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## Unreasonably Reasonable Reliance: Prospective At-Will Employment and Promissory Estoppel in *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999)

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Note\*

# Unreasonably Reasonable Reliance: Prospective At-Will Employment and Promissory Estoppel in *Goff- Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999)

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## I. INTRODUCTION

The doctrine of promissory estoppel was first recognized in section 90 of the original Restatement of Contracts.<sup>1</sup> Entitled “Promise Rea-

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\* David K. Lucas, J.D. expected, May 2001, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Executive Editor, 2000). I would like to thank my beautiful fiancée, Lena Winner, for reading several drafts of this article after it was accepted for publication. Only true love could compel a person to read an article on promissory estoppel more than once!

1. RESTATEMENT OF CONTRACTS § 90 (1932).

sonably Inducing Definite and Substantial Action,"<sup>2</sup> section 90 represented the first "out of the closet" apperception of the common law's propensity to protect a promisee's detrimental reliance by enforcing contracts that did not entirely comport with traditional contract principles.<sup>3</sup> Little did the drafters know, however, that section 90, originally intended as a defensive tool used to prevent a party from avoiding liability for a promise, would become what some commentators believe to be a separate and distinct theory of recovery.<sup>4</sup>

Nowhere is the debate over the appropriate role of promissory estoppel more prevalent than in the at-will employment context. The employment at-will doctrine, first articulated by Horace G. Wood in his employment law treatise,<sup>5</sup> promotes the concept that employees, in the absence of a contract for employment for a fixed and definite period, may be terminated at any time by the will of either party.<sup>6</sup> Upon that premise, it is difficult to argue that an employee may *reasonably* rely upon an offer of at-will employment and, if such an offer is terminated before, during, or after the employment relationship has begun, invoke the doctrine of promissory estoppel for recovery. Nevertheless, that is exactly what a number of courts have held.<sup>7</sup>

Recently, in *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*,<sup>8</sup> the Nebraska Supreme Court joined the group of jurisdictions that recognize that a prospective at-will employee may avail him or herself of the doctrine of promissory estoppel when seeking to recover against

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2. *Id.*

3. See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1197 (1998)(discussing Corbin's belief that the new principle of promissory estoppel had strong case-law foundations).

4. See Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 481-87 (1983).

5. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

6. See *id.* § 134, at 272.

7. See *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); see also *Bower v. AT&T Technologies, Inc.*, 852 F.2d 361 (8<sup>th</sup> Cir. 1988)(stating that an employer who withdraws a promise of at-will employment prior to the start of the employee's job fails to keep his or her promise in any material respect); *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784 (1990)(stating that an employee can expect to not be fired before he or she has had a chance to demonstrate his or her ability to satisfy the requirements of the job); *Ravelo v. County of Hawaii*, 658 P.2d 883 (Haw. 1983)(relying on section 90 to conclude that promissory estoppel could be applied in the case of a promise of at-will employment); *Gorham v. Benson Optical*, 539 N.W.2d 798 (Minn. Ct. App. 1995)(stating that an at-will employee may not be fired unless he or she has had a good-faith opportunity to perform his or her duties); *Rognlien v. Carter*, 443 N.W.2d 217 (Minn. Ct. App. 1989)(relying on reasoning similar to that of *Gorham*); *Peck v. Imedia, Inc.*, 679 A.2d 745 (N.J. Super. Ct. App. Div. 1996)(recognizing that there may be losses incident to reliance upon a job offer itself, even though the employer can terminate the relationship at any time).

8. 256 Neb. 19, 588 N.W.2d 798 (1999).

an employer who has terminated his or her employment agreement. Accordingly, this Note first details the factual background of the *Goff-Hamel* case, then reviews the opinions, both pro and con, of those courts that have faced the dilemma of applying promissory estoppel in the at-will employment context. Next, the Note turns toward (1) an analysis of the reasonableness of relying on an offer of at-will employment, and (2) a discussion of the propriety of reading "good faith" and "fair dealing" exceptions into the at-will doctrine.

This Note concludes that, while it may have been appropriate to use promissory estoppel as the basis for Goff-Hamel's recovery, the court should not have invoked the doctrine to protect her reliance interest—for it is unreasonable to rely upon an employment relationship that may be terminated at any time. Nevertheless, the court may have properly used promissory estoppel in furtherance of one of the alternative theories for its use—i.e. to promote economic activity,<sup>9</sup> identify enforcement-worthy promises,<sup>10</sup> or compensate for damage to one's expectation interests.<sup>11</sup> As such, this Note examines these alternative theories and concludes that each would represent a more viable theory of recovery for Goff-Hamel. Consequently, in similar cases the Nebraska Supreme Court should consider expressly adopting one or all of these alternative theories and, in so doing, provide structure and logical guidance to future promissory estoppel litigants in the State of Nebraska.

## II. FACTUAL BACKGROUND

The day *before* Julie Goff-Hamel was to report to work at her new job at Obstetricians & Gynecologists, P.C. [hereinafter "Obstetricians"] she was fired. Apparently, the wife of one of Obstetricians' co-owners opposed her employment. Instead of simply leaving, Goff-Hamel filed suit in a Nebraska District Court seeking damages under both contract law and promissory estoppel theories of recovery.<sup>12</sup>

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9. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 945 (1985) [hereinafter Farber & Matheson] (concluding that the promotion of trust in employment relationships is of ultimate importance and that "promises made in furtherance of economic activities be enforced without regard to the presence of consideration or reliance").
  10. See Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987) (explaining that promissory estoppel should be used as a subsidiary means of identifying bargains deserving of enforcement).
  11. See Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (concluding that expectation remedies, not reliance remedies, are routinely awarded in promissory estoppel cases).
  12. See *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999).

The trial court concluded that Goff-Hamel had relied on Obstetricians' offer in resigning from her previous employment of eleven years. However, the court ultimately opined that her dismissal was lawful under Nebraska's at-will employment doctrine since Goff-Hamel's employment agreement with Obstetricians did not specify that she be employed for any specific length of time (i.e., her employment contract lacked a "specific term").<sup>13</sup> As such, the lower court concluded that promissory estoppel was of little help on the facts of the case, since permitting recovery under that doctrine would create an anomalous result whereby at-will employees could recover if they were fired the day before work began, but not the day after.<sup>14</sup> Consequently, Obstetricians was awarded judgment as a matter of law on both counts.<sup>15</sup>

The Nebraska Supreme Court reversed, and in doing so took much of the sting out of Nebraska's at-will employment doctrine.<sup>16</sup> Previously, it had been "consistently held that when employment is not for a definite term and there are no contractual, statutory, or constitutional restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses."<sup>17</sup> Nevertheless, in what can only be considered a new exception to Nebraska's at-will employment law, Nebraska's highest court held that "promissory estoppel can be asserted in connection with the offer of at-will employment and that the trial court erred in granting Obstetricians summary judgment."<sup>18</sup> Moreover, based on its new promissory estoppel theory, the court found the facts of the case sufficient to grant summary judgment in favor of Goff-Hamel on the issue of liability.<sup>19</sup>

In reaching this conclusion, the majority opinion offers little independent analysis of those factors that might have driven its decision. After admirably reviewing the facts and holdings of cases from other jurisdictions that have faced the issue, the court simply announces itself to be in line with the pro-promissory estoppel crowd.<sup>20</sup> Nevertheless, the court gives attention, and apparently weight, to the fact that Goff-Hamel "relied . . . to her detriment" on Obstetricians' offer.<sup>21</sup> As

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13. *Id.* at 21-22, 588 N.W.2d at 801.

14. *See id.*

15. *See id.* at 22, 588 N.W.2d at 801.

16. *See id.* at 28-30, 588 N.W.2d at 804-05.

17. *Id.* at 22, 588 N.W.2d at 801; *see Myers v. Nebraska Equal Opportunity Comm'n*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994).

18. *Goff-Hamel*, 256 Neb. at 28, 588 N.W.2d at 804.

19. *See id.* at 29, 588 N.W.2d at 805.

20. *See id.* at 28, 588 N.W.2d at 804.

21. *Id.* at 29, 588 N.W.2d at 805.

such, the court's language reasonably leads one to believe that it, much like many of its pro-promissory estoppel predecessors, is most concerned with protecting Goff-Hamel's reliance interest. Whether such language is merely an illusory front for the underlying protection of other values remains to be seen, and ultimately constitutes the focus of this note.

### III. RELEVANT LAW

Not surprisingly, few courts have had the opportunity to ponder the use of promissory estoppel in the at-will employment context. However, the few courts that have weighed into the debate have been profoundly influential in shaping many of the ideas encompassing this topic. As such, it is important to spend a few brief moments discussing the significance of the holdings in those cases.

As the pro-promissory estoppel cases are discussed, the reader should attempt to discern exactly what interest the court seems to be protecting. Although preserving the injured party's "reliance interest" is oft quoted as the vehicle for redress, do these courts really have different motives underlying their holdings? Has protection of one's reliance interest merely become a perfunctory, albeit widely accepted, method for deciding cases on other grounds? Maybe.

#### A. Promissory Estoppel Allowed

The Supreme Court of Minnesota, in the seminal case of *Grouse v. Group Health Plan, Inc.*,<sup>22</sup> was the first to hold that a prospective at-will employee had a cause of action for damages incurred in reliance on the promise of employment.

John Grouse was a pharmacist who worked at a drugstore but desired employment with a hospital or clinic. A clinic telephoned and offered Grouse a job, which he accepted on the condition that he be allowed to provide his current employer two weeks notice. During the notice period, Grouse was offered another job with a hospital in Virginia, which he declined because of the clinic's offer. When Grouse ultimately arrived for work at the clinic, he was informed that his position had been filled by someone else, due to the clinic's inability to secure a "favorable written reference" on Grouse's behalf.<sup>23</sup> Grouse filed suit seeking damages under a promissory estoppel theory of recovery.

Citing section 90 of the Restatement (Second) of Contracts as authority, the Supreme Court of Minnesota allowed recovery.<sup>24</sup> The court held:

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22. 306 N.W.2d 114 (Minn. 1981).

23. *Id.* at 116.

24. *See id.*

The conclusion we reach does not imply that an employer will be liable whenever he discharges an employee whose term of employment is at will. What we do hold is that under the facts of this case the appellant had a *right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job*. He was not only denied that opportunity but resigned the position he already held in *reliance* on the firm offer which respondent tendered him. Since, as respondent points out, the prospective employment might have been terminated at any time, the measure of damages is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.<sup>25</sup>

After *Grouse*, a number of courts used similar reasoning to allow recovery based on promissory estoppel in the at-will employment context.<sup>26</sup> However, the court in *Bower v. AT&T Technologies, Inc.*,<sup>27</sup> while still employing promissory estoppel, focused on the fulfillment of the "employment promise" as the fulcrum of recovery. The court held:

Clearly, a contract which by its terms can be immediately terminated after it is commenced precludes a claimant from maintaining an action upon discharge after hire. This, however, does not prevent the claimant from recovering damages sustained in reliance on a clear and unambiguous promise that is broken. While, in practical effect, it may be hard to distinguish the case in which an employee is fired a day after beginning work from the situation in which a potential employee is prevented from assuming a promised at-will position, the cases *are* different. In the former case, the employer has completely fulfilled his promise; in the latter, the promise has not been kept *in any respect*. In the end, we believe this distinction sufficient to tip the balance in favor of the burdened employee who has *relied to his detriment on the unkept promise of his employer*. Such a rule, we believe, encourages employers to take such promises seriously.<sup>28</sup>

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25. *Id.* (emphasis added).

26. Relying on *Grouse*, the Minnesota Court of Appeals allowed recovery based on promissory estoppel in both *Gorham v. Benson Optical*, 539 N.W.2d 798 (Minn. Ct. App. 1995) and *Rognlien v. Carter*, 443 N.W.2d 217 (Minn. Ct. App. 1989). Consistent with *Grouse*, the court in *Gorham* held:

We see no relevant difference between Gorham, who reported to the national sales meeting on his first day of employment, and Grouse, who was denied even one day on the job. Both men *relied to their detriment* on the promise of a new job, only to discover that the opportunity had disintegrated before they ever actually started working. Neither man had a "*good faith opportunity to perform his duties*."

*Gorham*, 539 N.W.2d at 801 (emphasis added) (quoting *Grouse*, 306 N.W.2d at 116).

The court in *Ravelo v. County of Hawaii*, 658 P.2d 883 (Haw. 1983) also allowed a prospective employee relief based on promissory estoppel. Calling detrimental reliance the "essence" of promissory estoppel, the court allowed a police officer who had relied on a promise of future employment to recover when his employment agreement was terminated prior to commencement. *Ravelo*, 658 P.2d at 887-88.

27. 852 F.2d 361 (8<sup>th</sup> Cir. 1988).

28. *Id.* at 363-64 (third emphasis added).

Finally, the court in *Peck v. Imedia, Inc.*,<sup>29</sup> in yet another spin on the application of promissory estoppel, has decided an implied covenant of good faith and fair dealing should be read into prospective at-will employment contracts. The court held:

We conclude that reliance on the at-will employment contract relationship gives rise to a cause of action for damages flowing from plaintiff's losses based on her reasonable reliance on full-time employment with defendant and her losses based upon defendant's lack of good faith and fair dealing attributable to any delay in expressing the decision to terminate the relationship.<sup>30</sup>

## B. Promissory Estoppel Not Allowed

On the flip side, a number of courts have held as a matter of law that a prospective at-will employee cannot state a claim for promissory estoppel. The primary reason driving this analysis is the belief that it is unreasonable for a prospective employee to detrimentally rely on a promise of at-will employment. As such, since promissory estoppel requires *reasonable* reliance,<sup>31</sup> the doctrine is inapplicable.

A recent example of this reasoning was applied in *Bakotich v. Swanson*.<sup>32</sup> In *Bakotich*, the court held, "where the terminable at[-]will doctrine is concerned, the promise for promissory estoppel must be a clear and definite promise."<sup>33</sup> Moreover, a promise of at-will employment does not provide a "reasonable expectation of permanent employment."<sup>34</sup>

In *White v. Roche Biomedical Laboratories, Inc.*,<sup>35</sup> the court pays homage to the unreasonableness argument, and addresses the arguably anomalous result created by permitting an employer to discharge an at-will employee once work has begun, but not before. In disallowing promissory estoppel recovery, the court stated:

[We base] this conclusion on the fact that a promise of employment for an indefinite duration with no restrictions on the employer's right to terminate is illusory since an employer who promises at-will employment has the right to renege on that promise at any time for any reason. . . . The Court notes the apparent harshness of this ruling, the result of which is that an employee who resigns one job for other at-will employment does so at his peril. However, to hold otherwise would create an anomalous result and would undermine the doctrine of employment at-will in this state.<sup>36</sup>

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29. 679 A.2d 745 (N.J. Super. Ct. App. Div. 1996).

30. *Id.* at 753 (emphasis added); see *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784 (Dist. Ct. App. 1990).

31. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

32. 957 P.2d 275 (Wash. Ct. App. 1998).

33. *Id.* at 280 (quoting *Havens v. C & D Plastics, Inc.*, 876 P.2d 435 (Wash. 1994)).

34. *Bakotich*, 957 P.2d at 280.

35. 807 F. Supp. 1212 (D.S.C. 1992).

36. *Id.* at 1219-20.

Finally, the court in *Meerman v. Murco, Inc.*,<sup>37</sup> required "distinguishing features" before removing a case from the general rule of at-will employment.<sup>38</sup> Along these lines the court held, "resignation from one position to assume another and relocation of family would be customary and necessary incidents of changing jobs rather than consideration to support a promissory estoppel claim."<sup>39</sup> Consequently, no recovery was allowed.

Based on the aforementioned foundation, both the theoretical and pragmatic underpinnings of the *Goff-Hamel* case may now be analyzed. However, given the court's parse analysis in the *Goff-Hamel* case, the *Goff-Hamel* holding itself will not be separately critiqued. Any attempt to extrapolate the court's reasoning from words that simply are not there would no doubt be a futile exercise in outright speculation.

Consequently, the first part of the analysis section discusses the reasonableness of detrimentally relying on an offer of at-will employment, as well as the propriety of carving "good faith" exceptions into the at-will doctrine. The second part of the analysis section rejects both approaches and instead suggests that alternative, non-reliance based concepts of promissory estoppel offer more logical methods of softening the harshness of the at-will doctrine.

#### IV. ANALYSIS

In 1985, the Nebraska Supreme Court adopted the rule of law stated in section 90 of the Restatement (Second) of Contracts.<sup>40</sup> That rule, popularly known as the doctrine of promissory estoppel, reads as follows:

A promise which the promisor should *reasonably* expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>41</sup>

Accordingly, when taken at face value the doctrine appears to center around a determination of whether the *promisor* should reason-

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37. 517 N.W.2d 832 (Mich. Ct. App. 1994).

38. *Id.* at 834 (citing *Filcek v. Norris-Schmid, Inc.*, 401 N.W.2d 318, 320 (Mich. Ct. App. 1986); *Hackett v. Foodmaker, Inc.*, 245 N.W.2d 140, 141 (Mich. Ct. App. 1976)).

39. *Meerman*, 517 N.W.2d at 834-35 (quoting *Marrero v. McDonnell Douglas Capital Corp.*, 505 N.W.2d 275, 278 (Mich. Ct. App. 1993)).

40. *See Yankton Prod. Credit Ass'n v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985). Prior to the adoption of section 90, the Nebraska Supreme Court informally applied similar reasoning in a number of other cases. *See, e.g., Farmland Serv. Coop., Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976); *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957).

41. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (emphasis added).

ably expect his or her promise to induce action or forbearance on the part of the promisee. However, most courts and commentators instead turn the analysis on its head and discuss the reasonableness of the *promisee's* reliance on the promisor's promise.<sup>42</sup> This simply makes the doctrine less difficult to understand since, by most accounts, evaluating the reasonableness of the promisee's reaction to a promise is easier than judging the reasonableness of the promisor's state-of-mind in making the promise. Moreover, analyzing the doctrine in the reverse does not compromise the theoretical purity of the discussion since the reasonableness of the situation does not, or at least should not, hinge upon which side of the equation is being analyzed. Consequently, for convenience sake, this note will follow the common trend and analyze the situation from the promisee's perspective.

That being said, the million dollar question seems to be "Can a prospective employee reasonably rely on an offer of at-will employment?" The answer, contrary to the desires of the Nebraska Supreme Court, is no.

#### A. The At-Will Employment Doctrine and the Reasonableness of Reliance

The general rule of at-will employment states that, "when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability."<sup>43</sup> Affording these words their plain meaning, how could any prospective employee reasonably rely on an offer of at-will employment; an offer that, by its very definition, denounces any semblance of continuity and stability? The answer, of course, is they cannot.

Nevertheless, for reasons which continue to defy logic, a number of courts seem beholden to the idea that the reasonableness of reliance is somehow directly proportional to the distance the promisee travels.<sup>44</sup> For example, in *Sheppard v. Morgan Keegan & Co.*<sup>45</sup> the court noted, "implicit in . . . an [at-will] employment agreement . . . is the understanding that an employer cannot expect a new employee to sever his employment and move across the country only to be terminated before

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42. See, e.g., Gerald Griffin Reidy, *Definite and Substantial Reliance: Remedying Injustice Under Section 90*, 67 *FORDHAM L. REV.* 1217 (1998).

43. *Renner v. Wurdeman*, 231 Neb. 8, 14, 434 N.W.2d 536, 541 (1989).

44. Two examples of a court employing this philosophy can be found in *Peck v. Imedia, Inc.*, 679 A.2d 745, 753 (N.J. Super. Ct. App. Div. 1996) and *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784, 787 (Ct. App. 1990).

45. 266 Cal. Rptr. 784 (Ct. App. 1990).

the ink dries on his new lease . . . ”<sup>46</sup> But do not these courts have it exactly backwards? Is not the reasonableness of reliance *inversely* proportional to the distance one must travel? A reasonable person might feel comfortable quitting their current job and moving, say, down the street in reliance on an offer of at-will employment. If the offer is reneged, the employee is still only a few blocks from home. But only a fool would pack up his family and move half way across the country in reliance on an offer that is about as stable as the San Andreas Fault line. Such thinking is simply not rational and should not be encouraged, much less rewarded.

Even further, a number of courts implicitly hold that an employee should always be justified in relying on the “good word” of a soliciting employer. Operating on gentlemanly principles, these courts seem to suggest that an employer’s words always have an underlying “good will” component, but these courts are mistaken.

The words that create an employer’s offer of employment must be taken at face value. They should never be interpreted to connote a message greater than their literal meaning, nor should they take on greater value simply because an employer, as opposed to any other person, said them. Translated, this simply means that the speaker should not influence the message; the message should speak for itself.

For example, if the Pope were to say, “Goff-Hamel, I would like to offer you a job painting the ceiling of the Vatican, but I can fire you whenever I please,” his goodwill should not overshadow his ability to fire her. The Pope is a nice guy, but not that nice. Moreover, if the Pope does fire her, he would still be a man of his word. Why? Because he was true to his statement; the fact that his statement contained an automatic means of dismissal does not make him dishonorable. In short, his good nature does not create an implicit promise that extends beyond his words.

Accordingly, an employee may reasonably rely on the “word” of an employer, insofar as that means the employer is estopped from changing the terms of the offer midstream (the “you cannot take it back” defense, so to speak). But, the employee’s reliance becomes unreasonable when the words of the offeror are, “You can have the job, but I can fire you at any moment!” and the offeree interprets them to mean, “Yeah, I have a job until I do something wrong!” At this point, the “word” or “good will” of the employer is not being used to hold the employer to the expressions of his promise, but to create an offer that was never there. Such constructs are not only officious, but more importantly, unreasonable.

Consequently, from any logical point of view, reliance is simply misplaced in the at-will employment context. Many prospective at-

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46. *Id.* at 787.

will employees can say they relied, but few with a straight face can say they did so reasonably. As such, their reliance is simply not sufficient to properly invoke the section 90 variety of promissory estoppel.

### B. Avoiding Reality: Attempts to Read “Good Faith” and “Fair Dealing” Exceptions into the At-Will Employment Doctrine

Understanding that reasonable reliance is but a judicial fallacy with respect to at-will employment, a few courts have intuitively attempted to circumvent the harsh realities of the situation another way—this time by reading “good faith” or “fair dealing” exceptions into the at-will doctrine.<sup>47</sup> (Un)fortunately, the effect of such provisions does not merely carve a pigeonhole into the general strictures of at-will employment, but rather completely eviscerates its purpose. Requiring employers to act in good faith when making employment decisions is no more than a thinly veiled judicial dictate that masters show “cause” before lawfully discharging their servants. Such “for cause” constructions of the at-will doctrine are a complete betrayal of its very spirit.

Again, the reasoning of *Sheppard v. Morgan Keegan Co.*<sup>48</sup> is illustrative. In *Sheppard*, the court noted:

[I]mplicit in . . . an [at-will] employment agreement, and certainly implicit within the implied covenant of good faith and fair dealing, is the understanding that an employer cannot expect a new employee to sever his former employment and move across the country . . . before he has had a chance to demonstrate his ability to satisfy the requirements of the job.<sup>49</sup>

Such holdings are not only doctrinally impure, they are, more directly, patently false. For better or worse, the annals of the at-will employment doctrine are utterly devoid of any semblance of an “implicit” requirement that an employee must demonstrably fail to satisfy the requirements of his or her employment before he or she may be lawfully discharged.<sup>50</sup> More to the point, requiring an employer to show an employee’s inability to perform the *requirements* of the job before

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47. See *supra* notes 29-30 and accompanying text.

48. 266 Cal. Rptr. 784 (Ct. App. 1990).

49. *Id.* at 787.

50. See WOOD, *supra* note 5, § 134. In his treatise, Wood stated:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve . . . [U]nless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.

*Id.* § 134, at 272.

allowing lawful discharge sounds precariously similar to the substantive prerequisites inherent in dismissal "for cause."

Furthermore, beyond merely sounding like "for cause" discharge, the above quoted language suffers from serious application problems. For example, when does the "chance" to satisfy the job requirements end so that discharge is viable? One week? One month? One year into the job? Even more importantly, if the employee *is* satisfying the requirements of the job, may he or she ever be discharged? If not, the at-will employment doctrine has been defeated altogether. Thus, implied covenants of good faith and fair dealing, much like reliance-based promissory estoppel, are simply untenable "exceptions" to the at-will doctrine.

### C. Recognizing Reality: Alternative Applications of the Doctrine of Promissory Estoppel

If reliance-based promissory estoppel is unreasonable in the at-will employment context, and implied covenants of good faith and fair dealing are illogical with respect to the same, why do an increasing number of courts continue to endorse their application in cases involving prospective at-will employees? The answer is simple: courts despise the harshness of the at-will doctrine and, as a consequence, will do anything to limit its severity. Such determination includes, among other things, a complete disregard for the traditional, theoretical, and practical applications of promissory estoppel and other equitable remedies.

The problem is that these courts cannot find anything that resembles reasonable reliance. So, instead of simply giving up, they, in a poor interpretive move, fudge the reliance requirement, attempt to write opinions confusing enough to make even Cardozo jealous, and ultimately hide the ball. Unfortunately, such an approach entirely muddles the meaning of reliance-based promissory estoppel, and also fails to provide any discernible exception to the at-will doctrine, if indeed that is their goal.

So, as simple as it may seem, a better approach would be to simply tell the truth. The Nebraska Supreme Court might hold, "We cannot find reliance here, but we think you are a real scoundrel for withdrawing your offer to employ Goff-Hamel, so you are liable for damages. And further more, as a warning to other employers in Nebraska, if you make an offer of employment in furtherance of your own economic activity,<sup>51</sup> or take advantage of your position, information, and expertise to the detriment of others, such promises will also be enforced,<sup>52</sup> *regardless of the promisee's lack of reliance.*"

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51. See *supra* note 9 and accompanying text.

52. See *supra* notes 10-11 and accompanying text.

Yes, if a court were to be honest and do that, a number of things would seem to be accomplished. First, by being up-front, lower courts and current and future litigants would be able to understand and fully appreciate the rules of the game being played. Second, the doctrinal purity of section 90 would not be confusingly stretched beyond any form of recognition, additional *versions* of promissory estoppel would simply be available. By naming and officially recognizing these versions, the Nebraska Supreme Court could accomplish the exact same results without compromising the legitimacy of the judiciary. Such goals are, without a doubt, worthwhile.

Critics of this approach, while appreciating its simplicity, might suggest that it still fails to release the system from arbitrary, *ad hoc* judicial overreaching. They might suggest that an activist court, instead of simply stretching section 90 to fit its needs, will now just *add* a new version of promissory estoppel to accomplish the same. In fact, they might argue that the ability to dream up completely new versions of promissory estoppel makes the courts even more dangerous.

However, this argument is incorrect. No process will ever force a court into rubber-stamp objectivity, nor should it. Some of this country's greatest decisions have been products of subjective judicial overreaching.<sup>53</sup> Nevertheless, with respect to section 90 and at-will employment, much of the subjectivity has come from strained attempts to find reasonable reliance. If other avenues were available, avenues with which a court could reach the results they desire *and yet be up front with their reasoning*, much of the subjectivity would likely subside. Furthermore, as courts honestly decide cases and place them into certain categories the rule of *stare decisis* should further cabin subjectivity. So, over time, subjective judicial analysis will actually decrease instead of rise.

No court prefers smoke-and-mirrors over honest disclosure. At the same time, no court prefers an unnecessarily harsh result when a more mild one is available. Therefore, if a court can avoid engaging in deception to accomplish an equitable result, the system should operate more smoothly. The proposed process is not flawless, but it seems to be an improvement over the methods of old.

#### D. Adopting an Approach: A Starting Point

That being said, there are two alternative approaches that seem especially viable in the at-will employment context: the "in further-

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53. Many of the substantive due process cases decided by the United States Supreme Court have been subjective, at best. Without express textual support from the constitution, protection of an individual's personal liberty and right to privacy were upheld in cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstad v. Baird*, 405 U.S. 438 (1972); and *Griswold v. State of Connecticut*, 381 U.S. 479 (1965).

ance of economic activity" theory propounded by Professors Farber and Matheson<sup>54</sup> and the "deserving promise" theory proposed by Professor Juliet Kostritsky.<sup>55</sup>

Most directly, Farber and Matheson propose revising section 71 of the Restatement (Second) of Contracts to read: "A promise is enforceable when made in furtherance of an economic activity."<sup>56</sup> "Economic activity," according to the authors, includes "employment arrangements"<sup>57</sup> and the words "in furtherance" "carr[y] the implication that the promisor must expect a benefit to result from the promise."<sup>58</sup>

Their proposal is both interesting and significant for a number of reasons. First, and most notably, the authors decided to rewrite the Restatement's consideration provision, section 71,<sup>59</sup> instead of reinventing section 90. By doing so, the authors ingeniously attack the problem in the reverse. Many potential contracts end up as promissory estoppel claims simply because they lack one of the currently recognized forms of consideration. Therefore, by broadening the consideration requirement and moving away from strict "bargain theory," many previously unenforceable contracts instantly become valid. Voila!

Farber and Matheson chose this approach after studying over two hundred promissory estoppel cases. They concluded that "detrimental reliance had veered far from its traditional meaning"<sup>60</sup> and that courts were enforcing promises for their own sake, "rather than because 'justice' so require[d] . . ."<sup>61</sup> They believed that courts, regardless of reliance, were most prone to allow recovery when three factors were present: "(1) the presence of a credible promise; (2) the promisor's authority to make the promise; and (3) the existence of a benefit to the promisor from economic activity."<sup>62</sup> Without saying more, this approach makes objective sense in the at-will employment context, and thus seems a viable solution to the problem.

Finally, there is Professor Kostritsky's argument. She "advances the thesis that promissory estoppel can best be understood, not as a ground of recovery independent of bargain-enforcement, but rather as a subsidiary means of identifying bargains deserving of enforcement."<sup>63</sup> After extensive analysis of a number of decided cases, Kos-

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54. See Farber and Matheson, *supra* note 9.

55. See Kostritsky, *supra* note 10.

56. Farber & Matheson, *supra* note 9, at 929.

57. *Id.*

58. *Id.* at 931.

59. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

60. Farber & Matheson, *supra* note 9, at 912.

61. *Id.*

62. *Id.* at 914.

63. Knapp, *supra* note 3, at 1211 (discussing Kostritsky, *supra* note 10).

tritsky suggests that courts most often allow promissory estoppel in the following situations:

- (1) cases where the parties are of different status, or for other reasons have different degrees of knowledge about the subject of their dealings; (2) cases involving parties who are already "enmeshed" in some broader relationship; and (3) cases where a relationship of trust and confidence already exists between the parties.<sup>64</sup>

Therefore, Kostritsky believes that courts are actively engaged in policing transactional situations where contracts fail due to a lack of knowledge, status, information, and expertise between the parties.<sup>65</sup> Conversely, if parties operate at arms-length, with sufficient amounts of expertise, and/or with equal bargaining power a court is not likely to tamper with the results of their exchange.<sup>66</sup> Given the inequality in bargaining power and information between at-will employers and their prospective employees, Kostritsky's analysis also makes sense in the at-will employment context.

The list could go on, for there are many others with similar ideas. Nevertheless, the point is simple: if a court is interested in mitigating the harsh results of the at-will doctrine, there are logical ways to accomplish that goal. It may be high time that at-will employment be scrapped altogether, but until that day Farber, Matheson, and Kostritsky's approaches, among others, provide viable, logical intermediaries. They should be given serious consideration by the Nebraska Supreme Court in the future.

## V. CONCLUSION

Section 90 is a wonderful tool for alleviating or preventing undue harm to a promisee who has reasonably relied to his or her detriment. However, when a promisee lacks reasonable reliance sufficient to allow recovery under section 90, it is time for another rule of law to take over and mitigate the potentially harsh results. In the at-will employment context that time has come.

There are numerous alternative approaches available for dealing with the situation, each one unique in its concept and effect. The point is not to painstakingly attempt to decide which approach is best and then apply that one method universally across the board, but rather to have each court find which alternatives fit most appropriately in its state and apply them accordingly. Only then will the proper balance between the at-will doctrine and its employees be struck.

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64. *Id.*

65. *See id.* at 1211-1212.

66. *See id.*

