

## Part I. Working for the Man

### I. Introduction

- **Employment Law in General** – mixture of contract law (agreements; default rules), tort law (common law and statutory duties imposed), constitutional law (procedural due process; substantive due process), criminal law, and property law
- **Immutable Changes** – society enters the picture and makes something mandatory around which parties cannot contract around or change, e.g. workplace safety, minimum wage, whistleblowing

### II. At Will/Contractual Modifications

- **Special Consideration (*Skagerberg*):**  $\pi$  employee turned down job offer from Purdue to go work for  $\Delta$  employer.  $\Delta$  terminated  $\pi$  after a couple years, despite  $\pi$  being under the impression that he had negotiated for “permanent,” rather than “at will” employment with  $\Delta$ . HELD that  $\pi$  did not obtain permanent employment, which requires an employee to purchase the employment with valuable consideration outside services rendered day-to-day. The court did not care what the parties intended.
- Compare with examples of special consideration:
  - *Carnig* – employer bought employee’s business and offered employee a permanent job. Employer was shutting down competition, i.e. something of value aside from employee’s services as an enameleer
  - *Pierce* – employee injured on the job, and rather than sue employer, employee agreed to release claims in exchange for permanent employment
- **Life Cycle Model of Wages:** There’s a time when you’re supposedly being paid more than what you’re producing. You’re not worth the value of what you’re being paid because of investment/training. The sweet spot is when you’re generating more than what you’re being paid for. Later, you’re again getting paid more than what you’re contributing. The question becomes: what are you going to do to protect employees at the beginning and end of the life cycle model?
- **Historical Stuff**
  - The Statute of Laborers (1349) – King Edward
    - First employment law in common law history
    - Created a maximum wage statute after the plague killed many of the laborers, making wages go up
    - Employees have to work for a wage set in the pre-plague year and the government set the term for employment, also employers could retain no more employees than were necessary
  - Statute of Artificers (1562) – Queen Elizabeth
    - Created to common all employment law in one place
    - Set immutable term of employment for 1 year. Neither party could breach without reasonable cause, i.e. good cause exception
    - This was to keep landowners from hiring workers for harvest and then firing them until the next year
    - Attributable to “good feelings” relating to Xtianity OR employers found it cheaper to employ people rather than feed, house, and clothe slaves
  - Blackstone Commentaries (1765)
    - If there is no time specified for employment it is one year
    - Change from immutable to default
  - Master and Servant – Horace Gay Wood (1877)
    - Default provision is at-will
    - Either side can rebut this with evidence of mutual understanding

- General wage term without more isn't enough to overcome presumption, e.g.. \$2K offer to work at Dell does not mean a specific time period
    - Installment term is going to be treated as indivisible: hired for a period of time, work for that period, get paid for that period, otherwise get nothing
  - Today:
    - Wood's rule took off nationwide and is now the default
    - Texas adopted employment at-will in *Eastline RR*
    - Good evidence can be used to rebut it
    - Majority rule is that wage terms do not overcome the presumption
      - Minority follows wage term rule
      - Exceptions do exist – if you have a weird wage term, e.g. \$5K for first 10 mos. + \$25K after financing is secured = \$100K total, this may be specific proof of a definite term of employment
- **Texas and At-Will Employment (*Eastline RR v. Scott*):**  $\pi$  was injured in a RR accident and sued, getting a cash payment and a promise of employment at the RR as long as he wanted the job.  $\Delta$  tried to begin work after his recovery but the RR refused. Held, the K cannot be enforced since the court cannot calculate damages—who knows how long it would be, i.e. “It is very generally held that when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it *at will*, and so without cause” (quoting Wood).
- **Benefits of At-Will Employment:** to employees, it's human because you can quit at any time; also provides fluidity to the labor market
- **Firing Employee w/Definite Term Contract (*Chiodo*):**  $\pi$  sold his phone company to company  $\Delta$  on the condition he get at least 10 years of employment.  $\pi$  was fired 3 years later for padding the payroll with family, insubordination, and disloyalty by informing the gov't about internal (legal) company discussions. HELD, even in definite-term Ks, an employee's failure to render honest, faithful service in accordance with his ability is grounds for termination.
  - Court is creating an immutable term. Court will not create a moral hazard for devious employees. *But* exception might be found for manager position created for tax-saving purposes and employer gave wink-wink that employee never had to show up, etc.
  - The higher you go up the food chain, the more discretion there is for an employer to terminate an employee. If you make more money, an employer has more reasons to fire you.
- **Business Downturns**
  - Some jurisdictions allow firings for downturns, others require damages
  - It seems unfair to let employers end employment based on downturns, it could destroy K employment
  - However, we don't want to remove the employer's flexibility to deal with downturns
  - 90% drop would probably be allowed, 2% would not, middle ground is arguable but employer will likely lose most of the time
- **Statutory Reasons**
  - Habitual Neglect of Duty
  - Continued Incapacity
- **Damages**
  - Employee Duty To Mitigate – e.g., Employee has a duty to look for a comparable job in the same geographic area
    - Hard to say what that is, can vary based on job and is a jury question
    - Evidence of job openings, salaries, number of applications employee sent out are relevant
    - Can take into account wanting to stay close to ailing parents, etc

- Employee Damages – an employee’s measure of damages is the salary owed but the employer can deduct from that amount the salary earned or what salary should have been earned by the employee in the comparable job
  - Salary
    - Remainder of salary owed under K
    - Pro-rated for present value of money
    - Minus mitigation factors
  - Attorney Fees in TX
  - Employee Benefits – if there are benefits in the K the ER must pay them. Also medical bills from lack of insurance
  - Costs of finding new job (reasonable)
  - NOT emotional distress or punitive damages
  - Severance Payments
    - Can be deducted if K allows it, otherwise severance must be paid even if employee has found another job
- Employer Damages
  - Cost to find replacement
    - Employee Quitting During Term: Teacher A resigned right before the start of the school year after signing a K after finding a closer job. Held, the teacher is liable for the extra salary of her replacement, but would not be liable if she resigned for a legit medical reason. Damages run both ways!
  - Additional salary paid to replacement
  - Lost profits and consequential damages (commission-based workers)
- **Any Reason but “X” Contracts, i.e. a contract that allows an employee to be fired for any reason but “x” reason (*Jack Brown Cleaners*):** A, an EE of Levi Jeans, was hired to work for B, a Laundromat that had a K to pre-wash Levis. A took the job on the condition that she would not be fired if B lost the Levi’s K. Held, even though the K did not set a time period, there was a modification of at-will employment and A could not be fired for losing the Levi’s K.
- **Just Cause” Contracts**
  - Ks that allow employee to be fired only for just cause, not for no/any reason
  - Objective v. Subjective Determination of Cause
    - For a fry cook/assembly line worker average output is the standard
    - More professional jobs have a more subjective standard because they don’t have the objective measures like production
  - Must be able to indicate intent to be legally bound
    - Person giving assurance must have the power to create it
  - Need a certain level of specificity in order to be binding.
    - A moved her family from Houston to Conroe under an oral agreement that she would not be fired from the job without cause. Held, oral assurance of employment for an indefinite term is not specific enough to modify at-will. Courts must distinguish general platitudes and vague assurances from carefully developed employer representations. (*Montgomery Hosp.*)
  - More than mere encouragement, some level of technicality or formality needed. “Atta boy,” “You have a future with this company,” not enough.
    - Employer told employees that “generally, as long as employees generated sales and were honest, they had a job”. Held, this is too open-textured and loose to be a K, and was just encouragement. (*Rowe*)
  - Must be individualized to the employee, not "couched in general terms"

- A secretary was told by her employer that she would have a job as long as she did a good job. On appeal from SJ, held, if employee can prove this is what the parties intended and that she did a good job in the context of who was saying it, the promise was binding. (*Hetes*)
    - There can be arguments about what is a good job, and whether or not employee did a good job. On retrial in *Hetes*, jury will determine whether such a promise was made and, if so, did Hetes do something bad enough to justify just cause termination?
  - Probationary Periods – most courts hold that probationary periods do not change anything about the employment relationship, it is at-will during and at-will after. However, employees are less likely to sue if they are terminated during their probationary period, so employers say this anyway
- **Parole Evidence Rule**
  - If a K is clear and unambiguous you can't bring in prior or contemporaneous oral statements that contradict/vary the terms of a written contract.
    - A transferred to another of employer's B's offices under an oral agreement her would not be fired unless he screwed up badly. In his relocation form letter, a sentence indicated he was employed at-will. Held, the letter is not a K, and therefore does not lead to a battle of the forms, and the oral K is valid. (*Ohanian*)
    - Fails b/c jury found that D's letter (relocation letter) was not a contract.
    - Not using prior/contemporaneous statements to contradict a K, just to contradict a piece of paper given afterwards.
  - Other potential issue
    - Not contradicting the K, just explaining it.
- **3 views of the Statute of Frauds (See Handout)**
  - **Broad Brush View**
    - When nothing in the oral agreement shows that the K cannot be performed in 1 year, the K is valid
    - A agrees orally to employ B until he is 65. B is 30. The agreement is void under the SOF.
  - **Strict View**
    - The K must show that the K CAN be completed in one year, not counting breaches like death, walk-aways, etc.
    - In *Morgan*, the K could be ended in 1 year if P was fired for stealing, no reason, etc. so it was valid under the SOF.
  - **Ohanian View**
    - We only want to hear how it can be performed, but that also includes gap terms into the K (like business downturns, i.e. economic necessity)
    - Breach is not performance. Must show contract can end within a year with all parties performing
    - Ohanian found that P could be fired for a business downturn w/o a breach, so the K was performable in 1 year.
- **Gap Terms and Employment At-Will:** When an employee is fired without good cause before payment of a bonus, he is entitled to a pro-rata share of the bonus
  - A worked for B as an at-will employee. B had a program where A got 2.5% of B's net profit payable for the year payable the next March. A was fired in October and sued for the percent bonus. Held, A is entitled to a pro-rata share of the bonus even though he was an employee at-will. The agreement is not void under the SOF since even though B didn't pay until March, it could have calculated the percentage within a year. (*Miller*)
  - Modification of employment at will as time goes on: employer can change the bonus terms as time goes on. "Every day is a new contract" in employment at will. Change must be prospective only.

- The firing is not problematic, but the employer cannot retroactively drop the employee's wages, which would occur if the bonus was not paid
  - Strange wording, court says he was fired without cause, but that doesn't matter
- Employer could say that the bonus would not be paid at anytime, but since the promise is not void under the SOF, it still must be for the days the promise was in effect.
- **Year and a day contract** – Today I offer a job for a year starting tomorrow. Is this a year-long contract or a 366 day contract because performance doesn't start until tomorrow. *Riata* court looks to heart of bargain, and says that any after the fact calculations doesn't necessarily meant that the contract has to be performed outside a year. Still, lurking issue is the year and a day contract.
- A was an at-will employee of B, but A and B had contracted that if A was terminated/laid off within 1 year of hiring, B would pay the balance of the salary. A got into a fight with a 3<sup>rd</sup> party while working for B and was fired. Held, the K has an implied term if the employer is warranted in firing the employee, it does not have to pay the balance of the salary. (*Gorbet*)

### III. Implied Modification: How Common Law Can Modify the Terms of Employment Status

- **Promissory estoppel:**
  - Promise
  - Promisor should reasonably expect to be relied upon
  - $\pi$  did, in fact, rely on promise, and
  - injustice can only be prevented by enforcement
- **Start of employment:** courts have held that employees have a right to assume they will be given a good-faith opportunity to perform their duties once they are hired, even under employment at-will, for promissory estoppel purposes.
  - A applied for a pharmacist job with B. B's agent extended an offer, but later found out B required references, which he was unable to find for A. B hired another person, after A had resigned his job and rejected another offer of employment. Held, promissory estoppel applies here, A relied on B's promise to his determinant and B knew about the reliance. (*Grouse*)
  - Durst – this is a way to prevent the employer from sneakily hiring an employee for a day and then firing him. Where someone relies, promissory estoppel is a tool in many jurisdictions.
- **Unilateral v. Bilateral Contract:** bilateral contract is where each side is making a promise. Conversely, with a unilateral contract, if you work for me at wage certain, I will pay you. The employer is making a promise: if you show up and work, I will pay you. Employee is theoretically under no obligation to show up. Because no contract, *Grouse* court goes to promissory estoppel.
- **Good faith opportunity to perform:** Under at-will, A could have been fired on day 1, but for promissory estoppel we assume he would have a good faith opportunity to perform.
  - Court implies that there might be a promissory estoppel claim if A was fired on his first day, at odds with EM at will. Probably means if the ER was acting in bad faith, intending to fire A on day 1
- **Recovery**
  - A could likely argue for the salary from the alternative employer, or the salary he gave up from his old job, or maybe the cost of looking for another job
- **TX Rule:** There is no reasonable reliance on an EM at-will agreement.
- **Statute of Frauds and PE:** a K that is invalid under the SOF cannot be used for promissory estoppel in TX. One exception is when the promisee asked for a statement in writing and the promisor agreed but didn't do it
- **Consideration**
  - When sufficient additional consideration is present, courts infer that the parties intended that the contract will not be terminable at will