37 Am. Bus. L.J. 653, 653 (2000) (“[T]he employment relationship, absent a contract to the contrary, is “at-will” meaning that either the employer or the employee can terminate the relationship at any time for any reason, even for no reason, without legal liability attaching.”).
16 See, e.g., Daniel J. Libenson, Leasing Human Capital: Toward a New Foundation for Employment Termination Law, 27 Berkeley J. Emp. & Lab. L. 111, 112, n.1 (2006) (citing Payne for the point that employers have an unrestricted right to terminate employees who do not have a contract for employment for a definite term); Ballam, supra note 14 at 687 (calling the Payne court’s description the “classic exposition” of the employment at-will rule);
without legal liability attaching. While employment at-will is the most common contract of employment, there are numerous common law and statutory exceptions to at-will employment, some of which will be explored in subsequent parts of this paper. In fact, a right to employee privacy might be characterized as an exception to the employment at-will rule.

Despite the command of employment at-will that an employee may be discharged for any reason, common experience demonstrates that employers cannot in fact terminate an employee for absolutely any reason. For example, an employer cannot lawfully terminate an employee because of the employee’s race. However, it is also true that workers often overestimate their legal protection and believe that an employer would be liable, for example, for terminating an employee simply because the employer did not personally like the employee. While it is arguably not a sound business practice, under employment at-will, personal dislike is a perfectly valid reason for terminating an employee. Up against this framework, one might presume that an employee can be legally terminated based on any personal choices or conduct by the employee with which the worker’s employer does not agree, but the analysis is not so simple. Indeed, the trend in employment law has been to increasingly invalidate the legality of terminations when there is no good cause. Exceptions to the pure employment at-will rule are


See Payne, 81 Tenn. At 519-20.

Title VII prohibits employment discrimination on the basis of race, as well as color, sex, religion, and national origin. 42 U.S.C.S. §§ 2000e-17 (2006).

Cynthia L. Estlund, How Wrong are Employees About their Rights, and Why Does it Matter?, 77 N.Y.U.L. REV. 6, 9 (2002) (citing studies whereby “approximately ninety percent of employees surveyed believed that it was ‘unlawful’ to fire an employee based on personal dislike. Over eighty percent believed that it was illegal for an employer to fire an employee in order to hire another willing to do the same job for a lower wage.”).

Logically, an employee will feel wronged if he believes that his termination was baseless, and such an employee is more likely to seek a legal remedy from the employer. Conversely, an employee that does not feel wronged by his employer will be less likely to bring suit against his employer. See Erica Worth, In Defense of Targeted ERIPs: Understanding the Interaction of Life-Cycle Employment and Early Retirement Incentive Plans, 74 TEX. L. REV. 411, 415 (1995) (“a worker who leaves happy is less likely to sue.”). Additionally, such an action by the employer may create bad morale amongst the remaining employees.

It should be noted here that no reason at all is valid and legal under employment at-will. See Ballam, supra note 14 at 653; Alex Long, The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context, 33 ARIZ. ST. L.J 491, 491-92 (2001) (acknowledging that “under the employment at- will rule, employers are free to discharge an employee out of personal dislike,” but qualifying that this statement does have its exceptions where a discharged employee can sue an individual supervisor for tortious interference with business relations where the dislike reaches the severity of personal hostility or ill will).

See Ballam, supra note 14 at 687 (predicting that “employers soon will no longer be able to terminate employees for no cause or bad cause. The future of employment-at-will, then, is that it has no future.”).
numerous and include various federal and state statutes, discharges in violation of public policy, and express and implied contracts. The following sections of this paper will look at exceptions to the at-will rule that deal with and protect employee privacy based on the employee’s reasonable expectation of privacy, including the implied-in-fact contract, the implied covenant of good faith and fair dealing, and constitutional protections of public employees. However, the employment at-will rule proscribes the reasons for which an employee may be terminated, and an employee need not be discharged or experience any adverse employment action for the employee to bring a breach of an implied contract right to privacy where the employer violated the employee’s reasonable expectation of privacy. In this way, an implied-in-fact contract right is not accurately categorized as an exception to the at-will rule. Yet, where an employee is terminated in conjunction with a breach of the employee’s privacy rights, a cause of action available to the employee can be described as an exception to employment at-will.

B. Employee Privacy Protection as an Exception to Employment At-Will

One way to reconcile employee privacy rights with employment at-will is as follows: causes of action rooted in an employer’s violation of an employee’s privacy where the employee is terminated are exceptions to employment at-will. In fact, the growing concern over employee privacy rights has contributed to the erosion of the employment at-will doctrine. Indeed, if an employer could in fact terminate an employee for absolutely any reason, it is impossible to reason how an employee could successfully exercise any right to privacy; in other words, if the employee refused to submit to a drug test or reveal a piece of information to the employer, the employer could simply terminate the worker, and the worker would be without legal recourse no matter how justified the employee’s expectation of privacy.

However, as noted in the preceding section, it is not the case that an employer can always discharge a worker for any reason. With regard to employee privacy, there are federal and state constitutional protections, statutory protections, common law privacy tort protections and

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24 See Ballam, supra note 14 at 685-87 (“Perhaps the most significant development with the potential to destroy the employment-at-will doctrine is the increasing concern with privacy rights”).
public policy tort protections, and protections afforded by contract. These can be framed as sources of employee privacy protection or as exceptions to employment at-will. The former is probably a more accurate characterization because, as already noted, an employer might infringe a worker’s right to privacy without terminating the worker. In the employment context, there are basically three kinds of intrusions that may give rise to an employee privacy claim: surveillance, such as monitoring email and telephone communications; testing, such as drug testing or medical testing; and inquiry into an employee’s off-duty conduct, such as political and recreational activities. Surveillance and testing involve more of an intrusion than off-duty conduct because, while perhaps not the employer’s business, off-duty conduct involves personal facts more than it involves private information.

There are various privacy protections that may be available to employees where each of these intrusions is involved. In the employment relationship, one possible source of employee privacy protection is by an implied-in-fact contract. When an employer’s actions create a

26 Several states have enacted off-duty conduct statutes prohibiting employers from discharging workers for certain lawful conduct that takes place outside of the work premises. See, e.g., COLO. REV. STAT. § 24-34-402.5 (2009) (making it an “unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any unlawful activity off the premises of the employer during nonworking hours,” with certain exemptions). Additionally, there are various federal statutes protecting specific areas of employee privacy. See, e.g., Employee Polygraph Protection Act of 1988, 29 U.S.C.A. §§ 2001-09 (2006) (banning employer use of polygraph testing for pre-employment screening); Health Insurance Portability and Accountability Act, 42 U.S.C. §300gg (2006) (conditioning the release of medical records); Americans with Disabilities Act (“ADA”), 42 U.S.C. §12112 (2006) (prohibiting employers from inquiring about whether an applicant is disabled as defined by the statute). These federal statutes will not be discussed further in this paper.

27 Borse v. Piece Goods Shop, Inc. provides an example of a wrongful discharge based on public policy derived from the common law tort of intrusion upon seclusion. 963 F.2d 611 (3d Cir. 1992).

28 Like all terms of employment, the parties can contractually agree to the terms and extent of the employee’s privacy rights through private ordering. Such private ordering might be express or implied. See TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN, & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 301, (Aspen Publishers 2007) [hereinafter GLYNN, ARNOW-RICHMAN, & SULLIVAN, EMPLOYMENT LAW].

29 For example, an employer might monitor an employee’s communication to an extent or in a manner that violates the employee’s reasonable expectation of privacy, perhaps based upon employer policies and practices, and thereby violate the employee’s right to privacy regardless of any adverse employment action being taken against the employee by the employer. The contract is breached by the employer’s intrusion of the employee’s privacy rather than by the employer terminating or disciplining the employee. Such a cause of action based upon an implied contract right to privacy will be discussed in Part III of this paper.

30 Case examples used in this paper will involve situations under each of these types of intrusions.

31 See Selmi, supra note 4 at 1043 (2006) (recognizing that an implied contract may exist where “the employer tolerates or permits certain actions,” and it is “manifestly unfair for an employer to confer privacy rights through policies, written or implied, and then to turn around and ignore those policies when it is advantageous to do so.”). See also Pauline T. Kim, Privacy Rights, Public Policy, and the Employment Relationship, 57 OHIO ST. L.J. 671, 715 (“[E]mployee privacy rights, like any other term or condition of employment, would be established solely through the assent of the bargaining parties.”).
reasonable expectation of privacy for the employee, the implied-in-fact contract is available to employees to assert protectable privacy rights. As will be seen, each type of intrusion - surveillance, testing, and off-duty conduct - can be protected by an implied contract right to privacy if the employee has a reasonable expectation of privacy based upon the circumstances of the workplace. The success of an alleged implied-in-fact contract right to privacy will depend heavily on the circumstances, but it is an available cause of action where the employer’s conduct created a reasonable expectation of privacy for the employee, and the employer then violated that reasonable expectation of privacy. This next part of paper will discuss the implied-in-fact employment contract, explore employee privacy rights predicated on an implied-in-fact contract for employee privacy, and suggest how the employee’s reasonable expectation of privacy affects this analysis.

III. IMPLIED-IN-FACT EMPLOYMENT CONTRACTS: A LESSER KNOWN VEHICLE FOR ENFORCING PRIVACY RIGHTS

Employment at-will is the default contract for employment, but it is not the sole type of employment contract. While it may be unlikely for parties to an employment relationship to bargain out of the at-will status of the relationship, it is important to understand that it is merely a default rule that the employee and employer can bargain around. The terms of an employment contract are those to which the parties agree, and as with other types of contracts, employment contracts may be defined by implied terms. Indeed, a majority of states, forty-five according to a 2007 survey, recognize the implied contract as a common law exception to the employment at-will default rule. These differences exist because these are common law causes of action that arise under state law and differ from state to state. Implied-in-fact contract theories have been

32 Matthew W. Finkin, Lea VanderVelde, William Corbett, & Stephen F. Befort, Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination, 13 EMPL. RTS. & EMPLOY. POL’Y J. 93, 110 (2009) [hereinafter Finkin et al., Termination] (suggesting that there is little bargaining around the at-will default rule because little negotiation occurs at the outset of most employment relationships, many workers do not understand or are not aware of the default rule, and there is unequal bargaining power between the parties).
33 See id. at 114-15.
34 Sonne, supra note 4 at 160.
used to establish a right to job security. The 1981 California case, *Pugh v. See’s Candies, Inc.*, is regarded as the seminal employment law case recognizing an implied employment contract.

**A. Implied-in-Fact Contracts for Job Security**

In *Pugh*, the issue was whether the plaintiff, a long-term and loyal employee of the company, had a contract right to be terminated only for cause. The court laid out various factors to ascertain whether an implied-in-fact employment contract exists, including independent consideration, the personnel policies and practices of the company, the employee’s longevity at the company, the actions and communications by the employer, and the practices of the industry. Essentially, whether an implied-in-fact employment contract exists is a fact specific analysis determined by the totality of the circumstances. Based upon the “totality of the parties’ relationship” in *Pugh*, including duration of employment, praise and promotions received, lack of criticism, oral assurances, and employer policies, the court held that Pugh had established a prima facie case for breach of his implied employment contract that voided his status as an at-will employee. In other words, based on an implied-in-fact contract, Pugh could only be discharged if the employer had good cause to terminate; thus, if the employer did not have good cause, then the termination was wrongful.

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36 See, e.g. Finkin et al., *Termination*, supra note 31 at 114-15 (using *Pugh* as an illustration of the factors courts consider in determining whether an implied employment contract exists); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 358 (2008) (noting that the implied employment contract issue was first addressed by the California Supreme Court four months prior to the *Pugh* decision in *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Ct. App. 1980), but *Pugh* is the “more famous decision.”).
37 *Pugh*, 116 Cal. App. 3d at 315 (explaining the facts as “[a]fter 32 years of employment with See’s Candies, Inc., in which he worked his way up the corporate ladder from dishwasher to vice president ..., Wayne Pugh was fired” and alleged breach of contract).
38 *Pugh*, 116 Cal. App. 3d at 327. Note that the court held independent consideration, meaning consideration other than the worker’s continued employment with the company, to be but one factor of many to consider in the analysis. *Id.*
39 See, e.g., Foley v. Interactive Data Corp., 47 Cal. 3d 654, 681 (Cal. 1988) (“[T]he totality of the circumstances determines the nature of the contract.”); Dupree v. United Postal Service, 956 F.2d 219, 222 (10th Cir. 1992) (acknowledging that the inquiry regarding whether an implied contract right exists is a factual one); Hartbarger v. Frank Paxton, Co., 857 P.2d 776, 780 (N.M. 1993) (“A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct.”).
40 *Pugh*, 116 Cal. App. 3d at 329. On remand, the jury found that See’s Candies had not breached the implied contract right to be fired only for cause because the jury credited testimony that Pugh was rude and disrespectful, and this was the good cause reason for Pugh’s termination. *See* Pugh v. See’s Candies, Inc., 203 Cal. App. 3d 743, 771 (Cal. App. 1988) (affirming the judgment in favor of See’s Candies).
Courts and commentators have recognized that the concept espoused in *Pugh* of not requiring consideration independent of the worker’s continued employment correctly applies general contract principles to the employment context. In addition, allowing implied-in-fact contract terms in employment contracts will not negate the at-will rule because implied contract rights will only be found when it appears from the circumstances that the parties intended to be contractually bound to the implied contract terms. However, courts differ in their degree of acceptance of implied-in-fact employment contract terms. Further, some courts formalistically require offer, acceptance, and consideration, while other courts accept a more open-ended totality of the circumstances approach focusing on the employee’s expectation. For example, while it is a totality of the circumstances analysis, the United States Court of Appeals for the Tenth Circuit Court has rejected the argument that the employee can aggregate documents issued by the employer into a legally binding contract without showing that the elements of a contract were met as to each document. In contrast, it has been argued that implied contracts are enforceable based upon the employee’s reasonable expectations rather than whether the employer’s conduct comprised an offer. Consequently, it will depend upon the court whether

41 See Foley, 47 Cal. 3d at 676, 679 (noting as well that requiring “separate consideration as a substantive limitation” to the finding of an enforceable contract “would be ‘contrary to the general contract principle that courts should not inquire into the adequacy of consideration.’”); *Pugh*, 116 Cal. App. at 325 (criticizing that requiring consideration above the employee’s services “is contrary to the general contract principle that courts should not inquire into the adequacy of consideration.”); Eales v. Tanana Valley Medical-Surgical Group, 663 P.2d 958, 960 (Alaska 1983) (finding the independent consideration requirementrationally unsound under common law contract rules because “[t]here is no requirement of mutuality of obligation with respect to contracts formed by an exchange of a promise for performance.”); Fineman, *supra* note 35 at 362 (explaining that *Pugh* and *Foley* applied general contract principles to the employment relationship).

42 See Foley, 47 Cal. 3d at 681 (“Permitting proof of and reliance on implied-in-fact contract terms does not nullify the at-will rule, it merely treats such contracts in a manner in keeping with general contract law.”).

43 See Dupree, 956 F.2d at 223 (noting the “[h]igh threshold for invoking the implied contract doctrine”); Adams v. Pre Finish Metals, 1997 Ohio App. LEXIS 2053, *12-13 (Ohio Ct. App., 1997) (holding that handbooks and manuals will rarely be sufficient to create an implied-in-fact contract right, and an employee that cannot establish a promissory estoppel claim will rarely be able to establish an implied-in-fact contract claim based upon the same facts); Ball v. State Dep’t of Community Punishment, 340 Ark. 424, 430 (Ark. 2000) (reiterating that an implied provision is a manual or handbook will be insufficient to invoke the exception for an implied-in-fact employment contract).

44 Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1465 (10th Cir. 1994) (elaborating that the employee must be aware of the employer’s policy and such policy must influence the employee’s continued employment for there to be an acceptance). *But see* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1268, n.10 (N.J. 1985) (holding that an employee need not rely on or even be aware of an employer policy in order to benefit from that policy and thereby for the policy to create an implied contract right).

45 See Fineman, *supra* note 35 at 364 (“[T]he [Foley and Pugh] decisions also incorporate the idea that implied contracts are enforceable because of employees’ reasonable expectations. … This is potentially a different inquiry than whether the employer’s actions and policies express an intent to offer job protections.”).
the employee’s reasonable expectations will be sufficient to create an implied-in-fact contract or whether the exchange must formally meet all of the elements of a contract.

B. Potential for Implied-in-Fact Contracts Protecting Employee Privacy

In the states that recognize the implied-in-fact employment contract and under an appropriate set of circumstances, courts would conceivably recognize an employee’s implied contract right to privacy because privacy is a negotiable right that can be altered by contract.\footnote{See Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122, 1130-31 (9th Cir. Cal. 2000) (finding that an “objectively reasonable expectation of privacy” depends on the deal struck between labor and employment because consent is usually a defense to a privacy action).} Further, in a jurisdiction that will enforce an implied contract based on the employee’s reasonable expectations, the employee’s reasonable expectations of privacy will necessarily be more likely to give rise to an implied contract right to privacy. The claim might arise when an employee has been terminated and the employee feels as though his privacy rights were infringed because the employee had a reasonable expectation of privacy based upon the employer’s conduct and policies; therefore, the claim can be framed as a narrow way of arguing that the employee’s at-will employment status was negated based on an implied contractual right to privacy. In fact, such an argument has been made by a handful of employee-plaintiffs.\footnote{See, e.g., Vasey, 29 F.3d at 1464; Dupree, 956 F.2d at 222; Greenrock v. Whirlpool Corp., 2009 U.S. Dist. LEXIS 36360, *1-2 (N.D. Okla. 2009).}

However, it need not be the case that the employee be terminated in order to assert a breach of contract claim for violating the employee’s right to privacy. For example, if an employee has a contractual right to privacy in the content of text messages sent using a company issued phone and the employer breaches the contract by accessing the content of the employee’s text messages but does not fire the employee, the employee could still bring suit against the employer for breach of contract. It is the terms of the parties’ contract that will determine what actions constitute a breach of contract, and the employee’s reasonable expectations will assist the court in determining the terms of the contract.

An implied-in-fact contract for employee privacy might arise in the following manner: when an employer makes representations to an employee that gives rise to the employee’s reasonable expectation of privacy in some aspect of the job or the employee’s life and the employer breaches that promise, the employee might assert a cause of action for breach of an implied-in-fact contract protecting the employee’s privacy. As may be obvious, the more
specific and definite the assurances given by the employer, the more likely it is that a court will find that the assurances created an implied-in-fact contract right.

One case in which an employee asserted privacy rights based on an implied contract, *Dupree v. United Postal Service*, was taken to the United States Court of Appeals for the Tenth Circuit in 1992. In *Dupree*, two employees were terminated after word of their romantic involvement spread around the office. The employees argued that an implied contract voided their at-will status by creating certain privacy rights and based their claim on representations made orally and in policy manuals. The United States Court of Appeals for the Tenth Circuit enumerated the following five factors as critical to the evaluation of whether an implied contract exists: evidence of some “separate consideration” beyond the employee’s continued service, longevity of employment, provisions in employer manuals and handbooks, the employee’s detrimental reliance on oral statements and company policies and practices, and promotions. The court acknowledged that the inquiry is a factual one typically to be decided by a jury, but stipulated that “[i]f the alleged promises are nothing more than vague assurances … the issue can be decided as a matter of law.” The statement relied on by the employees in the company’s policy manual that “We Treat Our People Fairly and Without Favoritism” was held by the court to be too vague, as a matter of law, to create an implied contract right to privacy.

Two years later, the United States Court of Appeals for the Tenth Circuit Court approached a similar argument applying Colorado law in *Vasey v. Martin Marietta Corp.* Here, the plaintiff-employee worked for the defendant-employer for 33 years in various positions before being terminated in a round of layoffs. The court discussed the procedural requirements for an implied-in-fact employment contract, holding that the employee must show the formal requirements of a contract, namely, that the employer was making an offer to the employee and

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48 *Dupree*, 956 F.2d at 221.
49 *Id.* at 222.
50 As discussed, some jurisdictions do not require “separate consideration” and consider such a requirement to be contrary to general contract principles against inquiring into the sufficiency of consideration. *See, supra* note 40 and accompanying text.
51 *Dupree*, 956 F.2d at 222.
52 *Id.*
53 *Id.*
54 29 F.3d at 1460.
55 *Id.* at 1463.
that the employee’s initial or continued service qualified as acceptance and consideration. Further, for a handbook or manual to constitute an offer, it must be communicated to the employee. The worker in Vasey relied on statements in company memos that the employer was committed to “the dignity and privacy due all human beings,” to providing “a safe and healthy workplace,” and that the employer “believes in the highest ethical standards.” Like in Dupree, the court held that these general statements were “vague assurances” and too indefinite to contractually bind the employer to an implied contract.

Yet another example of a court rejecting assurances in an employee manual purporting to protect employee privacy rights as too vague is the Oklahoma Supreme Court case Gilmore v. Enogex, Inc. Gilmore was terminated for refusing to submit to a random drug test that was conducted on all employees. Gilmore asserted a cause of action based on an implied contract right to privacy from the employee manual which provided that "[t]he Company will respect the privacy of its employees and will involve itself in their personal lives only to the extent that job performance or conflict of interest is involved or where assistance programs are made available on a voluntary participation basis." The court recognized that it is possible for an employee manual or handbook to give rise to an implied contract but rejected that the cited provision was sufficient to implicate an implied contract right to privacy. While arguably more specific than the handbook statements in Dupree and Vasey, the Oklahoma court found Gilmore’s implied

56 Id. at 1464 (elaborating that to qualify as an offer the employer must have “manifested his willingness to enter into a bargain in such a way as to justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain.”). Dupree and Vasey were both decided by the United States Court of Appeals for the Tenth Circuit, but in Dupree separate consideration was a prerequisite to finding an implied employment contract whereas in Vasey the employee’s continued service could be sufficient consideration to support an implied employment contract. This difference is due to the fact that in Dupree the court was applying Oklahoma law, and in Vasey the court was applying Colorado law.

57 Id. This is not the holding in every jurisdiction. Some jurisdictions have held that an employer manual or handbook can contractually bind an employer regardless of whether the employee relied on or was even aware of the existence of the document. See, e.g., Woolley, 491 A.2d at 1268, n.10 (finding that “employees neither had to read it, know of its existence, or rely on it to benefit from its provisions any more than employees in a plant that is unionized have to read or rely on a collective-bargaining agreement in order to obtain its benefits.”).

58 Vasey, 29 F.3d at 1456.

59 Id.

60 878 P.2d 360 (Okla. 1994).

61 Id. at 362.

62 Id. at 368. Gilmore’s implied contract theory was asserted as an alternative to his first argument that his termination was a wrongful discharge in violation of public policy. The wrongful discharge claim was rejected because, “when Gilmore's privacy concerns are balanced against Enogex' legitimate interest in providing a drug-free workplace, his invasion-of-privacy claim fails to meet the law's highly-offensive-to-a-reasonable-person test.” Id. at 367.

63 Id.
contact claim flawed because the employee handbook provision did not contain any specific terms, only “vague assurances.”

Although each of these cases failed to find an implied contract right to privacy, each of them did accept that finding such a right would be appropriate under different circumstances, specifically, where there were more definite assurances of privacy protection. While the United States Court of Appeals for the Tenth Circuit and the Oklahoma Supreme Court did not give any guidance as to what kind of statement would be sufficiently specific and definite to give rise to an implied contract right to privacy, these cases indicate that some courts will require definite and specific promises of privacy from employers in order to find an implied contract right to privacy. Whether an employee has an implied contract right to privacy can be framed as whether the totality of the circumstances suffices to create a reasonable expectation of privacy for the employee. For the employees in Dupree, Vasey, and Gilmore, the lack of specificity in the handbook provisions made the provisions insufficient to create reasonable privacy expectations. Stated another way, it was not reasonable for these employees to rely on the handbook statements. When framed in terms of the employee’s reasonable expectation of privacy, the analysis is similar to that of a Fourth Amendment analysis, protecting citizens from unreasonable searches and seizures by government actors, for public employees. The similarities of these analyses will be discussed in Part IV of this paper.

In contrast to the higher threshold required under Oklahoma and Colorado law to invoke the implied contract doctrine with regard to employee privacy rights, other courts have been more willing to invoke the doctrine. The case described below is an example of a court more willing to find the existence of an implied contract to protect employee privacy rights.

1. Rulon-Miller v. IBM

Contrary to the cases described above, courts do not always refuse to find that an implied contract right to privacy exists. Rulon-Miller v. IBM has frequently been cited as recognizing an implied contract for certain employee privacy protection. As will be seen, the court relied

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64 Id. at 369 (“This court, while willing to imply the existence of a contract and construe the terms, will not imply terms in the context of obscure or ambiguous language.”).
65 See Dupree, 956 F.2d at 223.
67 See Selmi, supra note 4 at 1043-44 (calling the court’s recognition of an implied contract right of employee privacy the “most important aspect” of the case); Terry Morehead Dworkin, It’s My Life – Leave Me Alone: Off the-
heavily on the employee’s expectation of privacy created by the employer’s conduct. Rulon-Miller worked her way up through the company ranks, beginning as a receptionist and becoming a marketing manager.\textsuperscript{68} Before becoming a manager, Rulon-Miller was having a relationship with an employee of an IBM competitor, and Rulon-Miller’s IBM supervisors were aware of the relationship prior to promoting Rulon-Miller to the management position.\textsuperscript{69} Before offering her the promotion, Rulon-Miller’s superiors assured her that the relationship was not an issue; however, she was later told by her manager that the relationship created a “conflict of interest” and that she must end the relationship or lose her job.\textsuperscript{70} The manager told her that she had time to think it over, but the next day, Rulon-Miller was terminated by the same manager.\textsuperscript{71}

Rulon-Miller, and the court, relied on an IBM memo to managers that stressed the importance of employees’ privacy in their off-the-job lives.\textsuperscript{72} The court summarized the company policy as “one of no company interest in the outside activities of an employee so long as the activities did not interfere with the work of the employee.”\textsuperscript{73} While IBM relied on a “conflict of interest” as the reason for Rulon-Miller’s termination, the court found that, in fact, there was no such conflict of interest created by the romantic relationship.\textsuperscript{74} The court found that Rulon-Miller had rights to privacy in her personal, romantic life based on “substantive direct contract rights … flowing to her from IBM policies.”\textsuperscript{75} Interestingly, these IBM policies were not even distributed to employees but only to managers.\textsuperscript{76} Thus, if the court was relying solely

\textit{Job Employee Associational Privacy Rights, 35 AM. BUS. L.J. 47, 78 (1997)} (“Rulon-Miller raises a breach of implied contract common law claim that can be used to assert associational privacy rights.”); Stewart J. Schwab, \textit{Predicting the Future of Employment Law: Reflecting or Refracting Market Forces, 76 IND. L.J. 29, 43, n.79 (2001)} (describing Rulon-Miller as “[a] well-known case that can be understood on contract grounds” and citing the proposition that “[i]n the private sector … workers rarely succeed in their claims unless they can show that the employer held out the expectation of respecting privacy and then breached the expectation.”).

\textsuperscript{68} Rulon-Miller, 162 Cal. App. 3d at 244-45.

\textsuperscript{69} Id. at 245.

\textsuperscript{70} Id. at 245-46.

\textsuperscript{71} Id. at 246.

\textsuperscript{72} The memo stated that “IBM’s first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy.” Id. at 249. This policy does not appear any more specific than the statements relied on by the employee in \textit{Gilmore}. See \textit{Gilmore}, 878 P.2d at 368. Additionally, the employee in \textit{Gilmore} actually received and had knowledge of the employee manual containing the relied upon statement. Yet, the California court in \textit{Rulon-Miller} was willing to accept that an implied contract right to privacy existed while the Oklahoma Supreme Court was not. This divergence must be due to the courts’ differing acceptance and willingness to invoke the implied-in-fact contract to protect employee privacy.

\textsuperscript{73} Id. at 251.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 249.
on these policies to support an implied contract right, its holding is a far cry from that of other jurisdictions requiring that the distribution of a company policy be an offer by the employer that is communicated to the employee and inviting the employee’s assent. In finding that Rulon-Miller had an implied contract right to privacy, the court may have also relied on the assurances made by Rulon-Miller’s supervisors that the relationship was not a problem. Certainly, Rulon-Miller’s expectation of privacy was formed by the assurances of her supervisors rather than a company policy of which she was not even aware.

The court clearly affirmed that the company policy established that IBM had no interest in the off-duty conduct of an employee unless the conduct interfered with the employee’s work.

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77 See, e.g., Vasey, 29 F.2d at 1464.

78 Although commentators have cast the case as one finding an implied-in-fact contract right to privacy, the court was not straight forward in explaining its approach for its holding. Initially, the court framed the issue as whether Rulon-Miller could “reasonably rely” on the company’s policies and cited Pugh as authority for the proposition that an employer action in contrast to such reasonable reliance would violate her contract rights. Rulon-Miller, 162 Cal. App. 3d at 247. This certainly sounds like an implied-in-fact contract analysis; however, the court then explained that there is a covenant of good faith and fair dealing implicit in California employment contracts, including at-will employment contracts. Id. The implied covenant of good faith and fair dealing imposes a requirement on the employer that “like cases be treated alike.” Id. at 247-48. The court elaborated that “[i]mplied in this … is that the company, if it has rules and regulations, apply those rules and regulations to its employees as well as affording its employees their protection.” Id. at 248. In other words, it recognizes “the right of an employee to the benefit of rules and regulations adopted for his or her protection.” Id. Rather than being based on bargained for contract rights, the covenant of good faith and fair dealing described by the court is based on fairness. Under the implied covenant of good faith and fair dealing, IBM was required to afford Rulon-Miller the protections of IBM’s policy protection employee privacy, and IBM breached the covenant by not providing Rulon-Miller this protection. Nonetheless, the court then found it clear that IBM’s company policy granted its employees the right to privacy and the right to keep a job even if the employee’s supervisor disapproves of the employee’s off-duty conduct. Id. at 249. This holding reverts back to an implied-in-fact contract analysis.

Another way to state the issue may be whether the employee had a reasonable expectation of privacy based on the employer’s conduct. Additionally, framing the issue as one of reasonable reliance sounds like a promissory estoppel analysis which allows an employee to recover based upon reasonable reliance on a definite promise by the employer where reliance is to the employee’s detriment and nonenforcement would be unjust. See Nguyen v. CNA Corp., 44 F.3d 234, 241 (4th Cir. 1995) (defining promissory estoppel as allowing “recovery even in the absence of consideration where reliance and change of position to the detriment of the promisee make it unconscionable not to enforce the promise.”); Estrin v. Natural Answers, Inc., 103 Fed. Appx. 702, 705 (4th Cir. 2004) (listing the elements of a promissory estoppel claim as: “1. a clear and definite promise; 2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; 3. which does induce actual and reasonable action or forbearance by the promisee; and 4. causes a detriment which can only be avoided by the enforcement of the promise.”). A promissory estoppel claim by an employee might be predicated upon reliance on a promise of privacy by an employer and thereby make the employee’s reasonable expectation of privacy an issue under a promissory estoppel cause of action as well. See Coats v. Cuyahoga Metropolitan Housing Authority, 2001 Ohio App. LEXIS 1699, *22 (Ohio Ct. App. 2001) (holding summary judgment to be appropriate on a promissory estoppel claim where the plaintiff did not have a reasonable expectation of privacy).

79 Id. at 251. What is unclear in whether the court relied upon a breach of an implied contract right to privacy extending to Rulon-Miller sufficient to void her at-will status or a breach of the covenant of good faith and fair dealing implicit in her employment at-will contract due to IBM’s unfair treatment of Rulon-Miller. The statement in the court’s concluding paragraph that Rulon-Miller had “substantive direct contract rights” based on the company’s policies indicates that the former is correct; however, if that is the case, then the court’s discussion of the
Assuming that the Rulon-Miller court was in fact finding an implied contract right, the court primarily relied upon the written IBM policy distributed to IBM managers in finding a contract right to employee privacy. However, the court conceivably could have based this conclusion on the fact that Rulon-Miller’s superiors knew of and permitted the relationship when promoting her to manager. Of course, a written policy will usually be stronger evidence of an implied contract right, but by definition an implied-in-fact contract takes all of the facts and circumstances into consideration in determining whether such a contract right exists. While the court did not explicitly discuss how the facts met the common law contract requirements, the exchange, even absent the IBM policy, can fit within the contract definition of a bargained for exchange consisting of an offer, an acceptance, and consideration. Prior to receiving the promotion, Rulon-Miller was promised by her superior that her romantic relationship was not an issue. Thus, in offering her the promotion, it was an understood condition of her acceptance that she could continue with the relationship. In accepting the promotion, Rulon-Miller was accepting as a condition of her new employment contract that she could stay in the relationship while working in her new position, and her continued service to the company in the promoted position constituted consideration.

The facts can be analyzed to meet the elements of a contract, but crucial to finding an implied-in-fact contract is the employee’s reasonable expectations. There is no indication that Rulon-Miller even knew about the policy distributed to IBM managers; consequently, she could not expect privacy directly based upon that memo. However, the assurances by her supervisors covenant of good faith and fair dealing implicit in employment at-will contracts unnecessarily confused the issue. Perhaps in a jurisdiction that recognizes both causes of action, it is a distinction without a difference whether the court was finding that there was a breach of an implied contract right derived from the circumstances or a breach of an implicit covenant of good faith and fair dealing. Nevertheless, these are separate avenues for finding that an employee’s right to privacy has been breached. Indeed, many states that recognize the implied contract theory do not recognize the implied covenant of good faith and fair dealing in employment contracts.

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80 See Rulon-Miller, 162 Cal. App. 3d at 245.
81 See, e.g., Foley, 47 Cal. 3d at 681 (“[T]he totality of the circumstances determines the nature of the contract.”); Dupree, 956 F.2d at 222 (acknowledging that the inquiry regarding whether an implied contract right exists is a factual one).
82 Rulon-Miller, 162 Cal. App. 3d at 245. Rulon-Miller testified that her manager stated to her: “I don’t have any problem with [the relationship]. You’re my number one pick. I just want to assure you that you are my selection.” Id.
83 Perhaps indirectly the policy created a culture whereby the off-duty contract of employees was kept private, but relying on this as the basis for Rulon-Miller’s reasonable expectation of privacy is a stretch. More likely, it was the actual representations made by Rulon-Miller’s supervisors that fostered her reasonable expectation that her personal life was not the business of the employer.
could induce a reasonable expectation that what the supervisors said was accurate and that the relationship was not a problem. Based on the representations by her superiors, Rulon-Miller did have a reasonable expectation that her relationship was not a matter of concern for her employer, and this reasonable expectation shaped by the employer’s conduct created an implied contract right. Under the facts of the case, it does seem that Rulon-Miller was treated unfairly by her long time employer. As previously mentioned, the court indicated that the implied covenant of good faith and fair dealing could provide Rulon-Miller with relief because IBM failed to afford Rulon-Miller the protection of a company policy. Similarly, other decisions have invoked the implied covenant of good faith and fair dealing to protect employee privacy rights.


The court in Rulon-Miller made reference to the implied covenant of good faith and fair dealing present in employment at-will contracts. The covenant of good faith and fair dealing is another cause of action an employee may assert against an employer to allege an infringement of the employee’s privacy. Implied contract rights and the implied covenant of good faith and fair dealing are similar but distinct analyses. For example, while forty-five states recognized the implied contract theory as of 2007, only nine recognized the implied covenant of good faith and fair dealing theory. The implied covenant of good faith and fair dealing affords the employee the protection of employer policies without requiring the court to find that the policies created an implied contract. Thus, an employee-plaintiff might assert both causes of action with regard to the employee’s privacy rights when a finding of such privacy rights is supported by an employer policy. As illustrated in the following paragraphs, and as the name of the covenant indicates, courts might rely on fairness principles to find that an employer violated the implied covenant of good faith and fair dealing even absent the employer’s violation of a company policy.

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85 See supra notes 79-81 and accompanying text.
86 See Sonne, supra note 4 at 145-46 (listing the limitations to employment at-will with regard to privacy, including implied contract rights and the covenant of good faith and fair dealing); Rives, supra note 22 at 555; Charles J. Muhl, The Employment-at-Will Doctrine: Three Major Exceptions, MONTHLY LAB. REV., Jan. 2001, at 3, 4 (analyzing the implied contract and the covenant of good faith and fair dealing as two of the three major common law exceptions to employment at-will, with public policy being the third major exception).
87 See Sonne, supra note 4 at 160, n.149 (according to a 2007 survey).
88 See, e.g. William E. Hartsfield, Wrongful Discharge, 2 IEMPC § 14:13, n.19 (surveying decisions recognizing the implied covenant of good faith and fair dealing regarding employee privacy).
Luedtke is one case in which a court held that the employer violated the implied covenant of good faith and fair dealing. Luedtke was terminated after testing positive for marijuana. The Alaska Supreme Court held that the covenant of good faith and fair dealing is implied in all at-will employment contracts, and the focus for determining whether the covenant was breached must be on the employer’s intent and whether the employer acted in bad faith. In other words, the employer must “treat like employees alike” and act in a manner that a reasonable person would regard as fair. The court held that, as a matter of law, the employer’s actions violated the covenant of good faith and fair dealing because Luedtke was drug tested without prior notice, he was not aware his urine sample was being used for drug testing, no other worker was similarly tested, and the employer suspended him after the results were determined. The court further explained that the drug test added an additional term to Luedtke’s employment contract, and the employer should have provided advance notice of this additional term.

While the court’s analysis in Luedtke recognized that the drug test was a term of Luedtke’s employment contract, it was not finding that Luedtke had an implied contract right to privacy that prohibited the employer from drug testing him. Rather, the court essentially held that the employer did not treat Luedtke fairly when he was tested for drugs without notice when other employees were not similarly tested. This analysis focuses more on fairness based on the employee’s reasonable expectation of privacy due to the employer’s actions rather than fitting the circumstances into a contractual relationship. Luedtke had a reasonable expectation that he would not be tested for drugs because he was not given advance notice and no other employees were tested. Where an employee’s situation seems manifestly unfair, perhaps because the employer’s conduct caused the employee to reasonably expect privacy, but the circumstances will not fit within the contract framework of a mutually bargained for exchange, the covenant of good faith and fair dealing may afford such an employee a method of relief in the states that

89 Id. at 1222.
90 Id. at 1223-24.
91 Id. at 1224.
92 Id. at 1226.
93 Id. (“By requiring a test, an employer introduces an additional term of employment. An employee should have notice of the additional term so that he may contest it, refuse to accept it and quit, seek to negotiate its conditions, or prepare for the test so that he will not fail it and thereby suffer sanctions.”) (quoting Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1137 (Alaska 1989)).
recognize this cause of action. Yet, most state judiciaries have rejected the implied covenant of good faith and fair dealing in employment contracts based on the justification that such a cause of action would deviate too far from the employment at-will doctrine. The underlying inquiries in an implied-in-fact contract case and an implied covenant of good faith and fair dealing case are the same: Did the employee have a reasonable expectation of privacy? Employee privacy expectations are central to other causes of action as well. As the next section examines, public employees are afforded constitutional protection where the employee has a reasonable expectation of privacy based on the realities of the workplace.

IV. PRIVACY RIGHTS OF THE PUBLIC EMPLOYEE

For public employees, the analysis can be quite different because the government-employer must comply with the protections of the Fourth Amendment to the United States Constitution guaranteeing the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by government actors. Under the implied-in-fact contract analysis, whether the employee had a reasonable expectation of privacy is somewhat of a hidden inquiry; courts have not explicitly stated that this is the standard. In contrast, under the Fourth Amendment analysis for public employees, whether the employee had a reasonable expectation of privacy is a threshold question for a court to address. The United

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94 According to a 2000 study, the following states recognized the implied covenant of good faith and fair dealing in employment at-will contracts: Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming. See Muhl, supra note 92 at 4.Interestingly, the analysis for finding a breach of the implied covenant of good faith and fair dealing is similar to the implied-in-fact contract analysis in jurisdictions that focus on the employee’s reasonable expectations rather than strictly requiring that the circumstances meet the elements of a contract.

95 See, e.g., Pittman v. Larson Distribution Co., 724 P.2d 1379, 1385 (Colo. Ct. App. 1986) (declining to extend the covenant of good faith and fair dealing to employment contracts); White v. State, 929 P.2d 396, 407 (Wash. 1997) (declining “to adopt a broad ‘bad faith’ exception to the employment-at-will rule which would have implied a covenant of good faith and fair dealing in every employment contract” because such an exception would intrude too greatly upon the employment relationship). See also Murphy v. Bancroft Constr. Co., 135 Fed. Appx. 515, 518 (3d Cir. 2005) (recognizing an implied covenant of good faith and fair dealing in employment at-will relationships in Delaware, but qualifying that this exception has a narrow application because the covenant “could swallow the doctrine of employment at will.”). See also Thomas C. Kohler & Matthew W. Finkin, Bonding and Flexibility: Employment Ordering in a Relationless Age, 46 AM. J. COMP. L. 379, 382 (1998) (“[T]he vast majority of state courts decline to recognize any implied covenant of good faith and fair dealing on the employer's part as inherently inconsistent with an ‘at will’ relationship.”).

96 USCS Const. Amend. 4.

97 As discussed below, the Court in Quon distanced itself from the holding that finding a reasonable expectation of privacy is a threshold requirement in Fourth Amendment employee privacy cases. After Quon, it is unclear what the correct analytical framework is for a public employee Fourth Amendment claim.
States Supreme Court has held that “[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make some employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.” The test for public employees’ claiming Fourth Amendment protection is whether the employee has a reasonable expectation of privacy and, if so, whether the search was unreasonable. Thus, whether the public employee had a reasonable expectation of privacy is a threshold analysis to be determined on a case-by-case basis considering all of the circumstances and “operational realities” of the workplace. In making such a case-by-case determination, the analysis may look similar to an analysis determining whether an implied-in-fact contract exists as both analyses require the court to take account of the totality of the circumstances including the employer’s policies, practices, and representations.

A. City of Ontario v. Quon

Quon exemplifies the similarities and overlap of the privacy rights of public employees under the Fourth Amendment and a cause of action for an implied contract right to privacy. Quon worked as a sergeant for the Ontario Police Department and as part of the job received a two-way pager from his employer. The City had a general policy regarding computer, Internet, and email usage providing that personal use was prohibited and access was not confidential; however, there was no official policy regarding the employer-issued pagers. Prior to receiving the pager, Quon signed an acknowledgement of the policy which stated, in part, that “[u]sers should have no expectation of privacy or confidentiality when using these resources.” After receiving the pager, Quon attended a meeting where Lieutenant Duke stated that the pager messages would fall under the computer, Internet, and email usage policy. Under the City’s contract with the pager service provider, Arch Wireless, each pager was allotted

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99 Quon, 529 F.3d at 904 (citing O’Connor, 480 U.S. at 718, 725-26).
100 O’Connor, 480 U.S. at 718.
101 For this discussion regarding the totality of the circumstances analysis for an implied contract, see supra note 37-39 and accompanying text.
102 Quon, 529 F.3d at 895.
103 Id. at 896.
104 Id.
105 Id.
25,000 characters per month, and there would be additional charges for exceeding this allotment.\textsuperscript{106} Lieutenant Duke was in charge of the pager payments.\textsuperscript{107} When an employee went over the monthly allotment, the practice of Lieutenant Duke was to collect payment from that employee for the overages.\textsuperscript{108} Quon went over his pager’s character allotment several times and was told by Lieutenant Duke that if he paid for the overages, an audit would not be conducted to determine whether the overages were for personal or business purposes.\textsuperscript{109} Quon paid these overages each month that he exceeded his monthly character allocation, and for several months his pager messages were not audited; however, an audit was later conducted by reviewing the pager transcripts, and Quon’s superiors found that many of his pager messages were personal and sexually explicit.\textsuperscript{110} There is no indication from the opinion that Quon was terminated or suffered any adverse employment action. Rather, the harm suffered by Quon was that various persons within the department reviewed the content of the pager messages.

Quon filed suit asserting constitutional protections in the content of the pager messages under the Fourth Amendment, and the district court held that Quon had a reasonable expectation of privacy in the messages due to Lieutenant Duke’s informal policy of not auditing a pager if the employee paid the overuse charges.\textsuperscript{111} The United States Court of Appeals for the Ninth Circuit agreed and found that, although the employer had a policy purporting that “‘[u]sers should have no expectation of privacy or confidentiality’ …, such was not the ‘operational reality’ at the Department.”\textsuperscript{112} The court relied on the “operational reality” that Lieutenant Duke had an informal policy, which he made particularly clear to Quon, that employee pagers would not be audited if the employee paid any overage fees.\textsuperscript{113} In addition to relying on this informal policy, the court also considered the employer practice of not auditing Quon’s pager messages when Quon paid for his overages in the several months that he exceeded his monthly character

\textsuperscript{106} Id. at 897.  
\textsuperscript{107} Id.  
\textsuperscript{108} Id.  
\textsuperscript{109} Id. The parties’ descriptions of the exact exchange differed. According to Lieutenant Duke, he told Quon “that [Quon] had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, ‘It’s all business, I’m not paying for it,’ then I would do an audit to confirm that.” Id. However, Quon quoted Lieutenant as stating the following: “if you don’t want us to read it, pay the overage fee.” Id.  
\textsuperscript{110} Id. at 898. The stated purpose of the audit was to determine whether the 25,000 character allotment was sufficient to cover business use of the pagers. Id.  
\textsuperscript{111} Id. at 899.  
\textsuperscript{112} Id. at 906-07.  
\textsuperscript{113} Id. at 907.
Thus, the court considered the oral representations of the employer as well as the policies and practices of the employer and concluded that Quon did have a reasonable expectation of privacy in the pager messages.

The United States Supreme Court granted certiorari and issued an opinion on June 17, 2010. One of the questions presented to the United States Supreme Court was whether the employee had a reasonable expectation of privacy when the employer’s actual practice and informal policy differed from the official employer policy. In their respective briefs, the parties agreed that the reasonable expectation of privacy test is a fact specific inquiry; unsurprisingly, the parties differed on which facts they advocated for the Court to direct its attention. Brief of the Respondents urged the Supreme Court to adopt the view that an employee’s expectation of privacy must be determined based on all the circumstances of the employment context and focuses the Court’s attention to the Lieutenant’s informal policy and actual practice of not auditing the officers’ pager messages. Brief of the Petitioners also used a “totality of the operational realities” test, but urged the Court to concentrate on the factors that diminish the expectation of privacy, such as that the pager was issued by the employer and the department’s formal no-privacy policy, rather than the informal policy or actual practice of the employer.

In an opinion issued by Justice Kennedy, the Court determined that the case “can be resolved by settled principles determining when a search is reasonable” rather than delving into reasonableness of the employee’s privacy expectations. Thus, the Court assumed that Quon

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114 Id. (“Quon had exceeded the 25,000 character limit ‘three or four times,’ and he had paid for the overages every time without anyone reviewing the text of the messages.”).
115 Id. (dismissing the City’s argument that Lieutenant Duke could not create a reasonable expectation of privacy because Lieutenant Duke was not a policymaker). Unimportant for the purposes of this paper, the court also held that the search was unreasonable and thus violated Quon’s Fourth Amendment rights. Id. at 909 (holding that reviewing the content of the text messages “was excessively intrusive in light of the noninvestigatory object of the search.”).
117 American Bar Association, Preview of United States Supreme Court Cases: City of Ontario, CA v. Quon, Docket No. 08-1332, available at http://www.abanet.org/publiced/preview/briefs/april2010.shtml (“Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.”).
119 Brief of Petitioners at 41-45, City of Ontario v. Quon, No. 08-1332 (U.S. Feb. 2010).
120 Quon, 130 S. Ct. at 2624.
did have a reasonable expectation of privacy and avoided the “operational realities” issue.\textsuperscript{121} However, the Court discussed in dicta the parties’ disagreement over whether Quon had a reasonable expectation of privacy and noted that whether the oral statements constituted a change in the Department’s policy would bear on the reasonableness of Quon’s expectation of privacy.\textsuperscript{122} The Court indicated that its caution over the “reasonable expectation of privacy” question is due to concern over announcing too broadly that employees can expect privacy in new forms of technology: “Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.”\textsuperscript{123} Yet, the Court made clear that employer policies, “especially to the extent that such policies are clearly communicated,” will “shape the reasonable expectations of their employees.”\textsuperscript{124}

Because the Court did not want to make “[a] broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment,” it assumed that Quon did have a reasonable expectation of privacy and held, more narrowly, that the search was reasonable under the Fourth Amendment.\textsuperscript{125} In discussing whether the search was too intrusive, the Court again considered the reasonableness of Quon’s expectation of privacy and determined “it would not have been reasonable for Quon to conclude that his messages were in all

\textsuperscript{121} Id. at 2628-29. Interestingly, the Court backs off the two-part framework used in the O’Connor plurality by stating that “were we to assume that inquiry into ‘operational realities’ were called for,” it would be necessary to consider the facts bearing on the legitimacy of Quon’s expectation of privacy in his pager messages. Id. at 2629. Thus, post-Quon, it is unclear whether the Court has rejected the O’Connor plurality approach in favor of Justice Scalia’s approach. Id. at 2628 (“His opinion would have dispensed with an inquiry into ‘operational realities’ and would conclude ‘that the offices of government employees … are covered by Fourth Amendment protections as a general matter.’ But he would also have held ‘that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment.’”)(citing O’Connor, 480 U.S. at 731-32)(Scalia, J., concurring)).

\textsuperscript{122} Id. at 2629. “[I]t would be necessary to ask whether Duke’s statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or in appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws.” Id.

\textsuperscript{123} Id. at 2629-30 (elaborating that “[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior,” and “it is uncertain how workplace norms, and the law’s treatment of them, will evolve.”).

\textsuperscript{124} Id. at 2630.

\textsuperscript{125} Id.
circumstances immune from scrutiny.” The Court concluded that the United States Court of Appeals for the Ninth Circuit erred in finding the search unreasonable and reversed.

While the Court did not elaborately address whether Quon had a reasonable expectation of privacy in the contents of his pager messages, it did generally state the factors that a court should consider when approaching the issue. The Court’s dicta regarding an employee’s reasonable expectation of privacy may be persuasive in future breach of implied contract cases. Of course, a court applying state law to a breach of contract claim will not be bound to follow the Fourth Amendment analysis used by the United States Supreme Court in Quon. As discussed in the following subsection, the facts in Quon could potentially give rise to an implied-in-fact contract claim for a private sector employee for whom the constitutional cause of action is unavailable.

The conclusion by the United States Court of Appeals for the Ninth Circuit that Quon had a reasonable expectation of privacy in the pager messages is similar to a conclusion that Quon had an implied-in-fact contract right to privacy in the pager messages based on the oral assurances, policies, and practices of his public employer which created a reasonable expectation of privacy in the contents of the messages. The court used the term “operational realities,” language used in the United States Supreme Court plurality opinion in O’Connor v. Ortega, to refer to Lieutenant Duke’s informal policy and practice of not auditing pagers when employees paid their overage fees. The use of looking at “operational realities” to enhance an employee’s expectation of privacy rather than diminish it is unique. Regardless, the reasoning recognizes

126 Id. at 2631.
127 Id. at 2632-33 (holding further that because “the employer had a legitimate reason for the search” and “the search was not excessively intrusive in light of that justification, … the search would be ‘regarded as reasonable and normal in the private-employer context.’” (quoting O’Connor, 480 U.S. at 732)).
128 In a concurring opinion, Justice Scalia criticized that majority for its “recitation of the parties’ arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question.” Id. at 2634-35 (Scalia, J., concurring). Justice Scalia warns that lower courts and litigants will read the Court’s digression as an instruction to delve into arguments regarding “employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees’ use of electronic media.” Id. at 2635. These are the same fact-specific questions a court deciding an employee’s implied-in-fact contract right to privacy case would consider. Thus, the implications of the Court’s digression may spread further than Justice Scalia fears.
129 O’Connor, 480 U.S. at 717.
130 Quon, 529 F.3d at 907.
131 See, e.g. United States v. 284 Fed. Appx. 757, 759 (11th Cir. 2008) (holding that the employee did not have a reasonable expectation of privacy in her purse where a posted policy informed individuals that purses were subject to inspection on the property and all employees were required to read all posted policies); Lynch v. City of New York, 589 F.3d 94, 103 (2d Cir. 2009) (finding that police officers do not have a reasonable expectation of privacy
that the actual facts and circumstances of the particular workplace must be considered to
determine whether an employee has a right to privacy based upon his reasonable expectation of
privacy. Of course, under the Fourth Amendment framework, the elements of a contract need
not be present, but for an employee asserting a right to privacy under either an implied contract
right or the Fourth Amendment, the underlying inquiry is whether the employee had a reasonable
expectation of privacy.

B. An Implied-in-Fact Contract Theory for Quon?

Because Quon was a public sector employee, he was able to invoke Fourth Amendment
protection against his employer. The Supreme Court’s handling of the case may signal that a
wider range of public employer conduct will be found reasonable under the Fourth Amendment.
The Court distanced itself from the analytical framework that inquired, as a threshold matter, into
the employee’s reasonable expectation of privacy; this limitation on a public employee’s
constitutional avenue for relief makes the implied contract theory an important alternative for
public employees. Quon may have been able to assert a successful cause of action based on an
implied-in-fact contract for privacy.\footnote{In fact, public employees can, in addition to a Fourth Amendment cause of action, assert a claim based on an implied employment contract. Such a cause of action is not limited in its application to private sector employees because public sector employees can enter into contracts with their government employers just as private sectors employees can contract with their employers. \textit{See, e.g.}, Bennett v. Marshall Public Library, 746 F. Supp. 671, 679 (W.D. Mich. 1990) (finding that the public employee had a claim based on the common law implied contract doctrine); Whittington v. State Dept of Pub. Safety, 215-16 (N.M. Ct. App. 2004) (reversing the trial court’s finding that “just-cause public employees do not have the right to sue their governmental employer for breach of an implied employment contract.”); Cabaness v. Thomas, 2010 Utah LEXIS 2, *37-38 (Utah 2010) (finding that, although the plaintiff was a public employee, an implied-in-fact employment contract was created based on an employee manual).} As previously discussed, courts vary greatly from state to
state in their recognition and level of acceptance of the implied-in-fact employment contract;\footnote{\textit{See supra} note 42 and accompanying text.} therefore, the court and its application of the facts would matter greatly. Like the Fourth Amendment reasonable expectation of privacy analysis undertaken by the United States Court of
Appeals for the Ninth Circuit and considered by the Supreme Court, an implied-in-fact contract

\begin{footnotesize}
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\item \textsuperscript{132} In fact, public employees can, in addition to a Fourth Amendment cause of action, assert a claim based on an implied employment contract. Such a cause of action is not limited in its application to private sector employees because public sector employees can enter into contracts with their government employers just as private sectors employees can contract with their employers. \textit{See, e.g.}, Bennett v. Marshall Public Library, 746 F. Supp. 671, 679 (W.D. Mich. 1990) (finding that the public employee had a claim based on the common law implied contract doctrine); Whittington v. State Dept of Pub. Safety, 215-16 (N.M. Ct. App. 2004) (reversing the trial court’s finding that “just-cause public employees do not have the right to sue their governmental employer for breach of an implied employment contract.”); Cabaness v. Thomas, 2010 Utah LEXIS 2, *37-38 (Utah 2010) (finding that, although the plaintiff was a public employee, an implied-in-fact employment contract was created based on an employee manual).
\item \textsuperscript{133} \textit{See supra} note 42 and accompanying text.
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analysis would be fact-intensive and would scrutinize Quon’s reasonable expectation of privacy.\textsuperscript{134}

In an implied contract analysis, a court would take into account the totality of the circumstances, including the oral assurances, policies, and practices of the employer.\textsuperscript{135} As discussed above, the official policy of the police department in \textit{Quon} was that of no expectation of privacy.\textsuperscript{136} However, the informal policy and actual practice of the police department was to refrain from auditing the pagers so long as the officer paid any overage charges for the pager text messages.\textsuperscript{137} Lieutenant Duke even orally assured Quon specifically that his pager messages would not be audited if Quon paid for the overage charges.\textsuperscript{138} A court might find that Quon had a reasonable expectation of privacy in the content of his pager messages based on these facts, which the United States Court of Appeals for the Ninth Circuit did in fact find under its Fourth Amendment analysis. A court that handles the existence of implied-in-fact contracts as an informal, open-ended question might find this reasonable expectation of privacy sufficient to give rise to an implied contract right to privacy in the contents of the messages.

Some courts are more rigid in their implied-in-fact contract analysis, requiring the facts to meet the formal requirements of a contract. It is also possible that these circumstances qualify as a bargained for exchange sufficient to establish an implied-in-fact contract for privacy in the contents of the pager messages. Applying the facts to the elements of a contract, Lieutenant Duke’s oral representation was an offer by the employer; the terms of the offer being that if Quon paid for the overages, then his pager messages would not be audited. By paying for the overages, Quon was accepting the offer; additionally, the payment constituted Quon’s consideration. The employer’s consideration was not auditing the pager messages when Quon met his end of the bargain. Quon’s continued employment with the department could also be consideration because the arrangement was adding an additional employment term to the parties’ employment contract, but it is not necessary to find that Quon’s continued employment constituted consideration because there was separate consideration in his payment to the

\textsuperscript{134} Of course, these causes of action are quite distinct. Implied contracts are about an agreement, albeit an implied one, between the parties, while the Fourth Amendment is about a fundamental right to be free from unreasonable government intrusion. Nonetheless, these theories share a common theme in the employee’s reasonable expectation of privacy.

\textsuperscript{135} See supra notes 43-45 and accompanying text.

\textsuperscript{136} \textit{Quon}, 529 F.3d at 896.

\textsuperscript{137} \textit{Id.} at 897.

\textsuperscript{138} \textit{Id.}
employer for the pager overages. Under these circumstances, the implied contract right to privacy is not an alteration of Quon’s status as an at-will employee, assuming that Quon was in fact an at-will employee. Quon’s contract right to privacy in the pager messages prohibited his employer from auditing the contents of those messages irrespective of any adverse employment action being taken against Quon. In other words, the employer breaches the contract by reviewing the pager messages after Quon has paid the overuse charges, not by terminating Quon because of the contents of those messages.

While the facts can be analyzed to meet the elements of a contract, the court would take the totality of the circumstances into consideration in determining whether an implied-in-fact contract for privacy existed. Whether Quon had a reasonable expectation of privacy in the pager messages would be important in the court’s assessment. As with the Fourth Amendment analysis articulated by the O’Connor plurality and discussed in Quon, other factual considerations would be taken into account, such as that the pager was issued by the police department and the department had an official policy of “no expectation of privacy or confidentiality” with regard to internet use and email. Therefore, the balancing of these factors will determine whether the totality of the circumstances created an implied-in-fact contract for privacy in the pager messages, keeping in mind that the question in an implied-in-fact contract case is whether the parties had an enforceable agreement. A jury could likely come out either way based on these circumstances.

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139 As discussed in Part III, some courts do not accept continued employment as sufficient consideration to find an implied employment contract. Other courts have held that requiring separate consideration is contrary to the general contract principle that courts do not inquire into the adequacy of consideration. See supra note 40 and accompanying text.

140 In fact, there is no indication in the factual background of Quon that Quon suffered any adverse employment consequences. Presumably, if Quon were an at-will employee, the department could have terminated him for the excess pager use without auditing his pager and thereby without breaching his right to privacy in the contents of the messages. Yet, under that scenario, Quon could potentially assert that the policies and practices created an implied contract that employees would not be terminated for excessive pager use if the employee paid the charges associated with the excessive use.

141 Quon, 529 F3d at 896.

142 Alternatively, Quon could assert a claim for breach of the implied covenant of good faith and fair dealing, which is recognized in California, the state in which Quon was employed. Under the implied covenant of good faith and fair dealing cause of action, Quon’s argument would be that he was treated unfairly because he was not afforded the protection of an employer policy. In fact, Quon was not afforded the protection of the informal employer policy that if he paid his overages, his pager would not be audited. However, the official employer policy did not assert an expectation of privacy in the messages. Therefore, whether the implied covenant of good faith and fair dealing could protect Quon would depend on whether the court found the informal policy or the formal policy to be the appropriate policy for the assessment. Again, whether Quon had a reasonable expectation of privacy in the pager messages based upon the employer policies and actual practices would be a part of the covenant of good faith and
Under the implied contract theory, it is probable that Quon would have a successful cause of action against his employer for breach of his privacy rights. Particularly under California law, the jurisdiction that decided Pugh and Rulon-Miller, an employee in Quon’s position would likely succeed against his employer. The Supreme Court avoided the reasonable expectations of privacy issue in its Fourth Amendment analysis; however, under an implied-in-fact contract theory, the case turns on whether the court accepts that the circumstances created a reasonable expectation of privacy for Quon. This depends on the importance the court places on the employer’s informal policy and actual practice of not auditing the pager messages when the employee paid for the overages. In reality, most employees probably rely on the actual practice of their employers in forming privacy expectation rather than formal policies that most employees may have seen only once when commencing employment. This parallels the findings that many employees believe their legal protection is greater than what at-will employment afford. Where constitutional protection is unavailable, an employee under circumstances similar to Quon’s can argue breach of an implied-in-fact contract right to privacy.

V. WHAT’S NEXT?: THE VALUE OF IMPLIED-IN-FACT CONTRACT RIGHTS

The implied-in-fact contract may serve a gap-filling function to protect privacy of public employees where a constitutional theory fails; it may do the same where tort and statutory privacy protections fail. The employee’s reasonable expectation of privacy is a common thread in each of these causes of action. Courts differ from state to state in their recognition of a public policy under common law supporting employee privacy when the employee has a reasonable expectation of privacy. This public policy tort, when recognized, is only implicated when the fair dealing analysis. In addition, whether Quon was treated differently than other employees would come into play with regard to the covenant of good faith and fair dealing because the core of this cause of action is based upon fairness, and treating similarly situated employees differently is unfair. Quon could be successful under an implied covenant of good faith and fair dealing theory if the court accepts that, under the circumstances, Quon’s treatment by his employer was unfair. Alternatively, under the implied covenant of good faith and fair dealing theory.

See supra notes ___ and accompanying text. See, e.g., Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621-23 (3d Cir. 1992) (holding that, under Pennsylvania law, if a discharge is “related to a substantial and highly offensive invasion of the employee’s privacy” when all of the facts and circumstances are considered, the termination is in violation of public policy and the employer may be liable for wrongful discharge); Twigg v. Hercules Corp., 406 SE 2d 52, 57 (W. Va. 1990) (finding a public policy right to privacy whereby an employer may not “intrude upon this right of his employee absent some showing of reasonable good faith objective suspicion.” but granting an exception where the employee is in an occupation involving the safety of others). But see Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170, 176
health or safety of the public is sufficiently impacted. Thus, finding that violating an employee’s privacy affects the public sufficiently enough to give rise to a public policy cause of action is a broad understanding of the public policy exception, and many state courts have not accepted such a broad interpretation.

The implied contract, implied covenant of good faith and fair dealing, and public policy theories are three separate potential sources of employee privacy protection; but, these exceptions can overlap and merge in court opinions. Such an overlap is exemplified in the *Rulon-Miller* decision with regard to the implied-in-fact contract and the implied covenant of good faith and fair dealing. Another example of a merger of these theories in the employment privacy context is *Luedtke*, where the Alaska Supreme Court recognized a public policy supporting protection of employee privacy and opined that an employer violation of that public policy could rise to the level of a breach of the implied covenant of good faith and fair dealing. In this way, a court might bring the implied covenant of good faith and fair dealing into an implied contract or a public policy analysis where the court finds that the employee was treated unfairly. In addition to these common law causes of action, there are also statutory exceptions to employment at-will that protect certain aspects of employee privacy. For instance, some states have passed statutes protecting employee engagement in lawful off-duty conduct. However, these statutes are limited in the employee conduct protected and the employer action prohibited; for this reason, the implied-in-fact contract cause of action is an important protection that an employee might assert when statutory protection is unavailable under the circumstances.

(N.J. Super. Ct. App. Div. 1991) (concluding that privacy is an important societal value, but it is “too amorphous a standard” to be a public policy exception to the at-will doctrine).

See Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 74 (2000) (explaining the narrowness of the public policy tort in that it “may be limited to those situations where the public’s health and safety are affected; it may not apply if only the internal affairs of the employer are involved.”).


See supra notes 78–86 and accompanying text.

*Luedtke*, 834 P.2d at 1225.
A. An Open Field for Legislation: Off-Duty Conduct Statutes and their Limited Impact on Employee Privacy Rights

Some states have attempted to clarify the law in the area of employee privacy and legislated for broad employee protection of legal off-duty conduct. The broadest such statute is Colorado’s off-duty conduct statute, which makes it unlawful for an employer to terminate an employee for the employee’s lawful conduct off-duty and off the employer’s premises unless such conduct creates a conflict of interest or relates to a bona fide business purpose. The Colorado statute protects a vast range of off-duty activity and departs from the Colorado courts’ traditional support of the employment at-will doctrine. These broad statutes can be looked at as protecting aspects of an employee’s private life in which the employee will generally have a reasonable expectation to be free from employer intrusion and involvement. For instance, employees typically expect that their participation in lawful product consumption or lawful recreational activities outside of work is none of their employers’ business when such lawful conduct does not impact the employee’s ability to do the job. Yet, perhaps categorizing off-duty conduct statutes as protecting employee privacy is inaccurate. Such statutes certainly protect personal facts and involvement in personal activities, but not exactly private ones. While the conduct protected may well be none of an employer’s business, whether an employee engages in a particular recreational activity, for example, is not really a private aspect of that employee’s life. Regardless of whether off-duty conduct statutes may accurately be described as protecting employee privacy, in certain situations, such statutes may diminish the need for an aggrieved employee to assert a cause of action based on an implied-in-fact contract for

150 See, eg. COLO. REV. STAT. § 24-34-402.5(1) (making it unlawful for an employer to discharge an employee for engaging in any lawful activity off the employer’s premises and during nonworking hours unless it relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest); N.Y. CLS LABOR LAW § 201-d(2) (making it unlawful for an employer to discharge an employee because of the employee’s political activities, legal use of consumable products off work hours and off work premises, legal recreational activities outside work, or union membership). See also Sonne, supra note 4 at 170 (explaining that such statutes were first enacted in the 1990s as protection against workplace discipline for off-duty smoking but have evolved in some states into sweeping protection of all legal off-duty conduct).

151 COLO. REV. STAT. § 24-34-402.5(1).

152 See Jackson, Colorado’s Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law, 67 U. COLO. L. REV. 143, 148-49, 158 (1996) (citing cases holding that the statute protects activities such as sexual orientation, membership in the Ku Klux Klan, and interoffice dating which “undermines and contradicts decades of strong support for employment at-will principle’s” by effectively giving employees the vast protection of an implied covenant of good faith and fair dealing recognized in other states but rejected by Colorado courts).

153 Put another way, inquiry into an employee’s lawful off-duty conduct is not as intrusive as surveillance or drug testing.
privacy. For instance, under the facts of *Rulon-Miller*, the employee would have been protected by Colorado’s off-duty conduct statute because Rulon-Miller was terminated for engaging in lawful, off-duty conduct, namely, having a romantic relationship with an employee of a competitor company, and her conduct did not create a conflict of interest or relate to a bona fide business interest of her employer. Therefore, an employee in Rulon-Miller’s situation in Colorado could assert protection under Colorado’s off-duty conduct statute rather than arguing an implied-in-fact contract right to privacy.

However, the Colorado off-duty conduct statute would not impact an employee in Quon’s situation because Quon’s conduct was not off-duty; rather, it was on-duty conduct using company property. Thus, even the broadest off-duty conduct statutes cannot adequately protect an employee’s reasonable expectation of privacy where the employer creates that expectation with respect to on-duty activities. Another limitation of the off-duty conduct statutes is that they only protect employees from termination based upon the applicable conduct; thus, off-duty conduct statutes are an exception to employment at-will rule. Consequently, if an employee is not discharged from his job, he does not have a cause of action under these statutes. For this reason as well, Colorado’s off-duty conduct statute would not protect Quon because Quon was not terminated after his employer’s intrusion of his privacy interests. In contrast, if an employee has an employment contract, express or implied, protecting the employee’s privacy, then the employee will have a breach of contract cause of action against the employer based on the terms of the parties’ contract without the prerequisite that the employee be terminated to assert his claim. Therefore, while state legislatures are providing greater statutory protection to workers, there are limitations to these legislative protections that can be supplemented by common law causes of action like the implied-in-fact contract.

Indeed, because of the great jurisdictional differences created by state off-duty conduct legislation, which create problems for multistate companies, arguments have been made for the

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154 For example, while Colorado does recognize an implied employment contract theory based on an employer handbook, this theory will protect employee privacy only in rare circumstances whereas the Colorado "lifestyle discrimination" statute protect a wide range of legal activities. *See* Jackson, *supra* note 155, at 150-52.
156 *See id.* at 251.
157 To be sure, some of the conduct probably occurred off-duty because Quon had access to the pager during his non-working hours; however, because the pager was provided by the employer for business purposes, the conduct would fall under the statutory exception of being for a bona fide business purpose.
158 *See* COLO. REV. STAT. § 24-34-402.5(1); N.Y. CLS LABOR LAW § 201-d(2).
passage of federal legislation regarding employee privacy rights with respect to off-duty conduct.\textsuperscript{159} While such federal legislation would likely achieve the goal of standardizing the protection afforded employees in their activities outside of work, such legislation would not help to protect employees’ reasonable expectations of privacy in activities conducted on-duty. Future legislation in this area is likely to be enacted, but it will probably focus on discrete types of information, as most privacy legislation does.\textsuperscript{160} There will not be a comprehensive legislative answer, but the implied-in-fact contract is available to fill any gaps left by attempted legislation that fails to protect employees’ reasonable expectations of privacy.

First, employers must be cognizant of their employees’ expectations of privacy and manage those expectations appropriately. When an employer is successful in this endeavor, then the employer will not be subject to liability for violating employee privacy rights because the employee will not have a reasonable expectation of privacy on which to base his claim. Second, private ordering is always important in the employment relationship, and when an employer fails to adequately manage employee expectations of privacy, the implied-in-fact contract cause of action might be claimed where there are not applicable statutory, constitutional, or tort protections.

\textbf{B. The Limits of Implied-in-Fact Contract Right}

This paper has proposed the idea that the central theme of employment actions brought by public as well as private employees asserting privacy protection is that of a reasonable expectation of privacy. Because of this common thread, the implied-in-fact contract theory can supplement where other causes of action protecting employee privacy fail. In determining

\textsuperscript{159} See Rives, \textit{supra} note 22 at 554, 563-64 (calling for specific federal legislation protecting employees’ right to engage in lawful off-duty conduct that would “standardiz[e] employee privacy rights across state lines.”); Marisa Anne Pagnattaro, \textit{What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct As the Basis for Adverse Employment Decisions}, 6 U. PA. J. LAB. & EMP. L. 625, 680-83 (2004) (proposing uniform legislation regarding employee privacy to address the significant variance of employee privacy issues across the country). In contrast, other commentators have observed that the off-duty conduct statutes passed by state legislatures were enacted prematurely and unnecessarily. See Sonne, \textit{supra} note 4 at 183-84 (citing evidence that employers realize that it is counterproductive to have overly intrusive policies with regard to employees’ private lives). Additionally, survey data indicates that employers and employees have similar expectations with regard to what information is acceptable for an employer to gather and examine about an employee. Sonne, \textit{supra} note 4 at 184-85 (supporting this proposition by the lack of litigation despite the broad protection of off-duty conduct statutes). Indeed, the lack of case law on the issue is probably the best evidence that sweeping, federal legislation would be an inefficient endeavor. By way of example, shepardizing the Colorado off-duty conduct statute yields only 20 case results and 39 law review articles indicating that it is of greater academic concern that employees receive this protection than a practical problem.

\textsuperscript{160} See \textit{supra} note ___
whether an implied-in-fact contract right to privacy exists, courts look at the totality of the circumstances, and whether the employee had a reasonable expectation of privacy; or could “reasonably rely” on the employer’s assurances, policies, and practices; is important in this inquiry. The question is whether the parties had an enforceable agreement protecting the employee’s privacy, and the court answers the question by looking at the circumstances and the employee’s reasonable expectations. Therefore, if the employee cannot demonstrate a reasonable expectation of privacy based upon the employer’s actions, the employee will not prevail. In fact, an employee that did not subjectively expect privacy will be less likely to feel wronged by what might otherwise be considered the employer’s infringement of such privacy, and thereby be less likely to bring suit against the employer.

Therefore, if an employer, public or private, can successfully manage its employees’ expectations of privacy, then the employer will not only be unlikely to be found liable by a court, but the employee will be less likely to file suit against the employer in the first place. In other words, from the employer’s perspective, managing employee expectations of privacy is an employer’s first line of defense against avoiding liability for alleged infringements of employee privacy, but it is also in the best interest of the employee that both parties be on the same page with regard to privacy expectations. Setting clear and definite policies and ensuring that all

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161 See supra Part III.

162 Rulon-Miller, 162 Cal. App. 3d at 247. Whether an employee had a reasonable expectation of privacy will be important to an implied covenant of good faith and fair dealing claim as well because the employee’s reasonable expectation will impact the court’s determination of whether the employee was treated unfairly.

163 Under other privacy causes of action that an employee can assert against an employer, such as the tort of intrusion upon seclusion, an employer can also avoid liability by reducing employee privacy expectations. See Nancy J. King, Sukanya Pillay, and Gail A. Lasprogata, Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States, 43 AM. BUS. L.J. 79, 122 (2006).

164 See, e.g., Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 CRIME & JUST. 283, 293 (2003) (explaining that when terminated or laid off employees perceive the process as fair, they are less likely to sue their former employer); Ann M. Anderson, Who’s Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages, 78 N.C.L. REV. 799, 826-27 (2000) (asserting that, in the discrimination context, when employer policies are implemented in good faith, employees are more receptive and less likely to file suit). See also Worth, supra note 19 at 415 (noting that “a worker who leaves happy is less likely to sue.”).

165 Managing employee privacy expectations is an important matter for companies for many reasons beyond legal consequences. See, e.g., Eric Krell, Privacy Matters, 55 HR MAGAZINE 2 (Feb. 1, 2010) (recognizing that “[t]he risks of mismanaging employees’ privacy can be severe: lost revenue, lost productivity, legal or regulatory actions, declines in brand value and shareholder value, and recruiting and retention problems.”). Of course, the focus here is the legal ramifications, but it is worth noting that effective management in this area will have benefits to a business in terms of productivity and company value as well. Human resource professionals realize that it is important for the privacy expectations of employers and employees to be aligned and that it is a bad business practice for employers to be overly intrusive and unnecessarily monitor employee activities. See id. (noting the importance of aligning the
employees are aware of these company policies aligns the expectations of the parties and avoids employees’ expectations of privacy from being inflated beyond what the employer intends. Nonetheless, it is often not in the best interest of business to be overly restrictive in setting such policies. Employers may also require that supervisors not deviate from the formal policies.\textsuperscript{166}

However, employer management in this area might fail, and the circumstances of the workplace might make it such that employees do have a reasonable expectation of privacy in certain activities. In fact, it might be in the best interest of the employer in terms of morale and productivity to intentionally provide employees with certain expectations of privacy. Inevitably, the realities of the workplace and actual practices cause managers and supervisors to deviate from formal company policies; as in \textit{Quon}, there will invariably be situations where policies and realities in the workplace differ. When an employee does have a reasonable expectation of privacy based upon the employer’s conduct and policies, some courts will find that sufficient to recognize an implied-in-fact contract right to employee privacy.\textsuperscript{167} Alternatively, contract rights for employee privacy need not be derived from the circumstances and found in an implied contractual right. Rather, employers and employees can explicitly agree to certain privacy rights in an express contract.

In an employment relationship, private ordering is perhaps the preeminent way for the parties to have coinciding expectations about the relationship; thus, one way in which an employer can manage its employees’ expectations of privacy is through private ordering. Simply stated, private ordering is another term for the freedom of contract,\textsuperscript{168} or the ability of the parties to define the terms of their relationship. While employment law has moved toward greater

\textsuperscript{166} Indeed, in \textit{Quon}, if Lieutenant Duke had not contradicted the department’s formal policy with his own informal policy, then whether Quon had a reasonable expectation of privacy would likely not have been a difficult issue for the court to decide.

\textsuperscript{167} See Fineman, \textit{supra} note 35 at 364 (explaining that some courts find that “implied contracts are enforceable because of employees’ reasonable expectations.”).

government mandates and regulation of the relationship, the rules set by the parties’
themselves are still important in defining the relative rights of the parties. Obviously, private
ordering can be accomplish through an express contract between the parties, and an express
contract may provide an employee with privacy protection. While an express contract right to
employee privacy is possible, it is unlikely that an employer will expressly contract to give
employee privacy protection.

Because employee privacy rights are dependant upon the employee’s reasonable
expectations of privacy, it is necessarily private ordering that determines such rights. In other
words, because it is the circumstances of the parties’ relationship that determines an employee’s
reasonable expectation of privacy, it must be the interaction of the parties and the terms set by
the employer and the employee that defines the employee’s privacy rights. Likewise, under the
constitutional privacy rights for public employees, private ordering plays an integral role in the
employee’s privacy protection because the circumstances of the workplace determine the
employee’s reasonable expectation of privacy, and the employee’s privacy rights are based upon
the employee’s reasonable expectation of privacy.

Naturally, workers acquire expectations from the day-to-day practices of the workplace and expect that employers will continue to act in
accordance with the ordinary course of the employer’s prior actions. Further, it is reasonable for employees to expect that employers will act in a consistent manner. If an employer consistently
acts in a manner inconsistent with a formal policy, as was the situation in Quon, it is reasonable
for an employee’s expectations to align with the actual practices of the workplace rather than the
formal policies of the company.

When an employer takes an action that is inconsistent with prior representations or actual
practices, then the employer is setting itself up for potential liability for breach of an implied
contract right because the employer may be acting contrary to the employee’s reasonable

169 See GLYNN, ARNOW-RICHMAN, & SULLIVAN, EMPLOYMENT LAW, supra 27 at xxv (“[T]he law governing the
employment relationship has developed away from private ordering and toward greater government regulations.”).
170 See Kohler & Finkin, supra note 102 at 382 (explaining that employment law in the United States is founded on a
belief in the “efficiency of private ordering.”).
171 Justin Confoni, Somebody’s Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth
(“because an employee’s privacy expectation must be reasonable before he has any Fourth Amendment protection,
and because the Ortega framework works on a contextual rather than a categorical approach, private ordering has
defined workplace privacy. Therefore, employers may alter the context of a given workplace to eliminate employee
privacy expectations.”). This assessment may be incorrect in light of the Court’s decision in Quon to refrain from
embracing the analytical framework set forth by the O’Connor plurality.
expectation of privacy. In sum, it is the realities of the workplace that will determine the terms of the parties’ relationship and whether the employee has a reasonable expectation of privacy. Where such realities do create a reasonable expectation of privacy and the employer acts contrary to that reasonable expectation, the employee may assert a breach of an implied contract right to privacy. This cause of action is available to employees based on the terms of the contract set by the parties, and a court will consider the circumstances to determine the terms of the contract.

VII. Conclusion

Regardless of any statutory, constitutional, or tort protection available to an employee, a contract cause of action may be available when the employee has a reasonable expectation of privacy based upon the circumstances. An employee’s reasonable expectation of privacy might be rooted in an implied contract right to privacy, or it might be a result of an express contract right to privacy.

In light of the trend toward greater government regulation over the employment relationship, it is probable that further legislation will be passed by federal and state legislatures in an effort to provide employees with heightened privacy protection. Inevitably, there will be gaps in these statutes. For example, like the off-duty conduct statutes, new legislation might only protect employees from termination. Where a statutory scheme does not adequately protect an employee’s reasonable expectation of privacy, the implied-in-fact contract argument is available to fill the gaps.

Some jurisdictions may require the circumstances to meet the elements of a contract including an offer, an acceptance, and consideration. However, even in these jurisdictions the employee’s reasonable expectation of privacy will be important to the court’s analysis. The reasonableness of an employee’s expectation of privacy will always be dependant on the circumstances and the realities of the workplace, and the Supreme Court in *Quon* opined about circumstances creating reasonable privacy expectations. The Court’s dicta may be persuasive to future implied-in-fact contract causes of action. In the evolving legal climate with the trend toward increasing employee protection and recognizing greater privacy protection for all citizens, it is likely that some courts will be more accepting of implied-in-fact contracts for employee privacy. From the employer’s perspective, this makes it more crucial for employers to manage the privacy expectations of their employees, but when this management fails, the
implied-in-fact contract may be the only cause of action available to protect the reasonable privacy expectations of employees.