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(In)Coherence in Employment Contract Law: Response to Professors Arnow-Richman and J.H. Verkerke

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(IN)COHERENCE IN EMPLOYMENT CONTRACT LAW: RESPONSE TO PROFESSORS ARNOW-RICHMAN AND J.H. VERKERKE

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INTRODUCTION

In *Deconstructing Employment Contract Law*, Professors Rachel Arnow-Richman and J.H. Verkerke present a rigorously logical and perfectly compelling case that the application of unilateral contract theory to employment agreements "makes no sense" and is "an antiquated, ill-fitting, incoherent mess."[1] Unlike a reward, which is the paradigmatic (and perhaps only real example of) a unilateral contract, Professors Arnow-Richman and Verkerke are absolutely accurate when they describe employment contracts as bilateral and "hyper-relational."[2] By hyper-relational, they mean that employment is "a fluid, indefinite, and long-term relationship," not a one-shot, "discrete" transaction.[3] As a case for doctrinal coherence, and a shift of employment contracts from antiquity to modern understanding and practice, the article is a praiseworthy achievement.

There are two premises upon which *Deconstructing Employment Contract Law* proceed that are unassailable: (1) employment at-will is a "super-presumption,"[4] and (2) despite the typical scholarship advocating for just-cause legislation[5] employment at-will is entrenched in United States law and it is here to stay. Additionally, the authors are correct that, because of the potential threat the employment cases present to a

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1. Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 898–900 (2023) [hereinafter EMPLOYMENT CONTRACT LAW].

2. *Id.* at 922.

3. *Id.*

4. *Id.* at 909–14

5. *Id.* at 901.

coherence of general contract law principles, those cases are often seen as off in their own corner, a *sui generis* aberration.[6]

I depart with the authors, however, where they criticize what they call "employment contract exceptionalism."[7] And it may be that I would simply define this exceptionalism differently, because I am not attempting to bring order to doctrine where there is none. Rather, in throwing up my hands at the incoherent mess, I look at it and say: yes, employment contract law cases *are* different.[8] This is because of two very important features of the employment relationship that Professors Arnow-Richman and Verkerke recognize. First, employment contract law mostly consists of adhesive terms drafted by employers.[9] Second, the employment relationship is characterized by a more than notable imbalance in bargaining power.[10]

Given these realities, for those focused on protecting employees, logic and coherence, both lofty goals, might net out the instrumental benefits of unilateral contract theory.[11] That is to say, the forward path presented in *Deconstructing Employment Contract Law* brings a welcome coherence, but possibly at the expense of fairness for employees.[12]

I. FOCUS ON FORMATION

The article focuses on contract doctrine that addresses the formation (and, with that, the modification) of employment contracts. Formation, however, is not where contract doctrine polices bargain for fairness.

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6. *Id.* at 908.

7. *Id.* at 902.

8. A larger point may be that contract law broadly serves too many contexts and constituents to allow a unifying coherence. Rather than looking to employment law cases and trying to unify them with general contract principles, it might be more profitable to recognize employment contracts as a special branch of contract law. *See, e.g.*, Sinai Deutch, *Consumer Contracts Law as a Special Branch of Contract Law – the Israeli Model*, 29 TOURO L. REV. 695, 695 (2013) (advocating for the idea that there is not just one "unified 'contract law'"); Ruth Plato-Shinar, *The Banking Contract as Special Contract: The Israeli Approach*, 29 TOURO L. REV. 721, 722 (2013) (concluding that recognizing banking contracts as special fiduciary contracts yields better banking practices); *see also* Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract Law*, 29 Touro L. Rev. 659, 663 (2013) ("[T]he attention to the sophistication of contracting parties fits neatly within a theoretical shift toward pluralism and provides a way to strive for coherence and yet still order the competing values of contract law.").

9. EMPLOYMENT CONTRACT LAW, *supra* note 1, at 899.

10. *Id.* at 962 ("In contrast, workers are comparatively unsophisticated, make few employment contracts in their lifetime, and rarely enjoy legal representation during the negotiation or the performance of those contracts.").

11. *Id.* at 929 ("Thus, Professor Befort forthrightly acknowledges the doctrinal shortcomings of handbook cases, viewing judicial invocation of the unilateral contract framework as a desirable instrumentalist move that protects employees.").

12. *Id.* at 902.

Formation is, at least nominally, about mutual assent[13]that is, whether the parties have reached an agreement in the first place. But once there is an employee doing a job in exchange for a wage, there is no question that there is, at least objectively viewed, mutual assent.[14]

The more specific problem is whether certain specific terms, or terms peripheral to the fundamental exchange of work for a wage, are part of that bargain—for example, protections against termination, handbook terms, deferred compensation, arbitration clauses, confidentiality provisions, non-competes, etc. It does not appear that the common law doctrine of contract formation, whether through the lens of unilateral or bilateral contracts, is equipped to do the heavy lift of addressing these specific and peripheral terms (which are, often, the "details" to which "most workers pay very little attention").[15]

Where the term is one that benefits the employee—e.g., deferred compensation or specific job protections—why not proceed under a unilateral theory, if that serves the instrumentalist end of protecting an employee? After all, applying unilateral contract theory worked to the benefit of the employees in the cases that *Deconstructing Employment Contract Law* highlights for their doctrinal incoherence.[16]

Where the term is one that benefits the employer—e.g., arbitration, non-competition or non-disclosure—employment contract law leans heavily on traditional contract defenses (namely, unconscionability and public policy), which often fail to provide any protections.[17]

It may be that what the law needs is not to clean up the messy wake of ill-fitted general contract law principles to employment cases but, rather, statutory protections to address the places where the common law doctrine is ill-equipped to achieve fairness for employees: non-disclosure

13. *See* RESTATEMENT (SECOND) CONTRACTS §§ 17–18 (AM. L. INST. 1981).

14. *Id.* at § 17, cmt. c (explaining the objective nature of mutual assent: "The parties to most contracts give actual as well as apparent assent, but it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake").

15. EMPLOYMENT CONTRACT LAW, *supra* note 1, at 899.

16. *Id.* at 914–22.

17. *See, e.g.*, Xuan-Thao Nguyen, *Disrupting Adhesion Contracts with #metoo Innovators*, 26 VA. J. SOC. POL'Y & L 165, 197 (2019) ("Despite the reliance of litigants and scholars on unconscionability in challenging arbitration clauses [in employment contracts], judges have not responded positively to the unconscionability argument in this context."); Marissa Ditkowsky, *#ustoo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 100 (2019) ("Despite clear differences in bargaining power between low-wage workers and employers, a nondisclosure agreement would not be automatically unconscionable."); Meredith R. Miller, *Time's Up: Against Shortening Statutes of Limitation by Employment Contract*, 68 VILL. L. REV. 221, 230 (2023) (applying unconscionability and public policy analyses, courts have reached different conclusions on the enforceability of provisions shortening the time for an employee to bring a claim against their employer).

agreements, non-compete clauses, mandatory arbitration, etc. There is a current trend of statutory proposals to address these specific provisions.[18]

It seems that, in recognizing *Toussaint v. Blue Cross & Blue Shield*,[19] as a revolutionary and welcome departure from strict contract principles,[20] the authors are also recognizing that the existing contract principles are not up to the task of protecting employees. What is needed is not an abandonment of unilateral contract theory, but instead a *Toussaint* approach that looks informally to public policy by enforcing employees' reasonable expectations (more about this below).

II. APPLICATION OF MODERN APPROACH TO FORMATION

Profs. Arnow-Richman and Verkerke propose to bring order to doctrinal incoherence by looking to modern contracting principles: fluidity in formation and modification, heightened contextuality, and emphasis on the contractual obligation of good faith and fair dealing. The problem, of course, is that fluidity in formation and especially modification is most likely to serve employers, as will a heightened emphasis on context (industry standards, for example). This is compounded by the fact that employers write the express terms, which will inevitably reserve the right to unilaterally modify those terms and disclaim any interpretation that overrides the super-presumption of employment at-will. This, in turn, serves to counteract any reasonable expectation of greater protection.

Moreover, the implied covenant of good faith and fair dealing is just that—implied. And even under a modern approach, the courts will not

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18. *See, e.g.*, Ellen J. Zucker, *NDAs: Is There Anything Worth Keeping?*, BOS. B.J., Summer 2022, at 22 (reporting that over a dozen states have passed legislation limiting the use of non-disclosure and non-disparagement agreements in the workplace); Will Kishman, *The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws (US)*, EMP. L. WORLD VIEW (Sept. 28, 2023), https://www.employmentlawworldview.com/the-non-compete-landscape-in-2023-what-employers-should-know-about-changes-in-non-compete-law-from-the-ftc-nlrb-antitrust-claims-and-new-state-laws-us/ [https://perma.cc/46Y5-NSGV] ("There are now five states that outright ban virtually all non-competes, i.e., California, Colorado, Minnesota, North Dakota and Oklahoma."); Deborah A. Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, A.B.A. (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/#:~:text=In%20March%202022%2C%20Congress%20enacted,)%2C%20went%20into%20effect%20immediately [https://perma.cc/JMP6-WAUL].

19. 292 N.W.2d 880 (Mich. 1980).

20. EMPLOYMENT CONTRACT LAW, *supra* note 1, at 943.

imply terms that would be inconsistent with express ones.[21] The employers write the express terms to minimize their obligations and maximize their own exculpation from liability. Therefore, there will be very little room for the application of an implied good faith standard (and, at least at common law, good faith is generally understood to apply only to contract performance, not formation).[22]

Further, in this connection, it is difficult to square good faith and fair dealing with the super-presumption of at-will employment. Indeed, at its core, the at-will presumption reserves unfettered discretion and business flexibility for the employer.[23] The motive for termination, whether viewed objectively or subjectively, is made irrelevant. So, if the analysis proceeds on the concession of employment at-will, it is not clear how we can find good faith.

III. REASONABLE EXPECTATIONS

Professors Arnow-Richman and Verkerke discuss the approach used in *Toussaint*, which looked to the "reasonable expectations" of an employee, in holding the employer bound to oral assurances of job security and written termination policies in a supervisory manual.[24] However, this inquiry into an employee's reasonable expectations, has not gained wide application or acceptance. This could be because it departs from the formalism to which modern contract law still adheres.[25] Once the law is concerned with an employee's reasonable expectations, Grant Gilmore surfaces to remind us that the borderline between contract and tort has been eroded.[26]

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21. *See, e.g.*, Singh v. City of New York, 217 N.E.3d 1, 5 (2023) ("Thus, the covenant cannot be used to 'imply obligations inconsistent with other terms of the contractual relationship,' and encompasses only those 'promises which a reasonable person in the position of the promisee would be justified.'") (citations omitted); VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773, 777 (S.D.N.Y. 1969) ("The general rule which these cases lay down is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing.").

22. *See* RESTATEMENT (SECOND) CONTRACTS § 205, cmt. c (AM. L. INST. 1981) ("This Section . . . does not deal with good faith in the formation of a contract.").

23. Joseph A. Seiner, *Sensible Just Cause*, 103 B.U. L. REV. 1295, 1298 (2023) ("The primary benefit of at-will employment is the flexibility that it provides businesses, and it may (in some instances) even encourage the hiring of employees.").

24. EMPLOYMENT CONTRACT LAW, *supra* note 1, at 945–46.

25. *See* Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 499 n.32 (2010) (collecting scholarship identifying a return to formalism in contract law).

26. GRANT GILMORE, THE DEATH OF CONTRACT 50–51 (1974) (comparing contract law to tort law and recognizing the delineation between the two has lessened since the early nineteenth century).

The focus on reasonable expectations of employees has all of the trappings of the Restatement (Second) Contracts § 211. Section 211 "provides for enforcement of all terms in a standardized agreement unless the drafting party 'has reason to believe' that the non-drafting party was unaware of the terms and would not have signed the contract if aware of them."[27] The text of Section 211 does not specify that its application is limited to standardized forms in the consumer context, and the comments do mention the use of adhesion contracts in employment.[28]

Nevertheless, the fundamental concept of Section 211 is that, when addressing adhesion contracts, formation is presumed, and the question about standardized terms is simply one of interpretation. That interpretation is based upon reasonable expectations of the adhering party, not what the terms of the form actually say. It is an "elegant" approach that recognizes the modern realities of standard form contracts.[29] Yet, similar to the "reasonable expectations" approach used in *Toussaint*, it has not been widely adopted by the courts.[30]

CONCLUSION

Coherence is a lofty goal, but it may be that a little incoherence is not such a terrible thing, especially if it serves the instrumental end of protecting an employee who has been unfairly denied a bonus or dismissed in a way that does not accord with the employer's stated termination procedures. Fairness first; coherence second. Further, it may be that the lever to bring coherence is not the common law doctrine of contracts but, legislative proposals that police employment agreements for fairness in terms. I do not believe that Professors Arnow-Richman and Verkerke would find it controversial to say that we cannot leave the job of protecting employees' reasonable expectations to general common law contract principles.

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27. Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 739 (2016).

28. RESTATEMENT (SECOND) CONTRACTS § 211, cmts. b–c (AM. L. INST. 1981).

29. ZACKS, *supra* note 27, at 736; *see also* Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 272 (2007).

30. ZACKS, *supra* note 27, at 757.