THE AT-WILL RELATIONSHIP IN THE 21ST CENTURY: A CONSIDERATION OF CONSIDERATION

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I. INTRODUCTION

The basic rule, applied by the vast majority of jurisdictions, concerning the at-will relationship—that either party may terminate the relationship at any time, for any reason or no reason, and with or without notice—has been the law in the United States for well over a century. Although many consider the rule to be the result of a historical accident committed by Horace Wood[1], by the end of the 19th century, the rule had become an

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[1] HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (1877). Wood's conclusion regarding the American rule has generally been criticized as having been incorrect and the result of sloppy research or perhaps even an intentional distortion of the law. *See* J. Peter

accepted part of American jurisprudence, and by the middle of the 20th century, it represented the law in virtually all American jurisdictions.[2]

Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341–43 (1974) (a much cited article arguing that none of the cases support Wood's conclusion); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994) (suggesting that the Note, above, started a debate regarding the propriety of Wood's conclusion); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Jay M. Feinman, *The Development of the Employment at Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 733–34 (1991) (reprising Professor Feinman's earlier article, cited above, in response to the Freed & Polsby article, below, suggesting that Wood's reputation for careful research might indicate an intentional misapplication of the law to foster a particular result); *cf.* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (arguing that Wood's conclusions *are* supported by the cases he cited). As to the cases considered by Wood, see *infra* note 13 and accompanying text.

[2] *See, e.g.*, Ala. Mills, Inc. v. Smith, 186 So. 699, 702 (Ala. 1939) (relying upon *Howard*, below, "a contract of employment which is in a true sense indefinite and without stipulation for an implied minimum period, is at the will of either party."); Peacock v. Virginia–Carolina Chem. Co., 130 So. 411, 412 (Ala. 1930) (relying upon *Howard*, below, the court said: "[A]n indefinite employment is terminable at the will of either party."); Lambie v. Sloss Iron & Steel Co., 24 So. 108, 110–11 (Ala. 1898) (relying upon *Howard*, below); Howard v. E. Tenn., Va. & Ga. Ry. Co., 8 So. 868, 869 (Ala. 1891) ("It is a mere matter of employment of services for the purposes specified, and, in the absence of some agreement or peculiar circumstances connected with the engagement, to take it out of the general rule, unless some time is fixed during which the employment is to continue, either party may terminate the contract at will."); Lord v. Goldberg, 22 P. 1126, 1128 (Cal. 1889) ("[The employment] was to be 'permanent,' but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish . . . to sever the relation."); De Briar v. Minturn, 1 Cal. 450, 451 (1851) (holding that where no definite period of employment is agreed upon between a master and servant, the master has a right to discharge the servant at any time); Greer v. Arlington Mills Mfg. Co., 43 A. 609, 610 (Del. 1899) ("With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will . . . unless 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, and in this respect there is no distinction between domestic and other servants." (quoting HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134 (1877))); Drake v. Hercules Powder Co., 55 A.2d 630, 632 (Del. Super. Ct. 1946) (relying on *Greer*, above); Savannah, Fla. & W. Ry. Co. v. Willett, 31 So. 246, 247 (Fla. 1901) ("If a term of employment be discretionary with either party, or be indefinite, either party may terminate it at any time."); Love v. Miami Laundry Co., 160 So. 32, 35 (Fla. 1935) ("The contract being for no definite period, it constituted a hiring at will."); Crawford v. Stewart, 25 Haw. 226, 231 (1919) (relying on Delaware authority, "[T]he rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will . . . ."); Larsen v. Postal Tel. Cable Co., 130 N.W. 813, 815 (Iowa 1911) (relying on *Harrod*, below); Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910) ("[A] contract of indefinite employment may be abandoned at will by either

party without incurring any liability to the other for damages."); Bowen v. Chenoa–Hignite Coal Co., 182 S.W. 635, 638 (Ky. 1916); Yellow Poplar Lumber Co. v. Rule, 50 S.W. 685, 686 (Ky. 1899); Louisville & Nashville R.R. Co. v. Offutt, 36 S.W. 181, 183 (Ky. 1896) (relying on *Harvey,* below); Louisville & Nashville R.R. Co. v. Harvey, 34 S.W. 1069, 1070 (Ky. 1896) ("[A]n employment, indefinite as to time, during which [the] relation of master and servant would exist, and consequently, as is well settled, subject to termination at the will of either."); Home News, Inc. v. Goodman, 35 A.2d 442, 446 (Md. 1944); Wash., Baltimore & Annapolis Elec. R.R. Co. v. Moss, 96 A. 273, 273–76 (Md. 1915) (relying on *McCullough*, below); McCullough Iron Co. v. Carpenter, 11 A. 176, 178 (Md. 1887) ("There can be no doubt that, in this country, the rule is, an indefinite hiring is *prima facie* a hiring at will. It is also well settled that a hiring at so much a week, month or year, no time being specified does not, of itself, make more than an indefinite hiring. It is competent for the parties to show what the mutual understanding was; but, unless there was a mutual understanding, it is only an indefinite hiring."); Fenton v. Fed. St. Bldg. Trust, 39 N.E.2d 414, 415 (Mass. 1942) (relying on *Harper*, below, "[t]he plaintiff did not agree to work for any definite time, nor did the testator agree to employ him for any stated period. Both could have terminated the employment when either desired to do so or at least at the end of each week while the employment continued."); Campion v. Boston & Me. R.R., 169 N.E. 499, 500 (Mass. 1930) (relying on *Harper*, below); Harper v. Hassard, 113 Mass. 187, 190 (1873) (holding that where a party is employed for an unspecified time, the employer may elect to terminate the employment at any time); Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 281–82 (Mich. 1945); McIntyre v. Smith–Bridgman & Co., 4 N.W.2d 36, 39 (Mich. 1942) (relying on *Loew,* below); Loew v. Hayes Mfg. Co., 188 N.W. 360, 361 (Mich. 1922) (the court said: "[A] hiring . . . where no time is specified, is indefinite and may be terminated at will.") (quoting Maynard v. Royal Worcester Corset Co., 85 N.E. 877, 878 (Mass. 1908)); Finger v. Koch & Schilling Brewing Co., 13 Mo. App. 310, 311 (1883) (relying on California case law); Donnellan v. Halsey, 176 A. 176, 177 (N.J. 1935) ("[U]nless a definite period of service is specified in the contract, the hiring is at will, and the master has the right to discharge, and the servant to leave, at any time."); Rubin v. Dairymen's League Co–op. Ass'n, 29 N.E.2d 458, 460–61 (N.Y. 1940); Cuppy v. Stollwerck Bros., Inc., 111 N.E. 249, 249 (N.Y. 1916); Watson v. Gugino, 98 N.E. 18, 20 (N.Y. 1912) (relying on *Martin*, below); Martin v. N.Y. Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) ("The present condition of the law as to the legal effect of a general hiring is thus stated by Mr. Wood in his work on Master and Servant (2d Ed., § 136), as follows: 'In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. . . . With us, the rule is inflexible that a general or indefinite hiring is, *prima facie*, a hiring at will . . . .'"); Currier v. W. M. Ritter Lumber Co., 64 S.E. 763, 763 (N.C. 1909) ("In contracts for personal service . . . when no time is fixed and no stipulated period of payment made, the contract is terminated at the will of either party."); Badger Oil & Gas Co. v. Preston, 152 P. 383, 384 (Okla. 1915) ("[U]nless a definite period of service is specified in the contract, the hiring is at will, and the master has the right to discharge and the servant to leave at any time.") (quoting Watson v. Gugino, 98 N.E. 18, 20 (N.Y. 1912)); Doolittle v. Pac. Coast Safe & Vault Works, 154 P. 753, 754 (Or. 1916) (relying on *Christensen*, below); McKinney v. Statesman Publ'g Co., 56 P. 651, 652 (Or. 1899) (relying on *Christensen*, below, the court said: "[E]mployment at a stated sum per week, month, or year, indefinite as to the term of service, is a hiring at will, which either party may terminate at pleasure . . . ."); Christensen v. Pac. Coast Borax Co., 38 P. 127, 129 (Or. 1894) (stating that the particular agreement was "a simple contract of employment for an indefinite time, which could be

dissolved at the pleasure of the defendant at any time it saw proper to shut down its mine."); Jones v. Pittsburgh Mercantile Co., 145 A. 80, 80 (Pa. 1928) (relying on *Peacock*, below); Hogle v. De Long Hook & Eye Co., 94 A. 190, 190 (Pa. 1915) (relying on *Weidman*, below); Weidman v. United Cigar Stores Co., 72 A. 377, 377 (Pa. 1909) ("In a contract of hiring, where no definite period is expressed, in the absence of facts and circumstances showing a different intention, the law will presume a hiring at will."); Kirk v. Hartman & Co., 63 Pa. 97, 105 (1869) (relying on *Coffin*, below, the court said: "When . . . a person is employed as an agent, traveller [sic] or salesman, for no definite time, the law does not imply a hiring by the year, but at the will of both parties, and the principal has a right to terminate it at any time, and to discharge the agent from his service without notice. . . ."); Coffin v. Landis, 46 Pa. 426, 433–34 (1864) (relying on *Peacock*, below, and holding that contracts not for continuous employment but for an agency to sell land are generally revocable at pleasure, unless the power to revoke is restrained by express stipulation, or unless given for a valuable consideration); Peacock v. Cummings, 46 Pa. 434, 437 (1864) ("Duration of service was left to be defined by agreement, outside of the articles, or, if not defined, it was necessarily at will."); Booth v. Nat'l India–Rubber Co., 36 A. 714, 715 (R.I. 1897) ("[A] hiring for an indefinite period . . . in accordance with the American rule, is a hiring at will, and consequently may be terminated at any time by either party."); Hughes v. Taubel–Scott–Kitzmiller Co., 6 Tenn. App. 432, 438 (1927); St. Louis Sw. Ry. Co. v. Griffin, 106 Tex. 477, 171 S.W. 703, 704 (1914) (relying on *Scott*, below); E. Line & Red River R.R. Co. v. Scott, 72 Tex. 70, 10 S.W. 99, 102 (1888) ("[W]hen 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."); Mullaney v. C. H. Goss Co., 122 A. 430, 432 (Vt. 1923) ("The contract of employment . . . being indefinite in duration, the doctrine in this country, laid down by a great majority of the courts having the question before them, is that it was a hiring at will, under which either party had the right at any time to terminate the employment. Mr. Labatt says in his work on Master and Servant, § § 159, 160, that the preponderance of American authority in favor of this doctrine is so great that it is now scarcely open to criticism."); Bell v. S. Penn Natural Gas Co., 62 S.E.2d 285, 288 (W. Va. 1950); Adkins v. Aetna Life Ins. Co., 43 S.E.2d 372, 378 (W. Va. 1947); Resener v. Watts, Ritter & Co., 80 S.E. 839, 840 (W. Va. 1913) ("The authorities . . . generally state the doctrine applicable to such cases to be that an employment upon a weekly, monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will."); Koskey v. Harnischfeger Corp., 265 N.W. 583, 586 (Wis. 1936); Brooks v. Nat'l Equip. Corp., 244 N.W. 598, 599 (Wis. 1932); Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 396 (Wis. 1924) (relying on *Prentiss*, below); Irish v. Dean, 39 Wis. 562, 568 (1876) ("The true rule, we think, is this: In a contract for personal services, or for the sale of personal property to be delivered from time to time, if the contract is silent as to its duration, either party may terminate it at pleasure by giving reasonable notice to the other party of his intention to terminate it."); Prentiss v. Ledyard, 28 Wis. 131, 133 (1871) ("Either party, however, was at liberty to terminate the service at any time, no definite period for which the service was to continue having been agreed upon."); Casper Nat'l Bank v. Curry, 65 P.2d 1116, 1120 (Wyo. 1937) ("[A] promise which contemplates continuing performance for an indefinite time has been interpreted as stipulating only for performance terminable at the will of either party.") (citing 1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 39, at 106-107 (rev. ed. 1936)); s*ee also* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 77 (2000) (stating that the trend in the last ten years

Indeed, Montana, which passed a wrongful discharge statute in 1987[3] in response to highly employee-favorable judicial decisions under the at-will rule, is the only state[4] where the law requires that an employer must have

has been toward more employer dominance.); Kurt H. Decker, *Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for all At–Will Employees?*, 38 DUQ. L. REV. 723, 729–30 (2000); Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 352 (2002).

[3] Prior to the passage of the Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901–15 (2000), discussed at greater length *infra* notes 5 and 6, Montana was, like the other United States, an at–will employment jurisdiction. In Montana, however, unlike in the majority of states, the at–will status of employees was conferred legislatively, rather than judicially, until the legislature repealed the at–will statute in the wake of the Wrongful Discharge Act. *See* MONT. CODE ANN. § 39–2–503 (1999), *repealed by* § 4, ch. 583, (2001). However, even prior to the repeal of the at–will statute in 2001, the Supreme Court of Montana had held that the enactment of the Wrongful Discharge Act had effected an implied repeal of the at–will statute. Whidden v. John S. Nerison, Inc., 981 P.2d 271, 275 (Mont. 1999).

[4] The U.S. Virgin Islands and Puerto Rico also have Wrongful Discharge Acts. *See* 24 V.I. CODE ANN. §§ 76–79 (2004), especially § 76; P.R. LAWS ANN. TIT. 29 § § 185a–185m (2003), especially § 185b. The National Conference of Commissioners on Uniform State Laws promulgated a Model Employment Termination Act in 1991, but no state adopted it. 7 A.U.L.A. 421 (1991). The Virgin Islands Act excepts union contracts specifying other rules, then lists nine specific grounds for which an employer may terminate an employee, and then provides that a termination based on other grounds is wrongful. 24 V.I. CODE ANN. TIT. § 76 (2004). Unlike the Montana Act or the Puerto Rico Act, the Virgin Islands Act does not allow a probationary at–will period. It provides that an aggrieved employee may proceed administratively or judicially, and case law has determined that there is no requirement that an aggrieved employee exhaust his administrative remedies. *See id.* § 77.

The Puerto Rico Act is much longer and more complex than either the Montana Act or the Virgin Islands Act, specifying that there may be a written probationary contract of up to three months (longer under specified circumstances), during which period the employer is exempt from the requirements of the statute; Section 185b, which specifies what constitutes just cause, specifically declares that a termination at the whim of the employer is not considered just cause. P.R. LAWS ANN. TIT. 29 § 185b (2003). The Act also specifies the employees' remedies for a failure of the employer to comply with it, places the burden of proving good cause on the employer and requires the court to hold a hearing at which the judge is to make an initial determination of whether the employer had good cause and, if the judge determines that the employer did not have good cause, the Act mandates that the employer be ordered to deposit damages or a bond for damages equal to the probable amount of damages under the statute, together with attorneys' fees. *See id.* § 185k.

Compare GA. CODE ANN. § 34–7–1 (2006), which provides that if wages are payable at a stipulated period, there is a presumption that the term of employment is for that period, but that, if there is anything else in the contract that indicates a longer term, the fact that wages are to be paid at shorter intervals does not control. Though that might suggest that Georgia is a "for good cause"

"good cause" in order to discharge an employee,[5] and even in that state, employment is deemed to be at-will during any probationary period established by the employer at the outset of the employment relationship.[6]

state, the Georgia statute also provides that if the hiring is for an indefinite period, it is deemed to be at–will. *Id.*

[5] *See* MONT. CODE ANN. §§ 39-2-901–15 (2000), and especially Section 39-2-904. The Act provides that it is generally the exclusive remedy for wrongful discharge. *Id.* § 39-2-902. It allows for at–will termination only during a probationary period, which may be set by the employer, or, if no probationary period is so established by the employer, is statutorily set for six months. *Id.* § 39-2-904. The Act specifies that a discharge is wrongful only in three circumstances: when it is in retaliation either for an employee's refusal to violate public policy or for the employee reporting a violation of public policy; when the discharge is not for good cause after the probationary period has expired; or when the discharge is in violation of the express provisions of an employer's written personnel policy. *Id.* The statute establishes damages. The wronged employee is entitled to lost wages and fringe benefits for not more than four years from the date of discharge, plus interest, less wages the employee earned or could have earned during the interim period, with expenses incurred from searching for and obtaining the new employment, and relocating to the new job, subtracted from the interim earnings. *Id.* § 39-2-905. In addition, if the firing was in violation of the public policy section of the statute, discussed above, the employee may obtain punitive damages, but otherwise, the employee may not recover, "under any legal theory", any other damages. *Id.* Good cause is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." *Id.* § 39-2-903(5). Subject to certain exceptions, the term excludes the employee's legal use of lawful products, such as tobacco or alcohol, off the employer's premises and during nonworking hours. *Id.* Finally, the Act establishes a one–year limitations period for the bringing of an action. *Id.* § 39-2-911.

A recent study that compared employment gains or losses in Montana under the Act with employment gains or losses under the former at–will rule, as limited by pro–employee judicial decisions, concludes that the pro–employee judicial decisions adversely impacted employment, whereas the Act has positively influenced employment in the state. *See* Bradley T. Ewing, Charles M. North & Beck A. Taylor, *The Employment Effects of a "Good Cause" Discharge Standard in Montana*, 59 INDUS. & LAB. REL. REV. 17, 17 (2005). The authors concede that, because of the Montana judiciary's pro–employee bias before enactment of the Act, which made Montana among the most liberal states in the country, it is difficult to extrapolate from the employment effects in Montana to reach any concrete prediction concerning whether the enactment of similar statutes in other states would have a like positive effect, but suggest that their conclusions might justify experimentation with such legislation. *Id.*

[6] See MONT. CODE ANN. § 39–2–904(2) (2000), which permits an employer to establish a probationary period, and sets a six month default rule if the employer does not do so. Judicial decisions under the Act make clear that the burden is on the employer to establish that the employee is a probationary employee, and therefore subject to at–will termination or failing that, that the termination was for good cause. *See* Whidden v. John S. Nerison, Inc. 981 P.2d 271, 274 (Mont. 1999).

Although the Act has been cited in scores of judicial decisions, it remains unclear exactly how much flexibility an employer has in establishing the length of its probationary period. Thus, it is at least possible—and in light of the *Hobbs* and, especially, the *Hunter* decision, below, perhaps likely—that an employer could entirely circumvent the Act by establishing a probationary period lasting for an extremely long period, perhaps years or even decades, as long as the employer makes this fact known to the employee at the outset of the employment relationship. No case directly on point could be found, but the following two cases strongly suggest that an employer, and especially a private employer, might, subject to some as yet unarticulated policy established by the courts, be able unilaterally to reimpose at–will status upon the employee.

Thus, in *Hobbs v. City of Thompson Falls*, 15 P.3d 418, 420–21 (Mont. 2000), a statute provided that police officers must serve a probationary period of "not more than one year," during which period they could be terminated by the city's mayor, presumably at will, and that within 30 days of the end of the probationary period, the officer's appointment "must be submitted to the city council . . . and if such appointment is confirmed by the city council . . . such applicant becomes a member of the police force . . . unless suspended or discharged as provided by law." The plaintiff–officer served for one year, and about fifteen days after the year ended, he was terminated without cause at a city council meeting, and thereafter sued, alleging that the termination violated the Wrongful Discharge Act. *Id.* at 419. The city maintained that, because the statute under which the officer was hired required confirmation by the council within thirty days of the end of the probationary period, and because the officer was terminated before confirmation and within that thirty–day period, the officer was still subject to termination at will. *Id.* at 419–20. The court, construing the police hiring statute and the Wrongful Discharge Act, held that following the probationary period, and during the 30 day period, confirmation could not be denied without good cause. *Id.* at 421. However, by comparison, in *Hunter v. City of Great Falls*, 61 P.3d 764, 767 (Mont. 2002), a statute provided that firefighters were to be appointed "for a probationary term of 6 months, and thereafter the mayor or manager may nominate and, with the consent of the council . . . appoint such . . . firefighters . . . ." The plaintiff was hired as a probationary firefighter on March 1 for an initial term of six months, though he was, according to an uncontradicted affidavit in support of the city's motion for summary judgment, told at that time that "the firefighters' probationary period would last for six months unless extended". *Id.* at 768. At the end of the six–month period, based on concerns of his superiors, plaintiff's probationary status was extended, and he was then terminated on October 31, well outside the initial six–month period. *Id.* at 765. He argued that, based on *Hobbs*, above, once he completed the six–month probationary period, he could not be terminated except for good cause. *Id.* at 766–67. The Montana Supreme Court, however, affirmed a summary judgment in favor of the city, holding that, unlike the statute in *Hobbs*, which established a maximum one year probationary period, the firefighter statute set forth a six–month probationary period, but did not state that a longer probationary period could not be imposed, and was therefore properly interpreted to establish a minimum probationary period, which could be, and had properly been, extended by the city. *Id.* at 767–69. Moreover, the statute was supplemented by the fire department's policy manual which, in addition to stating that in order to become a confirmed firefighter, a probationary firefighter was required to have at least six months' experience as a firefighter, set forth other criteria which probationary firefighters had to meet. *Id.* at 768. Finally, and most significantly, in response to the plaintiff's argument that allowing the unilateral extension of the probationary period by the employer would "nullify the [Wrongful Discharge] Act by creating a defense which will swallow

Because the traditional rule allows either party to an at-will relationship to put an end to it at any time, a promise by either the employer or the employee[7] to continue an existing at-will relationship is by its nature illusory.[8] As a result, a number of courts hold that a promise made by

the Act's remedial provisions in their entirety," the court quoted the *Whidden* decision, *supra* note 3, for the proposition that an employer was required to "define the probationary period at the outset of an employment relationship, and the employer has the burden of showing that a probationary period was in effect at the time of a discharge." *Id.* at 767. It then concluded that these safeguards were sufficient to implement the policies underlying the Wrongful Discharge Act, stating, "The *Whidden* conditions deter abusive expansion or extension of probationary periods after the fact, thereby avoiding the prospect of nullifying the protections provided to Montana workers by the Act." *Id.* However, that reasoning would seem to permit an employer to establish a probationary period of any length, as long as the employer makes the probationary period known to the employee at the outset of the relationship.

It thus seems clear from *Hunter*, especially when read in conjunction with *Hobbs*, that, subject to some overarching public policy argument, as long as the employer provides the employee with notice at the time of the initial hiring, there is nothing—outside of the employer's economic interest in maintaining some level of satisfaction among its employees—to prevent the employer from establishing even an extremely long probationary period. Of course it is possible that a court, faced directly with the question, would restrain a private employer from doing so, perhaps distinguishing *Hunter* by pointing out that there, the legislature had specifically set a six month period, and (as found by the *Hunter* court), deliberately established that time frame as the minimum probationary period. By contrast, in the private employment setting, no such legislative imprimatur exists. On the other hand, however, it seems clear from the *Hunter* case that a substantial majority of the court believes that the *Whidden* safeguards—requiring the employer to specify the probationary period and notify the employee of its scope before or at the time of initial hiring, and further, imposing on the employer the burden of establishing that the probationary period remained in effect at the time of discharge—are sufficient to implement the policies underlying the Wrongful Discharge Act. To the extent that this is true, a policy at least as powerful as legislative fiat—freedom of contract—would seem to override any other objections to the employer establishing even an extremely lengthy probationary period.

[7] Throughout this Article, unless otherwise specifically indicated, the rules with respect to the effect of promises made at the outset, or during the continuation, of an at–will relationship, apply regardless of whether the promisor is the employer or the employee. For example, a promise by an employer to continue to employ an existing at–will employee is illusory, and an employee's promise to remain employed is no less so. When the promise is to continue the employment, it is typically the employer who is the promisor, and I will often refer to the employer's promise and to the employer as promisor, and state the applicable rule accordingly; however, when an employee agrees to a restrictive covenant, it is the employee who is the promisor as to the promise not to compete, and the employer who is the promisee, and I will refer to the parties in that manner, and state the rule accordingly. I will often note the symmetrical application of a particular rule in the text, but even if it is not specifically noted, the rule applies equally to each party as promisor.

[8] *See* RESTATEMENT (SECOND) OF CONTRACTS § 77, cmt. a, illus. 2 (1981); 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:7 (4th ed. 1992

either party to an existing at-will relationship will not serve as consideration for any promise made by the other party. Nevertheless, a substantial number of jurisdictions hold that an express or implied promise by an at-will employer to continue to employ an at-will employee, or the actual continued employment of an at-will employee, can serve as consideration for an at-will employee's promise, such as, for example, a promise not to compete.[9]

Because of the illusory nature of a promise of at-will employment, it should follow that a promise made at the beginning of employment and in consideration of an at-will relationship is illusory as well; yet, paradoxically, almost all courts hold that a promise made at the inception of employment and in consideration of the at-will relationship is binding.[10]

& Supp. 2006); *e.g.*, Wilmar, Inc. v. Liles, 185 S.E.2d 278, 282–83 (N.C. Ct. App. 1971) (continued at–will employment is illusory, and therefore could not serve as consideration for employee's covenant not to compete).

[9] *See infra* note 118.

[10] *See* Kadis v. Britt, 29 S.E.2d 543, 548 (N.C. 1944) ("Ordinarily, employment is a sufficient consideration to support a restrictive negative covenant, but will not, of course, aid it as to other defects . . . and it has been frequently held that employment at will will afford such consideration, although some cases held that where the employment is at will, there must be provided a reasonable notice in order that it may be accounted a consideration. Other cases hold that where the employment is actually continued for a substantial period, it may be considered as importing a consideration. To some of these holdings we will be compelled to dissent on principle; but the course of decision relieves us from more detailed discussion. For the most part, these cases featuring employment as constituting consideration will be found to deal with initial employment—where the employee is for the first time inducted into the service. It would seem that the principle has no reasonable application to situations like that presented in the case at bar, where the contract containing the negative covenant is exacted from the employee while he is, and has been for years, in the employment, where his position and duties are left unchanged, and the nature of the business remains the same, and where, in the nature of things, he must already have acquired such knowledge of the business as his position afforded. In that case, the question of consideration is narrowed to the question of discharge rather than to its correlative of employment, and in the case at bar that feature is frankly paramounted. The grammatical sense of the language used, taken with the context, plainly infers that *continued employment* must be understood to mean further *continuance in employment*, which more than implies the threat of immediate discharge. A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under the definite threat of discharge. Unemployment at a future time is disturbing—its immediacy is formidable. The choice may be expected.") (citation omitted); *see also* Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982) (implying the rule, indicating that where a restrictive covenant is entered after employment has begun, additional consideration is required, and cutting back

Indeed, only Texas has flatly declared that under no circumstances can the promise of a future at-will relationship serve as consideration for a return promise. The Texas Supreme Court correctly recognizes that the at-will relationship is necessarily and always illusory, since neither party to the at-will relationship is bound to begin or continue it, regardless of any promise he or she may have made to do so.[11]

slightly on its earlier adopted rule that continued employment is sufficient consideration, the court declaring: "The practice of not telling prospective employees all of the conditions of employment until after the employees have accepted the job, like the practice of requiring a lie detector test in *State v. Century Camera, Inc*., 309 N.W.2d 735 (Minn. 1981), takes undue advantage of the inequality between the parties. Appellants and National were parties to an employment agreement after they had completed negotiations on compensation, duties, benefits and other terms of employment. An addition to that agreement would require independent consideration. We hold the noncompetition clause invalid because it was unsupported by such additional independent consideration.") (citation omitted); Whittaker Gen. Med. Corp. v. Daniel, 379 S.E.2d 824, 827 (N.C. 1989) (dictum); George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 314 (Pa. 1975) (holding that actual employment contract had been reached before employee gave two weeks' notice to former employer, so that, when employee signed restrictive covenant when he first began work with plaintiff, it was after employment contract had been made, and therefore required additional consideration, indicating that, where original employment contract contains restrictive covenant, no additional consideration is needed, but when restrictive covenant is entered into after the initial employment contract has been made, additional consideration is required); Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 281 (Pa. 1974) (stating rule); Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207, 209 (S.C. 2001) (indicating that this is the law in South Carolina, whereas, when the covenant is entered into after employment has begun, separate, additional consideration is necessary); Schneller v. Hayes, 28 P.2d 273, 274–75 (Wash. 1934) (implying rule; holding that injunctive relief was properly denied when restrictive covenant was not entered into until after employment had begun, absent additional consideration). *Compare* Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 977 (Miss. 1992) (after stating rule that at–will employee may be terminated for any reason, court upholds chancellor's decision that since the termination of at–will employee was in bad faith, restrictive covenant was invalid, and former employee was entitled to a percentage of the profits that he would have been entitled to under the employment agreement, but for the breach by the employer; "In his Final Order, the Chancellor awarded Bain $4,656.86, or 5% of the profits of Empiregas of Kosciusko, Inc. for calendar year 1987, pursuant to his employment contract. We recognize that the contract provides that 'should the employment relationship be terminated (except by death) by either party prior to May 1st of any year, the Retail Manager shall not be entitled to receive the annual bonus for the preceding calendar year.' Continued employment and good behavior therefore served as consideration for the agreement. However, it was Empiregas which breached the duty which the parties had to each other to deal in good faith by firing Bain without good cause. Accordingly, Bain was entitled to receive the bonus which had accrued.").

[11] See *infra* notes 39–91 and accompanying text for a discussion of the Texas cases.

This Article will discuss the traditional doctrine and how it affects and is affected by the pervasive contract doctrine of consideration. It concludes that, although Texas has gotten it right, because the doctrine of consideration and its impact on the at-will relationship are so fully embedded in American case law, it's doubtful that other courts will follow the Texas example; but, if courts are unwilling to do that, they should instead abandon the use of consideration doctrine altogether when it comes to the enforceability of promises made both at the inception and during the existence of the at-will relationship. Courts instead should focus on whether the interests of the parties, based on their relationship, and the interests of fairness, based on the circumstances surrounding the parties' relationship, justify the enforcement of promises made by either the employer or the employee. This is, after all, what courts are doing, and they should be open about it.

A subsequent Article will consider how the doctrines of good faith and reliance, and notions of public policy, have come to affect the at-will relationship, but this Article will consider those doctrines only in passing. Likewise, because this Article is concerned principally with the courts' response to the at-will doctrine—after all, the at-will rule is a product of the common law, rather than of positive legislative enactment—any discussion of the effect of statutory enactments on the at-will doctrine will be minimal and incidental. Thus, for example, statutes that regulate otherwise at-will franchises or distributorships[12] will not be considered except insofar as the

[12] *See, e.g.*, Alabama Tractor, Lawn and Garden and Light Industrial Equipment Franchise Act, ALA. CODE § 8–21A–4(a)–(b) (2002) (providing minimum notice period, right to cure deficiencies and requiring good cause for termination); Alaska Gasoline Products Leasing Act, ALASKA STAT. § 45.50.810(b)–(d) (2004) (providing for forty–five days' written notice of termination unless parties' agreement calls for shorter period of notice, except under very limited circumstances, and further providing that termination, except during a reasonable trial period, may only occur upon good cause as defined in the statute); Arizona Beer Franchise Act, ARIZ. REV. STAT. ANN. § 44–1566 (2003) (providing that any termination of beer franchise must be in good faith and for good cause); Connecticut Franchise Act, CONN. GEN. STAT. § 42–133f(a) (2000) (providing that franchisor may not terminate franchise except for good cause); IDAHO CODE ANN. § 49–1614 (2000) (requiring good cause and notice for cancellation, termination or nonrenewal of motor vehicle franchise); KAN. STAT. ANN. § 8–2414(a) (2001); MICH. COMP. LAWS SERV. §§ 445.1567, 445.1580 (LexisNexis 2006) (requiring notice, good faith and good cause for termination of motor vehicle franchise, and allowing action for violation of those requirements); Missouri Franchise Act, MO. REV. STAT. § 407.405 (2006) (providing ninety–day notice period except where termination is based on specified causes); Nebraska Franchise Practices Act, NEB. REV. STAT. § 87–404 (1999) (requiring good cause and sixty–day notice period); New Jersey Franchise Practices Act, N.J. STAT. ANN. § 56:10–5 (West 2001); New York Motor Fuels

cases decided under them discuss the effect of these enactments on the role that consideration plays in the at-will relationship.

II. THE TRADITIONAL AT-WILL RELATIONSHIP

Horace Wood, in his 1877 treatise concerning the law of master and servant, misread a number of American cases,[13] and declared without

Franchise Act, N.Y. GEN. BUS. LAW § 199–c (McKinney 1980) (requiring good cause and ninety days' notice, and providing cause of action for violation); Oklahoma Motor Vehicle Franchise Act, OKLA. STAT. tit. 47, § 565.2 (2001) (requiring good faith, good cause, notice and right to cure before termination of franchise); Tennessee Franchise Act, TENN. CODE ANN. § 47–25–1503 (2001) (requiring good faith, good cause and thirty–day cure period); Washington Motorsports Vehicles Act, WASH. REV. CODE § 46.93.030 (2006) (requiring good faith, good cause and notice before termination of franchise); Wyoming Motor Vehicle Franchise Act, WYO. STAT. ANN. § 31–16–109 (2005) (requiring good cause and notice).

[13] Wood cited to four American cases (*Wilder*, *De Briar*, *Tatterson*, and *Franklin Mining Co.*), no one of which was precisely on point. In *Wilder v. United States*, 5 Ct. Cl. 462, 466–67 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871), the plaintiff transported goods under the contract for an agreed price for approximately two months but declined to receive goods when Indian hostilities broke out, making transportation more dangerous. The plaintiff refused to recognize the continued validity of the contract and insisted upon being paid more, and the defendant agreed to pay a reasonable price. *Id.* After the plaintiff performed, however, the defendant paid only the amount alleged to be due according to the original agreement. *Id.* The Court of Claims allowed that the plaintiff could recover the sum due under the second agreement, which apparently led Wood to believe that the first contract must have been terminable at will. *Id.* at 468. In *De Briar*, the defendant, an innkeeper, had hired plaintiff as a barkeeper under an agreement of indefinite duration, and had given the plaintiff a room to occupy for as long as plaintiff was in defendant's employ. De Briar v. Minturn, 1 Cal. 450, 451 (1851). After the defendant discharged the plaintiff, he told the plaintiff to leave the room, but plaintiff refused, and the defendant forcibly caused his removal. *Id.* A trial resulted in a verdict in plaintiff's favor, but the appellate court reversed, ruling that plaintiff had no right to remain in the room after being notified to leave and that defendant had not used unreasonable force in removing plaintiff. *Id.* The plaintiff then had no cause of action except, perhaps, for nominal damages. *Id.* In *Tatterson*, the court affirmed a jury verdict that the employment contract had been for a year. Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 56–58 (1870). Dicta in the case suggests that the contract might have been terminable within the year, and that, if the defendants pled this, the trial court's ruling might not have stood. *Id.* In *Franklin Mining Co*., the plaintiff testified that he would not have given up his existing permanent employment for employment with defendant that was of uncertain duration, and that he wanted a contract for a definite duration—presumably a year. Franklin Mining Co. v. Harris, 24 Mich. 115, 115 (1871). The defendant's agent testified that the length of the contract was immaterial to him, and that he would apparently agree to plaintiff's terms, despite also saying that plaintiff did not need to worry about changes in defendant's management. *Id.* at 116–17. The appellate court therefore ruled that there was at least some evidence from which the jury could have concluded that the contract was for at least a year. *Id.* at 117.

hesitation that in employment contracts of indefinite duration, the at-will relationship was established, and either party could terminate the relationship at will, that is, for any reason or no reason, and with or without giving notice. Although it is questionable whether Wood's rule was the majority view in the United States at that time,[14] it rapidly gained favor; after all, the nation was expanding, and individualism was the watchword of the day. The at-will doctrine suited an expanding nation's sense that both employers and employees could put an end to their relationship, the employer to obtain a different, better, perhaps less expensive employee, and the employee to obtain a better paying job, perhaps in a different location and perhaps with greater opportunities for advancement.[15] In short, the doctrine underlying at-will employment served an expanding geography and economy, and the doctrine was rapidly accepted as the law throughout the United States.[16]

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[14] Wood's conclusion regarding the at–will rule has been criticized as having been incorrect at the time. *See* Feinman, *The Development of the Employment at Will Rule*, *supra* note 1; Feinman, *The Development of the Employment–at–Will Rule Revisited*, *supra* note 1; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 n.53–54 (1974); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At–Will*, 59 MO. L. REV. 679, 680 (1994); David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 1026–29 (1998).

[15] A surprising number of modern cases discuss the development of the rule as a prelude to criticism of the rule and, often, as a prelude to the adoption of one or more of the commonly recognized exceptions to the at–will principle. *See, e.g.*, Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 446 (N.C. 1989) ("A brief look at the history of the employee–at–will doctrine is appropriate. The English rule prior to our revolution was that an employment without a particular time limitation was presumed to be a hiring for a year. Reasonable notice was required before an employer or employee could terminate the employment. This was said to be in response to the shortage of laborers resulting from the Black Death. After the revolution, American courts followed the English rule with respect to agricultural and domestic workers, but with the industrial revolution and the development of freedom of contract, our courts moved towards the at–will doctrine. The formulation of the rule was principally the work of Horace Wood, who published in 1877 a work on master–servant relations stating the rule. Subsequent adoption of the rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth century.") (citation omitted); *see also* Kurtzman v. Applied Analytical Indus., Inc., 493 S.E.2d 420, 422 (N.C. 1997) (reiterating the views expressed in *Coman*); *cf.* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68 (2000) (suggesting that none of the proposed explanations for why the rule developed as it did in the United States is entirely satisfactory).

[16] *See supra* note 2.

Early decisions were concerned with establishing the nature of the relationship, as well as the circumstances under which the relationship would be deemed to exist. Thus, it was early determined that an at-will relationship exists whenever employment is for an indefinite duration.[17] An

[17] *See* Haney v. Caldwell, 35 Ark. 156, 161 (1879) (dicta) (stating that if plaintiff were hired to serve as engineer for defendant at a salary of $2500 per year, this did not make the contract one for a definite period, and plaintiff would be entitled to be paid for such time as he actually served, or offered to serve, as engineer at the rate agreed; and if he were terminated before the end of the year, suggesting that this was a contract at will, plaintiff would be entitled to compensation at the agreed rate for the time he actually served up until the termination); Greer v. Arlington Mills Mfg. Co., 43 A. 609, 612 (Del. 1899) (collecting and considering the extant case law and holding that "a hiring at a certain sum a year, no time being specified, unaccompanied by any facts and circumstances in proof from which a different intention may be inferred, and when the testimony as to the contract is not conflicting, is an employment for an indefinite term and not for a year," and was therefore terminable at will); Crawford v. Stewart, 25 Haw. 226, 237 (1919) (collecting cases and holding that "a hiring at a certain sum per month, no time being specified, unaccompanied by any facts or circumstances or any proof from which a different intention may be inferred, and when the testimony as to the contract is, as in this case, not conflicting, is an employment for an indefinite term and not for a month, and terminable at the will of either party."); Orr v. Ward, 73 Ill. 318, 318 (1874) (indicating principle); Speeder Cycle Co. v. Teeters, 48 N.E. 595, 597 (Ind. App. 1897) (stating and adopting principle, holding that hiring at a specified daily rate of pay until such time as a factory was built and thereafter at an increased daily rate was an indefinite hiring, terminable at will); Louisville & Nashville R.R. Co. v. Harvey, 34 S.W. 1069, 1070 (Ky. 1896) (stating principle, noting that it is well settled); McCullough Iron Co. v. Carpenter, 11 A. 176, 178–79 (Md. 1887) (stating principle as well settled, but affirming verdict in favor of employee where there was evidence that his employment had been by the year); Evans v. St. Louis, Iron Mountain & S. Ry. Co., 24 Mo. App. 114, 115 (Mo. Ct. App. 1887); Martin v. N.Y. Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (a leading case, quoting and adopting Wood's rule and holding that a general hiring is a hiring at will, absent clear evidence propounded by the employee); Edwards v. Seaboard & Roanoke R.R. Co., 28 S.E. 137, 137 (N.C. 1897) ("The contract before us is not specific as to the *term* of service – certainly not so expressed in the writing. The plaintiff does not so insist, but says a reasonable construction thereof leads to the conclusion that the parties intended a one–year term of service. We are not able to see that such was their intention. It seems reasonable that, if they had so intended, they would have expressed themselves in more definite and explicit terms on so important a feature of their agreement. Why they were not more definite, we cannot tell. They may or may not have had reasons for leaving the writing as it is, or they may not have called their minds to that feature of the contract. It does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will, for their own convenience."); Booth v. Nat'l India–Rubber Co., 36 A. 714, 715 (R.I. 1897) (stating and adopting principle, collecting authorities and calling it the American rule); Hughes v. Taubel–Scott–Kitzmiller Co., 6 Tenn. App. 432, 439 (Tenn. Ct. App. 1927); Prentiss v. Ledyard, 28 Wis. 131, 133 (Wis. 1871) (stating, without citation to authority, that absent agreement to a definite term, the contract of employment was terminable by either party at any time); *cf. De*

exception to this apparently exists in at least some states when the employee pays some additional consideration for the employment, in which case the courts would construe the agreement as one for a definite, albeit very long, time.[18] The indefinite duration, at-will rule applies whether the

Briar, 1 Cal. at 451 (implying that a hiring for an indefinite time is a hiring at will); Yellow Poplar Lumber Co. v. Rule, 50 S.W. 685, 686 (Ky. 1899); Echols v. New Orleans, Jackson & Great N. R.R. Co., 52 Miss. 610, 611–12 (Miss. 1876) (stating the rule to be that a contract of indefinite duration is terminable either at the pleasure of either party or after a reasonable time, and upholding a verdict for the plaintiff establishing a one–year term, asserting that this was a reasonable time); Harrington v. Kansas City Cable Ry. Co., 60 Mo. App. 223, 225 (Mo. Ct. App. 1895); Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 399 (Va. 1932) (agreeing that the law of Virginia is that a contract for an indefinite period is terminable at will, and upholding a jury determination that the particular hiring was for a year).

[18] *See Yellow Poplar*, 50 S.W. at 686 (holding that, where the plaintiff, after severing his thumb in an accident at the defendant mill, agreed not to sue in exchange for defendant's offer of employment for so long as it continued to operate the mill in that locale, the hiring was for a definite, ascertainable time); *Harrington*, 60 Mo. App. at 225 (plaintiff was injured on the job and proved that a written agreement, which provided that in consideration of $30, plaintiff would release his claims against defendant, was supplemented by an oral agreement by which defendant offered plaintiff employment for as long as he could do his job satisfactorily; when defendant terminated plaintiff shortly thereafter, plaintiff sued and recovered). In *Harrington*, the court stated:

> The plaintiff was, before his injury by defendant, engaged in labor upon defendant's street railway; the defendant being a corporation exercising its franchise in operating such railway. The terms of the employment were that it should be steady and constant so long as plaintiff should properly do the work. We will concede that this may mean, or come to mean, under its terms, employment for and during the plaintiff's life. But this would not make the term of employment indefinite or uncertain in a legal sense, since that is certain in law which depends upon a certain event. It may be freely conceded that a hiring for an indefinite time is a contract determinable at the will of either party. Such might be the construction of a contract for steady and constant employment where the sole consideration for the employment was the services rendered during the current time of the employment. But if that should be granted, it is not this case. Here the plaintiff had a valuable cause of action against defendant, which he released in consideration that he would receive constant and steady employment at work so long as he did it well. The consideration is not only the work well done during the course of the service, but a valuable consideration relating to the length of the service. To borrow an illustration from the case of *The Pennsylvania Co. v. Dolan*, 6 Ind. App. 109 (Ind. App. 1892), suppose this plaintiff had paid defendant $500 in money in consideration that defendant would give him employment so long as he performed his work faithfully. Would it, in such case, be contended that defendant could receive and keep the $500, hire plaintiff for a day or two and then discharge him without cause? The plaintiff by surrendering his cause of action against defendant has

agreement is oral[19] or written,[20] and whether the agreement specifies no

> rendered it a consideration which has caused to arise on defendant's part an obligation to give him constant employment so long as he performs the service well and faithfully.

Harrington, 60 Mo. App. at 225. *Cf.* Panther v. Mr. Good–Rents, Inc., 817 S.W.2d 1, 4 (Mo. Ct. App. 1991) (signing of covenant against competition at inception of relationship and thereafter did not constitute additional consideration rendering at–will employment terminable only for cause); *contra* Eales v. Tanana Valley Med.–Surgical Group, Inc., 663 P.2d 958, 959 (Alaska 1983) (considering an alleged promise by the employer to employ the plaintiff until he reached retirement age; the court ruled that such a promise was for a definite period, and as an alternative theory, that the contract was unilateral, and that, therefore, mutuality of obligation was not required). The *Eales* court also noted:

> Even if the contract were considered to be one for an indefinite period a remand would be required. Evidence was presented that it was represented to Eales that so long as he was properly performing his duties he would not be discharged. This representation may be found to be part of Eales' employment contract, even if the employment contract was for an indefinite period of time. If so, the Clinic would be precluded from discharging Eales except for cause. Implicit in the foregoing conclusions is our rejection of those authorities which hold that employment contracts until retirement, or for permanent employment, or for life are necessarily terminable at the will of the employer, where the employee furnishes no consideration in addition to the services incident to the employment. We have never so held. Those authorities which have are generally based on the lack of mutuality of obligation which exists in such cases; since an employee cannot be bound to work permanently for a particular employer, the employer is not bound to engage the employee permanently. . . . As a matter of contract doctrine we regard this rationale as unsound. There is no requirement of mutuality of obligation with respect to contracts formed by an exchange of a promise for performance. . . . While there are many cases supporting the rule that contracts for permanent employment are necessarily terminable at will by the employer unless supported by independent consideration, there is a substantial body of authority which recognizes, correctly in our view, the unsound foundation of that rule.

Id. (citations omitted).

[19] *See, e.g.*, *Greer*, 43 A. at 612; *Crawford*, 25 Haw. at 237; Lynch v. Eimer, 24 Ill. App. 185, 186 (Ill. App. Ct. 1887); *Speeder*, 48 N.E. at 597; *Evans*, 24 Mo. App. at 115; Copp v. Colo. Coal & Iron Co., 46 N.Y.S. 542, 543 (N.Y. City Ct. 1897) (oral contract to serve as general counsel); *Booth*, 36 A. at 715; *Prentiss*, 28 Wis. at 133; *see also supra* note 17; *cf.* Pa. Co. v. Dolan, 32 N.E. 802, 807 (Ind. App. 1892) (oral contract; court stating principle, but finding that contract was not at will).

[20] *See, e.g.*, *Orr*, 73 Ill. at 318; Watson v. Gugino, 98 N.E. 18, 20 (N.Y. 1912); Currier v. W. M. Ritter Lumber Co., 64 S.E. 763, 763 (N.C. 1909); Coffin v. Landis, 46 Pa. 426, 434 (1864) (exclusive agency); Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 396 (Wis. 1924) (containing an excellent discussion of the matter); *cf.* Olney Sch. Dist. v. Christy, 81 Ill. App. 304, 304–05 (Ill. App. Ct. 1898) (where contract by its terms gave employer right to discharge at will); Buschmeyer v. Advance Mach. Co., 7 Ohio App. 202, 214–15 (Ohio Ct. App. 1916)

time[21] or, oddly, indicates a substantial duration, such as lifetime employment or permanent employment,[22] again, with an exception if the

(stating principle, but finding, under the circumstances, that contract was to last a reasonable time); *see also supra* note 17.

[21] *See, e.g.*, *De Briar*, 1 Cal. at 451 (implying rule); Fuchs v. Standard Thermometer Co., 144 N.W. 484, 485–86 (Mich. 1913) (holding defendant liable to compensate plaintiff salesman on reorders); Finger v. Koch & Schilling Brewing Co., 13 Mo. App. 310, 310 (Mo. Ct. App. 1883) (holding that employment was either terminable at will of either party or of employer); *Watson*, 98 N.E. at 20; *Coffin*, 46 Pa. at 434 (exclusive agency); *Prentiss*, 28 Wis. at 133; *see also supra* note 17; *cf.* Weidman v. United Cigar Stores Co., 72 A. 377, 377 (Pa. 1909) (stating principle, but holding it inapplicable where contract of employment accompanied sale of business, with sellers to remain as employees following sale).

[22] *See, e.g.*, Lord v. Goldberg, 22 P. 1126, 1128 (Cal. 1889) (permanent employment is at will); Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 786 (Cal. Ct. App. 1990); Gray v. Wulff, 68 Ill. App. 376, 376 (Ill. App. Ct. 1896) (at most, contract was for long engagement which was indefinite and terminable at will, subject to industry practice concerning notice); Faulkner v. Des Moines Drug Co., 90 N.W. 585, 586 (Iowa 1902) (contract's terms specified that it continued until mutually agreed void and this was held the equivalent of permanent or perpetual employment and terminable at will); Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761–62 (La. 1932) (agreement to employ so long as the defendant firm should operate held indefinite and terminable at will); Sullivan v. Detroit, Ypsilanti & Ann Arbor Ry. Co., 98 N.W. 756, 760 (Mich. 1904) (agreement that plaintiff would be permanent attorney for company to be formed created at–will relationship); *Echols*, 52 Miss. at 611–12 (agreement to deliver wood to defendant with no time set; plaintiff argued that contract was to be perpetual, but court held that contracts of indefinite duration are either at will or for reasonable time, and ruled that verdict determining one year to be a reasonable time was proper); Minter v. Tootle–Campbell Dry Goods Co., 173 S.W. 4, 7 (Mo. Ct. App. 1915) (permanent employment and similar terms are indefinite and terminable at will); McKelvy v. Choctaw Cotton Oil Co., 152 P. 414, 415 (Okla. 1915) (permanent employment is terminable at will); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 218 (Wyo. 1994). In *Wilder* the court stated:

> The word "permanent" as used in employment contracts is subject to multiple definitions. Under one standard, "permanent" employment is indefinite employment which continues until a party to the contract terminates the agreement with cause.
>
> However, "permanent" may also be used to refer to employment status, such as distinguishing between an employee on probation or hired temporarily and another who is considered "permanent." We hold that a claim by an employee that the employer promised "permanent" employment does not alter the at will presumption without additional consideration supplied by the employee or explicit language in the contract of employment stating that termination may only be for cause.

Id. (citations omitted). *Cf. Eales*, 663 P.2d at 959 (Alaska 1983) (permanent or lifetime employment, or employment until employee reaches retirement age, is not at–will, but rather is terminable only for cause, under what amounts to a unilateral contract analysis); Ruinello v. Murray, 227 P.2d 251, 253 (Cal. 1951); *Speeder*, 48 N.E. at 597 (hiring at a specified daily rate of

lifetime or permanent employment is paid for with consideration other than simply the employee's labor.[23] Where, however, the parties' agreement calls for employment for a specific duration,[24] or permits termination by the

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pay until such time as a factory was built and thereafter at an increased daily rate was an indefinite hiring, terminable at will); *Harrington*, 60 Mo. App. at 225 (stating principle, but finding in effect that lifetime employment was promised as part of consideration for release for industrial accident); *see also supra* note 17.

[23] *See supra* note 18. *But see Ruinello*, 227 P.2d at 253. In *Ruinello*, plaintiff alleged that he had given up permanent employment to accept a position with defendant, after which he was terminated; the court said as to the position given up:

> Ordinarily a contract for permanent employment, for life employment, for so long as the employee chooses, or for other terms indicating permanent employment, is interpreted as a contract for an indefinite period terminable at the will of either party, unless it is based on some consideration other than the services to be rendered. Since plaintiff has not alleged such consideration or other terms indicating a contrary intention, it cannot be concluded that the employment he gave up was not at the will of either party.

Id. (citation omitted).

[24] *Eales*, 663 P.2d at 959 ("An employee who has been hired for some definite period of time is not an employee at will."); Manzo v. Park, 247 S.W.2d 12, 13, 15 (Ark. 1952) (broker's contract for specific period; unless revocation of broker's authority is for cause, breaching principal owes damages); Ingram v. Century 21 Caldwell Realty, 915 S.W.2d 308, 310, 314 (Ark. Ct. App. 1996) (dissenting opinion); Stark Distillery Co. v. Friedman, 150 S.W. 981, 982–83 (Ky. 1912); Camp v. Baldwin–Melville Co., 48 So. 927, 931 (La. 1909) (finding that actor, hired "for the season" was employed for a definite time and could not be terminated except for cause, despite evidence of "custom" that, when hiring was for indefinite period, it was terminable on two weeks' notice); Saacks v. Mohawk Carpet Corp., 855 So. 2d 359, 364 (La. Ct. App. 2003); Vezina v. Mahoney & Wright Ins. Agency, Inc., 662 N.E.2d 721, 725–26 (Mass. App. Ct. 1996) (as to what the jury may properly consider to determine whether contract is at–will or for a definite period); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 891 (Mich. 1980). *Toussant* is a leading case for the proposition that personnel manuals can convert at–will employment to employment terminable only for cause. *Id.* In reaching that decision, the court rejected the argument that where a contract was indefinite in duration, it necessarily had to be terminable at will, holding in part:

> Where the employment is for a definite term—a year, five years, ten years—it is implied, if not expressed, that the employee can be discharged only for good cause and collective bargaining agreements often provide that discharge shall only be for good or just cause. There is, thus, no public policy against providing job security or prohibiting an employer from agreeing not to discharge except for good or just cause. That being the case, we can see no reason why such a provision in a contract having no definite term of employment with a single employee should necessarily be unenforceable and

employer only for specified reasons, the employment is deemed terminable only for cause,[25] though the employee might be able to terminate the relationship at will.[26] Some courts, in the latter cases, applying a notion of mutuality of obligation, ruled that to the extent that the employee was not bound, and could terminate the relationship at any time, the employer was likewise not bound, and despite its promise to terminate the employee only for specified cause, the agreement was construed to allow termination by either party at will.[27] To the extent that mutuality of obligation means only

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> regarded, in effect, as against public policy and beyond the power of the employer to contract.

Id. (citations omitted).

[25] United Chem. & Exterminating Co. v. Sec. Exterminating Corp., 285 N.Y.S. 291, 293–94 (N.Y. App. Div. 1936) (Dore, J., dissenting) (majority holding that mutual assent is required to terminate agreement, as set forth in the parties' contract; dissent, which would have held contract terminable at will, is probably more correct); McWithy v. Heart River Sch. Dist. No. 22, 32 N.W.2d 886, 888–89 (N.D. 1948) (noting that contract must be terminated in accordance with its terms; school board's closing of school as subterfuge to avoid continuation of teacher was wrongful); *Coffin*, 46 Pa. at 434 (dictum); Jewel Tea Co. v. Himmelstein, 159 N.W. 910, 911–12 (Wis. 1916) (finding where contract specified methods of termination, and plaintiff employer discharged employee other than in accord with contract, lower court properly exercised its discretion in refusing to enjoin defendant from competing with plaintiff).

[26] *Cf. Pitcher*, 139 So. at 761–62 (referring in dictum to these cases where an employee has paid consideration in addition simply to his employment as giving the employee an option); *Finger*, 13 Mo. App. at 310 (that employment was either terminable at will of either party or of employer).

[27] *See, e.g.*, Evans v. Cincinnati, Selma & Mobile Ry. Co., 78 Ala. 341, 345 (1884) (quoting authorities, "'If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but, without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void.' So, in 1 ADD. ON CONTR. § 18, the doctrine is thus expressed: 'All contracts, founded upon mutual promises between persons of full age, must be obligatory upon both parties, so that each may have an action upon it, or neither will be bound.' In Wood's Master and Servant, § 81, the doctrine is very forcibly expressed, as follows: 'In order to constitute a strictly express contract of hiring, the contract should be definite as to all essential elements, as time, business, and compensation; and in order to be enforced, both parties must be bound thereby; that is, the one must be bound to employ, and the other to serve.'"); *Pitcher*, 139 So. at 761–62 (dicta) (since employee would not bind himself to work forever, a promise of permanent employment by the employer, which left the employee free to leave, would lack mutuality); c*f.* Comer v. Bankhead, 70 Ala. 136, 144 (1881) (holding that a statute that empowered a prison warden to contract out the labor of convicts did not authorize the warden to enter into a contract terminable at the will of the other party, and therefore the contract was valid for only the first year of its five–year term: "A contract, *ex vi termini*, imports a mutual agreement between two or more parties; and to be binding on one, must be equally binding on the other.").

that there must be consideration,[28] these cases in effect hold that at-will employment cannot serve as consideration for the employer's promise to terminate only for specified reasons. In other words, a promise by the employee that he would work at will is illusory, and could not support an employer's promise to terminate the employee only for specified cause. On the other hand, where the employee made no such promise, a unilateral contract would be formed, with the employer promising to employ the employee for as long as the employee continued working, or until the employee committed one of the acts set forth as sufficient justification for termination. As is true with unilateral contracts generally, only one party, the employer, is bound; the employee is free to leave at any time, in which case he simply does not get paid.

In truth, the at-will relationship is, by its nature, illusory, and the courts that refuse to enforce the employer's promise where the only consideration received by the employer for its promise is the employee's promise—express or implied—to continue working, almost certainly have gotten it right. However, an articulation by the courts of the illusory nature of the at-will relationship would require them to articulate as well that, as a general principle, the promise of continued employment or, indeed, the actual continued employment, cannot serve as consideration for any promise made by either party. Oddly, this is exactly what many courts routinely hold with respect to promises made by the employee, such as a covenant by the employee not to compete, after employment has begun.[29] However, the courts—with the exception of those in the Lone Star State—never carried this principle forward to its logical (and analytically correct) conclusion: the promise (or actual performance) of continued at-will services cannot serve as consideration for any promise, at any time, by either the employer or the employee (or by any other party to an at-will relationship).[30] Indeed, in what is perhaps *the great paradox* of the at-will doctrine, the vast majority of courts hold that a promise of at-will employment by the employer—or, presumably, any promise by either party—does serve as consideration for any promise made by the employee when the exchange of promises occurs at the inception of the relationship, despite the fact that the relationship is to

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 79(c) cmt. f (1981); 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:14 (4th ed. 1992).

[29] *See infra* note 117.

[30] Such as franchisor–franchisee, supplier–distributor, representative–represented party, etc.

be at-will. Thus, for example, courts routinely hold that an employee's covenant not to compete with a prospective employer is binding as long as the covenant is entered into at the inception of the employment relationship, despite the fact that under the at-will doctrine, the employer could theoretically terminate the relationship at any time thereafter, for any reason or no reason.[31] Similarly, other promises made by the parties are deemed binding as long as they are made at the beginning of the at-will relationship, whereas, those same promises, made after the relationship has begun, are traditionally held to require additional consideration to support them. For example, employee handbooks or personnel manuals are routinely held binding when made available at the inception of the at-will employment relationship, though the employee gives no consideration for them except for the initial agreement to become employed.[32]

Nor is it any answer to assert that, in the case of promises made by an employee at the inception of the relationship, the promisor would not be bound if he or she were terminated immediately or shortly after the hiring. While it is undoubtedly true that a court would not enforce a promise (such as, for example, a restrictive covenant) made by a promisor, the employee, if the promisee, the employer, immediately terminated the relationship, that fact is irrelevant to the question whether the promise is backed by consideration in the first instance. Thus, for example, if an employer paid an employee additional consideration for the employee's promise, given

[31] *See infra* text accompanying notes 92 and following; *see also* Bailey v. King, 398 S.W.2d 906, 908 (Ark. 1966) (the court, after indicating that there was sufficient consideration for the covenant in the giving of initial employment, said: "Of course, if an employer obtained an agreement of this nature from an employee, and then, without reasonable cause, fired him, the agreement would not be binding. In other words, an employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor. As we have pointed out, each case must stand upon its own facts. Here, there is no evidence that this was not a bona fide agreement. There is no evidence of trickery or chicanery. Bailey was employed for nearly two years before his services were terminated, and without going into detail, we simply say that there were valid reasons for ending his employment."); Reed, Roberts Assocs., Inc. v. Bailenson, 537 S.W.2d 238 , 240–42 (Mo. Ct. App. 1976) (multiple restrictive covenants, signed before and during employment); Ramsey v. Mut. Supply Co., 427 S.W.2d 849, 850–51 (Tenn. 1968) (collecting Tennessee authority); *cf.* Panther v. Mr. Good–Rents, Inc., 817 S.W.2d 1, 2–5 (Mo. Ct. App. 1991) (signing of covenant against competition at inception of relationship and thereafter did not constitute additional consideration rendering at–will employment terminable only for cause).

[32] Gadsden Budweiser Distrib. Co. v. Holland, 807 So. 2d 528, 530–31 (Ala. 2001); Coelho v. Posi-Seal Int'l, Inc., 544 A.2d 170, 176 (Conn. 1988); Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 281–83 (Iowa 1995). *But see* Tenet Healthcare Ltd. v. Cooper, 960 S.W.2d 386, 386–87 (Tex. App.—Houston [14th Dist.] 1998, pet. dism'd w.o.j.).

after the at-will relationship had begun, and the employer then immediately terminated the employment, the employee's promise would be no more or less binding than it would be when given at the inception of the relationship. In other words, the presence of consideration in such a case is not the sole, or even a principal, determinant of the enforceability of the employee's promise; rather, whether the promise is binding on the employee will depend upon other factors, such as the length of time the employee has worked and whether the employee has been given specialized training, or has had access to trade secrets or the like, and whether the employer therefore has a protectable interest. Thus, in the case of a restrictive covenant, if the employer terminated the employee shortly after having hired the employee, or shortly after having paid an existing, but short-term, employee consideration in exchange for the covenant, the restriction would probably be held unenforceable, for the reason that the restraint would be, under those circumstances, unreasonable.[33]

Of course, the point is that courts that distinguish between employee promises that are made after at-will employment has begun and those that are made at the inception of the at-will relationship, enforcing the latter while refusing to enforce the former on the ground that consideration exists for the one but not the other, are making a false distinction. It is not solely, or even primarily, the presence or absence of consideration that determines whether the promise is binding, but other factors that apply without regard to whether consideration exists. Since it is true in both cases that the employer could terminate the relationship immediately after its creation[34]—unless there is some bridle on the employer's right to terminate[35]—in neither case is the dispositive issue whether there is consideration for the employee's promise; since the employer's promise in both cases is to retain the employee only as long as the employer chooses to do so, the employer's promise is necessarily and always illusory, whether made at the inception of employment or long after the relationship's existence began.

[33] *See Bailey*, 398 S.W.2d at 908. There might be other reasons for a court's refusal to enforce a restrictive covenant, without regard to whether there was consideration paid for it, such as the absence of an employer interest that can be protected, the determination that the restraint was a bald restraint, obtained solely to prevent competition or the possibility of a failure of consideration.

[34] *See infra* text accompanying note 113 (as to the fact that the employee might also be able to terminate the relationship immediately after making the promise, and the effect that this should or might have on the enforceability of the employee's promise).

[35] *See, e.g.*, *infra* notes 95, 105 & 114.

Virtually all of the reported decisions concerned with the enforceability of promises in an at-will relationship involve disputes regarding the enforceability of restrictive covenants. The cases, however, are clear that this doctrine is applicable regardless of the nature of the promise made by the employee or other at-will promisor. That is, where the promise is made after the at-will relationship has begun, most courts hold that the promise is not binding unless the promisor has received some consideration in addition to the promise that the preexisting at-will relationship will continue, though more and more courts are holding that the actual continuation of that relationship can constitute sufficient consideration.[36] Where, however, the at-will relationship has not yet begun—or where it can fairly be said still to be at its inception[37]—it is said that the promisor is receiving some consideration for his or her promise; that is, the inception of the at-will relationship itself.[38] This is said to be the case despite the fact that, because

[36] *See infra* note 118.

[37] *See* 1st St., Nw., Inc. v. Yeager, No. C4–95–331, 1995 WL 434465, at *2 (Minn. Ct. App. July 25, 1995); Wilmar, Inc. v. Corsillo, 210 S.E.2d 427, 429–30 (N.C. Ct. App. 1974) (noting as to a covenant signed at inception, "It is generally held that the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract. That the employment contract could be terminated by either party upon fifteen days' notice does not mean that the promise of employment was not valuable consideration.")(citations omitted); *see also* Moskin Bros., Inc. v. Swartzberg, 155 S.E. 154, 156 (N.C. 1930) (where the employment was from week to week and could be terminated by either party for any reason whatsoever); McCombs v. McClelland, 354 P.2d 311, 314 (Or. 1960) (dictum); Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 280 (Pa. 1974) (clarifying the *Capital Bakers* case below); Capital Bakers, Inc. v. Townsend, 231 A.2d 292, 293–94 (Pa. 1967) (stating principle, but also noting that a supplemental agreement, entered into afterward, was void despite the fact that it gave the employee a right to notice under Pennsylvania's rule that "[c]ontracts in restraint of trade, made independently of a sale of a business or contract of employment, are void as against public policy, regardless of the value of the consideration exchanged."); Riedman Corp. v. Jarosh, 349 S.E.2d 404, 405 (S.C. 1986); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 34 (Tenn. 1984); Labriola v. Pollard Group, Inc., 100 P.3d 791, 794–95 (Wash. 2004) (containing a good discussion of Washington law, holding that no consideration existed for covenant signed five years after employment had begun).

[38] Van Dyck Printing Co. v. DiNicola, 648 A.2d 898, 901 (Conn. Super. Ct. 1993), *aff'd*, 648 A.2d 877 (Conn. 1994) (covenant signed four weeks after beginning employment binding where all the terms of employment had not previously been agreed upon); Abel v. Fox, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995) (adopting the view that continued employment is sufficient consideration); Robins & Weill, Inc. v. Mason, 320 S.E.2d 693, 696–97 (N.C. Ct. App. 1984) (noting that if employees discussed restrictive covenant with employer before accepting employment, so that it could be said that they were part of the oral contract, fact that written contract was not executed until after employment began did not render covenants lacking in

the relationship is at-will, it might be terminated—albeit by either party—at any time, including immediately. In other words, the vast majority of courts paradoxically hold that there is consideration for the employee's (promisor's) undertaking despite the fact that the employer's (promisee's) undertaking is clearly illusory.

Only Texas has refused to indulge in this fiction, boldly holding that the at-will relationship can, under no circumstances, constitute or serve as consideration for a promise, regardless of when the promise is made, whether at the inception of the at-will relationship or after the at-will relationship has begun.

III. THE TEXAS POSITION: PURE THEORY IN OPERATION

Between 1987 and 1994, the Texas courts and its Legislature battled regarding the enforceability of covenants against competition in that state. That war has been detailed elsewhere;[39] since only a portion of the war involved the at-will relationship, it need not be discussed at great length here. Nevertheless, to understand the full significance of the Texas courts' position with respect to the at-will doctrine, some detail regarding the course of events that took place during that seven-year span is necessary.

The first shot in the war was fired in 1987, when the Texas Supreme Court decided *Hill v. Mobile Auto Trim, Inc.* where it first clarified its rule governing restrictive covenants, indicating that in order to be reasonable, the covenant must satisfy four requirements:

> First, the covenant must be necessary for the protection of the promisee. . .. Second, the covenant must not be oppressive to the promisor, as courts are hesitant to validate employee covenants when the employee has nothing but his labor to sell. In this respect, the limitations as to time, territory, and activity in the covenant not to compete must be reasonable. . .. Third, the covenant must not be injurious to the public, since courts are reluctant to enforce covenants

consideration); *Wilmar, Inc.*, 210 S.E.2d at 429–30; Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 517 (S.D. 1996) (South Dakota statutes permit modification of contracts without the need for consideration).

[39] *See* Steven R. Borgman, *The New Covenant Not to Compete Statute*, 2 TEX. INTELL. PROP. L.J. 19, 19–29 (1993); Todd M. Foss, Comment, *Texas, Covenants Not to Compete, and the Twenty–First Century: Can the Pieces Fit Together in a Dot.Com Business World?*, 3 HOUS. BUS. & TAX L.J. 207, 216–24 (2003).

> which prevent competition and deprive the community of needed goods.
>
> Finally, as with any contract, the non-competitive agreement should be enforced only if the promisee gives consideration for something of value.[40]

This statement of the rule governing restrictive covenants is essentially comparable to that adopted virtually everywhere.[41] However, the Texas Supreme Court, after applying these criteria to the restrictive covenant at issue and finding the covenant unreasonable, without consideration and not necessary to protect any interest of the covenantee, declared the covenant "oppressive to the promisor." It then concluded:

> Today, we are presented with an individual who is skilled in auto trim repair and are asked to prohibit him from engaging in a common calling. We refuse to do so. The longevity of the reasonableness approach has been its flexibility. . .. In 1982, the Utah Supreme Court refused to enforce a hearing aid distributor's non-competition agreement against a former salesman, setting forth the standard which we adopt today: "[c]ovenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable."[42]

The *Hill* court left little doubt regarding its antipathy toward restrictive covenants, in effect holding that it would not generally allow a covenant against competition designed to prevent one from engaging in "a common calling".[43] In reaching this conclusion, the court apparently adopted the broadest definition of the phrase "common calling", suggesting that

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[40] 725 S.W.2d 168, 170–71 (Tex. 1987) (citations omitted).

[41] IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 128 (D. Mass. 1999); Retina Servs., Ltd. v. Garoon, 538 N.E.2d 651, 652–53 (Ill. App. Ct. 1989); Grand Union Tea Co. v. Walker, 195 N.E. 277, 280 (Ind. 1935); Idbeis v. Wichita Surgical Specialists, P.A., 112 P.3d 81, 86–87 (Kan. 2005); Sec. Acceptance Corp. v. Brown, 106 N.W.2d 456, 463 (Neb. 1961); Solari Indus., Inc. v. Malady, 264 A.2d 53, 56 (N.J. 1970); Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005) (holding that physician's restrictive covenant violates public policy); Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 910 (W. Va. 1982).

[42] *Hill*, 725 S.W.2d at 172 (citing Robbins v. Finlay, 645 P.2d 623, 627 (Utah 1982)).

[43] *Id.*

virtually any employee who might provide services to the public would fit within the definition.[44]

Two years later, the Legislature responded with its opening shot, passing the Texas Covenant Not to Compete Act of 1989.[45] A full discussion of that Act and its effect may be found elsewhere.[46] For present purposes, it is enough to point out that the statute set forth criteria for the effectiveness of a covenant against competition and two things of note are significant: first, though the statute provides in general that reasonable covenants are to be enforced, it omits any discussion of the so-called "common calling", an omission intentionally designed, according to commentators and the legislative history, to overrule the *Hill* decision;[47] second, and of greater significance for purposes of this Article, two of the criteria for the enforceability of a covenant not to compete were that the covenant had to be "ancillary to an otherwise enforceable agreement" and, if the covenant was entered into separately from the underlying agreement to which the covenant was appended, there was an additional requirement that "such covenant must be supported by independent valuable

[44] See BLACK'S LAW DICTIONARY 292 (Bryan A. Garner ed., 8th ed. 2004), in which the phrase is given two definitions: (1) "An ordinary occupation that a citizen has a right to pursue under the Privileges and Immunities Clause." (2) "A commercial enterprise that offers services to the general public, with a legal duty to serve anyone who requests the services. For example, an innkeeper or a common carrier engages in a common calling", Garner continues, quoting the following from Professor Atiyah: "'It was only in a very few cases indeed that a person was under a legal obligation to enter into a contract; virtually the only example of such an obligation in fact was the person exercising a 'common calling' such as the innkeeper and the common carrier who were (subject to certain safeguards) legally bound to contract with any member of the public who required their services.' P.S. Atiyah, *An Introduction to the Law of Contract* 8 (3d ed. 1981)." Obviously, someone who is "skilled in auto trim repair" is not in the same legal position as an innkeeper or common carrier, who must make his services available to the general public. Thus, the Supreme Court of Texas obviously had in mind the broad category of "common calling," though subsequent Texas decisions have interpreted the phrase "common calling" somewhat less broadly. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 682–83 (Tex. 1990) (detailing Texas case law respecting the "common calling" doctrine following the *Hill* decision); *see also* Bergman v. Norris of Houston, 734 S.W.2d 673, 674 (Tex. 1987) (holding beauty parlor employees to be engaged in a common calling); *Borgman*, *supra* note 39 at 20–24 (discussing other Texas cases and criticism of the court's common calling discussion.).

[45] TEX. BUS. & COM. CODE ANN. §§ 15.50, 15.51 (Vernon 2002) (hereinafter *1989 Act*); *see also* Borgman, *supra* note 39, at 22.

[46] Borgman, *supra* note 39, at 22–29.

[47] *See* Borgman, *supra* note 39, at 23 n.33.

consideration."[48] The 1989 act clearly demonstrated the legislative intent to make reasonable restrictive covenants enforceable, notwithstanding the courts' apparent disdain for such covenants. The Texas Supreme Court, however, soon flexed its muscles again, deciding several cases in which none of the restrictive covenants at issue were upheld, and two of which are especially significant for purposes of this Article. Among the cases was one in which the court, acknowledging that the Legislature had eliminated the common calling test, backed off from its use of that test, although it strongly suggested that whether a covenantor was engaged in a common calling could still be a factor in the reasonableness of a restraint.[49] The court said in part:

> The references to "common calling" in *Hill* and *Bergman* have proven confusing in determining whether to enforce agreements not to compete. Two courts of appeals have attempted to define "common calling". Another court of appeals has attempted to apply the standard without defining it. Other courts have acknowledged this Court's reference to "common calling" but then reached decisions regarding the enforceability of agreements not to compete in their respective cases without attempting to apply that standard. One court has held that veterinary medicine is not a common calling. Another has held, over a vigorous dissent, that a medical doctor certified as an ear, nose and throat specialist is engaged in a common calling.
>
> In deciding whether an ancillary agreement not to compete is reasonable, the court should focus on the need to protect a legitimate interest of the promisee and the hardship of such protection on the promisor and the public. The nature of the promisor's job—whether it is a common calling—may sometimes factor into the determination of reasonableness, but it is not the primary focus of inquiry. The results in *Hill* and *Bergman* would have been the same irrespective of whether the promisors in those cases had

[48] *1989 Act*, *supra* note 45, 71st Leg., R.S., ch. 1193, § 1, 1989 Tex. Gen. Laws 4852.

[49] *DeSantis*, 793 S.W.2d at 682–83; *see also* Jeffrey W. Tayon, *Covenants Not To Compete in Texas: Shifting Sands from Hill to Light*, 3 TEX. INTELL. PROP. L.J. 143, 220 (1995) (suggesting that the Supreme Court of Texas substituted its at–will doctrine for the "common calling" doctrine).

> been engaged in common callings. Moreover, the Legislature has now rejected common calling as a test for the reasonableness of non-competition agreements. Accordingly, we do not apply "common calling". We hold instead that the principles set out above are to be applied in determining whether an agreement not to compete is reasonable.[50]

Interestingly, two concurring justices believed that the common calling test was still an appropriate test.[51]

Of even greater significance for purposes of this Article were two other cases decided by the Texas Supreme Court shortly after the passage of the 1989 act. In the first of these, *Martin v. Credit Protection Association*, the court held a "restrictive covenant void in all respects", ruling in part that because the employee who had signed the restrictive covenant was at all times an at-will employee, the restrictive covenant was not ancillary to an otherwise valid agreement as required either by case law or under the 1989 statute.[52] Moreover, because the employee was at all times an employee at-will, his continuation as an employee at-will was not consideration sufficient to support the covenant.[53] Since the Texas common law and the 1989 statute each require both that the covenant be ancillary to an enforceable agreement and that there be consideration for it, and since neither was present, the covenant was deemed invalid.

According to the facts in *Martin*, the employee had been hired in 1980 and had received raises and promotions over the years.[54] In April 1983, shortly after being promoted to vice president, he executed the covenant against competition on threat of termination.[55] He continued working for the company for some two years, and within a few days after voluntarily resigning his employment he started his own competing business, soliciting customers of his former employer.[56] The employer sued and obtained injunctive relief, and the court of appeals affirmed the trial court's decision

[50] *Desantis*, 793 S.W.2d at 682–83 (citations omitted).

[51] *Id.* at 689–90.

[52] 793 S.W.2d 667, 669–70 (Tex. 1990).

[53] *Id.* at 670.

[54] *Id.* at 668.

[55] *Id.*

[56] *Id.*

to enforce those portions of the covenant that were deemed reasonable.[57] In reversing the decision, the supreme court stated the general rules that in order to be enforceable, a restrictive covenant must be ancillary to an otherwise valid contract and must be supported by consideration.[58] In a footnote, the court noted that these general rules were consistent with the 1989 act.[59] After reviewing the terms of the restrictive covenant the court set out its rule:

> An enforceable covenant not to compete must be ancillary to an otherwise enforceable agreement. In its findings of fact, the trial court found that the "agreement was ancillary to employment." However, we find that the covenant not to compete was not *ancillary* to an employment agreement as a matter of law. It is undisputed that the "employment agreement" consisted entirely of a covenant not to compete; it did not contain any terms or provisions usually associated with an employment contract such as title, position, duration of employment, compensation, duties or responsibilities. It is also undisputed that [the employee] executed the covenant not to compete approximately three years after he was employed by [the employer] and that [the employee] was required to sign the agreement or he would have been terminated. Furthermore, even if the covenant not to compete was ancillary to the employment agreement, the covenant is not *an otherwise enforceable agreement.* An "employment-at-will" relationship is not binding upon either the employee or employer. Either may terminate the relationship at any time. As a result, we conclude that the covenant not to compete was not ancillary to the employment agreement as a matter of law and that the covenant not to compete is not an otherwise enforceable agreement.
>
> A covenant not to compete, executed on a date other than the date on which the underlying agreement is executed, is enforceable only if it is supported by

[57] *Id.*

[58] *Id.* at 669.

[59] *Id.* at 669, n.1.

> independent valuable consideration. Assuming that the inception of [the employee's] employment-at-will relationship in 1980 constitutes the "underlying agreement," the covenant not to compete was not supported by independent valuable consideration. Since an employment-at-will relationship is not binding upon either the employee or the employer and either may terminate the relationship at any time, continuation of an employment-at-will relationship does not constitute independent valuable consideration to support the covenant. Special training or knowledge acquired by an employee during employment may constitute independent valuable consideration. The trial court found that [the employer] (1) had no trade secrets, and (2) had a sufficiently important interest in its customer information to justify reasonable restrictions. However, "customer information" is neither special training nor knowledge. As a result, we find that the covenant not to compete was not supported by independent valuable consideration. Since the covenant not to compete is not ancillary to an otherwise enforceable agreement or supported by independent valuable consideration, we hold that the covenant not to compete is not enforceable against [the employee].[60]

The *Martin* court thus established the rule in Texas that the at-will relationship cannot constitute an otherwise enforceable agreement, nor can it serve as consideration for a restrictive covenant (or, presumably, any other agreement). But, the Texas court was not through; a year later it decided *Travel Masters, Inc. v. Star Tours, Inc*.[61] The *Martin* court had broken new ground by holding that the at-will employment relationship could not qualify as an otherwise enforceable and valid agreement to which a restrictive covenant could be ancillary. The second holding, however, that continued employment under an at-will agreement would not serve as consideration for a restrictive covenant was not so ground-breaking. Indeed, courts applying the traditional view have long held that a promise of continued employment at-will cannot be consideration for an employee's promise not to compete, since the promise of at-will employment is

[60] *Id.* at 669–70 (footnotes and citations omitted).

[61] 827 S.W.2d 830 (Tex. 1991).

illusory.[62] Additionally, many courts have held that the actual continued employment cannot be consideration for the restrictive covenant either, since it is not bargained for, a rule that has since been modified in many jurisdictions as will be discussed subsequently.[63] However, virtually all other jurisdictions hold that a restrictive covenant entered into at the beginning of an at-will employment relationship is binding; and this is where *Travel Masters* made its great impact.[64]

In *Travel Masters*, the employee, who had experience as a travel agent, signed a restrictive covenant at the inception of her at-will employment with the plaintiff.[65] Several years later, she formed her own, competing travel agency with her parents, and subsequently left the plaintiff and began working full time for her agency, the defendant.[66] The plaintiff brought suit to enforce the restrictive covenant, seeking an injunction to prevent its former employee from soliciting specific customers.[67] It also brought a tortious interference with contractual relations lawsuit against the former employee's father and the corporation the employee and her father had formed.[68]

The court noted that the contemporaneity of the covenant with the inception of employment did not change the analysis:

> The only difference between this case and *Martin* is that [the employee] executed the covenant not to compete contemporaneously with the inception of her employment while the *Martin* covenant was executed three years after [the employee there] began employment.
>
> In both cases, however, the employment relationship was "at-will". An "employment-at-will" relationship is not binding upon either the employee or the employer. Either may terminate the relationship at any time. Thus, an employment-at-will relationship, although valid, is not an otherwise enforceable agreement. Because employment-at-will is not binding upon either the employee or the

[62] *See supra* note 35.
[63] *See supra* note 36.
[64] *See supra* note 31.
[65] 827 S.W.2d at 831.
[66] *Id.* at 832.
[67] *Id.*
[68] *Id.*

> employer and is not an otherwise enforceable agreement, we conclude that a covenant not to compete executed either at the inception of or during an employment-at-will relationship cannot be ancillary to an otherwise enforceable agreement and is unenforceable as a matter of law. Since [the employee's] covenant not to compete is not ancillary to an otherwise enforceable agreement, we hold that the covenant not to compete is an unreasonable restraint of trade and unenforceable on grounds of public policy.[69]

Thus, the Texas court ruled that an at-will relationship could not support a covenant against competition even though it was entered into at the inception of the at-will relationship.[70] And, because the covenant was invalid, it would not support a cause of action for tortious interference with contractual relations.[71]

The Texas Supreme Court had thus clearly indicated its disdain for restrictive covenants, and in doing so had made clear its view that the at-will employment relationship—and presumably, any at-will relationship—although valid, is by its nature illusory, and therefore incapable of supporting a restrictive covenant. Given the reasoning for this decision, it logically follows that the at-will relationship, as viewed by the Texas courts, is incapable of supporting any other agreement as well.

But the war in Texas was not yet over. *Travel Masters* was decided in December 1991;[72] a little over a year later, in 1993, the Texas Legislature amended the Covenant Not to Compete Act.[73] According to legislative history, the new Act was specifically designed to overrule *Martin* and *Travel Masters*.[74] While the Legislature may have intended to overrule

[69] *Id.* at 832–833 (citations omitted).

[70] *Id.*

[71] *Id.* at 833.

[72] *Id.* at 830.

[73] Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 965, 1993 Tex. Gen. Laws 4201.

[74] *Borgman*, *supra* note 39, at 27. The act has provided since 1989 that the burden of establishing the reasonableness of the covenant in an employment contract is on the employer; the 1993 amendment said that this was the case whether the ancillary agreement was "for a term or at–will", thereby indicating that the Legislature intended to include at–will employment agreements, which would overrule *Travel Masters* and *Martin*, since, by implication, at–will employment agreements could be deemed agreements to which a restrictive covenant might be ancillary. Borgman examines the legislative intent:

Martin and *Travel Masters*, its intent was apparently not sufficiently clear for the Texas Supreme Court. In 1994, that court decided *Light v. Centel Cellular Co. of Texas*, in which the court once again considered a restrictive covenant entered into by an at-will employee.[75] Much of the *Light* case is beyond the scope of this Article, since the court essentially construed the Texas statute narrowly, and held that the restrictive covenant was unenforceable, despite the fact that it found an otherwise enforceable agreement, ruling that the covenant was not ancillary to that otherwise enforceable agreement.[76] Thus, the Supreme Court of Texas held that in order for a restrictive covenant to be deemed ancillary to the otherwise enforceable agreement, the covenant must be related to the otherwise enforceable agreement, so that the consideration given by the employer is what gives rise to its interest in restraining the employee from competition, and the covenant or restriction must be designed to enforce the employee's return promise.[77] Because the court found that the otherwise enforceable agreement consisted of the employer's promise to provide initial training in exchange for the employee's promise to give fourteen days notice and provide an inventory upon her termination of employment, and the covenant not to compete bore no relationship to either of these two promises, the covenant was not ancillary to the otherwise enforceable agreement.[78]

Of significance to this Article is the court's reiteration that the at-will relationship, even under the 1993 statute, cannot give rise to an otherwise

> The amendment expressly applies the rule regarding the burden of proof to such agreements "for a term or at will." The intended purpose is clear—[the amendments] allow the enforcement of a non–competition agreement ancillary to an at will employment relationship. A review of the legislative history reveals exactly this intent. The relevant bill analysis notes that the amendment provides "that 'at will' personal service contracts are covered." This statement is made after noting a "case invalidated covenants not to compete in connection with 'at will' employment contracts." Hence, both the text of the 1993 Act and the legislative history clearly reflect an intent to overrule the rule applied in *Martin* and *Travel Masters* which prohibits enforcing noncompetition agreements ancillary to an at will relationship.

Id. (citing Act of 1993; HOUSE COMM. ON BUS. & COMMERCE, BILL ANALYSIS, Tex. H.B. 7, 73rd Leg., R.S. (1993)).

[75] 883 S.W.2d 642 (Tex. 1994).

[76] *Id.* at 648.

[77] *Id.* at 647.

[78] *Id.* at 646–47.

enforceable agreement.[79] With respect to this aspect of the case, the court stated:

> Although Light was an employee-at-will, and by definition, she and her employer could not have an "otherwise enforceable agreement" between them pertaining to, for example, the duration of her employment, at-will employment does *not* preclude the formation of other contracts between employer and employee. At-will employees may contract with their employers on any matter except those which would limit the ability of either employer or employee to terminate the employment at will. Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract. In short, we hold that "otherwise enforceable agreements" can emanate from at-will employment so long as the consideration for any promise is not illusory. This holding does not conflict with our recent decision in *Travel Masters, Inc. v. Star Tours, Inc.*, because in that case there was no otherwise enforceable agreement between the parties and we similarly held that the at-will employment relationship alone could not constitute an otherwise enforceable agreement.[80]

The court further explained its position with respect to the at-will relationship in three exceptionally important footnotes contained within the above paragraph.[81] Citing Professor Farnsworth's treatise on contracts, the court, in the first of these footnotes, explained the illusory nature of promises contingent on continued at-will employment:

> Any promise made by either employer or employee that depends on an additional period of employment is illusory

[79] *Id.* at 644–45.

[80] *Id.* (footnotes and citations omitted).

[81] *Id.* at 645 n.5, n.6, n.7.

> because it is conditioned upon something that is exclusively within the control of the promisor. Thus, the promise of a raise to an at-will employee, for example, would be illusory because it is dependent upon some period of continued employment. Upon promising a raise in wages, the employer could fire the employee and be under no obligation to perform the promise.[82]

The court is correct in its assertion that the promise of a raise cannot be consideration for an at-will employee's *promise* not to compete, since the promised raise might never be given, and the employee could be terminated immediately after signing the covenant. Whether such a termination would constitute a lack of good faith or give rise to an estoppel is another matter.[83]

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[82] *Id.* at 645, n.5 (explaining that if the obligation of a promise is terminable at will, the promise is illusory) (citations omitted).

[83] *See infra* notes 95, 105 & 114. *See also* Bower v. AT & T Techs., Inc., 852 F.2d 361, 363–66 (8th Cir. 1988) (allowing recovery based on promissory estoppel for reliance damages incurred when employer promised at–will employment but broke promise; the court discusses at length the distinction between enforcing an at–will contract and allowing recovery of reliance damages); Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 787 (Cal. Ct. App. 1990) (stating, "Although appellant has not demonstrated that respondent required good cause to terminate him, implicit in such an 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 only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job. Further, the employer's conduct here is governed by the doctrine of promissory estoppel. . . ."); Newkirk v. Precision Auto., Inc., No. 12498, 1992 Ohio App. LEXIS 967, at *9 (Ohio Ct. App. March 3, 1992) (basing its discussion on promissory estoppel, the court said, "A promise to hire someone is not fulfilled by simply allowing that person to enter the business premises. Having been told he was hired to be a district manager, Newkirk was entitled to a good faith opportunity to train for, and to fulfill his responsibilities in, that position, to the satisfaction of Precision Tune. Newkirk was never given such a chance, and thus, we find that Precision Tune did not fulfill its promise to hire him to be a district manager." (citing Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981))); *Grouse*, 306 N.W.2d at 116 (relying on offered position, pharmacist quit his job and turned down other opportunities, after which the would–be employer refused to hire him; the court said, "The parties focus their arguments on whether an employment contract which is terminable at will can give rise to an action for damages if anticipatorily repudiated. . . . Group Health contends that recognition of a cause of action on these facts would result in the anomalous rule that an employee who is told not to report to work the day before he is scheduled to begin has a remedy while an employee who is discharged after the first day does not. We cannot agree since under appropriate circumstances we believe [Restatement of Contracts] section 90 would apply even after employment has begun. . . . The conclusion we reach does not imply that an employer will be liable whenever he discharges an

By the same token, however, if the employer gave the employee a raise, that is, actually paid the employee a sum of money at the time that the employee signed the restrictive covenant, the restrictive covenant might be construed as a promise by the employee seeking a unilateral contract, the payment of money.[84] The court in its next footnote discussed the possibility of a valid unilateral contract being formed.[85] Still citing to Professor Farnsworth, the court stated:

> If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. For example, suppose an employee promises not to disclose an employer's trade secrets and other proprietary information, if the employer gives the employee such specialized training and information during the employee's employment. If the employee merely sought a promise to perform from the employer, such a promise would be illusory because the employer could fire the employee and escape the obligation to perform. If, however, the employer accepts the employee's offer by performing, in other words by providing the training, a unilateral contract is created in which the employee is now bound by the employee's promise. The fact that the employer was not bound to perform because he could have fired the employee is irrelevant; if he has performed, he has

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."); Gorham v. Benson Optical, 539 N.W.2d 798, 801–02 (Minn. Ct. App. 1995) (expanding the *Grouse* decision, above, to the employee who had already begun employment); *cf.* Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (holding that termination of at–will employee to avoid paying him bonus violated obligation of good faith and was actionable); Mers v. Dispatch Printing Co., 483 N.E.2d 150, 155 (Ohio 1985) (holding that promissory estoppel can modify the at–will relationship); Patrick v. Painesville Commer. Props., 704 N.E.2d 1249, 1253–56 (Ohio Ct. App. 1997) (holding that at–will relationship was modified to one terminable for cause by promissory estoppel, and affirming damage award based on employee's expectation interest).

[84] Actually, this seems to be a reverse unilateral contract, wherein the promisee pays the money in exchange for the promisor's promise. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 (Tex. 1994); *see* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 4:4, 4:5, 6:9 (4th ed. 1990).

[85] *Light*, 883 S.W.2d at 645 n.6.

> accepted the employee's offer and created a binding unilateral contract. To form such a unilateral contract, however, (1) the performance must be bargained-for so that it is not rendered past consideration, and (2) acceptance must be by performance and not by a promise to perform. Such a unilateral contract existed between Light and [her employer] as to Light's compensation. But such unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an "otherwise enforceable agreement at the time the agreement is made" as required by [the statute].[86]

The most interesting aspect of the court's recognition that, although a promise to do something made by the employer to an at-will employee is, by its nature, illusory, since the employer can terminate the employment at any time, the actual act of doing something—whatever it might be—in exchange for the restrictive covenant would be consideration for the employee's promises contained within the restrictive covenant is this: the court recognizes that in order for a performance to constitute consideration, that performance must be bargained for by the employee.[87] In other words, the employee must be seeking that which the employer does—the act undertaken by the employer—as the exchange for the employee's promises contained within the restrictive covenant. This recognition by the Texas court escapes those courts that hold that an at-will employee who signs a restrictive covenant, and is subsequently employed for a substantial length of time, or given raises and promotions, has received consideration for his or her promise. Unless the employee is actually bargaining for the continued employment, raises or promotions, the actual continued employment cannot be consideration, regardless of what other benefits have been conferred on the employee.[88] Unfortunately, most courts that hold that

[86] *Light*, 883 S.W.2d at 645 n.6 (citing Farnsworth, *supra* note 61, at 75–76) (citations omitted).

[87] *Id.*

[88] *See* Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 38–39 (Tenn. 1984) (Brock, J., dissenting). In *Ingram*, the dissent stated:

> We are urged to hold in this case that consideration may be found to have consisted of promotions and increases in compensation granted to the defendants–employees over the years of their employment with the appellant. . . . I decline this invitation because of

the actual continued employment of an at-will employee for a substantial length of time does constitute consideration for the employee's promises contained within a restrictive covenant neglect to consider this "bargained for" requirement of consideration.

The final footnote written by the Texas Supreme Court in *Light* considers the inclusion by the Legislature of language suggesting that the at-will relationship might support a promise by an employee—in other words, that the at-will employment relationship can serve as the otherwise valid agreement to which the restrictive covenant is ancillary.[89] As to this, the Supreme Court of Texas stated:

> We reach this conclusion [that the at-will relationship can give rise to other enforceable agreements, so long as there is independent consideration given by the employer for the other agreements] on the basis of black-letter contract law, and not because the legislature added the words "at-will" to [the statute], which now provides, in pertinent part:
>
> > (b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, *for a term or at will*, the promisee has the burden of establishing that the covenant meets the criteria specified by [other sections of this statute].
>
> As written, part (b) has no meaning, because there cannot be an "[otherwise enforceable] agreement" which

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the fundamental doctrine that in order for an act to constitute consideration for a promise it must have been "bargained for and given in exchange for that very promise." There is simply no indication in this record whatever for a conclusion that promotions and increases in compensation, given years after the covenants not to compete were executed, were bargained for and given in exchange for those covenants. The covenants not to compete in the instant case were not bargained for at all but were merely imposed upon the employees after their employment began. I would hold that these covenants fail for lack of consideration. The majority finds consideration where there is none."

Id. (citations omitted) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 75 (1963)).

[89] 883 S.W.2d at 645 n.7.

> "obligate[s]" a promisor "at will." Describing something as an at-will obligation is nonsensical.[90]

Thus, despite the apparent intent of the Legislature to overrule *Travel Masters* and *Martin* and allow restrictive covenants to be supported by an at-will relationship, the Texas Supreme Court remains adamant—and correctly so—that no such effect is possible.[91] Despite the fact that the Texas Supreme Court is correct in this regard, no other jurisdiction has joined it in its view that the at-will relationship, by its terms, is incapable of supporting any promise for the simple reason that the at-will relationship is illusory. It now remains appropriate to consider how other courts have dealt with the matter.

IV. THE DISTINCTION BETWEEN PROMISES MADE AT THE INCEPTION OF, AND AFTER THE AT-WILL RELATIONSHIP HAS BEGUN

As discussed above, the Texas court is theoretically correct in its assessment that the at-will relationship is illusory. Moreover, to the extent that there is a concern that the at-will relationship has outlived its usefulness, or that it is unreasonably tilted in favor of the employer,[92] the Texas decisions also provide solace to employees, since they must actually receive something other than at-will employment—whether at the inception

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[90] *Id.* (citing TEX. BUS. & COM. CODE §§ 15.50–15.51 (Vernon Supp. 1994)) (emphasis in original).

[91] *Id.*

[92] *See* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 656 (2000); Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 377 (2002); Kurt H. Decker, *Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At–Will Employees?*, 38 DUQ. L. REV. 723, 726 n.6 (2000); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (noting but refuting the arguments); Daniel Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 117 (2006); Peter Linzer, *The Decline of Assent: At–Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 335–37 (1986); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1137 (1989); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1–5 (1979) (and predicting the demise of the doctrine); Ellen Rust Pierce, Richard A. Mann & Barry S. Roberts, *Employee Termination At Will: A Principled Approach*, 28 VILL. L. REV. 1, 3 (1982); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000) (that "the trend in the last ten years has been toward more employer dominance.").

of the at-will relationship or after it has begun—in order for any promise the employee makes, such as in a restrictive covenant, to become enforceable. Thus, as the Texas court makes clear, it is not enough for the employer to promise something, since the employer could release the employee at any time thereafter and presumably not break its promise.[93] As such, the Texas rule is actually more beneficial to the employee, presumably the weaker party in the at-will relationship, than is the rule adopted by a majority of jurisdictions that, at least at the inception of the at-will relationship, employee promises are made binding by the at-will hiring.

As indicated previously, most courts draw a distinction between the enforceability of promises made at the inception of the at-will relationship and the enforceability of promises made after the at-will relationship has begun.[94] According to the majority of courts, a promise made by the employee at the inception of the at-will relationship is binding, the consideration for it being the initial hiring, though some courts, apparently recognizing the theoretical difficulties with this position, indicate that the employer must give the employee an opportunity to perform or succeed under the at-will agreement, based either on the obligation of good faith and fair dealing, on the employee's reliance and a form of promissory estoppel, or both.[95]

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[93] *Light*, 883 S.W.2d at 645 n.5. In this sense, the court may have overstepped the mark slightly. It would seem that if the employer promised the employee a bonus for the employee's actual continued employment, even though the employment were to continue at will, a unilateral contract could be created whereby the employee's continued work—even for a brief time, since the law does not generally inquire into the adequacy of consideration—would serve as consideration for the promised bonus, making the employer liable to pay it regardless of whether the employer terminated the employee. However, the court's analysis would be correct with respect to any *promise* made by the employee in exchange for the employer's promise of a bonus.

[94] *See supra* text accompanying notes 10 & 29-31.

[95] *See infra* notes 105 & 114; *see also* Bower v. AT & T Techs., Inc., 852 F.2d 361, 364 (8th Cir. 1988) (allowing recovery of reliance damages based on promissory estoppel for broken promise of at-will employment); Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 787 (Cal. Ct. App. 1990) (stating that implied covenant of good faith and fair dealing and doctrine of promissory estoppel require employer who induces employee to sever former employment and move across the country to give employee a chance to demonstrate his ability to satisfy the requirements of the job); Newkirk v. Precision Auto., Inc., No. 12498, 1992 Ohio App. LEXIS 967, at *9 (Ohio Ct. App. March 3, 1992) (stating that promissory estoppel requires employer to allow employee a good faith opportunity to train for and fulfill new job responsibilities to the satisfaction of employer, and employer who violates that obligation is liable for damages employee incurs in reliance on employer's promise, including wages lost by leaving former job, less any amount employee actually earned at new job, until employee could either find another

Since most courts hold that promises made at the inception of the at-will relationship are backed by consideration, it becomes important to consider when the at-will relationship is deemed to begin. A number of courts have made clear that the at-will relationship does not necessarily begin at a specific, definite point in time, but rather extends over a short period of time during which the parties are beginning their relationship. In one leading case, *Central Adjustment Bureau, Inc. v. Ingram*, the Tennessee Supreme Court held "that a covenant signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement, and that therefore, under [prior case law], it is supported by adequate consideration."[96] This holding has been mirrored in other courts, where a restrictive covenant or other employee agreement is signed shortly after the at-will relationship has begun.[97] Moreover, a number of courts have indicated that, where a restrictive covenant was discussed by the parties before the at-will relationship began, no new consideration was required, although the actual covenant was not signed until substantially after employment had begun.[98] These decisions apparently accept the notion that

job, or with reasonable diligence should be able to find another job). *See also* Grouse v. Group Health Plan, Inc, 306 N.W.2d 114, 116 (Minn. 1981). In *Grouse*, the court refuted defendant's argument that since employment would have been at will, it could have terminated employee without liability, and therefore could not be held liable for not hiring him in the first place. *Id.* at 116. It noted that promissory estoppel would be applicable in both instances, that is, before the employee began work and once he had started. *Id.* Thus, the court held that the prospective employee "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," and that he could recover reliance damages based on what "he lost in quitting the job he held and in declining at least one other offer of employment elsewhere." *Id. See also* Gorham v. Benson Optical, 539 N.W.2d 798, 801 (Minn. Ct. App. 1995) (expanding the *Grouse* decision, above, to the employee who had already begun employment); *cf.* Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (holding that termination of at–will employee to avoid paying him bonus violated obligation of good faith and was actionable); Mers v. Dispatch Printing Co., 483 N.E.2d 150, 155 (Ohio 1985) (stating that promissory estoppel can modify the at–will relationship); Patrick v. Painesville Commercial Props., 704 N.E.2d 1249, 1253–56 (Ohio Ct. App. 1997) (holding that at–will relationship was modified to one terminable for cause by promissory estoppel, and affirming damage award based on employee's expectation interest).

[96] 678 S.W.2d 28, 33 (Tenn. 1984).

[97] *E.g.*, Nat'l Bus. Servs., Inc. v. Wright, 2 F. Supp. 2d 701, 707 (E.D. Pa. 1998); Beneficial Fin. Co. of Lebanon v. Becker, 222 A.2d 873, 876 (Pa. 1966); Nagaraj v. Arcilla, 20 Pa. D. & C.3d 574, 583 (C.P. Bucks 1981).

[98] *See, e.g.*, Basicomputer Corp. v Scott, 973 F.2d 507, 511 (6th Cir. 1992) (applying Ohio law); Van Dyck Printing Co. v. DiNicola, 648 A.2d 898, 901 (Conn. Super. Ct. 1993), *aff'd*, 648

the restrictive covenant in such a case is really entered into as part of the inception of the at-will relationship.

Another issue where the promises are exchanged at the beginning of the at-will relationship arises if the relationship is terminated shortly after it has begun.[99] In such a case, how a court deals with the issue might depend in part on what it deems the consideration for an at-will employee's promises, in part on the nature of the promises and, perhaps (though inappropriately), in part on whether the termination was the employer's or the employee's idea. As to the first of these matters, if the court views the consideration as the employer merely giving the employee the at-will position—that is, hiring the employee—the employee's promises could, on a purely theoretical basis, be binding. Under the longstanding rule that a court will not inquire into the adequacy of consideration, but only into its legal sufficiency,[100] where the consideration consists of the employer hiring the employee, that act is presumably completed as soon as the hiring takes place. Since the hiring is at-will, even if the employer releases the employee immediately afterward, there can be no lack of consideration (it

A.2d 877 (Conn. 1994) (finding that covenant signed four weeks after beginning employment was binding where all the terms of employment had not previously been agreed upon); Ellis v. James V. Hurson Assocs., Inc., 565 A.2d 615, 620 (D.C. 1989) (finding that covenant signed three weeks after employment was binding where application mentioned that covenant would be required and employee was retained for some ten years thereafter); Abel v. Fox, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995) (though Illinois adopts as well the view that continued employment is sufficient consideration); Wade S. Dunbar Ins. Agency, Inc. v. Barber, 556 S.E.2d 331, 335 (N.C. Ct. App. 2001) (covenant not signed until a year after employment had begun); Robins & Weill, Inc. v. Mason, 320 S.E.2d 693, 697 (N.C. Ct. App. 1984) (stating that if employees discussed restrictive covenant with employer before accepting employment, so that it could be said that they were part of the oral contract, the fact a that written contract was not executed until after employment began did not render covenants lacking in consideration); Wilmar, Inc. v. Corsillo, 210 S.E.2d 427, 430 (N.C. Ct. App. 1974); Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 517 (S.D. 1996) (under South Dakota statutes permitting modifications of contracts without the need for consideration); *cf.* Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 841 (Pa. 1957) (covenant was not entered into until four weeks after successor company purchased predecessor, but it was held to be at the time of employment because the employees were "provisional" during the four week period).

[99] *See Martucci*, 136 A.2d at 841. In *Martucci*, employees had worked for predecessor for some time, but they were employed by successor for only a short time after the restrictive covenants were signed. *Id.* Although the employees were precluded from soliciting customers or trading on confidential information, they were free to compete with their new employer. *Id.*

[100] 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:21 (4th ed. 1992).

having already been paid) and no inquiry into the value of the hiring. This same outcome would result where the consideration for the employee's promises contained in, say, a restrictive covenant, is the employer's promise to hire the employee, since the employer theoretically undergoes a detriment by promising to do that which it had no legal duty to do—give the employee a job—and the promisor-employee receives the promise of a job, albeit one that might be terminated immediately. Moreover, as long as the employer binds itself to hire the employee, though the employer might turn right around and fire the employee immediately, the employer's promise is theoretically not illusory; the employer does not have the option of not giving the employee the job.

The difficulty with this purely theoretical finding of a detriment and a benefit is that it ignores the fact that, as a real matter, the employee is not bargaining for a promise to be hired for an instant, or for the actual hiring for an instant. Moreover, the same analysis could result in the case of a promise of continued at-will employment being binding, so long as it was construed to mean only that the employer thereby bridled its freedom to discharge for only an instant.[101] Likewise, the actual continued at-will employment for an instant would qualify as a legal detriment. Thus, those courts that urge that there is no consideration problem when the promises—one of which is for the commencement of an at-will relationship—are exchanged at the inception of the relationship because the employer

[101] *See* Ackerman v. Kimball Int'l, Inc. 634 N.E.2d 778, 781 (Ind. Ct. App. 1994), *aff'd*, 652 N.E.2d 507, 509 (Ind. 1995). In *Ackerman*, the Indiana Supreme Court agreed with and adopted the analysis by the court of appeals in addressing the validity of a covenant signed some eleven years after employment had begun. *Id.* The covenant stated as its consideration that the employer agreed "to employ or continue to employ employee at the salary or wage as now or from time to time agreed on," the employer reserving, however, the right to terminate the employee at will. *Id.* The appellate court noted:

> We agree that the Employment Agreement favors [the employer]. . . . Nevertheless, we do not inquire into the adequacy of the consideration exchanged in a contract. Here, in exchange for his promise not to compete with [the employer] or divulge [its] confidential business information, [the employee] received [the employer's] promise to continue his at–will employment. An employer's promise to continue at–will employment is valid consideration for the employee's promise not to compete with the employer after his termination. We conclude that [the parties] exchanged valid consideration in the Employment Agreement and that the Employment Agreement is not unenforceable for lack of consideration.

Id. (citations omitted). *See* Lake Land Employment Group of Akron, LLC v. Columber, 804 N.E.2d 27, 31–32 (Ohio 2004) (discussed at length subsequently in the text).

undergoes a detriment and/or the employee receives a benefit,[102] are ignoring both the requirement that the consideration be bargained for and that, as the drafters of the Restatement (Second) have put it, while "there might theoretically be a bargain to pay for the utterance of the words, but in practice it is performance which is bargained for. Where the apparent assurance of performance is illusory, it is not consideration for a return promise."[103] Here, while it is possible, as a theoretical matter, to find that the promise to begin an at-will relationship or the actual beginning of the at-will relationship is consideration for promises made by the other party to the relationship, the reality is that the other party is not bargaining merely for the promise or the inception itself, but for something more; and the fact that the party promising to begin or beginning the at-will relationship reserves to itself the unbridled power to terminate that relationship at any time, including immediately, makes the promise or actual performance illusory, and the other party's promises not binding.

On the other hand, where a court determines that the consideration for an at-will employee's (or other at-will party)[104] promises is a good faith

[102] *See ex parte* McNaughton, 728 So. 2d 592, 595–96 (Ala. 1998) (finding that employer's promise of at–will employment was sufficient consideration for employee's promise to arbitrate disputes); Sherman v. Pfefferkorn, 135 N.E. 568, 569 (Mass. 1922) (since either party could terminate employment, restrictive covenant was not lacking in consideration because employment was at–will); *Martucci*, 136 A.2d at 845 n.13 (stating principle); Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 34 (Tenn. 1984); Riedman Corp. v. Jarosh, 349 S.E.2d 404, 405 (S.C. 1986). *But cf.* IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 131 (D. Mass. 1999).

See also Bailey v. King, 398 S.W.2d 906, 908 (Ark. 1966). In *Bailey*, the court, after indicating that there was sufficient consideration for the covenant in the giving of initial employment, said:

> Of course, if an employer obtained an agreement of this nature from an employee, and then, without reasonable cause, fired him, the agreement would not be binding. In other words, an employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor. As we have pointed out, each case must stand upon its own facts. Here, there is no evidence that this was not a *bona fide* agreement. There is no evidence of trickery or chicanery. Bailey was employed for nearly two years before his services were terminated, and without going into detail, we simply say that there were valid reasons for ending his employment.

Id. (emphasis in original).

[103] RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1979).

[104] Many of the cases in this area deal with at–will franchisees, distributors or independent contractors, as well as employees; the text will refer to all of these parties as "employees" for the sake of expedience.

opportunity to perform or succeed at the at-will job or other opportunity,[105]

[105] *See supra* notes 83 & 95; *infra* note 114. This may actually convert the at–will relationship to one terminable only after a reasonable time or for one terminable only for a good faith reason. *See* Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750, 751–52 (Ky. 1982); Mayflower Air–Conditioners, Inc. v. W. Coast Heating Supply, Inc., 339 P.2d 89, 91–92 (Wash. 1959) (reasonable notice required to terminate at–will distributorship, and absent that, distributor is entitled to damages); Cal. Wine Ass'n v. Wis. Liquor Co. of Oshkosh, 121 N.W.2d 308, 316–18 (Wis. 1963) (court found implied exclusive distributorship and held that it was terminable at will, subject to the giving of reasonable notice, affirming trial court's determination that 60 days was reasonable, where parties had been dealing with one another for 17 years). In *Higdon*, the employer, after employee had been with employer for four years, entered into employment contract providing that employer could terminate employee if employer was dissatisfied with employee. 641 S.W.2d at 751–52. The trial court enforced a restrictive covenant entered at the same time, the court of appeals reversed for lack of consideration, and the supreme court reversed and reinstated the trial court's decision. *Id.* The court, after noting that the employer could have terminated and then rehired the employee, so that there would be new consideration, said:

> The majority opinion of the Court of Appeals treated [good faith dissatisfaction clause] as simply *insuring* "that employment will be discontinued if it becomes unsatisfactory. Significantly, it does not provide that employment would be continued if it is satisfactory." We are unable to accept such a strained construction of the contract. If the employer has an arbitrary right to discharge the employe—that is, in good faith or bad—what earthly function would it serve to add that if in good faith he determines that the employee's work is not satisfactory he will fire him? We think, rather, that the sensible solution is to construe paragraphs 2.03 and 6.01 together as meaning that the employer's right to discharge the employe on the ground that his services are not satisfactory, or are no longer needed, is subject to the requirement of good faith. We are confident that Walker would be the first to espouse such a view if this were a suit against Higdon for wrongful termination of the employment.

Id. at 752 (citations omitted) (emphasis in original). *See also* Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 173 (8th Cir. 1987) (applying South Dakota law, interpreting Eighth Circuit cases and holding "that a distributor is entitled to a reasonable period to recoup its investment, during which the agreement may not be terminated without good cause."); Lockewill, Inc. v. U.S. Shoe Corp., 547 F.2d 1024, 1029 (8th Cir. 1976) (applying Missouri law which permits the distributor to have a reasonable time to recoup its investment, but holding that plaintiff had had such a reasonable time); Des Moines Blue Ribbon Distribs., Inc. v. Drewrys Ltd., U.S.A., Inc., 129 N.W.2d 731, 737 (Iowa 1964) (terminated distributor entitled to reasonable notice and, in lieu of that, damages); Atl. Richfield Co. v. Razumic, 390 A.2d 736, 739 (Pa. 1978); Seegmiller v. W. Men, Inc., 437 P.2d 892, 894 (Utah 1968) ("For this reason, when parties enter into a contract of this character [a franchise relationship], and there is no express provision that it may be cancelled without cause, it seems fair and reasonable to assume that both parties entered into the arrangement in good faith, intending that if the service is performed in a satisfactory manner it will not be cancelled arbitrarily."); *cf.* Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho, Inc., 851 P.2d 946, 949–51 (Idaho 1993) (holding that the implied covenant of good

an immediate termination would, presumably, constitute a lack or, more appropriately, a failure of consideration.[106] In such a case, according to traditional contract doctrine, the employer would not be entitled to enforce the employee's promises.[107] Whether the employee would be able to bring

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faith and fair dealing does not apply to independent contractors, but a vigorous dissent objected that there was no reason to treat at–will employees and at–will independent contractors differently).

[106] As to the similarity of the two doctrines, and their differences, *see* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:11 (4th ed. 1992 & Supp. 2006).

[107] *See* Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 915 (W. Va. 1982) (observing that "if the entire contract fails, for lack of consideration, fraud, duress, adhesion or other contractual excuse, the covenant is also without effect"). Similarly, the court in *Bailey*, after indicating that there was sufficient consideration for the covenant in the giving of initial employment, noted that "[o]f course, if an employer obtained an agreement of this nature from an employee, and then, without reasonable cause, fired him, the agreement would not be binding. In other words, an employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor." 398 S.W.2d at 908. *See also Simko, Inc. v. Graymar Co.*, where the court, in deciding that it would apply the rule that substantial subsequent employment could constitute consideration for a restrictive covenant, said:

> Were an employer to discharge an employee without cause in an unconscionably short length of time after extracting the employee's signature to a restrictive covenant through a threat of discharge, there would be a failure of the consideration. An employer who bargains in bad faith would be unable to enforce the restrictive covenant. Rather than adopt a bright line but inequitable rule, we deem the better approach is to hold that the continuation of employment for a substantial period beyond the threat of discharge is sufficient consideration for a restrictive covenant.

464 A.2d 1104, 1107 (Md. Ct. Spec. App. 1983). In *Frierson v. Sheppard Bldg. Supply Co.*, where the court, in dictum stated:

> If appellant had been discharged shortly after signing the restrictive agreement, this Court would probably hold the agreement was not supported by consideration. But appellant was not discharged until more than four years had elapsed during which time appellant had drawn as salary and bonuses about $200,000. Thus, the actual continuation of employment and the receipt by appellant of these large sums of money as compensation therefor, supplied any lack of consideration.

154 So. 2d 151, 154 (Miss. 1963). *See also Hopper v. All Pet Animal Clinic, Inc.*, although upholding the particular covenant, observed that if a "contract of employment containing the covenant not to compete fails for lack of consideration, adhesion or other contractual excuse, the covenant is without effect." 861 P.2d 531, 540 (Wyo. 1993). The court noted:

> [I]f an employer hired an employee at will, obtained a covenant not to compete, and then terminated the employee, without cause, to arbitrarily restrict competition, we

a wrongful termination action against the employer would depend on the court's view of what constitutes a good faith opportunity to perform, and whether the employer had given the employee that opportunity.[108]

Another aspect in determining the enforceability of a promisor's promises where the at-will relationship is terminated shortly after it begins is the subject matter of the promises. As indicated previously, perhaps most employee promises involve restrictive covenants of one sort or another. This may be the case in the independent contractor, franchise or distributorship setting as well, or there may be other promises at issue. With respect to restrictive covenants, courts have long paid at least lip service to the proposition that restraints on trade are disfavored,[109] though

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> believe such conduct would constitute bad faith. Simple justice requires that a termination by the employer of an at will employee be in good faith if a covenant not to compete is to be enforced.

Id. at 541. *See also Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, a pre–ERISA case in which the court held that a forfeiture–of–pension–benefits–for–competition provision would not be enforced against at–will employees who were involuntarily terminated and then competed. 397 N.E.2d 358, 360–61 (N.Y. 1979). In *Post*, the court noted:

> Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete. Where the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.

Id. (citations omitted).

[108] In the case of the employee, this reasonable time might be the amount of time necessary to enable the employee to recoup any expenses incurred in reliance on the promise of employment, including wages lost from the job the employee quit to take the offered employment, for a period sufficient to enable the employee to obtain comparable employment. In the case of a franchisee or distributor, it would generally be a period sufficient to enable the party to recoup its investment. *See supra* notes 83, 95 & 105.

[109] *See* Clark Substations, L.L.C. v. Ware, 838 So.2d 360, 363 (Ala. 2002) (Alabama statute declaring non–competition agreements void unless a statutory exception applied); Bed Mart, Inc. v. Kelley, 45 P.3d 1219, 1220–24 (Ariz. Ct. App. 2002) (stating this to be the case, but upholding six–month restraint despite fact that employee had been employed only from January to July 2000, and evidence showed that it generally took six months to train employee so employer would make

the courts routinely enforce reasonable restraints. Given the requirement of reasonableness, if an employee or franchisee/distributor at-will signs a restrictive covenant at the inception of the parties' relationship, and the relationship is nearly immediately terminated, it would seem to be unreasonable to restrain the employee or franchisee for any substantial length of time, unless it could be shown that during the brief period that the relationship existed the employee or franchisee was provided with training, trade secrets or other information that the promisor could use to harm the promisee. Certainly, in the typical case, even where the employee or other party obtains training or information, its usefulness depends on the extent to which the promisor has been able to assimilate the training or information to the purposes for which it was given; and the shorter the period of the relationship, the less likely it would be that even the most sensitive private information could be used to the detriment of the promisee.[110] Thus, where

a profit); Statco Wireless, LLC v. Sw. Bell Wireless, LLC, 95 S.W.3d 13, 16 (Ark. Ct. App. 2003); Freiburger v. J-U-B Eng'rs, Inc., 111 P.3d 100, 104 (Idaho 2005); H & G Ortho, Inc. v. Neodontics Int'l, Inc., 823 N.E.2d 718, 730 (Ind. Ct. App. 2005) (noting that restrictive covenants accompanying the sale of a business "are not as 'ill–favored at law' as employee covenants"); SWAT 24 Shreveport Bossier, Inc. v. Bond, 808 So. 2d 294, 298 (La. 2001) (under Louisiana's extremely strict statute); Hose Specialty & Supply Mgmt. Co. v. Guccione, 865 So.2d 183, 193 (La. Ct. App. 2003) (stating that except as specifically and narrowly permitted by statute, which statute itself is to be strictly construed, restrictions on competition violate public policy and are void); *Frierson*, 154 So. 2d at 156; Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 369 N.E.2d 4, 6 (N.Y. 1977); Single Source Packaging, LLC v. Cain, No. 2003-CA-14, 2003 Ohio App. LEXIS 4248, at *17 (Ohio Ct. App., Sept. 5, 2003) (holding that covenant not to compete is a restraint of trade, and thus is disfavored by the law and construed strictly); Premier Assocs., Ltd. v. Loper, 778 N.E.2d 630, 636 (Ohio Ct. App. 2002) (stating that restrictive covenants are viewed unfavorably in the medical profession, but are not *per se* invalid; however, in *Single Source*, 2003 Ohio App. LEXIS 4248, at *17, the court makes clear that the disdain for covenants against competition is not limited to cases involving the medical profession); Citadel Broad. Co. v. Gratz, 52 Pa. D. & C.4th 534, 544–45 (C.P. Lackawanna 2001) (collecting Pennsylvania cases); Standard Register Co. v. Kerrigan, 119 S.E.2d 533, 536 (S.C. 1961); Carolina Chem. Equip. Co. v. Muckenfuss, 471 S.E.2d 721, 723 (S.C. Ct. App. 1996); Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 678–79 (Tenn. 2005) (holding that physician's restrictive covenant violates public policy); Trilogy Software, Inc. v. Callidus Software, Inc., 143 S.W.3d 452, 459 (Tex. App.—Austin 2004, pet. denied); Equity Enters., Inc. v. Milosch, 633 N.W.2d 662, 668 (Wis. Ct. App. 2001) (and the policy has been codified in Wisconsin); *Hopper*, 861 P.2d at 539.

[110] This, of course, assumes good faith on the part of both the employer and the employee, and not a situation of industrial spying or the like, where the employee becomes employed with the goal of acquiring secret trade information. In that case, the employee might be enjoined from competing even absent a restrictive covenant, or might be held liable in tort for his misconduct in purloining secret or otherwise proprietary information.

the restraint precludes the employee from using employer training, trade secrets, customer lists or the like, it is manifestly unreasonable to enforce the restriction except to the extent that the employee or other promisor, during the short period that the relationship subsisted, might have been exposed to such material, and even then, a court should inquire into the potential harm that the recipient of the information can do.

Certainly, the franchisee or distributor that is provided with privileged franchisor information when the at-will franchise/distributorship agreement is first entered into is in a better position to obtain, and presumably to use, that information to harm the franchisor than is the typical employee, since the franchisee/distributor is likely to have received significant trade secrets or other information as soon as the franchise or distributorship fee is paid, or the relationship otherwise comes into being. Even there, however, the courts properly tend to assess the extent to which that information is likely to be used to harm the franchisor, or stated another way, what the nature and degree of the protectable interest of the franchisor or employer is, and how that compares to the harm likely to be suffered by the franchisee/distributor/employee being restrained from engaging in competitive activities.[111]

[111] Boulanger v. Dunkin' Donuts Inc., 815 N.E.2d 572, 578 (Mass. 2004) (likening franchisee restrictive covenants to those accompanying the sale of a business, and holding that franchisor had legitimate interests to protect which validated its restrictive covenant); H & R Block Tax Servs., Inc. v. Circle A Enters., Inc., 693 N.W.2d 548, 556 (Neb. 2005) (noting that franchisee's covenant not to compete is akin to a restrictive covenant accompanying the sale of a business, subject to a less rigorous reasonableness test than an employee restrictive covenant); H & R Block, 693 N.W.2d at 559 (Wright, J., dissenting) (urging that the franchise relationship is more like an employment relationship and should be subject to the stricter standard); Mkt. Am., Inc. v. Christman–Orth, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999), (applying similar test to independent distributor and upholding six–month restriction, reading it to apply to distributor during her distributorship as well as following its termination); Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1053, 1058 (R.I. 1989) (adopting RESTATEMENT (SECOND) OF CONTRACTS § 187 (1981) balancing test to distributorship and financing agreement, and holding that overly broad restrictive covenant could be modified and enforced, but that modification was unnecessary since no protectable interest of covenantee was at risk). For further support, look to *Casey's Gen. Stores, Inc. v. Campbell Oil Co.*, where the court affirmed a trial court decision modifying a restrictive covenant entered into by a franchisee, Campbell Oil, in favor of the franchisor, stating:

> [W]e conclude that in the present case the district court's attempt to protect the franchisor against competition at all existing franchise sites was proper.
>
> Noncompetition agreements between a franchisor and a franchisee are designed not only to protect the interests of the immediate parties but also to protect other franchisees against competitive activities. Thus, to the extent that such noncompetition

> agreements are exacted from all franchisees, each franchisee is thereby protected from competition from other franchisees. As a consequence of this reciprocal protection, Campbell Oil, in exchange for the provisions restricting it from competing with other Casey's franchisees, benefits from the protections barring those franchisees from competing against it. The court in *Armstrong v. Taco Time International*, 635 P.2d 1114, 1118 (1981), recognized that these reciprocal protections attendant to franchise agreements warranted enforcement against competition at all franchise locations. We find this reasoning to be persuasive and do not disturb the district court's determination that, during the term of the Campbell Oil franchise, competition should be restricted within a reasonable zone around all existing Casey's franchises.

441 N.W.2d 758, 761 (Iowa 1989). *See also* Robert S. Weiss & Assocs., Inc. v. Wiederlight, 546 A.2d 216, 220 (Conn. 1988) (collecting cases ruling that a restrictive covenant is reasonable where it is "limited and fairly protect[s] the interests of both parties."); *Freiburger*, 111 P.3d at 105, 107 (containing another employment covenant and a good discussion of the requirement that the employer have a protectable interest and that the covenant protect that interest, holding that the covenant at issue was overbroad as a matter of law); Hanchett Paper Co. v. Melchiorre, 792 N.E.2d 395, 400–02 (Ill. App. Ct. 2003) (applying Illinois' unique requirement that for employer to have protectable interest to an employment covenant, employer's customers must be "permanent or near–permanent"); Tabs Assocs., Inc. v. Brohawn, 475 A.2d 1203, 1211–12 (Md. Ct. Spec. App. 1984) (using the same or a similar test to protect trade secrets, the court, *inter alia*, ruling that plaintiff had made out a prima facie case that its processes constituted a trade secret worthy of protection). Additional support can be found in *W.R. Grace & Co., Dearborn Div. v. Mouyal*, where, on certified question, the court stated in part:

> In determining reasonableness, consideration must be given to the employee's right to earn a living and the employee's ability to determine with certainty the area within which his post–employment actions are restricted. At the same time, the employer has a protectable interest in the customer relationships its former employee established and/or nurtured while employed by the employer, and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer.
>
> Various precepts have evolved from the judicial balancing of the interests involved. It is an unreasonable and overbroad protection of the employer's interest to restrict a former employee from post–employment solicitation in a geographic area where the employer had no business interest. While territorial restrictions relating to the geographic area where the employer does business, and restrictions relating to the area where the employee did business are both more narrowly tailored . . . there is a "vital difference" between such territories. A restriction relating to the area in which the employer does business is generally unenforceable due to overbreadth, unless the employer can show a legitimate business interest that will be protected by such an expansive geographic description. A restriction relating to the area where the employee did business on behalf of the employer has been enforced as a legitimate protection of the employer's interest, but the prohibition against post–employment solicitation of *any* customer of the employer located in a specific geographic area is an unreasonable and overbroad attempt to protect the employer's interest in preventing the employee from

A final factor taken into account by the courts in determining the enforceability of restrictions, often involving restrictions agreed to after the employment has begun, is whether the employer or the employee terminated the relationship.[112] This may make sense when a court is dealing

> exploiting the personal relationship the employee has enjoyed with the employer's customers.
>
> As the group which the employer wishes to protect from solicitation by former employees becomes more narrowly defined, the need for a territorial restriction expressed in geographic terms becomes less important.

W.R. Grace & Co., Dearborn Div. v. Mouyal, 422 S.E.2d 529, 531–532 (Ga. 1992) (citations omitted) (emphasis in original).

[112] *See Post*, a pre-ERISA case in which the court held that a forfeiture-of-pension-benefits-for-competition provision would not be enforced against at-will employees who were involuntarily terminated and then competed. 397 N.E.2d at 358. The court stated:

> Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete. Where the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.

Id. at 360–61. *See also* Cmty. Hosp. Group, Inc. v. More, 869 A.2d 884, 898 (N.J. 2005) (noting that where it is the employee who terminates the relationship, the hardship on the employee—one factor in determining whether a restrictive covenant is valid—will be less than when the employer terminates the relationship); Mail–Well Envelope Co. v. Saley, 497 P.2d 364, 370 (Or. 1972) (where employee terminated employment and established competitor, any hardship to employee from enforcement of restrictive covenant was of his own making). *See also Woodfield Group, Inc. v. DeLisle*, where the court, after holding that a restrictive covenant could be ancillary to an employment at–will relationship and remanding the case for a determination of whether the restrictive covenant was valid, added:

> We note, however, that Illinois law provides that substantial continued employment may constitute sufficient consideration to support a restrictive covenant agreement. We do not believe case law limits the courts' review to a numerical formula for determining what constitutes substantial continued employment. Factors other than the time period of the continued employment, such as whether the employee or the employer terminated employment, may need to be considered to properly review the issue of consideration.

with a restrictive covenant entered into after employment has begun. After all, there the real question is often whether, on balance, the employer deserves the protection of the restrictive covenant, and the employer is so deserving as long as the relationship has continued for a substantial period of time after the covenant was executed, that is, as long as the employer did not terminate the relationship shortly after obtaining the restrictive covenant

693 N.E.2d 464, 469 (Ill. App. Ct. 1998) (citations omitted). In *Higdon Food Serv., Inc. v. Walker*, the court ruled that the employer's obligation to terminate only if he was dissatisfied constituted consideration for the employee's restrictive covenant, noting also that "it was [the employee] himself who terminated the employment in order to earn more compensation elsewhere and who now seeks to repudiate the contract after having worked under it for 2 1/2 years. Although we need not so decide, it seems to us that under the principles of equity he might very well be estopped." 641 S.W.2d 750, 752 (Ky. 1982). *See Insulation Corp. of Am. v. Brobston*, indicates that where the employee is terminated because he is not performing satisfactorily—even if he previously did so—or for other reasons that suggest that the employer is better off without the employee than with him, the employer's interest is necessarily lessened, since the employer has made a determination that the employee is "worthless":

> Where an employee is terminated by his employer on the grounds that he has failed to promote the employer's legitimate business interests, it clearly suggests an implicit decision on the part of the employer that its business interests are best promoted without the employee in its service. The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests. . . .
>
> It bears noting that there is a significant factual distinction between the hardship imposed by the enforcement of a restrictive covenant on an employee who voluntarily leaves his employer and that imposed upon an employee who is terminated for failing to do his job. The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer. . . . Accordingly, because the circumstances under which the employment relationship is terminated are an important factor to consider in assessing both the employer's protective interests and the employee's ability to earn a living, i.e. the reasonableness of enforcing the restrictive covenant, [the employee's] firing should have been included in the trial court's determination of reasonableness.

667 A.2d 729, 735–37 (Pa. Super. Ct. 1995).

from its employee.[113] The shorter the time period, the less reasonable the

[113] *Cf. Jordan v. Duff & Phelps, Inc.*, where the issue was whether a closely held company had to tell an employee–shareholder about a potential merger, when the employee was an at–will employee and had resigned, and the parties' agreement required him to sell back his stock. 815 F.2d 429, 438 (7th Cir. 1987). He did so, receiving about $23,000 for it, but before cashing the check, learned about the merger, which would have increased his stock's value to around $500,000 or more. *Id.* at 433. Judge Posner, in dissent, urged that there was no duty of disclosure, based in part on the at–will nature of the employment. *Id.* at 444–52. The majority, through Judge Easterbrook, responded with a discussion of inappropriate opportunistic behavior, analogous to that of an at–will employer firing an employee after obtaining a restrictive covenant:

> More than that, a person's status as an employee "at will" does not imply that the employer may discharge him for every reason. Illinois, where Jordan was employed, has placed some limits on the discharge of at–will employees. We do not disparage the utility of at–will contracts; this very panel recently recognized the value of informal (meaning not legally binding) employment relations. But employment at will is still a contractual relation, one in which a particular duration ('at will') is implied in the absence of a contrary expression. The silence of the parties may make it necessary to imply other terms—those we are confident the parties would have bargained for if they had signed a written agreement. One term implied in every written contract and therefore, we suppose, every unwritten one, is that neither party will try to take opportunistic advantage of the other. "[T]he fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and to make costly self–protective measures unnecessary."
>
> Employment creates occasions for opportunism. A firm may fire an employee the day before his pension vests, or a salesman the day before a large commission becomes payable. Cases of this sort may present difficult questions about the reasons for the decision (was it opportunism, or was it a decline in the employee's performance?). The difficulties of separating opportunistic conduct from honest differences of opinion about an employee's performance on the job may lead firms and their employees to transact on terms that keep such disputes out of court—which employment at will usually does. But no one . . . doubts that an *avowedly* opportunistic discharge is a breach of contract, although the employment is at–will. The element of good faith dealing implied in a contract "is not an enforceable legal duty to be nice or to behave decently in a general way." It is not a version of the Golden Rule, to regard the interests of one's contracting partner the same way you regard your own. An employer may be thoughtless, nasty, and mistaken. Avowedly opportunistic conduct has been treated differently, however.
>
> The stock component in Jordan's package induced him to stick around and work well. Such an inducement is effective only if the employee reaps the rewards of success as well as the penalties of failure. We do not suppose for a second that if Jordan had not resigned on November 16, the firm could have fired him on January 9 with a little note saying: "Dear Mr. Jordan: There will be a lucrative merger tomorrow. You have been a wonderful employee, but in order to keep the proceeds of the merger

employer's actions seem if it is the employer who terminates the relationship. Moreover, where an employer uses the at-will relationship as a tool to take what some courts have called opportunistic advantage of the employee (firing the employee in order to take advantage of the restrictive covenant), inquiry into the motives of the employer is appropriate even though the employment is at-will—good faith requires no less.[114]

> for ourselves, we are letting you go, effective this instant. Here is the $23,000 for your shares." Had the firm fired Jordan for this stated reason, it would have broken an implied pledge to avoid opportunistic conduct. It may well be that Duff & Phelps could have fired Jordan without the slightest judicial inquiry; it does not follow that an opportunistic discharge would have allowed Duff & Phelps to cash out the stock on the eve of its appreciation. This is the principle underlying *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983), which holds, applying Illinois law, that although an employer may dismiss an at–will employee for the purpose of preventing his becoming a partner, it may not enforce the no–competition clause in the contract even though the contract stated that the clause would become effective if the employee were discharged "for any reason." A short delay would have turned the fired employee into a partner and nullified the restrictive covenant. We concluded that although the discharge was final, the restrictive covenant would not be enforced. So, here, an opportunistic discharge would not necessarily allow Duff & Phelps to buy back the stock. As a result, Jordan's employment at will, the essential ingredient of our colleague's argument that Jordan waived the duty to disclose, does not establish that the firm had no duties concerning the stock.

Id. at 438–39 (emphasis in original).

[114] *Cf.* Rao v. Rao, 718 F.2d 219, 222–23 (7th Cir. 1983). In *Rao*, an employment contract was terminable for any reason, but only on giving 90 days notice. *Id.* at 221. However, the court considered whether the employer could properly notify the employee of termination 100 days before the employee was to become an equal shareholder in the employer–corporation, that is, by giving 90 days so that the employee was fired 10 days before his right to purchase half of the corporate shares was triggered, and then insist on the effectiveness of a restrictive covenant. *Id.* at 221–22. The trial court found as a fact that the employer had terminated the employee solely to prevent the latter from purchasing his 50% share, and held that the restrictive covenant was unenforceable. *Id.* at 222. On appeal, this was affirmed, the appellate court indicating that the restrictive covenant was oppressive, and not necessary to protect the employer's legitimate business interests and further stating:

> Under Illinois law, "in every contract both parties promise to act in good faith." The concept of "good faith" has its most natural and common application to the situation where one party exercises discretionary authority in a manner that affects the rights and duties of the other party. "Good faith between contracting parties requires that a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously." The implied promise of good faith, therefore, modifies [the employer's] discretionary right to dismiss [the employee] and then to invoke the restrictive covenant.

On the other hand, where it is the employee who terminates the relationship shortly after entering into a restrictive covenant—assuming, of course, that the employee has been employed for a sufficient period to give rise to a protectable interest on the part of the employer—the fact that the employee, rather than the employer, terminated the relationship may be relevant, since there can be no suggestion of bad faith or overreaching on the part of the employer when it is the employee who terminates the relationship. However, when the promise is made at the inception of the at-will relationship, and the relationship is terminated shortly after it begins, there is simply no reason to distinguish between termination by the employer or termination by the employee. In either case, the question should be whether the employee (or other at-will party) has obtained sufficient employer-vital information to give rise to a protectable interest on the part of the employer, and, if not, no promise made by the employee should be enforceable.

Despite the fact that they are on questionable theoretical ground, the majority of courts have no difficulty in upholding promises entered into at the inception of the employment relationship.[115] A significant split, however, exists among the courts regarding whether promises made by an at-will employee are binding once the relationship has begun.[116] The traditional rule is that such promises require new consideration beyond the promise or the actual continuation of at-will employment.[117] However, a

> The expressed language of the restrictive covenant can be overlaid with the implied promise of good faith in two ways. We could state that the promise of good faith dealing is an independent term, which, when breached, relieves [the employee] from abiding by the restrictive covenant. Alternatively we could state that the exercise of a good-faith termination is a condition precedent to the operation of the restrictive covenant. We need not choose the better verbal formulation because whichever expression is selected, the result is the same: [the employer's] failure to act in good faith in terminating [the employee's] employment precludes the application of the restrictive covenant.

Id. at 222–23 (citations omitted).

[115] *See supra* note 10.

[116] *See supra* notes 29 & 31.

[117] *See* IKON Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 131 (D. Mass. 1999); James C. Greene Co. v. Kelley, 134 S.E.2d 166, 167 (N.C. 1964) (citing *Kadis v. Britt*, below, the court said, "It is generally agreed that mutual promises of employer and employee furnish valuable considerations each to the other for the contract. However, when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new

consideration."); Kadis v. Britt, 29 S.E.2d 543, 548 (N.C. 1944); George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 316 (Pa. 1975) (holding that actual employment contract had been reached before employee gave two weeks' notice to former employer, so that, when employee signed restrictive covenant when he first began work with plaintiff, it was after employment contract had been made, and therefore required additional consideration, indicating that, when restrictive covenant is entered into after the initial employment contract has been made, additional consideration is required); Maint. Specialties, Inc. v. Gottus, 314 A.2d 279, 281–83 (Pa. 1974) (holding that continued employment for an at-will employee with no other change is insufficient consideration for a restrictive covenant executed after the relationship had already begun, while the concurring opinion contains a good discussion of the history of restrictive covenants and their modern requirements); Poole v. Incentives Unlimited, Inc., 548 S.E.2d 207, 209 (S.C. 2001) (indicating that in South Carolina, when a covenant is entered into after employment has begun, separate, additional consideration is necessary); Labriola v. Pollard Group, Inc., 100 P.3d 791, 795 (Wash. 2004) ("Consideration is a bargained-for exchange of promises. A comparison of the status of the employer before and after the noncompete agreement confirms that the 2002 noncompete was entered into without consideration. Employer did not incur additional duties or obligations from the noncompete agreement. Prior to execution of the 2002 noncompete agreement, Employee was an 'at will' Employee. After Employee executed the noncompete agreement, he still remained an 'at will' employee terminable at Employer's pleasure. We hold that continued employment in this case did not serve as consideration by Employer in exchange for Employee's promise not to compete."); PEMCO Corp. v. Rose, 257 S.E.2d 885, 888–89 (W. Va. 1979) (noting that where an employment agreement was formed orally on August 30, and the employee actually signed a restrictive covenant on September 20, when he arrived to work; the court applied Virginia law and said: "We believe Virginia's highest court would probably [rule]… that when the relationship of employer and employee is established without a restrictive covenant not to compete, any agreement thereafter not to compete, must be in the nature of a new contract based upon a new consideration. We would so hold."); NBZ, Inc. v. Pilarski, 520 N.W.2d 93, 97 (Wis. Ct. App. 1994). In addition to the above-cited cases, *Cashman* stated that where a restrictive covenant is entered after employment has begun, additional consideration is required. Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982). Cutting back slightly on an earlier adopted rule that continued employment is sufficient consideration, the *Cashman* court declared:

> The practice of not telling prospective employees all of the conditions of employment until after the employees have accepted the job, like the practice of requiring a lie detector test in *State v. Century Camera, Inc*., 309 N.W.2d 735 (Minn. 1981), takes undue advantage of the inequality between the parties. Appellants and National were parties to an employment agreement after they had completed negotiations on compensation, duties, benefits and other terms of employment. An addition to that agreement would require independent consideration. We hold the noncompetition clause invalid because it was unsupported by such additional independent consideration.

Id. (citations omitted). Similarly, the court in *Daniel* stated that a restrictive covenant entered into after the inception of the employment requires additional consideration. Whittaker Gen. Med. Corp. v. Daniel, 379 S.E.2d 824, 827 (N.C. 1989) (dictum). *Hopper* reiterated this principle, but

growing number of courts have held that the continuation of employment can constitute consideration for an employee's promise.[118]

found the additional consideration in a raise given to the employee. Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993).

[118] *See* Daughtry v. Capital Gas Co., 229 So. 2d 480, 483 (Ala. 1969) (under Alabama statute); Mattison v. Johnston, 730 P.2d 286, 289–90 (Ariz. Ct. App. 1986) (collecting and discussing numerous cases from throughout the country); Coastal Unilube, Inc. v. Smith, 598 So. 2d 200, 201–02 (Fla. Dist. Ct. App. 1992) (collecting Florida cases); Mid-Town Petroleum, Inc. v. Gowen, 611 N.E.2d 1221, 1226 (Ill. App. Ct. 1993) (collecting Illinois cases; Illinois allows substantial continued employment to serve as consideration, but here the employment following the signing of the covenant was only for seven months, which was insubstantial and justified the trial court's refusal to enjoin former employee in equity); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983) (declining to reconsider Iowa's position that continued employment for an indefinite period is sufficient consideration for a restrictive covenant entered into well after employment had begun); Simko, Inc. v. Graymar Co., 464 A.2d 1104, 1107–08 (Md. Ct. Spec. App. 1983) (adopting this rule and declaring that ten years was a sufficient period of time, noting also that, had employer terminated employment and then rehired employee, as was its right, there would be sufficient consideration); Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 130–31 (Minn. 1980) (substantial continued employment can serve as sufficient consideration, with each case to be decided according to its peculiar facts); Frierson v. Sheppard Bldg. Supply Co., 154 So. 2d 151, 154 (Miss. 1963) (continued employment for more than four years was sufficient consideration); Hogan v. Bergen Brunswig Corp. 378 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 1977). In *Wright & Seaton, Inc. v. Prescott*, the court found that substantial continued employment serves as consideration. 420 So. 2d 623, 627 (Fla. Dist. Ct. App. 1982). Accordingly, the *Baker* court stated and applied the rule, but found the restrictive covenant unreasonable. Camco, Inc. v. Baker, 936 P.2d 829, 831–32 (Nev. 1997). The court first indicated that the same reasons that permit the enforcement of beneficial promises made by the employer to the employee support holding detrimental promises by the employee—a restrictive covenant—binding. *Id.* Then the court considered the justification for the rule, noting "that in an at–will employment context 'continued employment' is, as a practical matter, equivalent to the employer's 'forbearance to discharge'; many courts have concluded that the consideration is equally valid phrased as a benefit to the employee or a legal detriment to the employer." *Id.* at 832 n.7 (citations omitted). The court continued by noting:

> There is no "substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to 'day one.'" A contrary holding might leave the employer in a position of having to fire an at–will employee and then rehire that same employee with the restrictive covenant in place, or have the covenant held unenforceable for want of consideration.

Id. at 832 (citations omitted). *See also* Zellner v. Conrad, P.C., 589 N.Y.S.2d 903, 907 (N.Y. App. Div. 1992). The court said:

> Because in at–will employment the employer has the right to discharge the employee (or, as here, an independent contractor providing services under a similar arrangement), without cause, and without being subject to inquiry as to his or her motives, forbearance

Most of the courts so holding require that the employment continue for a substantial length of time, unless terminated by the employee, in which case the employee has no right to complain regarding the enforcement of his or her promise. These cases are theoretically incorrect for at least two reasons: first, as previously indicated, a promise of at-will employment is illusory.[119] Second, if the transaction is construed not to constitute a promise of continued employment, but the actual continued employment itself, there is no consideration for the promise since the employees are not bargaining for that when they make their promises.[120]

The first of these reasons has already been discussed. If the employee signs a restrictive covenant after employment has begun in consideration of the employer's promise not to terminate the employment, the employer can nevertheless end the employment immediately without breaching its promise because the employment is at-will.[121] As such, the promise of continued employment is illusory.[122]

> of that right is a legal detriment which can stand as consideration for a restrictive covenant. It is certainly true that this detriment would have little meaning if the employer exercised his right to terminate the employment shortly after the execution of the agreement. However, where, as here, a relationship continues for a substantial period after the covenant is given, the forbearance is real, not illusory, and the consideration given for the promise is validated. Thus, "forbearance to discharge" and "continued employment" are but two expressions of the same legal detriment. Accepting the plaintiff's position would mean that the employer would have to fire the at–will employee and then immediately offer to rehire the employee on the condition that he or she signs the covenant in order to protect the covenant from a later attack that it lacked consideration. We will not encourage unnecessary legal dramatics.

Id. (citations omitted).

[119] *See supra* note 8.

[120] *See* Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 38–39 (Tenn. 1984) (Brock, J., dissenting); *cf.* Cellular One, Inc. v. Boyd, 653 So. 2d 30, 36 (La. Ct. App. 1995) (Shortess, J. dissenting) ("The only noncompetition agreement signed by the parties which arguably contained any mutual benefit was the initial one, which was signed in consideration of initial employment. They did not gain anything by signing new more onerous agreements—they were allowed to hold onto what they already had. Plaintiff did not give up anything at all in consideration for a new agreement. In these economic times, continued employment is not sufficient cause for a noncompetition agreement. It is economic blackmail.").

[121] *See supra* note 8; *see also* Woodward Ins., Inc. v. White, 437 N.E.2d 59, 70 (Ind. 1982) (Hunter, J., dissenting) ("Inasmuch as White could have been fired at any time for any reason by Woodward, who would have been immune from liability, any consideration received by White in the form of continued employment, at the time the contract was executed, amounted, at best, to a purely illusory promise. Woodward Insurance was not legally bound to retain White, nor does the

The second reason is similar, though somewhat more complex. Suppose, as is typical in these cases, that an employer threatens the employee with termination unless the latter will sign a restrictive covenant. The employee does so. At best, one can make out an implied promise not to terminate the employee, but that implied promise would, because of the at-will nature of the relationship, be itself illusory. Some courts suggest that if the employer continues the employment for a substantial length of time, what was initially a bad bilateral bargain—because of the employer's illusory promise—can become a good unilateral contract.[123] The difficulty with this is that, if the employee is deemed to be bargaining for continued employment, in other words, if the employee's promise is construed to mean, "I will not compete if you will continue to employ me for a substantial length of time," the relationship has changed from one at-will to one for a "substantial length of time", whatever that is.[124] However, in all

record reveal any facts to establish a promise—oral, written, express or implied—to do so."); *Kadis* 29 S.E.2d at 548 ("The grammatical sense of the language used, taken with the context, plainly infers that *continued employment* must be understood to mean further *continuance in employment*, which more than implies the threat of immediate discharge. A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under the definite threat of discharge."); *Poole*, 525 S.E.2d at 900, *aff'd*, 548 S.E.2d 207 ("After Poole signed the covenant not to compete, she remained merely an at–will employee, the same as before. She had no increase in salary, no bonus, and no changed work conditions. The promise of continued employment was illusory because even though Poole signed the covenant, Incentives retained the right to discharge her at any time."); *Labriola*, 100 P.3d at 798–99 (Madsen, J., concurring).

[122] *See supra* note 8.

[123] This is the rationale of several of the cases *supra* note 118.

[124] Similarly, if the agreement were construed to be bilateral—"I promise not to compete with you if you promise to employ me for a substantial length of time"—the employer would be bound to employ the employee for "a substantial length of time"—whatever that is—and, although the employee could leave at will, if he did so, he could not compete with the employer. Thus, there would be consideration for the bilateral contract, a promise by the employee in exchange for a promise by the employer, although there would be no "mutuality of obligation", in the sense that one party would be bound while the other was not, since the agreement would remain at–will on the employee's part, though not on the employer's part. A court that insists that either both parties be bound to an agreement or neither is bound would no doubt determine this agreement to be illusory, though it clearly is not, since the employee is bound to his promise despite not being bound to continue working. It should be noted that, even in this case where the contract is arguably made binding by consideration in the form of exchanged promises, the employer no doubt continues to believe that it has the power to terminate the employee at–will; in other words, the employer does not understand its promise to be to retain the employee for a substantial time.

of these cases, it is clear that the employer expected to retain (and believed that it retained) the right to terminate the relationship at will, and that the employee also expected to be able to terminate the relationship whenever he or she chose.[125] Thus, it seems clear that the notion, raised in so many of the modern cases, that continued employment for a substantial length of time somehow qualifies as consideration for an employee's promise contained within a restrictive covenant, is simply incorrect.

It would be better for the courts to forthrightly acknowledge that they are holding the employee to his or her restrictive covenant despite the absence of consideration, on the policy ground that the employer has a reasonable expectation that its secrets and competitive advantages will be respected and preserved. Of course, this makes a restrictive covenant—long said to be a disfavored species of agreement—enforceable without consideration. But this is what the courts are doing, and they might as well be honest about it. This is essentially the position I have taken elsewhere,[126] and is the same position that was recently taken by the Ohio Supreme Court in a decision that is discussed at length in the following section, which held

Moreover, whether the employee who voluntarily left after this exchange of implied promises would actually be restrained from competing with the employer should depend less on the nature of the promises made as construed by the court and more upon the nature of the protectable interest held by the employer. Thus, if the employee made the promise not to compete shortly after beginning his employment, and the court construed the employer to have impliedly promised to retain the employee for some period of time, and the employee then immediately quit the employment, whether the employee's promise should be enforced should depend not on whether the promise is enforceable in the abstract (because it is backed by consideration) but whether the employee had sufficient information or skills so that the employer could reasonably expect that the (now former) employee would not compete against it.

[125] *See* Coastal Unilube, Inc. v. Smith, 598 So. 2d 200, 201 n.1 (Fla. Dist. Ct. App. 1992) (where contract specifically provided that "both the Company and the Employee . . . retain the right to terminate the agreement relationship existing between them at any time and for any reason", the court nevertheless ruled that employee's continued employment for some two years was sufficient consideration); Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750, 751–52 (Ky. 1982) (suggesting that the offer of new at-will employment would be sufficient consideration for the covenant since the employer was not bound to retain the employee, and therefore the hiring, or rehiring, would be consideration, though finding sufficient consideration based on employer's express obligation to use good faith in making determination whether to terminate employee); Frierson v. Sheppard Bldg. Supply Co., 154 So. 2d 151, 154 (Miss. 1963) (upholding substantial subsequent employment as consideration despite specific contractual provision allowing either party to terminate employment).

[126] 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:13 (4th ed. 1995 & Supp. 2006).

that the employer's forbearance from firing an at-will employee constituted consideration sufficient to enforce the restriction despite the fact that the employer's forbearance was, by its nature, illusory.[127]

This is not to say that such agreements ought not to be enforced. In most of the cases where the courts do enforce such agreements, the employees engage in patently bad faith conduct—stealing customer lists, pirating trade or secret information, contacting customers prior to departure, and so forth—and deserve to be held to their covenants.[128] However, there is simply no consideration, at least in the traditional bargained-for benefit or detriment sense, for the employee's promise. Nevertheless, the majority of courts indulge the fiction that consideration is present.[129]

V. THE OHIO COURT'S RESOLUTION OF PROMISES MADE IN CONSIDERATION OF THE CONTINUATION OF THE AT-WILL RELATIONSHIP

In 2004, the Supreme Court of Ohio was confronted with a case in which an at-will employee had signed a covenant not to compete three years after he began working for his employer.[130] The employee continued working for the employer for an additional ten years, then quit and formed a competing company.[131] The employer brought suit to enjoin the continued violation of the covenant and for money damages.[132] The trial court found that there was no consideration for the covenant and rendered summary judgment for the employee, and the court of appeals affirmed, certifying, however, that there was a conflict in the Ohio case law.[133] The Supreme Court of Ohio was therefore confronted with the following certified question: "Is subsequent employment alone sufficient consideration to support a covenant-not-to-compete agreement with an at-will employee entered into after employment has already begun?"[134]

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[127] Lake Land Employment Group of Akron, LLC v. Columber, 804 N.E.2d 27, 31–32 (Ohio 2004).

[128] *See, e.g.*, Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 35 (Tenn. 1984).

[129] *See supra* note 118.

[130] *Columber*, 804 N.E.2d at 29.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 29–30.

[134] *Id.*

The court began its discussion by briefly reviewing the history of restrictive covenants, noting that today, if the restrictions are reasonable geographically and temporally they will generally be upheld if they are ancillary to the employment relationship.[135] It then turned to the question of what consideration was necessary to support such a restraint, noting a prior decision that had upheld a restrictive covenant signed after the beginning of employment for a one-year term that automatically renewed at the end of the year.[136] The court, however, pointed out that the case before it was different, as it involved an at-will employee rather than an employee who had a right to continued employment.[137] Noting the split of authority throughout the United States on the question presented, it synopsized the different views by quoting a leading Minnesota decision:

> [C]ases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced. By signing a noncompetition agreement, the employee gets no more from his employer than he already has, and in such cases there is a danger that an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere. Decisions in which continued employment has been deemed a sufficient consideration for a noncompetition agreement have focused on a variety of factors, including the possibility that the employee would otherwise have been discharged, the employee was actually employed for a substantial time after executing the contract, or the employee received additional compensation or training or was given confidential information after he signed the agreement.[138]

The Ohio court then continued:

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[135] *Id.* at 30–31.

[136] *Id.* at 30.

[137] *Id.*

[138] *Id.* at 30–31 (quoting Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 130 (Minn. 1980) (footnote omitted).

> More recently, some courts have found sufficient consideration in an at-will employment situation where a *substantial* period of employment ensues after a noncompetition covenant is executed, especially when the continued employment is accompanied by raises, promotion, or similar tangible benefits. These courts thereby implicitly find that the execution of a noncompetition agreement changes the prior employment relationship from one purely at will. In effect, these courts infer a promise on the part of the employer to continue the employment of his previously at-will employee for an indefinite yet substantial term. Under this approach, however, neither party knows whether the agreement is enforceable until events occur after its execution.[139]

Having set forth the various judicial views of the matter, the court, noting the foundational elements of a contract and that only the existence of consideration was at issue, held: "We conclude that forbearance on the part of an at-will employer from discharging an at-will employee serves as consideration to support a noncompetition agreement."[140]

Explaining its holding, the court took a position at almost polar extremes to that taken by the Supreme Court of Texas, discussed previously.[141] Noting that either a benefit to the promisor or a detriment undergone by the promisee is required for there to be consideration, and that in the at-will contractual context either party is free to terminate the relationship at any time, the court declared that "mutual promises to employ and to be employed on an ongoing at-will basis, according to agreed terms, are supported by consideration: the promise of one serves as consideration for the promise of the other."[142]

The court then reached its conclusion:

> The presentation of a noncompetition agreement by an employer to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties' at-will employment.

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[139] *Id.* at 31 (citing 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:13 (4th ed. 1995 & Supp. 2006)).

[140] *Id.* at 31–32.

[141] *See supra* notes 37–39.

[142] *Columber*, 804 N.E.2d at 32.

> Where an employer makes such a proposal by presenting his employee with a noncompetition agreement and the employee assents to it, thereby accepting continued employment on new terms, consideration supporting the noncompetition agreement exists. The employee's assent to the agreement is given in exchange for forbearance on the part of the employer from terminating the employee.
>
> We therefore hold that consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause.[143]

The difficulty with the court's determination, of course, is that the forbearance to terminate the relationship is, as discussed previously, illusory, because the employer could turn around and fire the employee immediately.[144] Thus, unless the employer is deemed to have agreed to forbear for a reasonable time from terminating the employee, the court's "consideration" is really no more than the employer stating, "Sign this or I will terminate you, and by the way, I reserve the right to terminate you anyway, even if you do sign."

The court, aware of this terrible gap in its legal logic, next issued a caveat, in effect taking the position that, while it was not prepared to abandon the rule that courts will not generally inquire into the adequacy of an exchange, it would not hesitate to police restrictive covenants by refusing to enforce them if the employer, after extracting one from its employee, did not in fact continue the relationship.[145] Thus, the court said:

> Our decision today does no more than recognize that consideration exists where an at-will employer and an at-will employee continue their employment relationship, rather than terminate it, after the employer imposes a new requirement for employment, i.e., execution of a

[143] *Id.* *See also* Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750, 752 (Ky. 1982) (suggesting that the offer of new at-will employment would be sufficient consideration for the covenant since the employer was not bound to retain the employee, and therefore the hiring, or rehiring, would be consideration).

[144] *See supra* note 8.

[145] *Columber*, 804 N.E.2d at 32–33.

> noncompetition agreement by the employee. While we are not prepared to abandon our long-established precedent that courts may not inquire into the adequacy of consideration, we do not disagree with Corbin's conclusion that the validity of a restraining contract such as a noncompetition agreement should be "determined by weighing as best we can the sum-total of all factors standing together." We simply recognize that weighing of these factors should not be performed in the context of an inquiry concerning the sufficiency of consideration. That balancing instead should occur in the context of our established precedent recognizing that only reasonable noncompetition agreements are enforceable.[146]

In other words, notwithstanding the court's assertion that it had found consideration in the employer's forbearance to terminate the employee, in reality the court enforced the restrictive covenant—despite the fact that it lacked consideration—in effect holding that as long as the restraint is reasonable under the circumstances, the parties would be free to structure their relationship as they desired. And the reasonableness of the restraint depends, in part, on the continuation of the employment by the employer after the employee agrees to the restrictive covenant, the majority ironically adopting the same rule that it had mildly criticized earlier, that if the test is the continuation of employment, "neither party knows whether the agreement is enforceable until events occur after its execution."[147]

Two dissenting opinions made precisely these points, the first focusing on the illusory nature of the consideration and the second focusing on the uncertainty of the rule established by the majority.[148] Thus, the first dissent took the majority to task for its forbearance analysis, stating:

> In fact, the majority endeavors to transform this mutual exchange of nothing into consideration by formulating such artful euphemisms as "forbearance on the part of an at-will employer from discharging an at-will employee," "mutual promises to employ and to be employed on an ongoing at-

[146] *Id.* at 33 (citing 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1395 (1962)).

[147] *Id.* at 31 (citing 6 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 13:13 (4th ed. 1995 & Supp. 2006)).

[148] *See infra* notes 149 and 150.

> will basis," and "a proposal to renegotiate the terms of the parties' at-will employment." But in the end, the employer simply winds up with both the noncompetition agreement and the continued right to discharge the employee at will, while the employee is left with the same preexisting "nonright" to be employed for so long as the employer decides not to fire him. The only actual "forbearance," "proposal," or "promise" made by the employer in this situation is declining to fire the employee until he executes the noncompetition agreement.
>
> Moreover, the majority's holding and supporting rationale would allow the enforcement of a noncompetition agreement that was exacted from an employee who, at the time of execution, had already acquired all the knowledge his or her position affords and who was fired the day after affixing his or her signature to the document. In cryptic fashion, the majority is essentially holding that a restrictive covenant may henceforth be exacted from an at-will employee without any supporting consideration.[149]

The second dissenting justice, though perhaps more sanguine, expressed regret at the open-endedness of the majority's rule, declaring that he agreed with the first dissent and then continuing:

> But the majority has found otherwise. In doing so, the majority must acknowledge that the execution of a noncompetition agreement for which forbearance from discharge is the consideration alters the at-will nature of the employment relationship. Any promise of continued employment removes the employment from the realm of an at-will relationship. For some undefined time, the employer must continue to employ the signer of the agreement. How long a period is enough? The absence of a specified term for the forbearance from discharge will leave courts to determine what is reasonable.[150]

The Texas and Ohio courts have reached diametrically opposite conclusions—the Texas court determining that the at-will relationship can

[149] *Columber*, 804 N.E.2d at 34 (Resnick, J., dissenting).

[150] *Id.* at 35 (Pfeifer, J., dissenting).

never serve as consideration for a promise, and the Ohio court determining that the at-will relationship will always be able so to serve—and although the Texas court has gotten it right as a matter of contract law and theory, the Ohio court clearly represents the growing weight of authority, albeit that no other court has come as close to admitting that it is eliminating the need for consideration in these settings entirely.[151]

VI. CONCLUSION

The traditional rule that the at-will employment relationship may be terminated by either the employer or the employee, at any time, for any reason or for no reason, with or without notice, continues to be the rule in almost all American jurisdictions.[152] The basis for the rule is that the relationship is by its nature illusory—since it binds neither party to any future conduct, it is not properly considered a contract at all, at least to the extent that that term means a promise that the law will enforce, or for

[151] *Cf.* Ackerman v. Kimball Int'l, Inc. 634 N.E.2d 778, 781 (Ind. Ct. App. 1994), *aff'd*, 652 N.E.2d 507, 509 (Ind. 1995). In *Ackerman*, the supreme court agreed with and adopted the analysis by the court of appeals in addressing the validity of a covenant signed some eleven years after employment had begun, which stated as its consideration that the employer agreed "to employ or continue to employ Employee at the salary or wage as now or from time to time agreed on," the employer reserving, however, the right to terminate the employee at will. *Id.* The appellate court said:

> We agree that the Employment Agreement favors [the employer]. . . . Nevertheless, we do not inquire into the adequacy of the consideration exchanged in a contract. Here, in exchange for his promise not to compete with [the employer] or divulge [its] confidential business information, [the employee] received [the employer's] promise to continue his at-will employment. An employer's promise to continue at-will employment is valid consideration for the employee's promise not to compete with the employer after his termination. We conclude that [the parties] exchanged valid consideration in the Employment Agreement and that the Employment Agreement is not unenforceable for lack of consideration.

Id. (citations omitted). *C.f.* Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750, 751–52 (Ky. 1982) (suggesting that the offer of new at-will employment would be sufficient consideration for the covenant since the employer was not bound to retain the employee, and therefore the hiring, or rehiring, would be consideration; the court, however, found that the employee had actually received additional consideration in the employer's promise to retain him if in the employer's good faith judgment his work was satisfactory).

[152] *See supra* note 2.

breach of which the law gives a remedy[153]—and therefore, either party may end the relationship at its whim. While this illusory nature was once its great virtue, since it provided both employers and employees with the means of putting an end to their relationship to seek better opportunities with other partners, that virtue became a stumbling block when the employer imposed additional obligations on its employee after the relationship had begun without providing the employee with anything beneficial other than continued employment; or when an employer decided after offering at-will employment, that it in fact did not want to follow through with the hiring; and when the employer sought to terminate the employee after having obtained additional promises from the employee or under circumstances viewed by the employee and the courts as morally, and ultimately legally, improper. The courts dealt with these stumbling blocks the way courts always do: by adapting common-law principles such as the requirement of consideration or the implied obligation of good faith or the creation of an estoppel to prevent employer overreaching.

Because the at-will relationship is not the result of a true contract, these common-law principles are ill-suited to the task. Courts applying traditional contract rules to the at-will relationship historically refused to enforce restrictive covenants made by employees because of a lack of consideration flowing to the promisor, even though the restrictions were fair and reasonable and probably should have been enforced in light of the employers' interests. Likewise, courts historically have permitted terminations of employees even though the terminations offended the courts' sense of morality, as long as there was nothing illegal about what the employer did. The dissonance that these kinds of decisions caused has led most courts to develop exceptions to the at-will rule, finding consideration when there is none, or paying lip service to the principle that either party may terminate the at-will relationship at any time for any reason, while in actuality changing the relationship by imposing an obligation of good faith, or estopping the employer from terminating the relationship for some undefined period, or making actionable, in contract or tort, terminations that are deemed to violate public policy.[154]

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[153] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 1990 & Supp. 2006).

[154] A subsequent article will deal more fully with the public policy exception as well as with the other exceptions to the at-will rule. S*ee, e.g.*, Knight v. Am. Guard & Alert, Inc. 714 P.2d 788, 792 (Alaska 1986) (that the public policy exception might flow from the implied obligation of good faith, citing authority indicating that twenty-two states accepted the doctrine as of the

mid–1980's); Wagner v. City of Globe, 722 P.2d 250, 253 (Ariz. 1986) (that Arizona has adopted three exceptions to the employment at–will doctrine, including the public policy exception); Island v. Buena Vista Resort, 103 S.W.3d 671, 679 (Ark. 2003) (termination of at-will employee for refusing sexual advances violates public policy); Gantt v. Sentry Ins., 824 P.2d 680, 683–84 (Cal. 1992), *overruled on other grounds by* Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998) (California adopted the public policy exception first in the 1980's, and today it is clear that a termination in violation of public policy is tortious); Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 106 (Colo. 1992) (collecting cases; according to the court, thirty-seven jurisdictions have recognized some form of public policy exception to the at-will rule, whether in contract or tort, while nine states have refused to recognize it; additional research reveals that some of the courts in the "refused" category have since changed their positions); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 386–87 (Conn. 1980) (one of the leading early cases); Adams v. George W. Cochran & Co., 597 A.2d 28, 31–34 (D.C. 1991) (holding that the District of Columbia would recognize a very limited public policy exception to the at-will rule, making it an intentional tort to discharge an employee for refusing to commit an illegal act, containing a good review of the cases and declaring that the majority of courts consider the action to sound in tort, not contract); Parnar v. Americana Hotels, 652 P.2d 625, 631 (Haw. 1982) (adopting a tort action for wrongful discharge in violation of a judicially or legislatively declared, or other clearly mandated public policy; later decisions have made clear that when the legislature establishes, by statute, an action for wrongful termination, that statutory action, rather than the judicially declared action, applies); Mallonee v. State, 84 P.3d 551, 557–58 (Idaho 2004) (synopsizing the law in Idaho, that what constitutes a public policy for purposes of the exception is a question of law. *But see Ostrander* below); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–81 (Ill. 1981) (containing an excellent discussion of the sources of public policy); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427–28 (Ind. 1973) (retaliatory discharge case for filing workers' compensation claim; later Indiana cases make clear that there must be a violation of a clear statutory mandate, and that courts are reluctant to expand the exceptions to the employment at-will rule); Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281–89 (Iowa 2000) (where the court noted that it had accepted two of the three bases for overcoming an employment at-will termination, those in violation of public policy and those which violate employee manuals, and reiterated its refusal to broadly construe the public policy exception, lest it morph into a broader good faith exception); Gonzalez-Centeno v. N. Cent. Kan. Reg'l Juvenile Det. Facility, 101 P.3d 1170, 1173 (Kan. 2004) (containing an historical survey of the Kansas rule, which appears to be a retaliatory discharge rule, somewhat different from the broad public policy rules embraced by most jurisdictions); *cf.* Schuster v. Derocili, 775 A.2d 1029, 1039–40 (Del. 2001) (ruling that there is a common law cause of action not based on a violation of public policy as such but rather based on a violation of the covenant of good faith and fair dealing when a plaintiff alleges that her termination directly resulted from her refusal to succumb to sexual advances or harassment); Jellico v. Effingham County, 471 S.E.2d 36, 38 (Ga. Ct. App. 1996) (unless and until the legislature acts to declare a termination wrongful as violative of public policy, the courts lack power to do so and will not usurp the legislative function by doing so; therefore only when the legislature has created such an action will the action lie in favor of a terminated employee); Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho, 851 P.2d 946, 948, 951 (Idaho 1993) (holding that the implied covenant of good faith and fair dealing, and the public policy exception, do not apply to independent contractors, here, an insurance agent who had worked at the agency for fourteen years; a vigorous dissent

This Article has examined the illusory nature of the at-will relationship and how the courts have manipulated the doctrine of consideration and related contract doctrines to reach what they believe are acceptable results in difficult cases. A future Article will examine the roles of good faith, reliance and public policy on the at-will relationship. For now though, it is apparent that, with the exception of Texas,[155] the courts have been unwilling to accept all the implications that flow from continued recognition of what is essentially an illusory relationship as the norm;[156] yet equally unwilling to acknowledge that they are changing the at-will relationship into something very different through the use and misuse of traditional contract doctrine; or, apparently, to discard the at-will relationship in favor of a relationship terminable only for cause, something the courts have the power to do—though they might be reluctant to exercise that power given the longstanding nature of the rule—since the doctrine is a court-created one.

Karl Llewellyn, over a half century ago, lamented that American courts were less than forthright when confronted with abusive contract clauses, preferring to construe the clauses in such a way that they lost their abusive effect in a particular case rather than simply hold them invalid as violative of public policy.[157] The difficulty with taking this indirect approach is that it both avoids resolving the true problem and creates additional problems farther down the road.[158] His concerns, and his conclusion, are no less true today, when it comes to courts dealing with the at-will relationship. Instead of manipulating doctrine to reach desired results, the courts should address

objected that there was no reason to treat at-will employees and at-will independent contractors differently).

[155] *See supra* note 11.

[156] *See supra* note 10.

[157] Karl Llewellyn, *Book Review*, 52 HARV. L. REV 700, 702–03 (1937) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1939)).

[158] *Id.* As Llewellyn pointed out, by construing the clause rather than invalidating it, courts imply that the clause is permissible, thereby encouraging lawyers to try to redraft the clause to make it enforceable despite its abusive effect, which they will inevitably accomplish. *Id.* Moreover, by avoiding rather than facing the issue, courts provide no guidance concerning the real problem, and thus give later lawyers and courts no guidance as to what is required to make the contract non-abusive, what Llewellyn called "marking out . . . what the *minimum decencies* are which a court will insist upon . . . ." *Id.* at 703. Finally, "since they purport to construe, and do not really construe . . . but are instead tools of intentional and creative misconstruction," courts make subsequent efforts at true construction more difficult, since similar language in legitimate contracts will be burdened by the earlier misconstructions. *Id.* at 703.

their fundamental problems with the at-will relationship, and either modify the rules, making consideration unnecessary for promises made by the participants in the relationship and/or declaring that the relationship no longer permits termination, at least by the employer, at will; or less likely, recognize that the relationship is illusory, so that it can never be the basis for any other agreement, and so that the parties to it are restrained only by notions of public policy, but may otherwise terminate it freely at any time and for any reason, without other exception. Llewellyn's words echo to this day: "Covert tools are never reliable tools."[159] It's time for the courts to cease their use in this area of the law.

[159] *Id.*