Reflections on California's At Will Employment Agreement Jurisprudence

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REFLECTIONS ON CALIFORNIA'S "AT WILL" EMPLOYMENT AGREEMENT JURISPRUDENCE

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I. INTRODUCTION

Garden-variety breach of contract claims are one of the mainstays of the disgruntled former employee's wrongful termination arsenal.1 In a typical case, the plaintiff claims that he or she was discharged in violation of an "implied-in-fact" contract2 not to terminate except for "good cause."3 As evidence of the implied-in-fact contract, the employee points to

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1. This is explained in part by restrictions on tort recovery. See, e.g., Hunter v. Up-Right, 864 P.2d 88, 90-94 (Cal. 1993) (excluding misrepresentations used to effect termination from the range of actionable fraud); Livitsanos v. Superior Court, 828 P.2d 1195, 1199-1204 (Cal. 1992) (holding the workers' compensation system preempts claims for negligent and intentional infliction of emotional distress based on "purely emotional" injury); Shoemaker v. Myers, 801 P.2d 1054, 1063-67 (Cal. 1990) (holding the workers' compensation system preempts claims for negligent and intentional infliction of emotional distress arising from the plaintiff's discharge unless the plaintiff's discharge results from risks not reasonably deemed within the compensation bargain or comes within a specific statutory exception, e.g., "whistleblowing"); Foley v. Interactive Data Corp., 765 P.2d 373, 389-96 (Cal. 1988) (limiting recovery for breach of the implied covenant of good faith and fair dealing to contract damages).

2. "Implied" contract terms are established by conduct. CAL. CIV. CODE § 1621 (West 1985). "Express" contract terms are established using words. Id. § 1620. Beyond semantics, the distinction is largely one of proof. Bell v. Superior Court, 263 Cal. Rptr. 787, 789 (Ct. App. 1989). Implied terms "ordinarily stand on equal footing with express terms." Foley, 765 P.2d at 385.

3. The good cause standard is discussed infra part II(A)(2).
his or her years (or in some cases months)\textsuperscript{4} of company service, to oral assurances of permanent employment, to the employer's personnel policies, and to his or her promotions, positive performance evaluations and salary increases.\textsuperscript{5} To establish breach, the plaintiff then endeavors to show that the reason asserted for termination did not amount to good cause or was false and pretextual.\textsuperscript{6} Proof of both elements is indispensable. Evidence of an implied-in-fact contract is necessary to overcome the statutory presumption that the plaintiff was an "at will" employee, meaning an employee who could be terminated for any lawful reason.\textsuperscript{7} Evidence of breach is essential because damages are not available to a plaintiff who merely demonstrates an implied-in-fact contract.\textsuperscript{8}

While experienced employment attorneys are accustomed to seeing these issues, a new wrinkle is becoming increasingly familiar to litigators on both sides of the fence. Specifically, management-side attorneys are now enjoying some distinct success using at will employment terms—provisions stating that the employee may be terminated at any time and for any reason—to foreclose potential contract claims.\textsuperscript{9} In this scenario, the employer argues that the parties' written at will agreement bars an implied-in-fact contract as a matter of law, or alternatively, that extrinsic evidence of an implied-in-fact contract is \textit{inadmissible} under the

\textsuperscript{4} E.g., DeHorney v. Bank of Am. Trust & Sav. Co., 879 F.2d 459 (9th Cir. 1989) (where the plaintiff emphasized her eight months working for the defendant as evidence of an implied-in-fact contract).

\textsuperscript{5} Evidence of an implied-in-fact contract is discussed \textit{infra} part II(A)(3). Plaintiffs can also establish a right to job security under a second theory by demonstrating that "the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer. . . ." Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 935 (Ct. App. 1981); \textit{see also} Rabago-Alvarez v. Dart Indus., 127 Cal. Rptr. 222, 224-25 (Ct. App 1976) (affirming a verdict for the plaintiff on her contract claim where she gave up long-term employment with another employer—which she was "extremely hesitant to leave"—in exchange for a job with the defendant, and where the defendant promised her she would have a permanent position and could only be terminated for cause). This article does not address the "independent consideration" theory.

\textsuperscript{6} Breach of contract is discussed \textit{infra} part II(B).

\textsuperscript{7} The statutory presumption of at will employment is discussed \textit{infra} part II(A)(1).

\textsuperscript{8} \textit{See infra} note 29.

\textsuperscript{9} \textit{See infra} part III(F) (discussing the two most recent decisions, both decided in favor of the employer).
parol evidence rule. In support of the first contention, employers look to opinions such as Shapiro v. Wells Fargo Realty Advisors,\(^1\) holding that "[t]here cannot be a valid express contract and an implied contract each embracing the same subject, but requiring different results."\(^1\) In support of the latter, employers look to opinions such as Gerdlund v. Electronic Dispensers Int'l,\(^2\) holding that "it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement."\(^3\)

While popular for the purpose of summary judgment motions,\(^4\) these arguments are far from a sure bet, because

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11. Id. at 621 (affirming ruling sustaining demurrer to the plaintiff's contract claim because he signed an at will stock option agreement). Accord Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271-72 (9th Cir. 1990) (reversing summary judgment, but holding that the plaintiff could not establish an implied-in-fact contract given the fact that he signed an at will employment application); Gianaculas v. TWA, 761 F.2d 1391, 1394 (9th Cir. 1985) (affirming summary judgment and holding that the plaintiffs were precluded from establishing an implied-in-fact contract as a matter of law where they signed at will employment applications); Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1320-21 (N.D. Cal. 1984) (granting summary judgment where the plaintiff signed an at will employment agreement); Crain v. Burroughs Corp., 560 F. Supp. 849, 852-53 (C.D. Cal. 1983) (same); Camp v. Jeffers, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 333-35 (Ct. App. 1995) (affirming summary judgment where the plaintiffs signed at will acknowledgment forms); Rochlis v. Walt Disney Co., 23 Cal. Rptr. 2d 793, 797-98 (Ct. App. 1995) (affirming summary judgment in part because the plaintiff signed an at will stock option agreement); Anderson v. Savin Corp., 254 Cal. Rptr. 627, 630-31 (Ct. App. 1988) (affirming summary judgment where the plaintiff signed an at will employment letter).

12. 235 Cal. Rptr. 279 (Ct. App. 1987). Shapiro and Gerdlund are the two principal cases in this area. Thus, the doctrine may be referred to as the "Shapiro-Gerdlund doctrine."

13. Id. at 282 (reversing judgment for the plaintiff in a contract action based on the trial court erroneously denying the defendant's motion in limine to exclude evidence of oral representations of job security). Accord Haggard v. Kimberly Quality Care, Inc., 46 Cal. Rptr. 2d 16, 21-24 (Ct. App. 1995) (reversing judgment for the plaintiff in a contract action where the plaintiff signed several at will employment agreements); Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 418-20 (Ct. App. 1989) (affirming summary judgment where the plaintiff signed both an at will employment application and an at will acknowledgment form); Malstrom v. Kaiser Aluminum & Chem. Corp., 231 Cal. Rptr. 820, 827-28 (Ct. App. 1986) (affirming summary judgment where the plaintiff signed an at will agreement).

14. Most of the published opinions in this area were decided on summary judgment. See generally part III, infra (chronicling cases). Note further that the issue of the existence of an implied-in-fact contract and the issue of whether the employer had good cause for termination may be resolved as a matter of law. See infra notes 29 and 107.
these decisions are not always easy to reconcile. For example, courts disagree on the need for an "integrated" writing, on the significance of at will employment applications, and on the continued viability of an implied-in-fact modification theory.

No one benefits from this uncertainty. Employers are forced to commit considerable resources to litigation. Additionally, employers, concerned about fueling potential contract claims, have begun to eliminate important employee benefits (e.g., termination guidelines and progressive discipline policies).

In response, this article suggests that the cases can be interpreted to stand for a unified proposition, and indeed, one which finds support in conventional reasonable expectation contract theory. Cases in this area of the law have all addressed the same fundamental question: Whether the parties' employment agreement includes an implied-in-fact contract term limiting the employer's statutory right to terminate the employment relationship at any time for any lawful reason.

Courts have responded by establishing the "rule" that once a plaintiff acknowledges his or her at will employment status in writing, the plaintiff will only be permitted to argue that the defendant breached an implied-in-fact security term

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15. Ninth Circuit Judge Alex Kozinski suggests that: "What was once a relatively simple inquiry has become the stuff of lengthy trials and burdensome discovery, encompassing everything that ever transpired between the employee and her employer, as well as the employer's treatment of other employees." Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 783 (9th Cir. 1990) (Kozinski, J., dissenting).

16. The employment relationship is fundamentally contractual. Foley v. Interactive Data Corp., 765 P.2d 373, 381 n.14 (Cal. 1988) ("[T]here is no reason that standard contract principles should not apply in the employment context."); Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 737 (C.D. Cal. 1986) ("In California, the employment relationship traditionally has been regarded as strictly contractual."). See also Scott v. Pacific Gas & Elec. Co., 904 P.2d 834, 838-45 (Cal. 1995) (extending the standard implied-in-fact contract analysis to claims for breach of an implied contract not to demote without good cause); General Dynamics Corp. v. Superior Court, 876 P.2d 489, 496-504 (Cal. 1994) (analyzing, in terms of traditional implied-in-fact contract law, the issue of whether a corporation has an absolute right to terminate an in-house attorney under the auspices of the attorney-client relationship). This includes the at will relationship. Ninth Circuit Judge Diarmuid F. O'Scannlain put it best when he stated that the question in breach of employment contract cases is not whether there was in fact a contract, but instead whether the contract required good cause for termination. Schneider v. TRW, Inc., 938 F.2d 986, 996 n.5 (9th Cir. 1991) (O'Scannlain, J., dissenting).
by offering evidence that establishes a reasonable expectation of job security. This rule, which focuses on objective evidence justifying the plaintiff’s expectations, is consistent both with the idea that contracts are promissory in nature, that is, contractual obligations are defined by the underlying “promise,” and with the related idea that not all manifestations of contractual intent rise to the level of a promise, but only external manifestations of intent which would lead a reasonable person to conclude that the promissor is assuming a specific commitment.18

Section IV explores this rule in more detail.19 The remaining sections will be structured as follows. Section II reviews the basic law governing implied-in-fact contracts, the implied covenant of good faith and fair dealing, and the parol evidence rule.22 Section III reviews the caselaw.23 Section V offers some concluding remarks.24 This article does not provide a comprehensive review of rudimentary contract theory, and does not attempt to justify the doctrine of at will employment. The scope of the article is limited accordingly.

II. IMPLIED-IN-FACT CONTRACT CLAIMS AND RELATED CONCERNS25

A. IMPLIED-IN-FACT EMPLOYMENT SECURITY TERMS

1. THE STATUTORY PREASSUMPTION OF AT WILL EMPLOYMENT

California Labor Code section 2922 provides that “[an] employment, having no specified term, may be terminated at
the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.” The first question to be asked in a breach of contract action where the plaintiff does not have an agreement for a specified term of employment is whether he or she can overcome (or more accurately “rebut”) this statutory presumption with evidence of a reasonable expectation of job security. Failing this, the plaintiff has absolutely no situations involving only a breach of contract, situations involving a discharge in violation of a fundamental public policy and situations involving breach of the implied covenant of good faith and fair dealing.” Id. at 824. Recognizing this, the court suggested that “[i]t would be conducive to proper analysis if courts and lawyers used a different nomenclature to denominate these different situations in which liability is imposed after all on different legal theories.” Id. According to the court, a more “appropriate nomenclature is ‘breach of employment contract’ for the true breach of contract cases, ‘tortious discharge’ for the public policy cases and ‘bad faith discharge’ for the cases involving breach of the implied covenant of good faith and fair dealing.” Id. Accord Anderson v. Savin Corp., 254 Cal. Rptr. 627, 629-630 (Ct. App. 1988).


27. In Foley, the California Supreme Court explained that the presumption is rebuttable because “courts seek to enforce the actual understanding of the parties to a contract, and in so doing, may inquire into the parties' conduct to determine if it demonstrates an implied contract.” Foley v. Interactive Data Corp., 765 P.2d 373, 385 (Cal. 1988). See also Schneider v. TRW, Inc., 938 F.2d 986, 990 (9th Cir. 1991) (“An employee may overcome this presumption with evidence of contrary intent.”); Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 885 (N.D. Cal. 1994) (The presumption of at will employment “may be rebutted only by evidence of an express or implied agreement that the employment will terminate only ‘for cause.’”); Scott v. Pacific Gas & Elec. Co., 904 P.2d 834, 839 (Cal. 1995) (“In Foley, we held that an implied-in-fact contract term not to terminate an employee without good cause, based on the employer’s course of conduct and oral representations, will overcome the statutory presumption found in Labor Code section 2922 that employment for an indefinite period is terminable at will.”).

breach of contract case.\textsuperscript{29} Employers are free to terminate at will employees at any time for any or no reason; provided the reason, if one exists, is not unlawful.\textsuperscript{30} infra note 48 (citing cases emphasizing the plaintiff's burden to demonstrate a reasonable expectation of job security).

\textsuperscript{29} "In a contract action asserting breach of a covenant not to discharge except for good cause, the plaintiff must demonstrate an agreement not to terminate except for good cause \textit{and} that the employer lacked good cause for the discharge." Foley, 765 P.2d at 400 n.38.

Significantly, the issue of whether or not the plaintiff established an implied contract can be resolved as a matter of law. Joanou v. Coca-Cola Co., 26 F.3d 96, 99 (9th Cir. 1994) (affirming summary judgment where the plaintiff failed to present any evidence establishing an implied contract); Schneider, 938 F.2d at 989-91 (same); DeHorney v. Bank of Am. Trust & Sav. Co., 879 F.2d 459, 466-67 (9th Cir. 1989) (same); Bianco v. H.F. Ahmanson & Co., 897 F. Supp. 433, 440-41 (C.D. Cal. 1995) (granting summary judgment where the plaintiff only produced "scant" evidence of an implied-in-fact contract); Hoy, 861 F. Supp. at 884-87 (granting summary judgment where the plaintiff's only evidence of an implied contract was his 26 years of company service); Paris v. F. Korbel & Bros., 751 F. Supp. 834, 837 (N.D. Cal. 1990) (granting summary judgment where the plaintiff failed to offer any evidence of an implied-in-fact contract); Davis v. Consolidated Freightways, 34 Cal. Rptr. 2d 438, 446 (Cal. App. 1994) (same); Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 418-20 (Cal. App. 1989) (affirming summary judgment and noting that there was an "utter lack of any substance to a claim of an implied or express agreement"); Miller v. Pepsi-Cola Bottling Co., 259 Cal. Rptr. 56, 58-59 (Cal. App. 1989) (affirming summary judgment where the plaintiff failed to establish implied contract). \textit{But see} Tonry v. Security Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (commenting that the existence of an implied-in-fact contract must be determined as a question of fact); Kern, 899 F.2d at 776 ("The existence of such implied promises is a question of fact for the jury to decide."); Scott, 904 P.2d at 839 (stating that determination of whether parties' conduct established implied contract is ordinarily a question of fact); Foley, 765 P.2d at 388 (same); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 625 (Cal. App. 1990) ("It must be determined, as a question of fact, whether the parties acted in such a manner as to provide the necessary foundation for an implied contract."); \textit{cert. denied}, 498 U.S. 939 (1990); Hejmadi, 249 Cal. Rptr. at 13 ("The question of whether an implied in fact promise has been made is normally a question for the jury, rather than a court, to decide."); Walker v. Northern San Diego County Hosp. Dist., 185 Cal. Rptr. 617, 622 (Cal. App. 1982) (emphasizing that the question of whether the plaintiff established an implied-in-fact contract was one for the jury, not the trial court).

In contrast, the existence of an implied-in-fact contract may not be resolved as a matter of law. In Haycock v. Hughes Aircraft Co., 28 Cal. Rptr. 2d 248 (Cal. App. 1994), the court explained that the presumption of at will employment is one affecting the burden of proof, and accordingly, that it is sufficient to warrant sending the issue to the jury even in the absence of evidence that the employment relationship was at will. \textit{Id.} at 258. The court reversed a verdict for the plaintiff where the trial court ruled that the plaintiff established an implied contract as a matter of law. \textit{Id.}

\textsuperscript{30} Foley, 765 P.2d at 376 ("Absent any contract . . . the employment is 'at will,' and the employee can be fired with or without good cause."); Davis, 34 Cal. Rptr. 2d at 446 (affirming summary judgment and holding that where the
2. Good Cause for Termination

An implied-in-fact contract can be used to limit the employer's power to terminate the employment relationship.\(^{31}\) If found to exist, an implied-in-fact agreement operates as a promise that the employer will not terminate except for "just" or "good cause."\(^{32}\) The widely accepted definition of the good cause plaintiff failed to rebut the presumption of at will employment, the defendant "was at liberty to discharge [the] plaintiff for any reason or no reason (so long as it was not unlawful"); Hejmadi, 249 Cal. Rptr. at 17 (commenting that continuous employment is not a benefit of an at will employment agreement); Brian F. Berger, Note, Defining Public Policy Torts in At Will Dismissals, 34 STAN. L. REV. 153 (1981) ("The employment-at-will rule allows an employer to discharge an employee for good cause, bad cause, or no cause at all."); J. Peter Shapiro & James F. Tune, Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335 (1974) ("Unless an employment contract expressly specifies a term of employment, an employer may discharge an employee for a good cause, a bad cause, or no cause at all."). See also Haggard v. Kimberly Quality Care, Inc., 46 Cal. Rptr. 2d 16, 23 (Ct. App. 1995) (commenting that the interpretation that employment was "terminable by either party 'at will, at any time, with or without cause or advance notice'" was "inescapable"); Gerdlund v. Electronic Dissensers Int'l, 235 Cal. Rptr. 279, 284 (Ct. App. 1987) (holding that the term "any reason" is not ambiguous within the meaning of the context of the parol evidence rule, because it is "is plainly all-inclusive, encompassing all reasons 'of whatever kind,' good, bad, or indifferent").

The policy supporting the at will doctrine is not to compel an employee to accept employment, on the one hand, and not to force an employer to hire or retain an employee, on the other. Consolidated Theaters, Inc. v. Theatrical Stage Employees Union, 447 P.2d 325, 335 n.12 (Cal. 1968); Haycock, 28 Cal. Rptr. 2d at 258-59.

31. "As the name suggests, an implied-in-fact contract claim as a limitation on an employer's historical at-will power to terminate one of its employees is rooted in the conduct of the parties to the employment relationship itself." General Dynamics Corp. v. Superior Court, 876 P.2d 487, 495 (Cal. 1994) (emphasis added).

32. The terms "just cause," "good cause" and "cause" are interchangeable. Scott, 904 P.2d at 837 n.1. Breach of implied-in-fact contract actions are not limited to termination claims. See, e.g., Rose v. Wells Fargo & Co., 902 F.2d 1417, 1425-27 (9th Cir. 1990) (asserting implied promise to make reasonable efforts to relocate the plaintiffs within the company in the event of a reduction in force); Gianaculas v. TWA, 761 F.2d 1391, 1393 (9th Cir. 1985) (asserting implied promise to displace junior employees in the event of a reduction in force); Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1317-18 (N.D. Cal. 1984) (asserting implied promise not to terminate the plaintiff before he was eligible for early retirement); Hillsman v. Sutter Community Hosp., 200 Cal. Rptr. 605, 608 (Cal. 1984) (asserting implied promise to be terminated only in accordance with by-laws); Shapiro, 199 Cal. Rptr. at 615 (asserting implied promise regarding the opportunity to achieve the maximum level of base pay).

At first blush, the theory underlying the implied-in-fact promise not to terminate except for cause would seem to be flawed in terms of traditional notions of mutuality. The employer agrees to accept an obligation without exacting any corresponding promise from the employee. While an appealing argument for
cause standard is a fair and honest reason for termination regulated by good faith.\textsuperscript{33} The terms are relative.\textsuperscript{34}

Good cause should not be confused with some sort of promise or guarantee of lifetime tenure. In the words of one court, "[e]ven when the implied promise of continued employment is found, it is only a promise not to terminate employment without some good reason ... or a fair and honest cause or reason, regulated by good faith."\textsuperscript{35} Employers frequently assert poor performance\textsuperscript{36} or misconduct\textsuperscript{37} as the reason for the employee's termination. Reductions in force are also com-

defense attorneys, the issue is in no way novel, and has already been resolved in the employee's favor. In the seminal case of Pugh v. See's Candies, Inc., 171 Cal. Rptr. 119 (Ct. App. 1981), the court explained that consideration beyond the employee's performance is not required, reasoning that there must be an exchange of consideration, but not an exchange of promises of equal value. \textit{Id.} at 126. \textit{Accord} Foley v. Interactive Data Corp., 765 P.2d 373, 386 (Cal. 1988).


For a thoughtful discussion of whether the good cause standard should be discarded in favor of a "fairness" standard, see Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 735-39 (C.D. Cal. 1986) (explaining that courts are not suited to make decisions for employers and that courts have encouraged the proliferation of lawsuits by analyzing termination decisions in terms of whether the plaintiff had a contractual right to termination only for good cause, and if so, whether the reason for the discharge met that standard).

34. Stokes v. Dole Nut Co., 48 Cal. Rptr. 2d 673, 679 (Ct. App. 1995); Walker, 6 Cal. Rptr. 2d at 189; Moore, 271 Cal. Rptr. at 843; \textit{Pugh}, 171 Cal. Rptr. at 928.


36. \textit{See}, e.g., Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 887-88 (N.D. Cal. 1994) (granting summary judgment where the plaintiff was terminated for poor performance); Van Komen v. Montgomery Ward & Co., 638 F. Supp. 739, 740-41 (C.D. Cal. 1986) (granting summary judgment where there was overwhelming evidence of the plaintiff's poor performance); \textit{Moore}, 271 Cal. Rptr. at 843-44 (affirming summary judgment where there was no question that the plaintiff's gross negligence resulted in a substantial loss of company property); Robinson v. Hewlett-Packard Corp., 228 Cal. Rptr. 591, 599-601 (Ct. App. 1986) (affirming summary judgment for wrongful termination where the defendant discharged the plaintiff for poor performance when, despite efforts to accommodate the plaintiff's work-related back injury, the plaintiff's performance increasingly deteriorated).
Specific examples of good cause include sexual harassment.

Of course, poor performance is not good cause *per se*. Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453, 459-60 (Ct. App. 1993) (holding that the plaintiff raised triable issue of material fact with evidence that he was terminated because he refused to discriminate against a coworker who was the union shop steward, not for poor performance and insubordination); Prevost v. First W. Bank, 239 Cal. Rptr. 161, 167-68 (Ct. App. 1987) (reversing summary judgment where there was evidence raising a triable issue of fact as to whether the plaintiff was actually terminated for poor performance, as asserted by the defendant, or whether he was discharged as part of a "power struggle").

37. See infra notes 39, 41, 43-44 (citing specific examples of misconduct). Notably, specific acts of misconduct are admissible in a contract action on the issue of the plaintiff's fitness for his or her job. Pugh v. See's Candies, Inc., 250 Cal. Rptr. 195, 203-04 (Ct. App. 1988) (rejecting the plaintiff's argument that the trial court mistakenly admitted evidence that he did not get along well with other employees, because the evidence was relevant to show the role the plaintiff's personnel problems played in his termination).

38. Schneider v. TRW, Inc., 938 F.2d 986, 989-92 (9th Cir. 1991) (affirming summary judgment and finding that the plaintiff failed to refute the defendant's evidence that she was discharged as part of a company-wide lay off for economic reasons); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1425-27 (9th Cir. 1990) (affirming summary judgment where the plaintiff failed to refute the defendant's evidence that they were discharged as part of a legitimate reduction in force following a merger); Gianaculas v. TWA, 761 F.2d 1391, 1394-95 (9th Cir. 1985) (affirming summary judgment where the plaintiff's discharged evidence that they were furloughed as the result of a general reduction in management necessitated by the company's economic condition); Burdette v. Mepco/Electra, Inc., 673 F. Supp. 1012, 1016-17 (S.D. Cal. 1987) (granting summary judgment where there was unrefuted evidence that the plaintiff was discharged as part of a reduction in force necessary due to deteriorating market conditions); Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 731-33 (C.D. Cal. 1986) (granting summary judgment where there was evidence of a legitimate reduction in force and rejecting the plaintiff's argument not that the reduction in force was pretextual, but that it was pretextual as applied to him). See also Lorentz v. Carus Corp., No. C91-1013BAC, 1992 U.S. Dist. LEXIS 12591, at *7-9 (N.D. Cal. July 14, 1992) (granting summary judgment where the defendant offered unrefuted evidence that the plaintiff was discharged as part of a reduction in force necessary due to severe financial difficulties); Mosely v. Metropolitan Life Ins. Co., No. C88-0905, 1991 U.S. Dist. LEXIS 11643, at *9-10 (N.D. Cal. Aug. 14, 1991) (granting summary judgment for the defendant where there was unrefuted evidence that the plaintiff was discharged as part of a necessary reduction in force).

A reduction in force is also not good cause *per se*. Madden v. Independence Bank, 771 F. Supp. 1514, 1519 (C.D. Cal. 1991) (denying summary judgment where there was conflicting evidence that there actually was a reduction in force). Cf. Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021, 1030-31 (N.D. Cal. 1988) (denying summary judgment on claim for breach of the implied covenant of good faith and fair dealing where the plaintiff raised a triable issue of material fact about whether the alleged reduction in force was merely pretextual). And discharge as part of a reduction in force may still be actionable where the manner of the discharge violates the defendant's written policies. Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 776-77 (9th Cir. 1990) (affirming
assment, disloyalty, reading confidential information, entering restricted areas at the workplace, marking down merchandise without authorization, falsifying documents, failing to return to work as scheduled, and refusing to follow the employer's reasonable instructions. What good verdict for the plaintiff where there was evidence that the manner of the plaintiff's layoff breached the defendant's layoff policy).


40. Stokes v. Dole Nut Co., 48 Cal. Rptr. 2d 673, 681 (Ct. App. 1995) (affirming summary judgment where the plaintiff management level employees performed substantial acts toward the objective of establishing a competing business knowing that they would be competing with the defendant); Fowler v. Varian Assoc., 241 Cal. Rptr. 539, 542-44 (Ct. App. 1987) (affirming summary judgment where the plaintiff marketing manager refused to disclose confidential information about competitor he was involved with, because in his position, he was obligated to share information about his competitor's plans with the defendant). Once again, this is not good cause per se. Wallis v. Farmers Group Ins., 269 Cal. Rptr. 299, 307-08 (Ct. App. 1990) (affirming judgment for the plaintiff on her implied contract claim and emphasizing that there was substantial evidence in support of the jury's finding that the plaintiff was terminated for filing suit against the defendant, not for a conflict of interest).


42. Id.


44. Lodermeier v. Toys "R" US, 9 Lab. Rel. Rep. (BNA) 301 (E.D. Cal. 1994) (granting summary judgment where the plaintiff was discharged for directing a subordinate to falsify accounting reports in violation of established company policies). The plaintiff raised an interesting argument in Lodermeier. While conceding that he directed a subordinate to falsify the accounting reports, the plaintiff argued his misconduct warranted less severe disciplinary sanctions. Id. at 304. He emphasized that the consequences of falsifying the reports were minimal. Id. The court disagreed, reasoning that the plaintiff's misconduct violated a number of written policies, and was therefore "serious" regardless of the financial consequences. Id.

45. Knights v. Hewlett-Packard Corp., 281 Cal. Rptr. 295, 297-98 (Ct. App. 1991) (affirming summary judgment where plaintiff repeatedly failed to satisfy deadlines to return to work imposed by the defendant or to request additional time off).

46. "Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty - a breach of the contract of service; and, like any other breach, of itself entitles the master to renounce the contract of employment." May v. New York Motion Picture Corp., 45 Cal. App. 396, 403 (1920); see also Cal. Lab. Code § 2856 (West 1995) (stating that employees must substantially comply
cause does not include is the employer’s subjective belief that termination can be justified when this belief lacks any factual support.\textsuperscript{47}

3. \textit{Evidence Establishing an Implied-In-Fact Contract}
   a. \textit{General Principles}

Whether or not the employee has met his or her burden to establish an implied-in-fact contract is determined with reference both to the reasonable expectations of the parties\textsuperscript{48}

with directions from their employers so long as the directions are not unlawful or impossible to perform, and do not impose new and unreasonable burdens on the employee; Compania Constructora Bechtel-McConne, S. Am. v. McDonald, 157 F.2d 749, 750-753 (9th Cir. 1946) (affirming judgment for the defendant where the plaintiff refused to follow instructions from his foreman); Story v. San Rafael Military Academy, 3 Cal. Rptr. 847, 847-848 ( Ct. App. 1960) (holding that the fact the plaintiff refused to follow instructions from his employer supported a finding of anticipatory breach); Bank of Am. Trust & Sav. Co. v. Republic Prod., 112 P.2d 972, 973 (Cal. App. 1941) (holding the fact that the plaintiff refused to comply with instructions from her employer to be at work justified her termination).

47. Courts continue to struggle with the role the employer’s subjective good faith belief plays in California’s employment contract jurisprudence. Compare Cotran v. Rollins Hudig Hall Int’l, 57 Cal. Rptr. 2d 129 ( Ct. App. 1996) (holding, in a breach of contract claim by managerial employee discharged for sexual misconduct, that the jury should have been instructed to determine whether the defendant reasonably, and in good faith, believed the misconduct had occurred; not to determine whether defendant proved plaintiff actually committed sexual harassment) with Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 192 (Ct. App. 1989) (rejecting as irrelevant evidence of the defendant’s subjective good faith belief that there was good cause for discharging the plaintiff for misconduct).

48. See Hejmadi v. AMFAC, Inc., 249 Cal. Rptr. 5, 18 (Ct. App. 1988) (discussing reasonable expectations of the parties to an at will employment agreement); Burton v. Security Pac. Nat’l Bank, 243 Cal. Rptr. 277, 782 (Ct. App. 1988) (commenting that California courts have limited the employer’s right to terminate an employee based in part on the reasonable expectations of the parties); Crosier v. United Parcel Serv., 198 Cal. Rptr. 361, 366 (Ct. App. 1983) (same). See also, infra note 487 (citing authority for the proposition that claims for breach of the implied covenant of good faith and fair dealing are also determined with reference to the parties’ reasonable expectations). Compare Mundy v. Household Fin. Corp., 885 F.2d 542, 544-45 (9th Cir. 1989) (affirming summary judgment where the plaintiff signed an at will employment agreement and finding that since the employment relationship was clearly at will, the plaintiff did not have a reasonable expectation of job security) and Crain v. Burroughs Corp., 560 F. Supp. 849, 852 (C.D. Cal. 1983) (commenting that the plaintiff did not have a legitimate expectation of a right to a just cause determination prior to discharge) and Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 333-35 (Ct. App. 1995) (finding that the plaintiff did not offer evidence demonstrating a legitimate expectation of employment for any particular length of time) with Scott v. Pacific Gas & Elec. Co., 904 P.2d 834, 846 (Cal.
and “totality” of the circumstances. Thus, a wide array of evidence may be used to establish the same. Typically, this evidence consists of the standard “Pugh factors” (explored below), which include the employee’s longevity of service, salary increases, promotions and performance evaluations. The plaintiff may also point to the employer’s personnel policies and handbooks, and to oral assurances of job security.

1995) (finding that the plaintiffs offered evidence demonstrating a reasonable expectation that the company would follow its progressive discipline policy) and General Dynamics Corp. v. Superior Court, 976 P.2d 487, 495 (Cal. 1994) (finding that the plaintiff met his burden to allege facts establishing a reasonable expectation of job security) and Foley v. Interactive Data Corp., 765 P.2d 373, 388 (Cal. 1988) (same).

49. Foley, 765 P.2d at 388 (explaining that “the totality of the circumstances determines the nature of the contract”); Gould v. Maryland Sound Indus., 37 Cal. Rptr. 2d 718, 730 ( Ct. App. 1995) (following Foley); Walker v. Blue Cross of Cal., 6 Cal. Rptr. 2d 184, 192 ( Ct. App. 1992) (same); Miller v. Pepsi-Cola Bottling Co., 259 Cal. Rptr. 56, 58 ( Ct. App. 1989) (same); Burton, 243 Cal. Rptr. at 282 (same); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 945 ( Ct. App. 1981) (making this same point). See also Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021, 1030 (N.D. Cal. 1988) (finding that the plaintiff established an implied contract and emphasizing that the defendant, in responding to the plaintiff’s evidence, improperly addressed the facts individually rather than based on the totality of the circumstances). For an interesting discussion of the reason courts will consider the totality of the circumstances, see HUGH COLLINS, THE LAW OF CONTRACT 209 (2d ed. 1993) (explaining that it is necessary to embrace a proxy as proof of intent since determining the exact state of minds of the parties is impossible, and also that a broad range of proxies are permitted in order to increase the chances of an accurate determination).

50. See infra notes 75-79 (discussing evidence of longevity).

51. See infra notes 73-74 (discussing evidence of salary increases, promotions and commendations).

52. See infra notes 80-84 (discussing evidence of the defendant’s personnel policies).

53. See infra notes 90-94 (discussing handbook language).

54. See infra notes 85-89 (discussing evidence of oral representations of job security). “There are no hard-and-fast rules for pleading [an implied-in-fact] agreement.” Gould v. Maryland Sound Indus., 37 Cal. Rptr. 2d 718, 730 ( Ct. App. 1995). A conclusory allegation that the employer “implied” that the plaintiff would only be terminated for good cause is insufficient. Hentzel v. Singer Co., 188 Cal. Rptr. 159, 168 ( Ct. App. 1982) (reversing demurrer). However, prospective plaintiffs may state a viable cause of action by alleging the standard Pugh factors, which include the defendant’s personnel policies or practices, the employee’s longevity of service, the defendant’s express or implied promises, and industry practices. See, e.g., General Dynamics Corp. v. Superior Court, 876 P.2d 487, 495 (Cal. 1994) (finding that the plaintiff stated a viable contract claim by alleging assurances of job security, consistent promotions, salary increases and bonuses, and 14 years of employment); Foley v. Interactive Data Corp., 765 P.2d 373, 394 (Cal. 1988) (finding that the plaintiff stated a viable contract claim where alleging repeated assurances of job security and consis-
Although common, employees are not limited to the standard \textit{Pugh} factors. Examples of other types of relevant evidence include evidence of a constructive or "positive discipline" policy,\textsuperscript{55} the lack of unfavorable job evaluations,\textsuperscript{56} early promotions,\textsuperscript{57} use of a company car,\textsuperscript{58} relocating at the
tent promotions, salary increases and bonuses, and also both that the defendant breached its own personnel policies and that he furnished independent consideration—signing a covenant not to compete—in exchange for job security; Zilmer \textit{v. Carnation Co.}, 263 Cal. Rptr. 422, 425 (Ct. App. 1989) (reversing the trial court's ruling sustaining demurrer where the plaintiff, an employee who worked for the employer for 31 years, alleged that the terms and conditions of his employment included both an express and implied promise that he would only be terminated for cause); Hejmadi \textit{v. AMFAC, Inc.}, 249 Cal. Rptr. 5, 13 (Ct. App. 1988) (holding that the plaintiff's complaint stated cause of action by alleging that he was assured cause would be required for termination, that the defendant's policy and procedure manual provided good cause was required for termination, and that he received promotions and strong evaluations during his eight year tenure); Hillsman \textit{v. Sutter Community Hosp.}, 200 Cal. Rptr. 605, 611-12 (Ct. App. 1984) (holding that the plaintiff's complaint stated a cause of action by alleging that his employer breached an implied-in-fact promise to follow its by-laws).

\textsuperscript{55} Scott \textit{v. Pacific Gas & Elec. Co.}, 884 P.2d 985, 991 (Cal. 1995) (holding that there was substantial, "compelling" evidence of an implied contract based \textit{solely} on the defendant's progressive disciplined policy); Wood \textit{v. Loyola Marymount Univ.}, 276 Cal. Rptr. 230, 232-33 (Ct. App. 1990) (reversing summary judgment and emphasizing evidence that the defendant's personnel policy manual set forth a progressive discipline policy in support of finding that the plaintiff established an implied contract); Robinson \textit{v. Hewlett-Packard Corp.}, 228 Cal. Rptr. 591, 599-601 (Ct. App. 1986) (emphasizing that the defendant's personnel policies and guidelines prohibited termination of an employee for poor performance until the employee was given counseling and an opportunity to correct his or her performance in support of finding that the plaintiff established an implied contract). \textit{ Cf.} Davis \textit{v. Consolidated Freightways}, 34 Cal. Rptr. 2d 438, 444 (Ct. App. 1994) (affirming summary judgment and rejecting the plaintiff's evidence of a progressive discipline policy as immaterial, because if relevant, "an employer would be forced purposely to terminate employees for any and every infraction - or none at all - in order to maintain the presumption of at will employment").

\textsuperscript{56} Panopulos \textit{v. Westinghouse Elec. Corp.}, 264 Cal. Rptr. 810, 815 (Ct. App. 1989) (accepting the plaintiff's "long service record without unfavorable evaluations" in support of finding that he established an implied-in-fact agreement).

\textsuperscript{57} Tonry \textit{v. Security Experts, Inc.}, 20 F.3d 967, 971 (9th Cir. 1994) (affirming judgment for the plaintiff and commenting that the district court could have found an implied-in-fact contract based on evidence, \textit{inter alia}, the plaintiff was promoted to a management level position early in his career).

\textsuperscript{58} \textit{Id.} (affirming judgment for the plaintiff and commenting that the district court could have found an implied-in-fact contract based on evidence, \textit{inter alia}, the plaintiff was given benefits including use of a company car).
employer's request,\textsuperscript{59} and that new-hires were required to pass a probationary period.\textsuperscript{60} In one case, the plaintiff was even able to establish an implied-in-fact contract with evidence that language requiring good cause was omitted from later versions of his agency agreement.\textsuperscript{61}

This is not to say that all of the employee's evidence is material. To the contrary, courts have rejected efforts by employees to introduce a wide spectrum of "evidence" of an implied-in-fact contract, including, for example, evidence of the following: The requirement that management was instructed to "build a file" on employees before termination,\textsuperscript{62} or that a termination decision required approval from a more senior manager;\textsuperscript{63} that the plaintiff was hired on temporary status, but later retained as a permanent employee;\textsuperscript{64} that the plain-

\begin{itemize}
\item \textsuperscript{59} Id. (affirming judgment for the plaintiff and commenting that the district court could have found an implied-in-fact contract based on evidence, inter alia, the plaintiff relocated at the defendant's request).
\item \textsuperscript{60} Walker v. Northern San Diego County Hosp. Dist., 185 Cal. Rptr. 617, 621-22 (Ct. App. 1982) (reversing judgment for the defendant and finding that the plaintiff was able to establish an implied contract with evidence that the defendant's handbook expressly restricted its right to terminate the plaintiff without good cause once the plaintiff successfully completed a probationary period); Prevost v. First W. Bank, 239 Cal. Rptr. 161, 167 (Ct. App. 1987) (reversing summary judgment and finding that the wording of the defendant's personnel manual—which stated that "[i]f it is evidence that excessive problems or deficiencies exist [during the three month probationary period], consideration should be given to terminating the employment relationship during the probationary period"—implied that good cause was required for termination). Cf: Gould v. Maryland Sound Indus., 37 Cal. Rptr. 2d 718, 730 (Ct. App. 1995) (affirming ruling sustaining demurrer and finding that, alone, allegations the plaintiff completed a 90-day probationary period would not establish an implied agreement).
\item \textsuperscript{61} Wallis v. Farmers Group Ins., 264 Cal. Rptr. 294, 307 (Ct. App. 1990) (emphasizing that language requiring cause for termination was omitted from a subsequent agreement in support of the jury's verdict for the plaintiff on her implied contract).
\item \textsuperscript{62} Davis v. Consolidated Freightways, 34 Cal. Rptr. 2d 438, 444-45 (Ct. App. 1994) (affirming summary judgment and rejecting as immaterial evidence that the employer had a practice of requiring managers to "build a file" to support an intended termination).
\item \textsuperscript{63} Id. (affirming summary judgment and rejecting as immaterial evidence that the employer had a practice of requiring managers to obtain approval on a decision to terminate an employee from a more senior manager).
\item \textsuperscript{64} Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 333-35 (Ct. App. 1995) (affirming summary judgment and finding that the plaintiffs could not establish an implied contract with evidence that they switched from temporary to permanent employment).
\end{itemize}
tiff participated in a pension program;\textsuperscript{65} that the plaintiff was invited to a retreat to discuss the employer's long-term objectives;\textsuperscript{66} that the plaintiff was given a parking space;\textsuperscript{67} and, that the plaintiff's schooling was paid for by the employer.\textsuperscript{68}

Insofar as evidence of promises allegedly made by the employer have been concerned, courts have similarly rejected evidence that the plaintiff was promised reasonable salary increases or an annual bonus,\textsuperscript{69} training,\textsuperscript{70} or that he or she would participate in executive meetings, have administrative responsibility, and would only be required to report to the employer's executives.\textsuperscript{71} Courts have also rejected other evidence of promises which had nothing to do with the grounds for termination.\textsuperscript{72}

b. \textit{The Standard "Pugh Factors"}

Because the standard \textit{Pugh} factors form the basis of most implied-in-fact contract claims, it is necessary to consider these factors in some detail.

Generally, the \textit{weakest} evidence of an implied-in-fact contract is that the employee received consistent salary increases and promotions. Numerous opinions have emphasized the fact that the plaintiff received salary increases and

\textsuperscript{65} Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1318 (N.D. Cal. 1984) ("The mere fact that [an employer] provides employee benefit plans for its employees does not place [the employer] under a duty to maintain them in its employ.").

\textsuperscript{66} Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 418-19 (Ct. App. 1989) (affirming summary judgment and emphasizing that the plaintiff could not establish an implied contract with evidence of her participation in a long range planning retreat).

\textsuperscript{67} Id.

\textsuperscript{68} Id.

\textsuperscript{69} Rochlis v. Walt Disney Co., 23 Cal. Rptr. 2d 793, 798-800 (Ct. App. 1993).

\textsuperscript{70} Schneider v. TRW, Inc., 938 F.2d 986, 989-91 (9th Cir. 1991) (affirming summary judgment and emphasizing that the plaintiff could not raise a triable issue of fact with evidence that she was generally promised training).

\textsuperscript{71} Rochlis, 23 Cal. Rptr. 2d at 798-800 (rejecting the plaintiff's argument that he could establish an implied agreement with evidence that the defendant promised he would receive "reasonable salary increases appropriate to his responsibilities and performance," because this promise was too vague and indefinite to be enforceable).

\textsuperscript{72} Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 333-35 (Ct. App. 1995) (affirming summary judgment and finding that the plaintiffs could not establish an implied contract with evidence that the employer promised to find one plaintiff another position in firm after she complained about the partner she was working for).
promotions in support of ruling for the plaintiff employee.\textsuperscript{73} However, recent decisions raise distinct questions about the weight of this evidence. In the words of one frequently cited opinion: "Promotions and salary increases are natural occurrences of an employee who remains with an employer for a substantial length of time. These factors should not change the status of an otherwise 'at will' employee to one dischargeable only for 'just cause.'"\textsuperscript{74}

\textsuperscript{73} Tonry v. Security Experts, Inc., 20 F.3d 967, 971 (9th Cir. 1994) (affirming judgment for the plaintiff and commenting that the district court could have found an implied-in-fact contract based on evidence, \textit{inter alia}, the plaintiff received a series of increases in his annual salary); General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (finding that the plaintiff stated a viable contract claim where alleging, \textit{inter alia}, consistent promotions, salary increases and bonuses); Haycock v. Hughes Aircraft Co., 28 Cal. Rptr. 2d 248, 257 (Ct. App. 1994) (emphasizing that the plaintiff received favorable evaluations and salary increases and commenting that he offered "very strong evidence" of an implied contract); Walker v. Blue Cross of Cal., 6 Cal. Rptr. 2d 184, 188-90 (Ct. App. 1992) (reversing summary judgment and emphasizing the fact that the plaintiff received consistent promotions and salary increases); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 625 (Ct. App. 1990) (emphasizing the fact that the plaintiff was promoted, received salary increases and was repeatedly complimented on the quality of her work in support of holding that plaintiff established an implied contract), \textit{cert. denied}, 498 U.S. 939 (1990); Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230, 232-34 (Ct. App. 1990) (reversing summary judgment and emphasizing evidence that the plaintiff received "meritorious ... evaluations, consistent salary increases and bonuses" in support of finding that the plaintiff established an implied contract); Panopulos v. Westinghouse Elec. Corp., 264 Cal. Rptr. 810, 814-15 (Ct. App. 1989) (emphasizing the fact the plaintiff received merit increases in support of finding that he established an implied-in-fact agreement), \textit{overruled by} Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994); Zilmer v. Carnation Co., 263 Cal. Rptr. 422, 424-25 (Ct. App. 1989) (reversing the trial court's ruling sustaining demurrer and emphasizing the plaintiff's allegations that he received repeated positive evaluations of his work in support of finding that he stated a viable contract claim); Bell v. Superior Court, 263 Cal. Rptr. 787, 790-91 (Ct. App. 1989) (emphasizing the plaintiff's allegations that "she performed well and was compensated commensurately" in support of finding that she alleged sufficient facts to overcome the presumption of at will employment); Hejmadi v. AMFAC, Inc., 249 Cal. Rptr. 5, 13 (Ct. App. 1988) (emphasizing allegation that plaintiff received promotions and bonuses in support of holding he stated viable contract claim); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (reversing nonsuit and emphasizing evidence that the plaintiff received commendations and promotions during his 32 year tenure in support of finding jury could determine existence of implied contract).

In sharp contrast, evidence of longevity appears to be essential evidence of an implied-in-fact contract.\(^7\) Although at least one 18-month employee managed to state a viable contract claim,\(^6\) the unspoken standard appears to be four or more years.\(^7\) Proof of longevity, however, does not guarantee

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\(^7\) Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 557-58 (Ct. App. 1990) (affirming summary judgment and holding that even if the plaintiff did not sign an at will agreement, she could not establish an implied promise to renew her employment contract absent good cause with evidence of the duration of her tenure and of promotions and salary increases). See also Haggerty v. United Parcel Serv., No. C92-1054JPR, 1993 U.S. Dist. LEXIS 2137, at *3-5 (N.D. Cal. Feb. 22, 1993) (granting summary judgment where the only evidence that the plaintiff offered to establish an implied contract was one positive performance evaluation); Wood, 267 Cal. Rptr. at 235-36 (Compton, J., dissenting) (“The suggestion in some recent court decisions that somehow a binding contract of employment can be ‘implied’ by nothing more than satisfactory performance by the employee and praise and promotion by the employer stands traditional concepts on their heads and will discourage employers from praising or promoting employees for fear that in doing so they are locking themselves into a binding contract which neither party ever contemplated.”).  

\(^6\) Crain v. Burroughs Corp., 560 F. Supp. 849, 853 (C.D. Cal. 1983) (emphasizing that the plaintiff’s two year tenure was insufficient to rebut the presumption of at will employment); Knights v. Hewlett-Packard Corp., 281 Cal. Rptr. 295, 297-98 (Ct. App. 1991) (emphasizing the absence of evidence regarding longevity of service while affirming summary judgment); Newfield v. Insurance Co. of the West, 203 Cal. Rptr. 295, 297-98 (Ct. App. 1991), rev’d on other grounds, Foley v. Interactive Data Corp., 765 P.2d 373, 381 n.14 (Cal. 1988) (affirming ruling sustaining demurrer and emphasizing that the plaintiff’s two year tenure was insufficient to establish an implied-in-fact agreement).  


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\(^7\). See Tonry, 20 F.3d at 971 (affirming judgment for the plaintiff and commenting that the district court could have found an implied-in-fact contract based on evidence, \textit{inter alia}, of the plaintiff’s eight year tenure); Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021, 1030 (N.D. Cal. 1988) (denying summary judgment and finding that the plaintiff established an implied contract where employed with the company for four years); General Dynamics Corp., 876 P.2d at 495-96 (finding that the plaintiff stated a viable contract claim where alleging, \textit{inter alia}, 14 years of employment); Foley, 765 P.2d at 387-88 (reversing demurrer and emphasizing allegations that the plaintiff worked for the employer for six years and nine months in support of finding that he alleged facts establishing an implied-in-fact agreement); Haycock, 28 Cal. Rptr. 2d at 257 (emphasizing the plaintiff’s 25 year tenure and commenting that he offered “very strong evidence” of an implied contract); Walker, 6 Cal. Rptr. 2d at 188-89 (reversing summary judgment and emphasizing the plaintiff’s 19 years of service); Luck, 267 Cal. Rptr. at 625 (emphasizing the plaintiff’s six year tenure in support of holding that the plaintiff established an implied contract); Wood, 267 Cal. Rptr. at 232-33 (reversing summary judgment and emphasizing evidence that the plaintiff worked for the employer for 15 years in support of finding that the plaintiff established an implied contract); Panopoulos, 264 Cal. Rptr. at 815
an implied-in-fact contract. Alone, it will not serve to establish the agreement. Of course, there is no duty to retain the plaintiff so that he or she can establish an implied-in-fact contract.

A number of opinions finding for the plaintiff have also emphasized evidence that the employer's personnel policies required cause for termination. Indeed, this appears to be a

(emanating the plaintiff's 32 year tenure in support of finding that he established an implied-in-fact agreement); Zilmer, 263 Cal. Rptr. at 424-25 (reversing the trial court's ruling sustaining demurrer and emphasizing the plaintiff's allegations that he worked for the employer for 31 years in support of finding that he stated a viable contract claim); Bell, 263 Cal. Rptr. at 791 (emanating the plaintiff's 11 years of company service in support of finding that she alleged sufficient facts to overcome the presumption of at will employment); Hejmadi, 249 Cal. Rptr. at 13 (emanating the plaintiff's eight year tenure in support of holding that the plaintiff stated a viable contract claim); Pugh, 171 Cal. Rptr. at 926-27 (reversing nonsuit and emphasizing evidence of the plaintiff's 32 year tenure in support of finding that the jury could determine the existence of an implied contract).

78. Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 884-87 (N.D. Cal. 1994) (granting summary judgment where the plaintiff's only evidence of an implied contract was his 26 years of company service); see also Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 418-21 (Ct. App. 1989) (affirming summary judgment where the plaintiff relied mainly on her 18 year tenure to support an implied contract).

79. Haggerty v. United Parcel Serv., No. C92-1054JPV, 1993 U.S. Dist. LEXIS 2137, at *3-5 (N.D. Cal. Feb. 22, 1993) ("This court will not hold that an employer has an obligation to provide an employee with the opportunity to achieve the necessary Pugh factors in order to sustain a claim for an implied contract.").

80. Foley, 765 P.2d at 387-88 (reversing demurrer and emphasizing that the plaintiff's allegation that the defendant breached a policy with self-imposed limitations on its power to discharge employees in support of finding that the plaintiff alleged facts establishing an implied agreement); Haycock, 28 Cal. Rptr. 2d at 257 (emanating that the defendant's lay-off policy provided "significant protection to long term employees" and commenting that plaintiff offered "very strong evidence" of an implied contract); Seubert v. McKesson Corp., 273 Cal. Rptr. 296, 299-300 (Ct. App. 1990) (emanating that defendant's personnel policy stated that employees could be terminated "if not at quota for two full quarters" in support of ruling that the plaintiff established an implied contract); Wallis v. Farmers Group Ins., 269 Cal. Rptr. 299, 306-07 (Ct. App. 1990) (emanating that the defendant's policy required cause for termination in support of finding that the plaintiff established an implied contract); Wood, 267 Cal. Rptr. at 232-33 (reversing summary judgment and emphasizing evidence that the defendant's published policies provided that administrative employees such as the plaintiff would be dismissed only as a "last resort" in support of finding that the plaintiff established an implied contract); Zilmer, 263 Cal. Rptr. at 424-25 (reversing the trial court's ruling sustaining demurrer and emphasizing the plaintiff's allegations that the defendant's policies required good cause for termination in support of finding that he stated a viable contract claim); Hejmadi, 249 Cal. Rptr. at 13 (emanating that the defendant's policy
particularly persuasive type of evidence.  

However, like the other standard Pugh factors, evidence of the employer’s personnel policies may be subject to a certain degree of scrutiny. For example, the nature and extent of the employer’s policies, as well as the words through which they are expressed, are all important. The plaintiff must do more than

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81. Scott v. Pacific Gas & Elec. Co., 904 P.2d 834, 845 (Cal. 1995) (holding that, alone, the defendant’s detailed progressive discipline policy provided the basis for an implied-in-fact contract); Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 192-93 (Ct. App. 1989) (reversing summary judgment and emphasizing evidence that the defendant’s policy required good cause for termination—which was the plaintiff’s only evidence of an implied contract—in support of finding that the plaintiff established an implied-in-fact contract).

82. Hoy, 861 F. Supp. at 885 n.2 (rejecting the plaintiff’s argument that an employment document entitled “Agreement of Terms and Conditions of Compensation for Big Ticket Salespeople” required good cause for his termination, because the agreement only dealt with his compensation, not the terms of his employment, and was thus irrelevant); Knights v. Hewlett-Packard Corp., 281 Cal. Rptr. 295, 297-98 (Ct. App. 1991) (emphasizing that the defendant’s personnel policy was merely a guideline in support of finding that the plaintiff failed to raise a triable issue of material fact as to the existence of an implied contract). Cf. Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1323 n.2 (N.D. Cal. 1984) (rejecting the plaintiff’s argument that he established a claim for breach of the implied covenant of good faith and fair dealing with evidence that he was discharged without application of the defendant’s progressive discipline policy, because the policy only applied to hourly employees, and he was on salary).

offer his or her own subjective impressions of what the employer's policy requires.\textsuperscript{84}

Standard allegations in a breach of contract complaint invariably include representations of job security, i.e., assurances that the employee would have a job so long as his or her job performance remains satisfactory.\textsuperscript{85} This is easily excluding that statements made in the defendant's handbook that the defendant had an "open door" policy and a policy of "respect and fair treatment for all employees" were too general to support an implied contract).

84. \textit{Hoy}, 861 F. Supp. at 887 (rejecting the plaintiff's argument that he established an implied contract with evidence that the defendant's policies required cause for termination because the evidence, which consisted of his declaration and a declaration of one of his co-workers stating that it was general knowledge that employees were only terminated for cause, "amount[ed] to no more than a recitation of the subjective impressions of selected employees without any apparent foundation for these conclusions or their relevance").

85. General Dynamics Corp. v. Superior Court, 876 P.2d 487, 495-96 (Cal. 1994) (finding that the plaintiff stated a viable contract claim where alleging, \textit{inter alia}, promises of job security and substantial retirement benefits); \textit{Foley}, 765 P.2d at 387-88 (reversing demurrer and emphasizing allegations that the plaintiff "received repeated oral assurances of job security" in support of finding that he alleged facts establishing implied agreement); Thomka v. Financial Corp. of Am., 19 Cal. Rptr. 2d 382, 383-86 (Ct. App. 1993) (affirming verdict for the plaintiff and finding that there was substantial evidence of an implied contract, including specifically evidence of posthire promises that the plaintiff would not be terminated without cause); Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230, 232-33 (Ct. App. 1990) (reversing summary judgment and emphasizing evidence that the plaintiff was assured that he would only be terminated for cause in support of finding that the plaintiff established an implied contract); \textit{Zilmer}, 263 Cal. Rptr. at 425 (reversing the trial court's ruling sustaining demurrer and emphasizing the plaintiff's allegations that he was assured that he would only be terminated for good cause in support of finding that he stated a viable contract claim); \textit{Hejmadi}, 249 Cal. Rptr. at 13 (emphasizing assurances of job security in support of holding that the plaintiff stated a viable contract claim); \textit{Pugh}, 171 Cal. Rptr. at 927 (reversing nonsuit and emphasizing evidence that the plaintiff was assured he would only be terminated for cause in support of finding that the jury could determine the existence of implied contract).

Claims for breach of an oral promise are routinely treated as claims for breach of an implied-in-fact contract. \textit{Foley}, 765 P.2d at 373 (remarking that the plaintiff's claim was properly described as one for breach of an implied-in-fact contract rather than breach of "oral contract" where he was relying on evidence of the parties' course of conduct, including oral representations of job security). Nonetheless, a promise made during an interview may be separately actionable. \textit{Comeaux} v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1272-73 (9th Cir. 1990) (holding that the plaintiff was entitled to recover reliance damages for his moving costs based on the defendant's breach of an express promise to assign work to the plaintiff if he relocated). \textit{But see} \textit{Sheppard} v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 786 (Ct. App. 1990) (commenting that promise by the defendant that the plaintiff would be earning a certain salary and that the plaintiff's salary would increase within one year was not the kind of communication indicating an assurance that the defendant would only
plained by the fact that evidence of these type of assurances is virtually essential to the employee’s implied-in-fact contract claim.66 Like evidence of longevity, assurances of job security must rise to a specific standard. The California Supreme Court has made clear that “oblique language will not, standing alone, be sufficient to establish [an implied-in-fact] agreement.”87 The court of appeal opinion in Gould v.

be terminated for cause where the defendant made the promise before the plaintiff even accepted a position with the company).

86. See, e.g., Davis v. Consolidated Freightway, 34 Cal. Rptr. 2d 438, 445 (Ct. App. 1994) (affirming summary judgment and commenting that assurances that the plaintiff would not be terminated so long as he was performing well were “conspicuously absent” from his pleadings or the evidence); Haycock v. Hughes Aircraft Co., 28 Cal. Rptr. 2d 248, 257 (Ct. App. 1994) (emphasizing in evaluating evidence of an implied agreement the fact that the plaintiff admitted that no one ever promised him permanent employment during his 25 year tenure and that he was never told that he could only be terminated for cause); Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 557 (Ct. App. 1990) (affirming summary judgment and emphasizing that the plaintiff admitted no one ever told her she had a right to have her contract renewed absent good cause); Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 419 (Ct. App. 1989) (affirming summary judgment and emphasizing that the plaintiff failed to present any evidence of oral representations that her employment was in fact permanent); Miller v. Pepsi-Cola Bottling Co., 259 Cal. Rptr. 56, 58 (Ct. App. 1989) (affirming summary judgment and emphasizing the absence of evidence that the plaintiff was assured cause was required for termination). But see Walker v. Blue Cross of Cal., 6 Cal. Rptr. 2d 184, 189-90 (Ct. App. 1992) (finding that the plaintiff established an implied contract despite the absence of evidence of assurances she would only be terminated for cause); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 624-25 (Ct. App. 1990) (finding that the plaintiff established an implied contract for the purpose of his claim for breach of the implied covenant of good faith and fair dealing even though the defendant did not make any assurances of continued employment, and reversing nonsuit), cert. denied, 498 U.S. 939 (1990).

87. Foley, 765 P.2d at 387; accord Newfield v. Insurance Co. of the West, 203 Cal. Rptr. 9, 12 (Ct. App. 1984) (affirming ruling sustaining demurrer and emphasizing promise that the plaintiff would have a “permanent career” was too oblique to support an implied contract). See also Hanson v. Heckler MFG. & Inv. Group, No. C91-2809SBA, 1992 U.S. Dist. LEXIS 16861, at *11-15 (N.D. Cal. Oct. 27, 1992) (granting summary judgment where the plaintiff’s relevant evidence consisted of one posthire statement to the effect that she would have a job as long as her performance was satisfactory).

Assurances allegedly establishing a contract may also be attacked as vague and indefinite. See, e.g., Ladas v. California State Auto. Ass’n, 23 Cal. Rptr. 2d 810, 813-15 (Ct. App. 1993) (rejecting the plaintiff insurance representatives’ claims for failure to pay commissions comparable to that received by agents at other companies as vague, amorphous and indefinite); Rochlis v. Walt Disney Co., 23 Cal. Rptr. 2d 793, 797-98 (Ct. App. 1993) (finding that promises allegedly made to the plaintiff that he would receive “reasonable salary increases,” a “reasonable bonus” and would “actively and meaningfully participate in . . . all creative activities” of the department were not cognizable as contract claims
Maryland Sound Indus. is representative. There, the appellate court affirmed the trial court’s ruling sustaining the employer’s demurrer, reasoning that statements that the employer was looking for “long-term” employees and that employees would become “members” of the company after successfully completing a probationary period were too oblique to support an implied-in-fact contract.

Employee handbooks also may be used to establish an implied-in-fact contract. In the appropriate case, the handbook alone may be enough. However, courts have responded to the increasing use of “disclaimers” (provisions stating that the handbook is not a contractual document) by

because they were too vague and indefinite to be enforceable). In his dissenting opinion in Wood, Judge Compton suggested that:

In the case of a claimed “implied-in-fact” contract, the employee should at a minimum be required to satisfy a court as to just what the specific terms of that contract are. The questions that need to be answered are: (1) How long is the employment to last? Is it for a lifetime? Until a specified age? (2) What is the amount of compensation? Can the employee’s salary be cut for any reason? Are raises required? (3) In the future, can the employee be required to do a different type of work? Can the employee be transferred? Demoted?

Wood, 267 Cal. Rptr. at 236 (Compton, J., dissenting). Judge Compton suggested further that: “Obviously, the simple assertion that the employee was ‘led to believe’ that if he satisfactorily did the job he was paid to do, he could only be discharged for ‘cause’ answers none of these questions.” Id. See also Ladas, 23 Cal. Rptr 2d at 816 (“Employers frequently boast of good benefits, competitive salaries, excellent working conditions and the like. To anoint such puffing language with contractual import would open the door to a plethora of specious litigation and constitute a severe and unwarranted intrusion on the ability of business enterprise to manage internal affairs.”).

88. 37 Cal. Rptr. 2d 718, 726 (Ct. App. 1995).
89. Id. at 726-27 (affirming summary judgment for the defendant).
90. Foley, 765 P.2d at 383 n.20 (commenting that the plaintiff could have stated a viable cause of action for breach of contract by alleging the defendant’s breach of an express promise in its employee handbook); Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 189-91 (Ct. App. 1989) (rejecting the defendant’s argument that its nonintegrated handbook was dispositive as to the terms of the employment relationship and commenting that the handbook was simply one of the factors for the jury to consider in determining the existence and content of the parties’ employment agreement).
91. Wood, 267 Cal. Rptr. at 231-34 (affirming summary judgment where there was evidence that the defendant’s handbook required good cause for termination); Prevost v. First W. Bank, 239 Cal. Rptr. 161, 167 (Ct. App. 1987) (reversing summary judgment and finding that the wording of the defendant’s personnel manual—which stated that “[i]f it is evidence that excessive problems or deficiencies exist [during the three month probationary period], consideration should be given to terminating the employment relationship during the probationary period”—implied that good cause was required for termination).
severely restricting the use of this particular type of evidence. "Reasonable reliance" and a "mutual intent" to be bound by the handbook terms are the chief restrictions. Even then, courts are free to offer their own construction of the handbook language.

92. Mundy v. Household Fin. Corp., 885 F.2d 542, 544-45 (9th Cir. 1989) (affirming summary judgment where the plaintiff signed an at will employment agreement and finding that since the employment relationship was clearly at will, the plaintiff could not have had a reasonable expectation that he would only be terminated for cause); Siddoway v. Bank of Am., 748 F. Supp. 1456, 1459-60 (N.D. Cal. 1990) (granting summary judgment); Crain v. Burroughs Corp., 560 F. Supp. 849, 852-53 (C.D. Cal. 1983) (granting summary judgment and emphasizing that the plaintiff could not rely on the defendant's handbook to establish an implied-in-fact agreement where the preface of the handbook stated that it was "informational only" (i.e., not a contract) and could be modified or revoked at any time); Modafferi v. General Instrument Corp., No. C90-0555K (CM), 1991 U.S. Dist. LEXIS 14098, at *18-19 (S.D. Cal. Feb. 21, 1991) (granting summary judgment and finding that the plaintiff could not rely on the defendant's policy where the plaintiff could not have reasonably believed that [the defendant's] personnel policies modified the clear terms of her employment contract...); Hag- gard v. Kimberly Quality Care, Inc., 46 Cal. Rptr. 2d 16, 22 (Ct. App. 1995) (reversing a jury verdict for the plaintiff based on this same conclusion).

93. Bianco v. H.F. Ahmanson & Co., 897 F. Supp. 433, 440 (C.D. Cal. 1995) (granting summary judgment and holding the plaintiff could not rely on state- ments in the defendant's handbook where there was strong evidence the parties did not intend to enter an agreement requiring good cause for discharge); Hillsman v. Sutter Community Hosp., 200 Cal. Rptr. 605, 611 (Ct. App. 1984) ("An employer may maintain rules or procedures related to the termination of employment which may form part of an implied contract of employment if the employer and the employee had a mutual understanding that the rules or procedures would apply to the employee."); see also Funk v. Sperry Corp., 842 F.2d 1129, 1132 (9th Cir. 1988) (commenting that the plaintiff would have to demon- strate that the parties had a "mutual understanding" the handbook terms would apply to him before he could rely on the handbook as evidence of an im- plied agreement); Modafferi, 1991 U.S. Dist. LEXIS 14097, at *16-18 (granting summary judgment and finding that the plaintiff could not rely on the defend- ant's policy defining "discharge" as a separation from the company for cause where admitting that he did not know of the policy when originally hired).

94. Haggard, 46 Cal. Rptr. 2d at 24-25 (scrutinizing language in the defendant's handbook); Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453, 459-460 (Ct. App. 1993) (emphasizing the defendant's admission of a mu- tual understanding that the plaintiff had a right to rely on the handbook in support of a finding that the plaintiff raised a triable issue of material fact as to the nature of his employment status); Moore v. May Dep't Stores Co., 271 Cal. Rptr. 841, 843 (Ct. App. 1990) (affirming summary judgment and rejecting the plaintiff's argument that the defendant breached an implied covenant by failing to warn and counsel her prior to termination, because contrary to the defend-
4. Breach of Implied-In-Fact Contract

a. Management Discretion

Just as Labor Code section 2922 is the starting point for any analysis on the issue of the existence of an implied-in-fact contract, the principle of "management discretion" is the starting point for any discussion on the issue of breach. This principle is an expression of the basic notion that juries should not be allowed to second-guess the employer's legitimate business decisions, especially where the decision involves management level employees. The Pugh court reduced this principle to its most rudimentary form, stating simply that "[c]are must be taken . . . not to interfere with the legitimate exercise of managerial discretion." In Wilkerson v. Wells Fargo Bank, the court then articulated the practical test. The court stated that "[b]ecause an employer has wide latitude in making personnel decisions, the test for good cause is not whether the jurors would have fired the employee, but rather, whether the discharge was within the bounds of the employer's discretion, or instead, was trivial, capricious, unrelated to business needs or goals, or pretextual's personnel policies did not provide for warning and counseling in every case, but rather depended on the seriousness of the violation)."

95. As noted by the court in the second Pugh opinion:

In any free enterprise system, an employer must have wide latitude in making independent, good-faith judgments about high-ranking employees without the threat of a jury second-guessing its business judgment. Measuring the effective performance of such an employee involves the consideration of many intangible attributes such as personality, initiative, ability to function as part of the management team and to motivate subordinates, and the ability to conceptualize and effectuate management style and goals. Unlike the employee with routine or mechanical duties whose performance can be measured by an objective standard, a management employee's unsatisfactory performance is often difficult to pinpoint precisely, and the reasons for his or her discharge may be difficult to articulate.

Pugh v. See's Candies, Inc., 250 Cal. Rptr. 195, 212-13 (Ct. App. 1988) ("Pugh II"). See also Wood, 267 Cal. Rptr. at 236 (Compton, J., dissenting) ("It cannot be the law that a private employer must . . . submit the soundness or wisdom of what he or she considers to be good cause for termination to the determination of a jury. This . . . would turn the courts into a civil service commission for employees in the private sector."). In Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Cal. 1987), the California Supreme Court observed that "every employer must on occasion review, criticize, demote, transfer and discipline employees." Id. at 750.

tual."98 Put another way, "[a]bsent some showing that the termination of [the] plaintiff’s employment was pretextual, the fact finder should not decide the correctness of the employer’s termination of [the] plaintiff’s employment."99

Significantly, while the scope of management discretion is substantial, it is not unlimited. In the words of one court:

> If the reason advanced by the employer for the discharge are trivial, capricious, unrelated to business needs or goals, or pretextual, the jury may properly find that the stated reason for the termination was not a “fair and honest cause or reason” regulated by good faith. In this sense, the employer does not have an unfettered right to exercise discretion in the guise of business judgment.100

In *Crosier v. United Parcel Serv., Inc.*,101 the court explained the reason for this restriction. The *Crosier* court observed that “[a]n implied-in-fact or implied-in-law promise to dismiss an employee only for cause would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the policy giving rise to the discharge.”102

**b. Evidence Establishing Breach**

Ordinarily, the plaintiff alleges breach of the employer’s written policies103 (e.g., a notice requirement or progressive

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98. *Id.* at 192.
100. *Pugh II*, 250 Cal. Rptr. at 213. *Accord Scott v. Pacific Gas & Elec. Co.*, 904 P.2d 834, 840 (Cal. 1995) ("[T]he employer’s right to demote, like the right to discharge, is not absolute."); *Walker v. Blue Cross of Cal.*, 6 Cal. Rptr. 2d 184, 190 (Ct. App. 1992) ("While the scope of [managerial] discretion is substantial, it is not unrestricted."); *Wood*, 267 Cal. Rptr. at 135 ("The employer does not have an unfettered right to exercise discretion in the guise of business judgment.").
102. *Id.* at 366.
103. See, e.g., *Kerr v. Rose*, 265 Cal. Rptr. 597, 600-03 (Ct. App. 1990) (holding that the plaintiff stated a viable claim for breach of implied contract where alleging that the defendant failed to follow its own recall policy). See also *Breitman v. May Co. Cal.*, 37 F.3d 562, 565 (9th Cir. 1994) (reversing summary judgment where the plaintiff was terminated for authorizing a temporary em-
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discipline policy), pretext, or simply that the employer
ployee to add four hours to her timecard to cover traveling expenses based on
evidence that the defendant had a written policy prohibiting the falsification of
timecards, but that this policy was neither followed nor uniformly enforced).

For this type of claim to be actionable, there must be a nexus between the
Nat'l Bank, 243 Cal. Rptr. 277, 280 (Ct. App. 1988) (finding that employee ter-
minated for reading confidential materials could not raise a triable issue of fact
with evidence the defendant failed to give him an oral warning before writing
him up for an unrelated offense).

104. See, e.g., Scott, 904 P.2d at 844 (holding that the plaintiffs established
breach of an implied contract not to demote without good cause with evidence
that the defendant failed to follow detailed procedures outlined in its progres-
sive discipline policy); General Dynamics Corp., 876 P.2d at 495 (finding that
the plaintiff stated a viable contract claim where alleging termination in viola-
tion of the defendant's published discharge procedures); Wood, 267 Cal. Rptr. at
233-35 (reversing summary judgment where the plaintiff offered evidence that
he was terminated in violation of the defendant's written termination proce-
dures requiring notice and a pretermination hearing).

105. See, e.g., Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d
453, 459-60 (Ct. App. 1993) (holding that the plaintiff raised a triable issue of
material fact with evidence that he was terminated because he refused to dis-
 criminate against a coworker who was the union shop steward, not for poor
performance and insubordination); Thomka v. Financial Corp. of Am., 19 Cal.
Rptr. 2d 382, 385-86 (Ct. App. 1993) (affirming a verdict for the plaintiff and
finding that there was substantial evidence that he was terminated for ob-
jecting to the defendant's misleading practices, and not because he had psychi-
atric difficulties); Walker, 6 Cal. Rptr. 2d at 188-89 (reversing summary judg-
ment where there was evidence that the defendant amended its medical leave
policy to facilitate the plaintiff's discharge while she was on medical leave in
order to avoid having to retain her after an impending reduction in force); Wal-
lis v. Farmers Group Ins., 269 Cal. Rptr. 299, 306-08 (Ct. App. 1990) (affirming
judgment for the plaintiff in a case where the plaintiff asserted that she was
terminated for filing suit against the defendant, and not for a conflict of inter-
(affirming a jury verdict for the plaintiff where the plaintiff asserted that he
was terminated for complaining about his supervisor's racist behavior); Prevost
v. First W. Bank, 239 Cal. Rptr. 161, 166-68 (Ct. App. 1987) (reversing sum-
mary judgment where there was evidence raising a triable issue of fact as to
whether the plaintiff was actually terminated for poor performance, as asserted
by the defendant, or whether he was discharged as part of a "power struggle").

In Scott, the California Supreme Court recently held that disgruntled em-
ployees may sue their employers for wrongful demotion. Scott, 904 P.2d at 838-
39. In that case, the plaintiffs were both long-term employees demoted based
on conflict of interest and negligent supervision charges. Id. at 836. They sub-
sequently brought suit alleging breach of an implied-in-fact promise not to de-
omite except for good cause, based largely on the defendant's failure to follow
procedures outlined in its detailed progressive disciplined policy. Id. at 837. In
rejecting the defendant's argument that there can be no claim for wrongful de-
motion, the court explained that:

Conceptually, there is no rational reason why an employer's policy that
its employees will not be demoted except for good cause, like a policy
restricting termination or providing for severance pay, cannot become
"got it wrong" (i.e., mistakenly concluded that there was good cause for termination). This issue also may be resolved as a matter of law.

an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation.

It must be noted further that an actual termination is not the sine qua non of a wrongful discharge claim. The doctrine of "constructive discharge" permits plaintiffs to maintain an action against an employer who "purposely creates working conditions so intolerable that the employee has no option but to resign . . . ." Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1025 (Cal. 1994) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984)). To prevail at trial, the plaintiff "would have to prove that [the defendant] breached an implied promise not to discharge him without good cause by forcing him to submit to intolerable working conditions which foreseeably and proximately caused his resignation." Panopoulos v. Westinghouse Elec. Corp., 264 Cal. Rptr. 810, 814 (Ct. App. 1989).

106. Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 192-93 (Ct. App. 1989) (reversing summary judgment where the plaintiff offered evidence controverting the defendant's evidence that the reason for his termination—personally benefiting from a bank transaction—constituted good cause for termination).

107. E.g., Joanou v. Coca-Cola Co., 26 F.3d 96, 99 (9th Cir. 1994) (affirming summary judgment where there was unrefuted evidence that the plaintiffs were discharged when the defendant sold the portion of its enterprise at which they were employed); Gianaculas v. TWA, 761 F.2d 1391, 1394-95 (9th Cir. 1985) (affirming summary judgment where the plaintiffs failed to refute the defendant's evidence that they were furloughed as the result of a general reduction in management necessitated by the company's economic condition); Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 887-88 (N.D. Cal. 1994) (granting summary judgment where the plaintiff was terminated for poor performance); Van Komen v. Montgomery Ward & Co., 638 F. Supp. 739, 740-41 (C.D. Cal. 1986) (granting summary judgment where there was overwhelming evidence of the plaintiff's poor performance); Stokes v. Dole Nut Co., 48 Cal. Rptr. 2d 673 (Ct. App. 1995) (affirming summary judgment against management level employees who tried to set up a new business which would compete directly with the defendant's business while still employed by the defendant); Knights v. Hewlett-Packard Corp., 281 Cal. Rptr. 295, 297-98 (Ct. App. 1991) (affirming summary judgment where the plaintiff's poor performance was "abundantly clear"); Moore v. May Dep't Stores Co., 271 Cal. Rptr. 841, 843 (Ct. App. 1990) (affirming summary judgment where there was "no question" that the plaintiff's gross negligence resulted in theft of substantial amount of jewelry); Fowler v. Varian Assoc., Inc., 241 Cal. Rptr. 539, 542-44 (Ct. App. 1987) (affirming summary judgment and expressly rejecting the plaintiff's argument that the good cause issue cannot be resolved as a matter of law); Robinson v. Hewlett-Packard Corp., 228 Cal. Rptr. 591, 599-601 (Ct. App. 1986) (affirming summary judgment where the plaintiff was discharged for poor performance when, despite efforts to accommodate his work-related back injury, his performance increasingly deteriorated).

However, to prevail on summary judgment, the employer has to offer evidence beyond conclusory statements concerning the reason for the plaintiff's discharge. Cf. Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 787 (Ct.
B. The Implied Covenant of Good Faith and Fair Dealing

1. General Principles

The implied covenant of good faith and fair dealing is implied in every contract not as a matter of fact, but instead as a matter of law.\(^\text{108}\) It obligates employers to act fairly and in good faith,\(^\text{109}\) to treat like cases alike,\(^\text{110}\) and to follow their own written policies and procedures.\(^\text{111}\) What the implied

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\(^{108}\) App. 1990) (reversing summary judgment and emphasizing that the defendant failed to demonstrate good cause for the plaintiff’s termination with conclusory statements about the reason for the plaintiff’s discharge). And note that at least one court has stated that the good cause issue may not be resolved as a matter of law in cases involving termination for misconduct. Wilkerson, 261 Cal. Rptr. at 192-93 (“If an employer claims the employee was discharged for specific misconduct, and the employee denies the charge, the question of whether the misconduct occurred is one of fact for the jury.”).

\(^{109}\) Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 777 (9th Cir. 1990) (“Under California law, every contract includes a covenant of good faith and fair dealing, which requires that neither party ‘do anything which will deprive the other of the benefits of the agreement.’”) (quoting Seaman’s Direct Buying Serv. v. Standard Oil Corp., 686 P.2d 1158, 1166 (Cal. 1984)); Mundy v. Household Fin. Corp., 885 F.2d 542, 544 (9th Cir. 1989) (“California law implied a covenant of good faith and fair dealing in every contract.”); Funk v. Sperry Corp., 842 F.2d 1129, 1132 (9th Cir. 1988) (“In California, as a matter of law every contract contains an implied covenant of good faith and fair dealing.”); Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 555 (Ct. App. 1990) (“[The law implies a duty of good faith and fair dealing in every contract.”); Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 786 (Ct. App. 1990) (“There is also inherent in every contract a covenant of good faith and fair dealing.”); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 623 (Ct. App. 1990) (“A covenant of good faith and fair dealing is implied in every contract.”); Hejmadi v. AMFAC, Inc., 249 Cal. Rptr. 5, 16 (Ct. App. 1988) (“It is well settled that the implied covenant exists in every contract.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1996) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”).

\(^{110}\) Hoy, 861 F. Supp. at 888 (“The implied covenant of good faith and fair dealing requires that the employer act fairly and in good faith.”); Walker, 6 Cal. Rptr. 2d at 190 (“The duty imposed by the covenant is one of good faith and fair dealing in the performance and enforcement of the contract.”); Sheppard, 266 Cal. Rptr. at 786 (“This covenant applies a promise that each party will refrain from doing anything to injure the right of the other to receive the benefits of the agreement.”).

\(^{111}\) Rulon-Miller v. International Business Machs. Corp., 208 Cal. Rptr. 524, 526 (Ct. App. 1984) (“The duty of fair dealing by an employer is, simply stated, a requirement that like cases be treated alike.”).

\(^{112}\) Kern, 899 F.2d at 776-77 (affirming verdict for the plaintiff where there was evidence that the manner of the plaintiff’s layoff breached the defendant’s layoff policy); Rulon-Miller, 208 Cal. Rptr. at 526 (Implied in the duty of fair dealing “is that the company, if it has rules and regulations, apply those rules and regulations to its employees as well as affording its employees their protection.”).
covenant of good faith and fair dealing does not require is
good cause for terminating at will employees. In this
sense, the implied covenant should be carefully distinguished
from an implied-in-fact promise not to terminate except for
good cause.

112. Foley v. Interactive Data Corp., 765 P.2d 373, 400 n.39 (Cal. 1988) (A
claim for breach of the implied covenant "cannot logically be based on a claim
that a discharge was made without good cause. If such an interpretation ap-
plied, then all at will contracts would be transmuted into contracts requiring
good cause for termination, and Labor Code § 2922 would be eviscerated."). Ac-
cord Schneider v. TRW, Inc., 938 F.2d 986, 991 (9th Cir. 1991) ("Because the
implied covenant protects only the parties' right to receive the benefit of their
agreement, and, in an at will relationship there is no agreement to terminate
only for good cause, the implied covenant standing alone cannot be read to im-
pose such a duty.") (quoting Foley, 765 P.2d at 400 n.39); Comeaux v. Brown &
Williamson Tobacco Co., 915 F.2d 1264, 1272 (9th Cir. 1990) (holding that the
plaintiff could not rely on the implied covenant to "transform" his at will em-
ployment contract into a contract requiring good cause for termination); Rose v.
Wells Fargo & Co., 902 F.2d 1417, 1425-27 (9th Cir. 1990) ("When an employ-
ment contract expressly provides that it may be terminated at will or for any
reason . . . the covenant of good faith and fair dealing cannot be used to supply a
requirement for good cause to terminate."); DeHorney v. Bank of Am. Nat'l
Trust & Sav. Co., 879 F.2d 459, 465-66 (9th Cir. 1989) ("In sum, Foley settles
California law that when parties have agreed that their contract is terminable
at the will of either of them, . . . the implied covenant of good faith and fair
dealing cannot be invoked by either party to prevent a court from enforcing
the terms of the contract.").

Termination of an at will employee without good cause does not violate the
implied covenant of good faith and fair dealing. See, e.g., Mundy, 885 F.2d at
544-45 (affirming summary judgment); DeHorney, 879 F.2d at 465-66 (same);
1995) (same); Gould v. Maryland Sound Indus., Inc., 37 Cal. Rptr. 2d 718, 727
(Ct. App. 1995) (affirming ruling sustaining demurrer); Slivinsky v. Watkins-
Johnson Co., 270 Cal. Rptr. 585, 588 (Ct. App. 1990) (affirming summary judg-
ment); Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 285-87 (Ct.
App. 1987) (commenting that it was error for the trial court to instruct the jury
on the plaintiff's claim for breach of the implied covenant of good faith and fair
dealing where the plaintiff signed an at will agreement). However, in the ex-
ceptional case, an at will employee may still be able to maintain a cause of
action. Comeaux, 915 F.2d at 1272 ("The implied covenant . . . remains avail-
able as a cause of action, even in the face of an at-will employment contract,
where a plaintiff alleges that conduct other than his discharge violated the [im-
plied] covenant."); Rose, 902 F.2d at 1425-27 (explaining that an at will em-
ployee can maintain an action for breach of the implied covenant of good faith
and fair dealing where establishing the following elements: "(1) the employee's
expectation of benefit from the contract; (2) that the expectation of benefit is not
dependent upon a continuous employment relationship which can only be ter-
minated for cause; and (3) a bad-faith termination coupled with the wrongful
intent of the employer to deprive the employee of that benefit of the
agreement.").
To establish this claim, the plaintiff must offer evidence of an employment contract and of "bad faith" conduct extraneous to the contract. Evidence of the absence of good

113. "If plaintiff is able to establish the existence of an employment agreement, California law will supply a covenant of good faith and fair dealing, which requires that neither party do anything to deprive the other of the benefits of the agreement." Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453, 458 (Ct. App. 1993); see also Bianco v. H.F. Ahmanson & Co., 897 F. Supp. 433, 441 (C.D. Cal. 1995) (granting summary judgment on the plaintiff's claim for breach of the implied covenant because he failed to establish an employment contract); Foley, 765 P.2d at 415 (Kaufman, J., concurring in part and dissenting in part) ("Clearly, no action for breach of the covenant of good faith and fair dealing will lie unless it has first been proved that, expressly or by implication, the employer has given the employee a reasonable expectation of continued employment so long as the employee performs satisfactorily."); Gould, 37 Cal. Rptr. 2d at 726 (affirming ruling sustaining demurrer to the plaintiff's claim for breach of the implied covenant of good faith and fair dealing where he failed to state a viable breach of contract claim).

114. See, e.g., Rose, 902 F.2d at 1425-27 (affirming summary judgment where even assuming the plaintiff established the fact that the defendant had a reassignment policy, there was no evidence that they were terminated in bad faith or that the defendant intended to deprive them of the benefit of the policy); Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1322-23 (N.D. Cal. 1984) (granting summary judgment where the plaintiff failed to establish bad faith conduct extraneous to the contract); Shapiro v. Wells Fargo Realty Advisors, 199 Cal. Rptr. 613, 619-20 (Ct. App. 1984) (finding that no cause of action for breach of the implied covenant was stated where the plaintiff's complaint alleged only that the defendant represented that the plaintiff would not be terminated without good cause or in violation of statute or public policy, that these representations were false and willfully concealed, and that the plaintiff relied on these representations to his detriment, because the complaint did not allege facts showing "a bad faith act by [the defendant] which was extraneous to the employment relationship and which was intended to frustrate his enjoyment of contractual rights"); see also Pugh v. See's Candies, Inc., 250 Cal. Rptr. 195, 213 (Ct. App. 1988) (reciting elements of cause of action); Burton v. Security Pac. Nat'l Bank, 243 Cal. Rptr. 277, 281 (Ct. App. 1988) ("To be entitled to a trial for breach of the implied covenant of good faith and fair dealing, [the plaintiff] must bring forth facts showing that [the defendant] acted in 'bad faith' and without 'probable cause.'"). But see infra note 122 (citing cases where the plaintiff established a viable covenant claim with evidence the defendant failed to follow its own personnel policies).


"'Bad faith' is defined as [t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake . . . , but by some interested or sinister motive[,] . . . not simply bad judgment or negligence, but rather . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will."
cause for termination is relevant to a showing of bad faith.\textsuperscript{116}
Conversely, evidence of good cause may be used to refute or negate allegations of bad faith,\textsuperscript{116} as can evidence of a good faith mistake\textsuperscript{117} or of the employer's efforts to investigate the charged misconduct.\textsuperscript{118} Recovery is limited to \textit{contract damages}.\textsuperscript{119}

\textit{Pugh II}, 250 Cal. Rptr. at 209 (quoting \textsc{Black's Law Dict.} 127 (5th ed. 1979)) (alterations original; internal quotation marks omitted).

115. \textit{Pugh II}, 250 Cal. Rptr. at 213 ("Lack of good cause is evidence that the employer acted in bad faith, i.e., had a wrongful motive in depriving the employee of the benefits of the employment contract."). \textit{See also Prevost}, 239 Cal. Rptr. at 168 ("[A]n action will lie where the existence of good cause for discharge is asserted by the employer without a good faith belief that good cause in fact exists.").

116. Fowler v. Varian Assoc., Inc., 241 Cal. Rptr. 539, 542 (Ct. App. 1987) (commenting that because the "defendant had good cause to discharge [the plaintiff], the discharge by definition was not in bad faith"); \textit{Pugh II}, 250 Cal. Rptr. at 213 ("Good cause to discharge is . . . evidence of the [defendant's] justification for its actions and inferentially of its good faith."). \textit{See also supra} note 112 (citing cases holding that termination of an at will employee for cause does not violate the implied covenant).

117. Walker v. Blue Cross of Cal., 6 Cal. Rptr. 2d 184, 191 (Ct. App. 1992) ("There is no breach of the implied covenant of good faith and fair dealing where the employer determined honestly and in good faith that good cause for discharge existed."); Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 193 (Ct. App. 1989) ("[A]n employer's honest though mistaken belief that legitimate business reasons provided good cause for discharge . . . will negate a claim that it sought in bad faith to deprive the employee of the benefits of the contract."); \textit{Pugh II}, 250 Cal. Rptr. at 213 ("Even an honest, though mistaken, belief that the employer for legitimate business reasons had good cause for the discharge would negate bad faith."); \textit{Burton}, 243 Cal. Rptr. at 281 ("If the law was otherwise, no employment contract would be 'at will'. . . . If the employee was entitled to a jury trial for breach of the implied covenant of good faith and fair dealing merely by asserting that the charged misconduct was not true, the decision to terminate would be at the discretion of a jury, not the employer. The law of employment contracts would be turned on its head."); \textit{Fowler}, 241 Cal. Rptr. at 543 n.7 (affirming summary judgment and acknowledging rule).

118. \textit{Burton}, 243 Cal. Rptr. at 281 (granting summary judgment and emphasizing evidence that the defendant investigated the charged misconduct in support of finding that the plaintiff was not discharged in bad faith).

119. Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1273 n.10 (9th Cir. 1990) (considering the impact of \textit{Foley} on remedies available to plaintiffs for breach of the implied covenant of good faith and fair dealing); \textit{Rose}, 902 F.2d at 1426 (same); Aragon-Haas v. Family Sec. Ins. Serv., Inc., 282 Cal. Rptr. 233, 238-39 (Ct. App. 1991) (same); Seubert v. McKesson Corp., 273 Cal. Rptr. 286, 300 (Ct. App. 1990) (same); Wallis v. Farmers Group Ins., 269 Cal. Rptr. 299, 308 (Ct. App. 1990) (same); Zilmer v. Carnation Co., 283 Cal. Rptr. 422, 427 (Ct. App. 1989). In \textit{Pugh II}, the court explained that the significance of this distinction is that punitive damages and damages for emotional distress are not available in a contract action. \textit{Pugh II}, 250 Cal. Rptr. at 201 n.6.
As a practical matter, the contract-requirement makes it difficult for an at will employee to challenge his or her termination under the implied covenant of good faith and fair dealing. Courts have repeatedly explained that the implied covenant only protects the plaintiff's right to receive the benefits of his or her agreement with the employer, and that the benefits of an at will agreement do not include the right to continuous employment.\textsuperscript{120} From the employee's perspective, this rule makes it all the more important to overcome the statutory presumption of at will employment.

\section*{2. Evidence Establishing Breach}

Two common allegations of breach are pretextual termination\textsuperscript{121} and breach of the employer's written policies, procedures or by-laws.\textsuperscript{122} The analysis with regard to the latter

\begin{itemize}
  \item See, e.g., Slivinsky v. Watkins-Johnson Co., 270 Cal. Rptr. 195, 201 (Ct. App. 1990) (rejecting the plaintiff's claim for breach of the implied covenant of good faith and fair dealing because she was an at will employee); Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 556 (Ct. App. 1990) (same). \textit{See also infra} note 487 (citing additional cases).
  \item Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021, 1030-31 (N.D. Cal. 1988) (denying summary judgment on claim for breach of the implied covenant of good faith and fair dealing where the plaintiff raised a triable issue of material fact about whether or not the defendant's alleged reduction in force was merely pretextual); Crossen v. Foremost-Mckesson, Inc., 537 F. Supp. 1076, 1078-79 (N.D. Cal. 1982) (denying summary judgment where the plaintiff offered concrete evidence that he was terminated because he refused to violate foreign law and not for insubordination, as asserted by the employer); \textit{Walker}, 6 Cal. Rptr. 2d at 189-90 (reversing summary judgment where there was evidence that the defendant amended its medical leave policy to facilitate the plaintiff's discharge while she was on medical leave in order to avoid having to retain her after an impending reduction in force); \textit{Zilmer}, 263 Cal. Rptr. at 426-27 (reversing the trial court's ruling sustaining demurrer where the plaintiff alleged both that he was told that he would have to obtain a certain kind of certificate to keep his job, and that the certificate requirement was merely a pretext used to force him out of the company); Prevost v. First W. Bank, 239 Cal. Rptr. 161, 167 (Ct. App. 1987) (reversing summary judgment where there was evidence raising a triable issue of fact as to whether the plaintiff was actually terminated for poor performance, as asserted by the employer, or whether he was discharged as part of a "power struggle"); Rulon-Miller v. International Business Machs. Corp., 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (affirming judgment for the plaintiff where the verdict was supported by substantial evidence that the reason given for the plaintiff's termination, a conflict of interest flowing from a romantic relationship with the manager of a rival firm, was pretextual).
  \item Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 776-77 (9th Cir. 1990) (affirming verdict for the plaintiff where there was evidence that the manner of the plaintiff's layoff breached the defendant's layoff policy); Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453, 459-60 (Ct. App. 1993) (holding that the plaintiff raised a triable issue of fact on his claim for breach of the
tracks the implied-in-fact contract analysis; that is, courts are likely to take the nature and extent of the policy into account in evaluating the plaintiff's claims. For example, it implied covenant of good faith and fair dealing with evidence that his pretextual termination violated the defendant's policies guaranteeing a safe working environment and providing for progressive discipline; Gray v. Superior Court, 226 Cal. Rptr. 570, 572-73 (Ct. App. 1986) (reversing ruling sustaining demurrer based on determination that the complaint stated a viable claim with allegations that the defendant failed to follow its progressive discipline policy and affirming judgment for the plaintiff where the verdict was supported by substantial evidence that the defendant's policies guaranteed employees a right of privacy and that the plaintiff was terminated for exercising this right). These opinions are difficult to square with cases explaining that covenant claims require proof of bad faith conduct extraneous to the contract. See supra note 114. Suffice it to say here that courts are still exploring the role the implied covenant plays in the employment relationship. See generally WRONGFUL EMPLOYMENT TERMINATION PRACTICE §§ 240-43, at 48-53 (California Continuing Education of the Bar ed., 1987) (discussing nature of cause of action).

Two other examples of successful claims for breach of the implied covenant include: failing to honor a promise made to an employee, Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 624 (Ct. App. 1990) (reversing nonsuit and remarking that the jury could have found that the defendant failed to honor a promise made to the plaintiff to provide her with a pretermination hearing and to continue her insurance coverage during the interim), and failing to give a new employee a chance to perform once he or she is initially hired, Sheppard v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 785-87 (Ct. App. 1990) (reversing summary judgment where, after initially hiring the plaintiff, the defendant discharged him before he started work).

123. See supra notes 82-84 (discussing contract claims). Moreover, like contract claims, claims for breach of the implied covenant of good faith and fair dealing can be resolved as a matter of law. See, e.g., Joanou v. Coca-Cola Co., 26 F.3d 96, 99-100 (9th Cir. 1994) (affirming summary judgment where there was unrefuted evidence that the plaintiffs were discharged when the defendant sold portion of its enterprise at which they were employed); Funk v. Sperry Corp., 842 F.2d 1129, 1132-33 (9th Cir. 1988) (affirming summary judgment and concluding that no reasonable jury could find that the defendant breached the implied covenant of good faith and fair dealing by failing to provide the plaintiff with a presidential review of his termination, as asserted by the plaintiff, where there was no evidence to support this theory and the unrefuted material facts showed otherwise); Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 732-35 (C.D. Cal. 1986) (granting summary judgment in a case where the plaintiff was discharged as part of a reduction in force); Burton v. Security Pac. Nat'l Bank, 243 Cal. Rptr. 277, 280-81 (Ct. App. 1988) (rejecting argument that the defendant breached the implied covenant by terminating the plaintiff for misconduct - reading confidential material in confidential area - because the defendant failed to give the plaintiff any warning before issuing a written warning for an unrelated offense, excessive absenteeism, on ground that even assuming a warning was required by the defendant's handbook, the plaintiff still failed to demonstrate any connection between the absence of a warning and his termination); Fowler v. Varian Assoc., Inc., 241 Cal. Rptr. 539, 543 n.7 (Ct. App. 1987) (affirming summary judgment where the record contained absolutely no supporting evidence). But see Luck, 267 Cal. Rptr. at 633 ("The reason for an employee's dismissal and whether that reason
may be difficult for a management-level employee to state a cause of action by relying on a policy which covers hourly employees, or which only concerns his or her compensation, and not the terms of employment. Moreover, not just any policy will do. At a minimum, the policy must apply to the situation, have some material significance, and create rights rather than mere expectations. Termination of an

constitutes bad faith are evidentiary questions most properly resolved by the trier of fact.”); Gray, 226 Cal. Rptr. at 573 (commenting that the issue of whether the defendant’s conduct “is a breach of the implied covenant of good faith and fair dealing is a factual question, not an issue of law”); Khanna v. Microdata Corp., 215 Cal. Rptr. 860, 868 (Ct. App. 1985) (“The true reasons for an employee’s dismissal, and whether they show bad faith rather than dissatisfaction with services and reflect an intention to deprive the discharged employee of the benefits of the contract, are evidentiary questions most properly resolved by the trier of fact.”).

124. Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315, 1323 n.2 (N.D. Cal. 1984) (rejecting the plaintiff’s argument that he established a claim for breach of the implied covenant of good faith and fair dealing with evidence that he was discharged without application of the defendant’s progressive discipline policy, because the policy only applied to hourly employees, which he was not).

125. Cf. Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 885 n.2 (N.D. Cal. 1994) (rejecting the plaintiff’s argument that an employment document entitled “Agreement of Terms and Conditions of Compensation for Big Ticket Salespeople” required good cause for his termination because the agreement only dealt with his compensation, not the terms of his employment, and was thus irrelevant).

126. Cox, 638 F. Supp. at 733 (granting summary judgment and rejecting the plaintiff’s argument that the defendant breached the implied covenant of good faith and fair dealing by failing to provide him with counseling before he was terminated, because there was no evidence that the counseling policy applied to a reduction in force).

127. Id. at 733-34 (granting summary judgment in a case where the plaintiff was discharged as part of a reduction in force and rejecting the plaintiff’s argument that the defendant violated the implied covenant of good faith and fair dealing by failing to provide him with an exit interview, because even assuming this was true, these were not the type of actions that would make the termination wrongful).

128. Mundy v. Household Fin. Corp., 885 F.2d 542, 545 (9th Cir. 1989) (affirming summary judgment and concluding that the plaintiff could not establish a right to job security based on written management guidelines focusing on employee evaluations, because while the guidelines stated they were intended to assist employees in identifying and improving performance problems, there was “no indication that they were intended to override existing employment agreements or to create any new rights in the employees”); Cox, 638 F. Supp. at 734 (granting summary judgment and concluding that the plaintiff mischaracterized the nature of his rights under the defendant’s reduction in force policy, because rather than rights under the policy, the plaintiff had a mere expectation that the employer would transfer him to another division in lieu of termination).
employee for cause, of course, does not breach the implied covenant.  

C. The Parol Evidence Rule

1. General Principles

California's parol evidence rule is codified in section 1856 of the Code of Civil Procedure, providing that: “Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.” At least two of the policies served by this rule are accuracy and promoting impassionate results. 

Parol evidence issues come up in two different situations. The first situation is where parol (or extrinsic) evidence is offered to prove the meaning of terms used in the parties’ written agreement (e.g., “indemnify”). Parol evidence is admissible for this purpose providing the disputed term is reasonably susceptible to the interpretation advanced by the party seeking to introduce the evidence. The second


130. CAL. CIV. PROC. CODE § 1856(a) (West 1996).

131. Masterson v. Sine, 436 P.2d 561, 563 (Cal. 1968) (explaining that one of the policies the parol evidence rule is intended to serve is “the assumption that written evidence is more accurate than human memory”).

132. Id. (explaining that because the party offering the parol evidence is “most often the economic underdog, threatened by severe hardship if the writing is enforced,” the parol evidence rule serves “to allow the court to control the tendency of the jury to find through sympathy and without a dispassionate assessment of the probability of fraud or faulty memory . . . that an oral agreement was made by the parties collateral to the written contract, or that preliminary tentative agreements were not abandoned when omitted from the writing.”).

133. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Co., 442 P.2d 641, 643-46 (Cal. 1968) (reversing judgment for the plaintiff in an action to enforce an indemnity clause contained in the parties' agreement and finding that the trial court erroneously excluded parol evidence that the clause was only intended to cover damage to property owned by third persons, because the term “indemnify” was reasonably susceptible to this meaning); Aragon-Haas v. Family Sec. Ins. Serv., Inc., 282 Cal. Rptr. 233, 237-38 (Ct. App. 1991) (reversing demurrer on the plaintiff's contract claim because the contract was ambiguous, in that it provided that the plaintiff could be terminated for cause during first six months, but did not say if this right continued after first six months); Wallis v.
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situation is where parol evidence is offered to prove additional terms of the parties' agreement. An example of this situation would be where the plaintiff's employment contract is silent on the grounds for termination, and he or she offers parol evidence of oral assurances of job security made during his or her initial interview with the company. Generally speaking, parol evidence is only admissible to prove additional terms which are consistent with, but do not vary or contradict, the written agreement. This is because "it can-

Farriers Group Ins., 269 Cal. Rptr. 299, 305-06 (Ct. App. 1990) (holding that the trial court properly permitted the plaintiff to introduce evidence that she was assured that she would only be terminated for cause, because the plaintiff's employment contract provided only that either party could terminate the agreement on 30 days notice, and thus was susceptible to the plaintiff's interpretation of the agreement that good cause was required for her termination); McLain v. Great Am. Ins. Co., 256 Cal. Rptr. 863, 868 (Ct. App. 1989) (holding that evidence of oral assurances made to the plaintiff that he would become a "permanent" employee after completing a probationary period was admissible to explain the meaning of the parties' written agreement since the written agreement provided that terms of the employment relationship could be changed at any time); Brawthen v. H & R Block, Inc., 104 Cal. Rptr. 486, 489 (Ct. App. 1972) (finding that evidence of an oral agreement that the defendant would employ the plaintiff as a manager as long as he did a good job was admissible where the written contract was silent on the grounds for termination, because it was such that it might naturally be made as a separate agreement). Cf. Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271 n.7 (9th Cir. 1990) (holding that at will term in the plaintiff's employment application was not ambiguous where stating "in no uncertain terms" that the employment relationship was at will); Haggard v. Kimberly Quality Care, Inc., 46 Cal. Rptr. 2d 16, 21 (Ct. App. 1995) (rejecting the plaintiff's argument that clause in her employment contract providing that she could be terminated "at will, at any time, with or without cause or advance notice" was ambiguous because the meaning of this provisions was "inescapable"); Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 283-84 (Ct. App. 1987) (holding that the term "any reason" is not ambiguous because it "is plainly all-inclusive, encompassing all reasons 'of whatever kind,' good, bad, or indifferent"); Malstrom, 231 Cal. Rptr. at 825 (rejecting the plaintiff's argument that evidence of oral assurances of continued employment was admissible to explain the meaning of contract terms because the contract—which provided that the employer would continue to employ the plaintiff "for a length of time as shall be mutually agreeable"—was not reasonably susceptible to an interpretation requiring cause for discharge).

134. CAL. CIV. PROC. CODE § 1856(a) (West 1996); Masterson, 436 P.2d at 562-67 (reversing judgment for the buyer in an action by the seller's trustee to enforce an option in the underlying landsale contract and finding that the trial court erroneously excluded evidence that the option was intended to keep the property in the family); Esbensen v. Userware Int'l, Inc., 14 Cal. Rptr. 2d 93, 95 (Ct. App. 1993) ("To the extent a contract is integrated, the parol evidence rule precludes the admission of evidence of the parties' prior or contemporaneous oral statements to contradict the terms of the writing . . . ."); Slivinsky v. Watkins-Johnson Co., 270 Cal. Rptr. 585, 587 (Ct. App. 1990) (affirming summary judgment and holding that evidence of prehire assurances was barred by parol
not reasonably be presumed that the parties intended to inte-
grate two directly contradictory terms in the same agree-
ment." In this sense, the parol evidence rule "is not merely
a rule of evidence, but is substantive in scope."

2. Integration

The parol evidence rule, which precludes introduction of
evidence of additional terms inconsistent with the terms of a
written contract, is generally qualified by the rules governing
integration. A written contract is "integrated" where it repre-
sents the final expression of the parties' agreement. Integration
does not mean that the writing contains all of the
terms and conditions of the parties' agreement. Instead, inte-
gration means only that the parties have reached a complete
and final understanding as to some or all of the terms of their
agreement.

"Evidence of related oral understandings . . . is admissible to prove addi-
tional terms of the contract not inconsistent with the express language of the writing." Esbensen, 14 Cal. Rptr. 2d at 96.

135. Gerdlund, 235 Cal. Rptr. at 283. Accord Haggard, 46 Cal. Rptr. 2d at 21. Extrinsic evidence which is contrary to the express contract terms is simi-
larly inadmissible to interpret the meaning of the agreement under a theory that the agreement is ambiguous. "Testimony of intention which is contrary to a contract's express terms . . . does not give meaning to the contract: rather it
seeks to substitute a different meaning." Gerdlund, 235 Cal. Rptr. at 284.


137. Esbensen, 14 Cal. Rptr. 2d at 96 ("In contract law, 'integration' means the extent to which a writing constitutes the parties' final expression of their
agreement."); Wagner, 265 Cal. Rptr. at 415 ("The central question in determining
whether there has been an integration, and thus whether the parol evidence
doctrine applies, is 'whether the parties intended their writing to serve as the
exclusive embodiment of their agreement.'") (quoting Masterson v. Sine, 436
P.2d 561, 563 (Cal. 1968)). See also RESTATEMENT (SECOND) OF CONTRACTS
§ 209(1) (1996) ("An integrated agreement is a writing or writings constituting
a final expression of one or more terms of an agreement.").

138. Wagner, 265 Cal. Rptr. at 415 ("An integration may be partial as well as
complete; that is, the parties may intend that a writing finally and completely
express certain terms of their agreement rather than the agreement in its en-
tirety."). Accord Haggard, 46 Cal. Rptr. 2d at 21 (citing Wagner). See also RE-
STATEMENT (SECOND) OF CONTRACTS § 209(1) (1996) ("An integrated agreement
force to written contracts which are only "partially" integrated.\textsuperscript{139} No particular form is required.\textsuperscript{140}

Whether or not the underlying contract constitutes an integrated agreement is a question of law for the court.\textsuperscript{141} Relevant evidence includes the agreement's scope (i.e., whether or not it covers essential contract terms),\textsuperscript{142} the presence or ab-

\textsuperscript{139} Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271 n.7 (9th Cir. 1990) (holding that evidence of oral assurances of continued employment which the plaintiff claimed were made to him when he was hired was inadmissible to vary the terms of his partially integrated at will employment contract); Masterson, 436 P.2d at 563 (explaining that where the contract is partially integrated, parol evidence is not admissible to vary or contradict the partially integrated contract terms); Haggard, 46 Cal. Rptr. 2d at 20 ("If only part of the agreement is integrated, the parol evidence applies to that part."); Wagner, 265 Cal. Rptr. at 415 ("The parol evidence rule applies equally to the partial integration.").

\textsuperscript{140} Restatement (Second) of Contracts § 209 cmt. b (1996).

\textsuperscript{141} Cal. Civ. Proc. Code § 1856(d) (West 1996). See also Haggard, 46 Cal. Rptr. 2d at 21 ("Whether the agreement is an integration is ... a question of law for the court."); Esbensen, 14 Cal. Rptr. 2d at 97 n.4 (same); Slivinsky v. Watkins-Johnson Co., 270 Cal. Rptr. 585, 588 (Ct. App. 1990) (same); Wagner, 265 Cal. Rptr. at 416 (same); Brawthen v. H & R Block, Inc., 104 Cal. Rptr. 486, 489 (Ct. App. 1972) (same); Restatement (Second) of Contracts § 209(2) (1996) (same).

\textsuperscript{142} Haggard, 46 Cal. Rptr. 2d at 22 (emphasizing the fact that the plaintiff's employment agreement covered various conditions relating to her employment in support of finding that the agreement was partially integrated); Seubert v. McKesson Corp., 273 Cal. Rptr. 296, 298-99 (Ct. App. 1990) (emphasizing that the plaintiff's employment application did not set forth essential terms in support of ruling that application was not an integrated writing); Wallis v. Farmers Group Ins., 269 Cal. Rptr. 299, 305 (Ct. App. 1990) (emphasizing that the plaintiff's employment application did not cover how the plaintiff would earn commissions nor how the defendant would pay the plaintiff for any commissions earned in support of ruling that application was only a partially integrated writing); Wagner, 265 Cal. Rptr. at 415 (emphasizing that the plaintiff's employment application lacked essential terms like position and salary in support of ruling that application was only partially integrated); Anderson v. Savin Corp., 254 Cal. Rptr. 627, 630 (Ct. App. 1988) (emphasizing that employment letter sent to the plaintiff described his position and set forth provisions of employment in support of finding that letter was integrated); McLain v. Great Am. Ins. Co., 256 Cal. Rptr. 863, 868 (Ct. App. 1989) (emphasizing that the parties' agreement did not contain essential terms such as salary and position in support of finding that the plaintiff's employment application was not an integrated agreement); Malstrom v. Kaiser Aluminum & Chem. Corp., 231 Cal. Rptr. 820, 828 (Ct. App. 1986) (emphasizing the fact that the parties' contract contained essential terms in support of finding that the contract was integrated).
sence of an "integration clause,"143 and language limiting contract modifications.144 Evidence that the contract is set forth in a form agreement145 and of any negotiations146 is also

143. Comeaux, 915 F.2d at 1271 n.7 (emphasizing the fact that the parties' employment agreement - an employment application - contained an integration clause in support of finding that the agreement was partially integrated); Haggard, 46 Cal. Rptr. 2d at 21 (same); Esbensen, 14 Cal. Rptr. 2d at 97 (emphasizing that the parties' agreement did not contain an integration clause in support of finding that the contract was only partially integrated); Seubert, 273 Cal. Rptr. at 298 (emphasizing that the plaintiff's employment application did not contain an integration clause in support of finding that the contract was not an integrated writing); Wallis, 269 Cal. Rptr. at 305 (same); McLain, 256 Cal. Rptr. at 868 (emphasizing the absence of an integration clause in support of finding that the plaintiff's employment application was not an integrated agreement); Malstrom, 231 Cal. Rptr. at 828 (emphasizing the fact that the parties' contract contained an integration clause in support of finding that the contract was integrated); Brauthen, 104 Cal. Rptr. at 489 (emphasizing the absence of an integration clause in support of finding that the plaintiff's employment application was not an integrated agreement).

144. Comeaux, 915 F.2d at 1271 n.7 (emphasizing the fact that the parties' employment agreement - an employment application - made no provision for a modification by a subsequent writing or oral agreement in support of finding that the agreement was partially integrated); Haggard, 46 Cal. Rptr. 2d at 22 (same where the agreement provided that the contract could only be modified by a subsequent writing signed by the president of the company); Wagner, 265 Cal. Rptr. at 48-49 (emphasizing that acknowledgment form stating that the employer's policies "may change from time to time" indicated a "specific intent that the terms and conditions of employment remain[ed] subject to change" in support of ruling that the acknowledgment was not an integrated writing); Anderson, 254 Cal. Rptr. at 629 (emphasizing the fact that the plaintiff’s employment letter provided that the parties’ agreement could not be modified without approval from corporate officer in support of finding that agreement was integrated); McLain, 256 Cal. Rptr. at 868 (emphasizing that contract language providing that the terms of the employment relationship could be changed at any time stripped at will clause of its force).

145. Seubert, 273 Cal. Rptr. at 299 (emphasizing that the plaintiff's employment application was a form agreement in support of ruling that the application was not an integrated writing); Wagner, 265 Cal. Rptr. at 415 (emphasizing that the plaintiff's employment application was a form agreement in support of ruling that the application was only partially integrated); Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 284 (Ct. App. 1987) (emphasizing the fact that the parties did not use a form agreement in support of ruling that their contract was integrated); McLain, 256 Cal. Rptr. at 866 (emphasizing the fact that the parties used a form agreement in support of finding that employment application was not an integrated document); Brauthen, 104 Cal. Rptr. at 490 (same).

146. Esbensen, 14 Cal. Rptr. 2d at 96 (“Obviously where following negotiations the parties execute a written agreement, that agreement is at least 'partially' integrated and parol evidence cannot be admitted to contradict the terms agreed to in the writing.”); Gerdlund, 235 Cal. Rptr. at 284 (emphasizing the fact that the plaintiffs helped draft the entire agreement, including the termination clause, in support of ruling that the contract was integrated).
important, as is evidence of legal advice\(^1\) and of the circumstances surrounding the transaction.\(^2\) Of course, courts will also consider whether or not the agreement was actually signed.\(^3\)

It must be noted that even assuming integration, parol evidence is still not inadmissible \textit{per se}. Rather, the trial court has discretion to admit evidence of a prior or contemporaneous agreement where it might "naturally" be made as a separate side-agreement.\(^4\) On the other hand, the exercise of this discretion is inappropriate where the additional terms would "certainly" have been included in the written contract.\(^5\)

\(^1\) \textit{Esbensen}, 14 Cal. Rptr. 2d at 97 (emphasizing the fact that the parties to the contract did not have the benefit of legal counsel in support of finding that contract was partially integrated).

\(^2\) \textit{Haggard}, 46 Cal. Rptr. 2d at 21 (emphasizing the fact that the plaintiff read the agreement before executing it, and that while she was reluctant to sign the agreement, she did so with the understanding that this was a necessary condition of her employment); \textit{Esbensen}, 14 Cal. Rptr. 2d at 97 (emphasizing the fact that the agreement was between business entrepreneurs and computer programmer unsophisticated in legal matters in support of finding that contract was partially integrated); \textit{Brawthen}, 104 Cal. Rptr. at 490 (emphasizing the fact that the plaintiff was hired to develop business in new region in support of finding that the contract was not integrated).

\(^3\) \textit{Haggard}, 46 Cal. Rptr. 2d at 21 (emphasizing the fact that the plaintiff signed the agreement in support of finding that the contract was partially integrated); Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185, 189-91 (Ct. App. 1989) (rejecting the defendant's argument that its at will handbook established the nature of the employment relationship as a matter of law because it was not a signed agreement).

\(^4\) \textit{Masterson} v. \textit{Sine}, 436 P.2d 561, 562-64 (Cal. 1968) (reversing judgment for the buyer in an action by the seller's trustee to enforce an option in the underlying landsale contract and finding that extrinsic evidence the option was personal to the seller was admissible parol evidence because the agreement was such that it might naturally be made as a side agreement); \textit{Brawthen}, 104 Cal. Rptr. at 489-90 (finding that evidence of an oral agreement that the defendant would employ the plaintiff as a manager as long as he did he a good job was admissible where the written contract was silent on the grounds for termination, because the agreement was such that it might naturally be made as a \textit{separate} agreement). \textit{Cf.} \textit{Gerdlund}, 235 Cal. Rptr. at 284 (finding that a separate collateral agreement regarding grounds for the plaintiff's termination was not the type of agreement which would "naturally" be made separately given explicit language in the contract that the agreement could be terminated for any reason).

\(^5\) \textit{Masterson}, 436 P.2d at 562-65 (articulating rule); \textit{Haggard}, 46 Cal. Rptr. 2d at 21-22 (concluding that an agreement not to terminate except for cause was not the type of agreement naturally made separately from the underlying contract where the contract specifically addressed the grounds for termination).
III. The Emerging Shapiro-Gerdlund Doctrine

It is difficult to reconcile the various opinions in this area, especially those dealing with employment applications. At the same time, it is important to appreciate the fundamental role that discord has played in this emerging area of the law. After wading through the cases, one is left with the distinct impression that the doctrine has been shaped largely by the tension between cases embracing an expansive interpretation of the reasonable expectation principle on the one hand, and opinions favoring a more narrow reading of this principle on the other.

A. 1952-1961: The Early Compensation Cases

The Shapiro-Gerdlund doctrine has been around a lot longer than one might think, with two of the earliest cases focusing on the plaintiff's right to compensation, not job security. Sharpe v. Arabian Am. Oil Co. is one of the earliest reported opinions. The issue there was whether the plaintiff tugboat captain was entitled to recover damages for compensation above the amount specified in his written contract.

The contract provided for a fixed monthly salary. The plaintiff argued that since he had been on "standby" during his off duty hours, he was working 24 rather than eight hours each day. According to the plaintiff, the employer therefore owed him wages for 16 hours a day in overtime for each day worked. Although there was no express provision covering overtime pay, the plaintiff claimed that this promise was implicit in the agreement.

152. In Foley, the California Supreme Court observed that "[a] few recent cases, including Shapiro v. Wells Fargo Realty Advisors . . . can be interpreted to preclude enforcement of an implied-in-fact modification of an on-going employment agreement when some express written provision insists on the employee's at will status." Foley v. Interactive Data Corp., 765 P.2d 373, 387 n.23 (Cal. 1988). With the exception of this passing reference in Foley, the court has not taken the opportunity to examine this emerging line of cases.

153. 244 P.2d 83 (Cal. 1952).
154. Id. at 84-85.
155. Id. at 85.
156. Id. at 84-85.
157. Id.
158. See Arabian, 244 P.2d at 85.
159. Id. at 85.
The appellate court disagreed and reversed a judgment for the plaintiff in the trial court. The court reasoned that because the contract covered the terms and conditions of the plaintiff's employment, it would be inappropriate to imply a provision for overtime pay. To do so, the court exclaimed, would be to make a new contract which was not necessarily consistent with the intentions of the parties.

The precise issue raised in Sharpe appeared again more than nine years later in Rogers v. American President Line, Ltd., a case involving a ship steward rather than a tugboat captain. The plaintiff sued his employer for outstanding wages after returning home from the last of nine voyages. Although he was paid under the terms of written shipping articles (which he executed), the plaintiff claimed that there was an implied promise that he was entitled to the same salary increase given to other employees.

The trial court rejected this argument, and the appellate court affirmed. The court reasoned that "[a]n action [will] not lie on an implied contract where there exists between the parties a valid express contract which covers the same subject matter."

B. 1982-1985: The Early Security Term Cases

After Rogers, the issue did not resurface in an employment case for more than twenty years, until Crossen v. Foremost-McKesson, Inc. was finally decided in 1982. In Crossen, the plaintiff was promoted to fill a management level position overseeing the operation of several of the defendant's foreign plants in late 1977. When promoted, he signed an agreement providing that his employment could "be terminated at any time on 60 days' written notice by

160. Id. at 87-88.
161. Id. at 85-88.
162. Id. at 86.
163. 291 F.2d 740 (9th Cir. 1961).
164. Id. at 741.
165. Id. at 740-41.
166. Id. at 741.
167. Id. at 742.
168. Rogers, 291 F.2d at 741.
169. Id. at 743.
170. Id. at 742.
171. 537 F. Supp. 1076 (N.D. Cal. 1982).
172. Id. at 1076.
either party."173 In November 1978, the defendant notified the plaintiff that he was terminated effective May 31, 1979.174 He subsequently filed a suit for wrongful termination, alleging that he was fired for trying to correct the defendant's violations of foreign law, and not, as asserted by the defendant, for sending disrespectful and disruptive letters to his supervisors.175

Although the district court denied summary judgment176 (reasoning that the plaintiff raised a triable issue of material fact on his claim for breach of the implied covenant of good faith and fair dealing)177 the court rejected the plaintiff's claim for breach of an implied-in-fact contract.178 The court explained that an implied promise that the plaintiff only would be terminated for cause was inconsistent with the express terms of his written employment agreement.179 Beyond revitalizing the rule articulated in Sharpe and Rogers, the

173. Id.
174. Id.
175. Id. at 1076, 1078.
177. Id. at 1077-79
178. Id. at 1076-77.
179. See id. The district court did not rely on the earlier employment cases, but rather on Wal-Noon Corp. v. Hill, 119 Cal. Rptr. 646 (Ct. App. 1975), a case involving a dispute over the cost of repairing premises leased by the plaintiffs. In that case, the lease provided that all repairs would be made by the defendant landlord. Id. at 647. The dispute involved the cost of replacing the roof, initially paid for by the plaintiffs. Id. At trial, the defendant maintained that he was not required to reimburse the plaintiffs, because they repaired the roof without telling him about the damage. Id. at 648. The trial court agreed that the plaintiffs breached the lease, but, applying the equitable principle of restitution, ruled for the plaintiffs. Id. The court of appeals reversed, reasoning that because the lease required the plaintiffs to maintain the property in "good order and condition at their own expense," the lease necessarily implied that the defendant had a right to control the nature and cost of any repairs. Id. at 649. The court reasoned further that by extending equitable relief to the plaintiffs, the trial court deprived the defendant of this right, which was "part of the bargained-for consideration in the lease . . . ." Id. at 650. In language frequently cited by contemporary opinions, the court stated: "There cannot be a valid, express contract and an implied contract each embracing the same subject matter, existing at the same time." Id.

The Crossen court did not stop to consider whether a valid analogy can be drawn to the landlord-tenant context. The court might have pointed out, for example, that both areas of the law involve an inequality of bargaining power. It is also important to observe that Wal-Noon is really a constructive condition case, that is, a case where the court was relying on an implied contract term. E. Allan Farnsworth, Farnsworth on Contracts § 8.2, at 346 n.12 (1990) (citing Wal-Noon for the proposition that courts may supply a term making an event a condition in order to effectuate the parties' contractual intent). This is
court's opinion marks the shift from actions to enforce an implied promise to pay additional compensation to actions to enforce an implied promise not to terminate without good cause.

In Crain v. Burroughs Corp.,180 decided the following year, the district court picked up where the Crossen court left off. In Crain, the plaintiff was terminated for poor performance after approximately two years of employment.181 She then brought suit alleging claims for breach of contract, age discrimination and intentional infliction of emotional distress.182

In rejecting the plaintiff's contract claim, the district court offered two reasons why the plaintiff could not establish an implied-in-fact promise by relying on statements in the defendant's "Field Marketing Manual." The first reason was that the plaintiff's contract183 clearly stated that her employment was at will.184 Citing Crossen, the district court explained that in light of her at will agreement, the plaintiff "could not reasonably have had a legitimate expectation of a right to a just cause determination prior to termination."185 The second reason was that the manual contained an effective disclaimer, stating that it was "informational only" and was not intended to constitute an employment contract.186

somewhat surprising given the fact that the opinion is cited in employment cases where the court is relying on an express contract term.

181. Id. at 851-52.
182. Id. at 851. The defendant only moved for summary adjudication as to the plaintiff's breach of contract and intentional infliction of emotional distress claims. Id. at 850.
183. The plaintiff signed a written employment agreement approximately one month after she was initially hired in December, 1979. Id. The written agreement contained the following terms. First, that either party was free to terminate the contract "at any time." Id. Second, that there were no oral agreements affecting the written contract. Id. Third, that the contract could only be modified by a subsequent agreement signed by both parties. Id. Fourth, that the written contract superseded all prior agreements. Id. She later signed two identical agreements, one in April 1981, and one in January, 1980. Id. In March 1981, the employer shifted from individual employment agreements to a "combined contract/personnel action notice" known as the "Sales Representative Agreement/P.A.N." Id. The agreement stated that it superseded all prior contracts. Id. It also stated that the employer retained the sole discretion to determine the length of an employee's tenure and would "continue to employ sales representatives only for as long as [it] desire[d] his/her services." Id.
184. Id. at 852.
186. Id. Emphasizing that the plaintiff was only employed for two years and that he had less than a satisfactory performance record, the court also con-
Accordingly, the court granted summary judgment for the defendant.\textsuperscript{187}

\textit{Crain} sent a message to employers: Spelling out the fact that the employment relationship is at will in a written agreement offers distinct advantages. By this same token, it was clear that it was time to start incorporating disclaimers into employee handbooks and to hire defense attorneys familiar with motions for summary judgment.

From the plaintiff's perspective, \textit{Crain} deviated from the earlier cases in a subtle, yet important way. While reciting the factual background for the dispute, the court observed that there was an integration clause in the contract, that it was signed by the plaintiff, and that it contained a provision limiting modifications to a subsequent written agreement.\textsuperscript{188} The court, in other words, seemed to be looking at some of the criteria traditionally used to determine whether a contract is integrated. Arguably, \textit{Crain} was thus the first case to suggest a substantive limitation on the scope of the \textit{Shapiro-Gerdlund} rule, i.e., that the rule might be limited to integrated agreements.\textsuperscript{189}

The opportunity to respond to this question arrived one year later, in what is now the very well known case of \textit{Shapiro v. Wells Fargo Realty Advisors.}\textsuperscript{190} In \textit{Shapiro}, the plaintiff was employed as the defendant's treasurer and vice president.\textsuperscript{191} He brought suit after his discharge, alleging claims for wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and breach of contract.\textsuperscript{192} With regard to the latter, the plaintiff's complaint alleged breach of implied promises not to terminate his employment without good cause and to provide him

\begin{itemize}
  \item \textsuperscript{187} Id. at 853-54. The court also rejected the plaintiff's claim for intentional infliction of emotional distress. \textit{Id.}
  \item \textsuperscript{188} Id. at 850-52.
  \item \textsuperscript{189} Significantly, though, the court did not discuss or even cite the parol evidence rule. This may not have been necessary, however, since the plaintiff was relying on posthire evidence of his longevity of service to establish an implied-in-fact contract. \textit{See id.} at 853.
  \item \textsuperscript{190} 199 Cal. Rptr. 613 (Ct. App. 1984).
  \item \textsuperscript{191} \textit{Id.} at 615.
  \item \textsuperscript{192} \textit{Id.} When the defendant made the alleged representations is not clear from the opinion.
\end{itemize}
with the opportunity to achieve the maximum level of base pay.\textsuperscript{193}

The trial court sustained the defendant's demurrer to all three causes of action,\textsuperscript{194} and the appellate court affirmed.\textsuperscript{195}

With respect to the plaintiff's contract claim, the court of appeals held that the plaintiff could not rebut his status as an at will employee as a matter of law.\textsuperscript{196} The court reasoned that the plaintiff signed an at will stock option agreement, and thus "could not have reasonably relied on any implied promise by [the defendant] which contradicted the express provisions of the written stock option agreement which he signed."\textsuperscript{197} The court reasoned further that the plaintiff's conclusory allegations of an implied promise were insufficient to support a cause of action.\textsuperscript{198}

The facts of 	extit{Shapiro} offered a perfect chance to limit the scope of the 	extit{Crossen} and 	extit{Crain} opinions. After all, the court was dealing with a stock option agreement, not a comprehensive employment contract. Instead, the court embraced an expansive interpretation of the rule, extending it not only beyond integrated agreements (the court did not even allude to the parol evidence rule),\textsuperscript{199} but beyond formal employment contracts as well.\textsuperscript{200}

The court's opinion in \textit{Hillsman v. Sutter Community Hosp.},\textsuperscript{201} decided within a month of \textit{Shapiro}, is one of the

\begin{itemize}
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{Id.} at 615-16.
  \item \textsuperscript{195} \textit{Shapiro}, 199 Cal. Rptr. at 622. The court treated the appeal as one from summary judgment, because the plaintiff failed to object to the trial court's decision to take judicial notice of the stock option agreement. \textit{Id.} at 616 n.3.
  \item \textsuperscript{196} \textit{Id.} at 621.
  \item \textsuperscript{197} \textit{Id.} (emphasis added). The court cited \textit{Wal-Noon} as direct authority for this proposition (without considering the analogy between employment and landlord and tenant law), and cited \textit{Crossen} and \textit{Crain} with a "see also" signal. \textit{Id.}
  \item \textsuperscript{198} \textit{Id.} The court also rejected the plaintiff's claims for wrongful termination in violation of public policy, breach of the implied covenant of good faith and fair dealing, and violation of due process. \textit{Id.} at 616-19, 622.
  \item \textsuperscript{199} Again, precisely when the defendant made the alleged representations is not clear from the opinion. Accordingly, discussing the parol evidence rule may not have been necessary.
  \item \textsuperscript{200} \textit{Shapiro}, 199 Cal. Rptr. at 621. Baker v. Kaiser Aluminum & Chem. Corp., 608 F. Supp. 1315 (N.D. Cal. 1984) was the first case where the plaintiff claimed that the underlying agreement—a patent agreement—was not an "employment contract." \textit{Id.} at 1320. \textit{Shapiro} was cited in support of the court's conclusion rejecting this argument. \textit{Id.}
  \item \textsuperscript{201} 200 Cal. Rptr. 605 (Ct. App. 1984).
\end{itemize}
first cases retreating from the expansive approach taken by decisions like Shapiro. In Hillsman, the plaintiff was terminated after three years of employment.\textsuperscript{202} Her complaint alleged, \textit{inter alia}, breach of an implied promise that she would be terminated only as provided by the defendant's bylaws.\textsuperscript{203}

The trial court sustained the defendant's demurrer without leave to amend,\textsuperscript{204} but the appellate court reversed.\textsuperscript{205} The dispute focused on a "letter of understanding" the defendant sent to the plaintiff when she was originally hired, stating the employment relationship could be terminated by either party upon 30 days notice.\textsuperscript{206} The defendant argued that the letter foreclosed an implied-in-fact contract as a matter of law.\textsuperscript{207} The court disagreed. The court acknowledged the "well settled" rule that it is inequitable to imply a promise which contradicts a term set forth in the parties' written agreement.\textsuperscript{208} According to the court, however, this principle was not dispositive. The court reasoned that the letter did not speak to the grounds and procedures for termination, and thus there was no "readily ascertainable conflict between [the] plaintiff's implied contract theory and the express terms of the letter of understanding."\textsuperscript{209}

In Hillsman, the defendant was definitely attempting to put the newly emerging doctrine to the test. The court responded with the unequivocal message that, at a minimum, a basic conflict was required.\textsuperscript{210} It is important to note, however, that the court simply could have said the letter of understanding was not the type of document which would support the Shapiro-Gerdlund defense. Like Shapiro, the court declined to do so.\textsuperscript{211}

\textsuperscript{202} Id. at 607-08.
\textsuperscript{203} Id. at 608. The court only discussed the plaintiff's contract claim. See id. at 607-08.
\textsuperscript{204} Id. at 607.
\textsuperscript{205} Id. at 613.
\textsuperscript{206} Hillsman, 200 Cal. Rptr. at 608 n.2.
\textsuperscript{207} Id. at 612. The defendant cited Wal-Noon in support of its position.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 612. The court also cited Wal-Noon for the proposition that it is inequitable to imply a contract term contrary to the parties' written contract, but distinguished Wal-Noon on the ground that the written contract did not expressly preclude an implied-in-fact contract. Id. The court did not consider whether a valid analogy could be drawn to the landlord-tenant context.
\textsuperscript{210} See id.
\textsuperscript{211} Hillsman, 200 Cal. Rptr. at 608-09.
The court's opinion in *Baker v. Kaiser Aluminum & Chem. Corp.* was a direct response to *Hillsman*. In *Baker*, the plaintiff was terminated after 15 years of employment for violating his supervisor's instructions not to give storeroom keys to non-salaried employees. The plaintiff, who was 51 years of age, claimed that he was really terminated to prevent him from qualifying for early retirement. He would have qualified for early retirement in two years. The plaintiff brought suit alleging, *inter alia*, breach of an implied-in-fact contract not to terminate except for good cause or before he was eligible for early retirement.

In granting summary judgment, the court reasoned that the plaintiff signed a written contract (a patent agreement), stating the defendant agreed to employ the plaintiff "at such compensation and for such a length of time as shall be mutually agreeable to [the parties]." The court explained further that "[t]he Pugh analysis . . . applies only in the absence of an express agreement. A valid express agreement precludes a contradictory implied contract embracing the same subject."

In *Hillsman*, the court emphasized the need to demonstrate an actual conflict between the written and implied contract terms. What *Baker* did was to effectively take the teeth out of this refinement by endorsing the use of relatively ambiguous at will language.

213. *Id.* at 1317.
214. *Id.* at 1319.
215. *Id.* at 1317.
216. *Id.* at 1317-18. The plaintiff also sued for interference with a beneficial contractual relationship, wrongful termination in violation of public policy, and breach of the implied covenant of good faith and fair dealing. *Id.* at 1317.
218. *Id.* at 1320-21.
219. *Id.* at 1320 (citing *Hillsman*, *Crossen*, *Crain* and *Shapiro*). The court also rejected the plaintiff's remaining claims. *Id.* at 1317-19, 1321-23. The court emphasized the fact both that the plaintiff signed the agreement and that the agreement was expressly at will, but did not discuss integration. *See id.* at 1320. The court did not discuss evidence of an implied-in-fact contract.
220. *Hillsman*, 200 Cal. Rptr. at 612.
In the next opinion addressing this subject, Gianaculas v. TWA, the Ninth Circuit went a step further than Shapiro and Baker by extending the rule to include employment applications. In Gianaculas, the plaintiffs, all long-term employees, were discharged as part of a company-wide reduction in force. Relying mainly on the defendant's "Management Policy and Procedure Manual," they brought suit alleging breach of an implied promise to allow them to displace less senior employees.

In affirming summary judgment, the Ninth Circuit emphasized that each of the plaintiffs signed at will employment applications stating that the defendant was free to terminate the relationship "at any time without advance notice." The court reasoned that the implied promise was contrary to the express terms of the plaintiffs' employment applications.

C. 1986-1988: The Emerging "Track Two" Cases

Beginning in 1986, California courts pioneered a second approach to the Shapiro-Gerdlund rule: Using it, not as a complete defense, but rather to exclude extrinsic evidence of an implied-in-fact agreement. Malstrom v. Kaiser Aluminum & Chem. Corp. was the first case decided using this approach.

In Malstrom, the plaintiff was hired in 1977, at the age of fifty-six. He was hired to work in California. The day before the plaintiff was hired, he signed an agreement stating that the defendant agreed to employ him "at such compensation and for such a length of time as shall be mutually agreeable to [the parties]." In or about April 1981, the plaintiff

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222. 761 F.2d 1391 (9th Cir. 1985).
223. Id. at 1392-93.
224. Id. at 1393.
225. Id. The plaintiff sued both for breach of contract and for breach of the implied covenant of good faith and fair dealing. Id. at 1392.
226. Id. at 1394.
227. Gianaculas, 761 F.2d at 1394. The court cited Shapiro as authority for this conclusion, but did not discuss the analogy between a stock option agreement and an employment application. Id. at 1394. The court also cited Wal-Noon, but used a "see" signal, suggesting that the opinion was relevant, but not controlling. Id. The court did not discuss or even cite the parol evidence rule.
228. 231 Cal. Rptr. 820 (Ct. App. 1986).
229. Id. at 823.
230. Id.
231. Id.
was then offered a transfer to Florida. He was offered the transfer in lieu of discharge when the defendant decentralized his job functions. The plaintiff accepted the transfer and sold his home to the defendant at a substantial profit. The defendant also paid both to move the plaintiff's family to Florida and to cover the mortgage rate differential, inflation and loan points on the purchase of his new home. The next year the plaintiff's job in Florida was eliminated as part of a reduction in force. After an evaluation, the defendant had decided that the plaintiff's experience was too specialized to place him in another job. The plaintiff secured alternative employment in California shortly after his termination. The defendant paid for his moving costs again.

On appeal from an order granting summary judgment the court focused on two issues. First, the court considered whether the plaintiff had established an implied contract that he would only be terminated for good cause with evidence of the defendant's alleged prehire promises in 1977. Second, the court asked whether the plaintiff had established an implied promise that he would be employed until the age of retirement with evidence of the defendant's alleged promises in 1981.

The court ruled for the defendant on both issues and affirmed summary judgment for the defendant. The court reasoned that the prehire statements constituted inadmissible parol evidence, and that the written agreement pre-

232. Id. at 824.
233. Malstrom, 231 Cal. Rptr. at 824.
234. Id.
235. Id.
236. Id.
237. Id.
238. Malstrom, 231 Cal. Rptr. at 824.
239. Id. at 825.
240. Id.
241. See id. at 826-29.
242. See id. at 829.
243. Malstrom, 231 Cal. Rptr. at 831. The court also rejected the plaintiff's claims for breach of an express oral agreement not to terminate except for cause, estoppel, and breach of the implied covenant of good faith and fair dealing. Id. at 830-32.
244. Id. at 828. The court ruled that the contract was integrated, reasoning that the contract expressly provided that it superseded all prior agreements and covered the essential terms of the parties' contract. Id. at 827.
cluded the alleged retirement-promise as a matter of law.\textsuperscript{245} Shapiro (which did not discuss the parol evidence rule)\textsuperscript{246} was cited as authority for both aspects of the court's holding.\textsuperscript{247}

The next "track-two" case employed the same analytical scheme but relied on different authority. Instead of Shapiro, the court in Gerdlund \textit{v.} Electronic Dispensers Int'l\textsuperscript{248} looked to Masterson \textit{v.} Sine,\textsuperscript{249} a California Supreme Court case focusing on the contours of the parol evidence rule.\textsuperscript{250} The basic facts of Gerdlund were as follows. Mr. Gerdlund was employed as a sales representative.\textsuperscript{251} He was hired in 1967.\textsuperscript{252} Mrs. Gerdlund joined him as a partner in 1973.\textsuperscript{253} In 1975, both plaintiffs signed an at will "Representative Agreement."\textsuperscript{254} The plaintiffs claimed that the defendant repeatedly promised their sales territory would be secure as long as they did a good job.\textsuperscript{255} In 1976, the defendant terminated the agreement after unsuccessful contract negotiations.\textsuperscript{256}

Prior to trial, the defendant filed a motion in limine to exclude evidence of the oral representations.\textsuperscript{257} The trial court denied the motion, and the jury eventually returned a verdict for the plaintiffs on the plaintiffs' breach of contract

\textsuperscript{245} \textit{Id.} at 826-829. According to the court, the only way the plaintiff could have established a separate agreement in 1981 would have been through a subsequent oral modification, a novation or an independent collateral agreement. \textit{Id.} at 829. The court concluded that there was no subsequent oral modification because there was no evidence that the parties intended to extinguish the written agreement. \textit{Id.} The court concluded that there was no independent collateral agreement reasoning that "[a]n independent collateral agreement cannot contradict the terms of a prior written contract." \textit{Id.} The court concluded that there was no oral modification because the alleged promise in 1981 was not supported by new consideration. \textit{Id.}

\textsuperscript{246} See supra note 199.

\textsuperscript{247} Malstrom, 231 Cal. Rptr. at 828-829. Malstrom implied that the scope of the Shapiro-Gerdlund rule was not limited to prior or contemporaneous agreements. However, because the court concluded that the agreement was integrated, the opinion does not speak to the issue of whether or not the Shapiro-Gerdlund rule requires an integrated writing.

\textsuperscript{248} 235 Cal. Rptr. 279 (Ct. App. 1987).

\textsuperscript{249} Masterson \textit{v.} Sine, 436 P.2d 561 (Cal. 1968).

\textsuperscript{250} \textit{Id.}

\textsuperscript{251} Gerdlund, 235 Cal. Rptr. at 280.

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} \textit{Id.}

\textsuperscript{255} \textit{Id.} at 280-81.

\textsuperscript{256} Gerdlund, 235 Cal. Rptr. at 281.

\textsuperscript{257} \textit{Id.} at 280.
and misrepresentation claims. On appeal, the defendant challenged the verdict on the ground that the trial court should have excluded evidence of the oral representations. The appellate court agreed and reversed. Relying on Masterson, the court held that regardless of whether the agreement was integrated, evidence of the oral representations was inadmissible because it contradicted the agreement's express at will provision. The court explained that "it cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement."

Anderson v. Savin Corp. was really the first case to comment on the relationship between the complete defense theory announced in Crossen, Crain and Shapiro, and the substantive evidentiary restriction articulated in Malstrom and Gerdlund. In Anderson, the plaintiff signed an employment letter when originally hired in May, 1978. The letter contained a provision stating that the employment relationship would be renewed for successive one year periods "unless terminated by either party in its discretion on five days notice." During the next four years, the plaintiff signed restrictive covenants, each stating that the agreement did not create a right to continued employment and did not interfere

258. Id. at 281. The trial court also instructed the jury on breach of the implied covenant of good faith and fair dealing. Id. at 286.
259. Id. at 280.
260. Id. at 287.
261. Gerdlund, 235 Cal. Rptr. at 283. The court explained that extrinsic evidence is inadmissible under Masterson where inconsistent with the terms of the parties' written agreement. Id. at 282-83. Obviously, this is an expansive interpretation of Masterson, one which extends the parol evidence rule beyond the confines of integration. Note, however, that since the Gerdlund court concluded that the agreement was integrated, this aspect of the court's holding is really dicta. See id. at 281-83.
262. Id. at 282-84.
263. Id. at 283-84 (emphasis added). Citing Shapiro, the court also held that that it was error for the trial court to instruct the jury on breach of the implied covenant of good faith and fair dealing. Id. at 286. The court reasoned that an obligation may not be implied "which would result in the obliteration of a right expressly given under a written contract." Id. Citing Masterson, the court further held that evidence of the parol representations was inadmissible to explain the meaning of the contract term "any reason," explaining that this term was "plainly all-inclusive, encompassing all reasons 'of whatever kind,' good, bad or indifferent." Id. at 283-84.
265. Id. at 628.
266. Id.
with the defendant's right to terminate the plaintiff "at any
time, with or without cause, without liability."\textsuperscript{267} He was
fired in August 1982 for making offensive remarks to a
trainee.\textsuperscript{268} In opposition to summary judgment on his con-
tract claim,\textsuperscript{269} the plaintiff offered his own declaration testi-
mony that he was told he would only be terminated for good
cause when hired, and that he had a strong performance rec-
ord.\textsuperscript{270} He denied making the offensive remarks, asserting
that he was terminated so that another employee could have
his promotion.\textsuperscript{271}

On appeal from an order granting summary judgment for
the defendant,\textsuperscript{272} the court held that the plaintiff failed to
overcome the presumption of at will employment.\textsuperscript{273} The
court concluded that because the contract was integrated, the
plaintiff's declaration testimony regarding the prior oral repre-
sentations was inadmissible parol evidence.\textsuperscript{274} "Moreover,"
the court reasoned, "the implied promise was inconsistent
with the express terms of the employment letter."\textsuperscript{275} Accord-
ingly, the court affirmed judgment for the defendant.\textsuperscript{276}

In contrast to Malstrom, the Anderson court did not care-
fully distinguish the alleged prehire statements from evi-
dence of the plaintiff's performance once he was hired. In-
stead, ignoring evidence of the plaintiff's performance, the
court seemed to conclude that the Shapiro analysis reinforced
its parol evidence analysis. Because the plaintiff was relying
in part on posthire evidence to establish an implied-in-fact
contract, the plaintiff's case offered an important opportunity

\textsuperscript{267} Id.

\textsuperscript{268} Id.

\textsuperscript{269} The plaintiff also sued for wrongful termination in violation of public
policy, breach of the implied covenant of good faith and fair dealing, and negli-
gent and intentional infliction of emotional distress. Anderson, 254 Cal. Rptr.
at 628.

\textsuperscript{270} Id.

\textsuperscript{271} Id.

\textsuperscript{272} Id.

\textsuperscript{273} Id. at 630-31.

\textsuperscript{274} Anderson, 254 Cal. Rptr. at 630 (citing Malstrom). The Court's integra-
tion analysis is implicit in the factual background portion of the opinion. See id.
(emphasizing both that the agreement contained an integration clause and that
it expressly stated the plaintiff's employment was at will).

\textsuperscript{275} Id. at 634 (citing Shapiro and Malstrom).

\textsuperscript{276} Id. at 632. The court also rejected the plaintiff's remaining claims. Id.
at 632 n.3.
to discuss the relationship between these two theories. Unfortunately, this is an opportunity the court declined to take.

D. 1989-1990: Early Signs of Resistance

Prior to 1989, the Shapiro-Gerdlund rule met with very little resistance. If anything, Shapiro was reinforced by the emerging track two cases. In 1989, however, at least two courts made it clear that they were not going to allow Shapiro and Gerdlund to steam roll Pugh. The first of these two cases was McLain v. Great Am. Ins. Co.,277 a case taking issue with the courts' decisions in Malstrom and Gerdlund.

In McLain, the plaintiff was terminated for insubordination approximately two years after he was hired away from another firm.278 The plaintiff was reluctant to leave his prior job, but accepted a position with the defendant based on representations about opportunities available at the defendant's company.279 In particular, he was told that he would become a "permanent" employee after completing an initial probationary period.280 The plaintiff's wrongful termination action asserted that he was discharged for complaining about his supervisor's inappropriate and racist behavior, not for insubordination.281

On appeal from a jury verdict finding for the plaintiff,282 the issue was whether the trial court violated the parol evidence rule by admitting the prehire statements into evidence.283 The defendant argued the statements were inadmissible because the plaintiff signed an integrated at will employment application when hired.284 The court disagreed and affirmed.285 The court reasoned that the standardized

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278. Id. at 867-69.
279. Id. at 865.
280. Id.
281. Id. at 865-66. The plaintiff sued for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of civil rights, negligent and intentional infliction of emotional distress, and wrongful termination in violation of public policy. Id. at 866. The court's opinion only addressed the merits of the plaintiff's contract claim. Id. at 867.
282. McLain, 256 Cal. Rptr. at 867.
283. Id.
284. Id.
285. Id. at 870.
form application was not an integrated agreement. The court also concluded that the plaintiff offered substantial evidence both of an implied-in-fact contract and that the reason asserted for his termination, insubordination, was pretextual.

The second case, Wilkerson v. Wells Fargo Bank, echoed the sentiments expressed in McLain. In Wilkerson, the plaintiff was terminated after approximately three years of employment for violating the defendant's prohibition against personally benefiting from bank transactions. The plaintiff conceded that he approved an overdraft on a customer's account for two checks paid to him. He countered, however, that the violation was unintentional and did not constitute good cause for termination. The plaintiff also claimed that his termination was racially motivated. His suit alleged claims for, inter alia, breach of contract.

286. Id. at 867-70. The court distinguished the plaintiff's case from the facts of Anderson and Gerdlund, reasoning that the application did not contain an integration clause and was merely a form agreement. Id. In particular, the court emphasized the fact that the application contained language stating that the terms of the agreement could "be changed, with or without cause, and with or without notice, at any time by the [defendant]." Id. at 868. The court explained that the significance of this provision was twofold. First, the court concluded, the provision strongly suggested "that the parties specifically intended their relationship to remain subject to change in terms and conditions." Id. Second, that it stripped the at will term of any force, in that the application stated that the plaintiff could be terminated "with or without cause," on the one hand, and that the agreement could be changed at any time, on the other. Id. Because of this, the court reasoned, there was no "flat" contradiction between the at will term and the plaintiff's claim for an implied-in-fact contract. Id. The court did not discuss or even cite Shapiro.

287. McLain, 256 Cal. Rptr. at 867-70. The court remarked further that the evidence was admissible to explain the meaning of the provision stating the terms of the plaintiff's employment could be changed at any time. Id. The court reasoned that this language was ambiguous given additional language stating the defendant could not enter into a "contrary arrangement." Id.


289. Id. at 187.

290. See id.

291. See id.

292. See id.

293. Wilkerson, 261 Cal. Rptr. at 188. The plaintiff sued for breach of oral contract, but his claim was treated as one for breach of an implied-in-fact agreement. Id. at 189 n.2. As evidence of an expectation of continuous employment, the plaintiff cited "exemplary performance reviews, success in developing and maintaining customer relations, and his elevation to assistant manager and then deposit team leader . . . ." Id. at 188.
The trial court granted the defendant’s summary judgment motion, but the appellate court reversed. The defendant argued that its express at will Service Operations Manual (“SOM”) precluded an implied-in-fact contract as a matter of law. The court disagreed, reasoning that the SOM was not a signed, integrated agreement. The absence of these requirements, the court concluded, distinguished the facts of the plaintiff’s case from the facts of earlier cases going the other way. The court reasoned further that the plaintiff raised a triable issue of material fact on the issue of good cause with evidence that the defendant’s policy was only to terminate for a gross violation resulting in a substantial loss.

Like Anderson, the Wilkerson court ignored an important opportunity to explore the relationship between the emerging doctrine and the parol evidence rule. The court commented only that Shapiro was “consistent with” the parol evidence rule. Some discussion would have been appropriate given the fact that the plaintiff was relying on posthire evidence of his exemplary job performance and not on any alleged prior or contemporaneous agreements.

294. Id. at 188, 194.
295. Id. at 194.
296. Id. at 189. The defendant cited, inter alia, Shapiro as authority for this argument. Id. at 190.
297. Id. at 190-93.
298. Wilkerson, 261 Cal. Rptr. at 190-93. In Walker v. Blue Cross of Cal., 6 Cal. Rptr. 2d 184 (Ct. App. 1992), the court cited this aspect of the Wilkerson court’s holding in support of its conclusion that the defendant could not negate the existence of an implied-in-fact contract by pointing to language in its employee handbook stating that the employment relationship was “voluntary employment ‘at will.’” Id. at 189. The court reasoned that “where the employment relationship has not been reduced to an integrated written agreement, signed by the employee, language in the handbook that there is an at-will relationship does not establish the nature of the relationship as a matter of law.” Id.
299. Id. at 191-93. The court also reversed as to the plaintiff’s breach of covenant claim, but rejected the plaintiff’s contention that his termination was a pretext for race discrimination. Id. at 191.
300. Id. at 190. Although the court did not say whether Shapiro requires an integrated writing, the opinion suggests as much. The court’s opinion states that Shapiro and its progeny “are consistent with the parol evidence rule, which generally prohibits the introduction of any extrinsic evidence to vary or contradict the terms of an integrated written instrument.” Id. Note further that the Wilkerson court cited Gerdlund in support of this description of the parol evidence rule, thereby implicitly rejecting the Gerdlund court’s dicta extending the parol evidence rule beyond integrated agreements. Id. at 190-91.
Wagner v. Glendale Adventist Medical Center, the third case decided in 1989, made an attempt to expressly limit the Shapiro-Gerdlund rule. In Wagner, the plaintiff was hired to work as a physical therapist in 1969. Her original employment application stated that she could be terminated at will. The at will application language was reinforced by at will language in the defendant’s employee handbooks. In 1986, the plaintiff also signed an acknowledgment form attached to the most recent version of the handbook, again stating that she was an at will employee. She brought suit after the defendant eliminated her position in January 1987.

On appeal, the issue was whether the trial court properly excluded parol evidence of a collateral agreement that the plaintiff could only be terminated for cause. This is an issue the court analyzed separately with respect to the plaintiff’s employment application and signed acknowledgment form. With regard to the application, the court disagreed with the trial court’s ruling excluding the parol evidence. The court’s reasoning was as follows.

The plaintiff’s employment application was partially integrated. In deposition, the plaintiff acknowledged the fact that the terms and conditions of her employment were set forth in the defendant’s employee handbooks. The at will language in the handbooks was also consistent with the at will language in the employment application. In fact, the latter version of the handbook added the words “at will” to the provision governing termination. On balance, it was thus apparent that the parties intended to incorporate the at will employment application into their agreement as the complete and final expression of one contract term. However, since the plaintiff was relying on evidence of express and im-

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301. 256 Cal. Rptr. 412 (1989).
302. Id. at 415.
303. Id.
304. Id.
305. Id.
306. Wagner, 265 Cal. Rptr. at 415.
307. Id.
308. Id. at 417-22.
309. Id. at 417.
310. Id. at 417-18.
311. Wagner, 265 Cal. Rptr. at 415.
312. Id. at 417-18.
plied assurances made after she executed the application, the issue of integration was not dispositive.\textsuperscript{313}

\textit{Shapiro} does not foreclose an implied modification of the prior written agreement: "The principle expressed is based on the reasoning that where the parties freely, fairly and voluntarily enter into a bargain, it would be inequitable to imply a different liability and to withdraw from one party benefits to which he or she is entitled under the contract."\textsuperscript{314} Where, as here, one party has induced the other party's reliance based on oral representations, conduct or custom, "it would be equally inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract."\textsuperscript{315} Nonetheless, summary judgment is granted.\textsuperscript{316} The plaintiff failed to offer admissible evidence raising a triable issue of material fact as to the existence of an implied-in-fact contract.\textsuperscript{317}

The court also disagreed with the trial court's ruling regarding the acknowledgment form. Emphasizing that the plaintiff was relying on prehire representations, the court explained that at will language in the acknowledgment form precluded a contrary implied-in-fact agreement as a matter of law regardless of whether the acknowledgment form was integrated.\textsuperscript{318} The court cited \textit{Shapiro} and \textit{Wal-Noon} for this proposition.\textsuperscript{319} The court then reiterated its conclusion that the plaintiff's evidence of an implied agreement failed to raise a triable issue of material fact.\textsuperscript{320}

\textsuperscript{313} \textit{Id.} at 418. The court cited \textit{Wal-Noon} for this proposition, but failed, like the courts' earlier opinions in \textit{Crossen} and \textit{Hillsman}, to analyze the analogy. See \textit{id.} Wal-Noon is discussed supra note 179.

\textsuperscript{314} \textit{Wagner}, 265 Cal. Rptr. at 418.

\textsuperscript{315} \textit{Id.}

\textsuperscript{316} \textit{Id.} at 418-22.

\textsuperscript{317} \textit{Id.}

\textsuperscript{318} \textit{Id.} at 420-22. Relying on \textit{McLain}, the court concluded that the acknowledgment form was not an integrated agreement. \textit{Id.} at 421-22. The court reasoned that the acknowledgment form was a standardized form contract missing key elements of the employment agreement, and that it indicated a specific intent that the terms of the agreement remained subject to change. \textit{Id.} at 421. The court pointed out, however, that in contrast to \textit{McLain}, the plaintiff was relying on events which preceded execution of the contract to establish an implied-in-fact agreement. \textit{Id.} at 421-22.

\textsuperscript{319} \textit{Wagner}, 265 Cal. Rptr. at 421. The court could have, but did not, cite \textit{Gerdlund} for its conclusion that the acknowledgment form was controlling even if it was not an integrated writing.

\textsuperscript{320} \textit{Id.}
The Wagner court was trying to strike a balance between the competing interpretations of the Shapiro-Gerdlund rule. Thus, while embracing the employment application and acknowledgment form as the type of documents which are within the Shapiro-Gerdlund rule, the court also ratified an implied-in-fact modification theory. The court was essentially saying that a written at will employment agreement will not operate as an absolute bar to a claim for breach of an implied-in-fact contract, so long as the implied contract is anchored in evidence of postexecution conduct and statements. However, because the court went on to conclude that the plaintiff failed to raise a triable issue of material fact as to the existence of an implied-in-fact modification, this aspect of the opinion is really dicta.

It is also noteworthy that the Wagner court tried to reconcile the emerging doctrine and parol evidence rule. The court's opinion implies that these are overlapping theories, in the sense that both bar implied-in-fact contract claims based on evidence of preexecution or contemporaneous agreements, but do not prevent the plaintiff from establishing an implied-in-fact contract based on evidence of postexecution conduct or representations. This is an extremely narrow interpretation of the doctrine's scope.

Notably, while not cited by the court in Wagner, the Ninth Circuit's opinion in DeHorney v. Bank of Am. Trust & Sav. Ass'n had already considered the implied-in-fact modification issue. In DeHorney, the plaintiff filed suit for, inter alia, wrongful termination and race discrimination following her discharge (after eight months of employment) for misappropriating bank funds. The plaintiff advanced the novel argument that the defendant's "Code of Corporate Conduct" modified the terms of her written at will employment con-

321. Id. at 420-21.
322. Id. at 416-20.
323. Id. at 419-22.
324. See Wagner, 265 Cal. Rptr. at 418.
325. On the other hand, though, the court's conclusion that the acknowledgment form precluded an implied-in-fact contract regardless of whether it was integrated would seem to strengthen the parol evidence rule, which ordinarily turns on the issue of integration. See id. at 421-22.
326. 879 F.2d 459 (9th Cir. 1989).
327. Id. at 460-62. The plaintiff also sued for interference with a beneficial contractual relationship and intentional infliction of emotional distress. Id. at 460.
tract. In particular, she emphasized language in the Code of Corporate Conduct promising "all employees fair treatment, good career opportunities, and attractive working conditions" and stating that employees would be terminated "whenever such action [was] justified."

The court was not persuaded and affirmed summary judgment. The court did not hold that an at will employment contract can never be modified by an implied-in-fact contract. Indeed, the court expressly declined to do so. Instead, the court held only that under the circumstances, the plaintiff could not have reasonably believed the Code of Corporate Conduct modified her written at will employment contract.

E. 1990-1994: Dissension

The first case decided in 1990 was Wood v. Loyola Marymount Univ. Although the Wood court did not look to the earlier opinion in Hillsman v. Sutter Community Hospital, the court resolved the appeal based on the same analysis: The absence of a conflict between the express and implied contract terms. In Wood, the plaintiff worked as the defendant’s head baseball coach from 1969 to 1984. Each year the plaintiff received an “annual appointment letter” stating

328. Id. at 466-67.
329. Id. at 466.
330. Id. at 466-67.
331. DeHorney, 879 F.2d at 466-67.
332. Id. at 466. The court also rejected the plaintiff’s remaining claims. Id. at 464-65, 467-78. In Siddoway v. Bank of Am., 748 F. Supp. 1456 (N.D. Cal. 1990), the district court cited DeHorney for the proposition that the plaintiff bank employee could not establish an implied-in-fact contract given her written at will agreement (which was the same agreement at issue in DeHorney), but failed to conduct any meaningful analysis. Id. at 1459-60. The modification issue was not raised in Siddoway. In fact, the plaintiff’s opposition papers failed to offer any rebuttal whatsoever. Id. at 1460. However, the modification issue was raised in Mundy v. Household Fin. Corp., a case decided shortly before DeHorney. 885 F.2d 542 (9th Cir. 1989). In that case, the Ninth Circuit commented that while it was possible the plaintiff’s written at will agreement was modified by his long tenure, the plaintiff failed to offer any evidence “that such a change in the expectations of the parties ever occurred.” Id. at 545. DeHorney did not cite Mundy.
335. Wood, 267 Cal. Rptr. at 232-34.
336. Id. at 231.
that his employment had been renewed for the coming academic year.\footnote{337} However, in 1971, the plaintiff also received a memorandum explaining that employment at the university was "continuous, subject . . . to the continuing mutual satisfaction from the [parties] with regard to performance, salary, professional opportunities, and working conditions."\footnote{338} The memorandum stated further that the plaintiff’s employment would be governed by the terms set forth in the university’s employee handbook.\footnote{339} The memorandum was authored by the president of the university.\footnote{340} The plaintiff filed suit after he was terminated without warning in May 1984.\footnote{341}

In reversing summary judgment,\footnote{342} the court rejected the defendant’s argument that the appointment letters precluded an implied-in-fact contract. According to the court, by stating that employment with the university was “continuous,” the letters raised a triable issue of material fact concerning the plaintiff’s at will status.\footnote{343} The court similarly rejected the defendant’s attempt to assert the president’s memo as a contract defense. The court concluded that a triable issue of fact was raised when the letter was read in conjunction with the handbook, which promised “that employees . . . would not be discharged pursuant to an ‘arbitrary process,’ but rather would be dismissed pursuant to established procedures.”\footnote{344}

After Wood came Tollefson v. Roman Catholic Bishop,\footnote{345} a decision which stands out as one of the first cases expressly extending the Shapiro-Gerdlund rule to claims for breach of the implied covenant of good faith and fair dealing.\footnote{346} In Tollefson, the plaintiff was employed first as a teacher, then later promoted to assistant principal.\footnote{347} She was employed under

\begin{footnotes}
\footnote{337}{Id.}
\footnote{338}{Id. at 232.}
\footnote{339}{Id.}
\footnote{340}{Wood, 267 Cal. Rptr. at 232.}
\footnote{341}{Id. at 234.}
\footnote{342}{Id. at 235.}
\footnote{343}{Id. at 231-32.}
\footnote{344}{Id. at 232.}
\footnote{345}{268 Cal. Rptr. 550 (Ct. App. 1990).}
\footnote{346}{Gerdlund was one of the earliest California opinions on this subject. See Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 286-87 (Ct. App. 1987) (commenting that it was error for the trial court to instruct the jury on the plaintiff's claim for breach of the implied covenant of good faith and fair dealing where the plaintiff signed an at will agreement).}
\footnote{347}{Tollefson, 268 Cal. Rptr. at 552.}
\end{footnotes}
successive one year employment agreements from 1978 to 1985, each explicitly stating that the defendant did not have any obligation to renew the agreement at the end of the one year term. 348

In 1985, the plaintiff was informed that her appointment as assistant principal would not be renewed, but that she could resume her teaching position. 349 While accepting the teaching position, the plaintiff also filed a lawsuit alleging claims for, inter alia, breach of contract and breach of the implied covenant of good faith and fair dealing. 350

The defendant moved for summary judgment asserting; (1) that the contract stated there was no obligation to renew the agreement; and (2) that the implied covenant of good faith and fair dealing could not be used to supply a good cause requirement. 351 The trial court agreed that the plaintiff became an at will employee at the end of the contract term and granted the employer’s motion. 352

On appeal, the issue was whether the implied covenant required the defendant to renew the plaintiff’s appointment absent good cause for not doing so. 353 The appellate court rejected the plaintiff’s position that good cause was required, reasoning that the implied covenant only protects the parties’ reasonable expectations, and that continuous employment is not a reasonable expectation of an at will agreement. 354 The appellate court also concluded that the plaintiff failed to re-
but the presumption of at will employment and, in any event, that the contract was integrated.

The Ninth Circuit arrived at this same conclusion two months later in Rose v. Wells Fargo & Co. which was principally an age discrimination case. In Rose, the plaintiffs filed suit after their jobs were eliminated following a merger. Their claim for breach of the implied covenant of good faith and fair dealing asserted breach of an implied promise not to discharge them except for good cause. In affirming summary judgment, the court agreed with the district court’s determination that the plaintiffs were at will employees. The court reasoned that the plaintiffs were employed pursuant to an express at will agreement.

The analytical focus of the courts’ opinions in Tollefson and Rose was not on integration. Indeed, no mention is made of the integration criteria. However, the issue came up again within a month of the Rose decision. In Slivinsky v. Watkins-Johnson Co., decided in June 1990, the plaintiff signed an at will employment application when originally applying for a job with the defendant. When hired, she then signed an at

355. The court reasoned both that the plaintiff's implied-in-fact contract theory was inconsistent with the express at will term in the written agreement, and that she could not establish an implied-in-fact contract with evidence of her longevity of service, salary increases and promotions. Id. at 557. The court's analysis with respect to the at will agreement is somewhat muddled. The court cites the parol evidence rule, and then states: "Indeed, there simply cannot exist a valid express contract on one hand and an implied contract on the other, each embracing the identical subject but requiring different results." Id. (citing, inter alia, Shapiro). What the court meant by "indeed" is unclear.

356. Id. at 557-58. The court did not explain why the contract was integrated. See id. The court also rejected the plaintiff's—and her husband's—remaining claims. Id. at 558-59.

357. 902 F.2d 1417 (9th Cir. 1990).
358. See id. at 1420-25.
359. Rose, 902 F.2d at 1419-20.
360. Id. at 1425.
361. Id. at 1425-26.
362. Id. In support of this finding, the court cited Gerdlund for the proposition that "the implied covenant may only be used to supply a requirement of good cause for termination when the contract between the parties is silent or ambiguous on that subject." Id. at 1426. The court also cited Foley v. Interactive Data Corp, 765 P.2d 373 (1988), even though Foley only made a passing reference to Shapiro. See supra note 152. The court's reliance on Foley was misplaced.
364. Id. at 586.
will employment agreement referenced in the application.\textsuperscript{365} Two years later, she was discharged as part of a reduction in force.\textsuperscript{366} She brought suit alleging that the reason for her termination was pretextual.\textsuperscript{367}

On appeal, the issue was whether the at will documents were dispositive as to the nature of the parties’ employment relationship.\textsuperscript{368} The court held that they were and affirmed summary judgment.\textsuperscript{369} The court reasoned that the parties’ written agreement was integrated, and thus that extrinsic evidence of an implied-in-fact contract was barred by the parol evidence rule.\textsuperscript{370} The court remarked further that “[t]here simply cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results.”\textsuperscript{371}

The facts of \textit{Slivinsky} were distinguished in the next case on this subject, \textit{Seubert v. McKesson Corp.}\textsuperscript{372} In \textit{Seubert}, the plaintiff signed an employment application stating that his employment could be “terminated at any time without prior notice” when he was originally hired in 1981.\textsuperscript{373} He brought suit alleging various wrongful termination claims after he was terminated in 1985.\textsuperscript{374} The plaintiff was terminated for

\textsuperscript{365} \textit{Id.} at 587.

\textsuperscript{366} \textit{Id.}

\textsuperscript{367} \textit{Id.} The plaintiff sued for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and invasion of privacy. \textit{Id.} at 586.

\textsuperscript{368} \textit{Slivinsky}, 270 Cal. Rptr. at 587.

\textsuperscript{369} \textit{Id.} at 590. The court also rejected the plaintiff’s other causes of action. \textit{Id.} at 589-90.

\textsuperscript{370} \textit{Id.} at 587-90. The court’s conclusion that the parties’ employment contract was integrated was based largely on the fact that the plaintiff first signed the at will employment application, and then later signed the at will employment agreement referenced in the application. The court reasoned that: “Reading these documents together, the only reasonable conclusion that can be drawn is that the parties intended that there would be no other agreement regarding termination other than that set forth in the employee agreement, i.e., that employment was terminable at the will of either party, with or without cause.” \textit{Id.} at 588.

\textsuperscript{371} \textit{Id.} at 588 (quoting Malstrom v. Kaiser Aluminum & Chem. Corp., 231 Cal. Rptr. 820, 828 (Ct. App. 1986)). The court’s exclusive focus on the parol evidence issue is once again suspect. True, the plaintiff was relying on evidence of prehire representations of continuous employment. \textit{Id.} at 587. However, she was also relying on posthire evidence of longevity of service, promotions and lack of criticism of her job performance. \textit{Id.}

\textsuperscript{372} 273 Cal. Rptr. 296 (Ct. App. 1990).

\textsuperscript{373} \textit{Id.} at 297.

\textsuperscript{374} \textit{Id.} at 298. The plaintiff sued for breach of contract, breach of the implied covenant of good faith and fair dealing, and misrepresentation. \textit{Id.}
failing to meet his sales quota. There was evidence, however, that the plaintiff's failure to meet his sales quota resulted from the defendant's decision, despite the plaintiff's protests, to market an inadequate computer system. Customers returned virtually all of the systems the plaintiff was instructed to sell.

On appeal, the defendant challenged the jury's verdict for the plaintiff on his claim for breach of the implied covenant of good faith and fair dealing. The defendant argued that, based on his signed employment application, the plaintiff's employment was at will. The court of appeals rejected this argument and affirmed. Relying on McLain, the court reasoned that the employment application was not an integrated agreement. The court concluded further that the plaintiff established an implied promise that he would only be terminated for good cause with evidence that the defendant's personnel policy provided for the termination of a salesperson for failing to meet quota for two full quarters.

Contrast the holding in Seubert with the Ninth Circuit's opinion in Comeaux v. Brown & Williamson Tobacco Co., decided only two days later. In that case, the plaintiff was hired to start work on August 18, 1987. When originally applying for the position, he signed an at will employment application. He was also invited to interview with the company. Additional terms were set forth at the interview, including a physical examination, relocation, and resigning from his job with one week's notice.

375. Id.
376. Id. at 297-98.
378. Id. at 299. The defendant also challenged the award for damages for misrepresentation. Id. at 297. The plaintiff, in turn, cross-appealed on the trial court's decision not to submit his Labor Code claim to the jury. Id.
379. Id. at 299.
380. Id. at 301.
381. Id. at 299. In support of its determination that the application was not integrated, the court emphasized that the application did not contain an integration clause, that it was a form agreement, and that it did not state that the employer was free to terminate the relationship at "any time." Id.
382. Seubert, 273 Cal. Rptr. at 300.
383. 915 F.2d 1264 (9th Cir. 1990).
384. Id. at 1266.
385. Id. at 1269-70.
386. Id. at 1270.
387. Id.
reported to work on August 18, 1987, after fully complying with these additional terms. However, he was informed first that his start date would be delayed, and then later that he was not going to be hired at all. The plaintiff was told that he was being rejected due to his poor credit history. He subsequently brought suit alleging, *inter alia*, breach of contract.

On appeal from an order granting summary judgment, the defendant argued that the plaintiff's employment application precluded his implied contract claim as a matter of law. The Ninth Circuit agreed, but only in part. The court agreed that the application precluded an implied-in-fact promise that the plaintiff would only be terminated for cause, explaining that the application was a partially integrated writing, and thus that evidence the plaintiff was told he would only be terminated for cause when he signed the writing was inadmissible under the parol evidence rule. The court explained further that the evidence was inadmissible under the theory that the application was ambiguous, because it clearly stated that the plaintiff's employment was at will. The court added that the implied promise was barred by the express contract term, stating that "[t]here cannot be a valid express contract and an implied contract each embracing the same subject, but requiring different results."

Nonetheless, analyzing the conversation where the defendant promised to "assign the plaintiff work" if he met the

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388. *Comeaux*, 915 F.2d at 1266.
389. *Id.* at 1267.
390. *Id.* at 1266-67.
391. *Id.* at 1267-68. The plaintiff also sued for breach of the implied covenant of good faith and fair dealing, promissory estoppel, wrongful termination in violation of public policy, violation of the Bankruptcy Act, invasion of privacy, loss of consortium and negligent and willful violation of the Fair Credit Reporting Act. *Id.*
392. *Id.* at 1268.
393. *Comeaux*, 915 F.2d at 1270.
394. *Id.* at 1271 n.7. The court concluded that the writing was partially integrated because it contained an integration clause and "made no provision for its modification by subsequent written or oral agreements." *Id.*
395. *Id.*
396. *Id.* (citing Gianaculas v. TWA, 761 F.2d 1391, 1394 (9th Cir. 1985)). The court also rejected the plaintiff's remaining claims. *Id.* at 1268-69, 1272-75. *Comeaux* was purely a parol evidence case and did not call on the court to consider the relationship between the parol evidence rule and *Shapiro-Gerdlund* doctrine. However, the court could have commented on the need for integration in the first place.
additional terms as a separate express employment contract, the Ninth Circuit held that the plaintiff was entitled to recover reliance damages. The court reasoned that the defendant breached this agreement by refusing to assign the plaintiff work and a salary. As to the application, the court explained that it was not controlling because it was not effective until the plaintiff actually started work.

In Harden v. Maybelline Sales Corp. the court squarely rejected the idea that an employment application could be used as a complete defense to a contract claim. In Harden, the plaintiff was contacted by the defendant about prospective employment while at another job. He was initially told that the defendant was looking for “long term” employees. Representations of long-term employment were again made at his subsequent interviews, including representations by the president of the company. Nevertheless, before he was hired, the plaintiff signed an at-will employment application. He was terminated after two and one-half years of employment for allegedly falsifying expense reports.

The question on appeal was whether the signed at-will employment application precluded an implied-in-fact contract. The court held that it did not and reversed summary judgment. The court reasoned that the application was a noncontractual document which did not constitute an integrated agreement and, accordingly, that evidence of the defendant’s prehire representations was admissible evidence of an implied-in-fact contract. The court reasoned further

397. Id. at 1269-71.
398. Comeaux, 915 F.2d at 1270.
399. Id.
401. See id. at 98-99.
402. Harden, 282 Cal. Rptr. at 97.
403. Id.
404. Id.
405. Id.
406. Id.
407. Harden, 282 Cal. Rptr. at 98.
408. Id. at 98-99.
409. Id. The court characterized the application as “a mere solicitation of an offer of employment.” Id. at 99. In contrast to some of the earlier opinions which failed to explore the foundation of the Shapiro-Gerdlund doctrine, the Harden court expressly stated that the doctrine is based on (not just “consistent with”) the parol evidence rule. See id. (citing, inter alia, Shapiro). Recall that
that this evidence was sufficient to raise a triable issue of material fact. 410

The next two cases were also decided in favor of the plaintiff. **Esbensen v. Userware Int'l, Inc.** 411 which followed directly after **Harden**, is an example of a case where the defendant was really trying to pull a fast one on the plaintiff. In that case, the plaintiff was originally hired pursuant to an oral contract in 1977, but persuaded the defendant to reduce the agreement to writing in 1979. 412 Between 1979 and 1981, he signed three written contracts, each stating that the parties’ employment agreement was effective for a one-year term. 413 In 1982, the plaintiff subsequently filed suit against the defendant alleging breach of an implied contract when he was terminated for failing to timely report to work after a vacation. 414 The plaintiff claimed that he was told his contract would be perpetually renewed given his satisfactory job performance. 415

The issue on appeal was the propriety of the trial court’s ruling granting the defendant’s motion *in limine* to exclude evidence of the alleged oral representations about job security. 416 The appellate court reversed. 417 The court started by making quick work of the defendant’s somewhat disingenuous argument that the at will language in the agreement was controlling. The court reasoned that such language did not refer to acceptable grounds for termination, but rather to the defendant’s obligation to pay the plaintiff his outstanding commissions in the event of his termination. 418 The court then explained further that, since the written contract was partially integrated, 419 the real issue was whether evidence

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*Shapiro* makes no mention of the parol evidence rule. See supra note 199. Therefore, it is somewhat difficult to see how the court arrived at this conclusion.

410. *Id.* at 99.
412. *Id.* at 94.
413. *Id.*
414. *Id.* at 95.
415. *Id.*
416. *Esbensen*, 14 Cal. Rptr. 2d at 95.
417. *Id.* at 98.
418. *Id.* at 96. The contract provided that “[u]pon termination for any reason, all salary shall cease on the effective date of termination.” *Id.* at 95.
419. *Id.* at 95-97. The court concluded that the writing was partially integrated because it did not contain an integration clause and was silent on the grounds for termination. *Id.* at 96-97. The court emphasized further that it
of the parol agreement was inadmissible because it was inconsistent with the contract’s one-year term. The defendant argued that the conflict was readily apparent, but the court disagreed. Emphasizing that the contract called for an annual salary review, the court reasoned that the one-year term was susceptible to an interpretation consistent with the evidence, namely that “the parties would be obligated to negotiate in good faith at the end of each year toward the goal of renewal on mutually acceptable terms.”

Like Esbensen, the defendant in Thomka v. Financial Corp. of Am. was really trying to stretch the limits of the emerging doctrine. In that case, the plaintiff was hired as an account executive in 1983. He did not sign any sort of at will employment agreement when hired but did sign at will sales regulations shortly before his termination in 1987. The plaintiff signed several sales regulations during his tenure. However, earlier versions of the sales regulations did not contain at will language. The plaintiff filed a wrongful termination suit alleging that he was terminated for objecting to the defendant’s misleading sales practices and not due to any psychiatric problems, as asserted by the defendant.

On appeal from a jury verdict for the plaintiff on his breach of contract claim, the defendant argued that the sales regulations barred the plaintiff’s contract action as a matter of law. The court disagreed and affirmed. Em-
phasizing the lack of any notice that at will language was being inserted into the sales regulations, the court reasoned that the defendant was not relying on an integrated agreement.\textsuperscript{432} The court reasoned further that the jury's verdict was supported by substantial evidence, including evidence of the plaintiff's strong performance record, and that the defendant assured account executives that they would have a "home" with the company as long as they continued to meet their quota during a period when the company was experiencing financial difficulties.\textsuperscript{433}

Before turning to the two most recent opinions, at least a passing reference must be made to the court's decision in \textit{Rochlis v. Walt Disney Co.},\textsuperscript{434} a case extending the \textit{Shapiro-Gerdlund} rule to contractual negotiations.\textsuperscript{435} In \textit{Rochlis}, the plaintiff entered into a written agreement with the defendant for a fixed three-year term.\textsuperscript{436} The parties renegotiated the plaintiff's employment agreement before the end of the contract term, with the plaintiff receiving a raise and stock options.\textsuperscript{437} The defendant refused to enter into a fixed-term contract but agreed to pay the plaintiff a year's salary as severance pay if electing to terminate the relationship.\textsuperscript{438} The stock option agreement the plaintiff ultimately signed provided that his employment could be terminated "at any time for any reason whatsoever, with or without good cause."\textsuperscript{439}

The plaintiff resigned in early 1989.\textsuperscript{440} He decided that he had to leave the company based on his increasing dissatisfaction with his job responsibilities and compensation.\textsuperscript{441} The plaintiff then filed suit against the defendant alleging claims for breach of contract, fraud, defamation and conspir-

\textsuperscript{431} Id. at 386.
\textsuperscript{432} Id. at 385-86. Although the opinion is not perfectly clear on the subject, it appears that the plaintiff was relying on posthire evidence to establish an implied-in-fact agreement. See id. at 383-84. Thus, this is another example of a case where the court's exclusive focus on integration was arguably inappropriate.
\textsuperscript{433} Thomka, 19 Cal. Rptr. 2d at 383-86.
\textsuperscript{434} 23 Cal. Rptr. 2d 793, 797-98 (Ct. App. 1993).
\textsuperscript{435} See id.
\textsuperscript{436} Rochlis, 23 Cal. Rptr. 2d at 794.
\textsuperscript{437} Id. at 795.
\textsuperscript{438} Id.
\textsuperscript{439} Id. at 795 n.7.
\textsuperscript{440} Id. at 796.
\textsuperscript{441} Rochlis, 23 Cal. Rptr. 2d at 794-96.
The trial court granted the defendant's summary judgment motion, reasoning—as to the plaintiff's implied contract claim—that his employment was at will. The trial court based this conclusion on the fact that the plaintiff signed the at will stock option agreements. The court of appeals affirmed. Without citing any specific authority, the court reasoned that “[i]t would be error for a court to imply a contractual term which the parties themselves had expressly rejected during their negotiations.” The court reasoned further that under Shapiro, the plaintiff could not rebut the presumption of at will employment given the fact that he signed the at will stock option agreement.

F. 1995: Fortification

Camp v. Jeffer, Mangels, Butler & Marmaro is the first of two cases decided in 1995. In Camp, the plaintiffs, husband and wife, sued their former employer alleging claims for breach of implied contract, breach of covenant, wrongful termination in violation of public policy, and misrepresentation. The plaintiffs were both employed as legal secretaries. Mrs. Camp was terminated for typing a letter with excessive errors. Mr. Camp was terminated soon thereafter for working on a personal matter during business hours. The Camps' complaint alleged that Mrs. Camp was terminated in retaliation for reporting alleged insider trading by one of the partners. The complaint alleged further that Mr. Camp was terminated because he was married to Mrs. Camp.

442. Id. at 796.
443. Id.
444. Id.
445. Id. at 802-03.
446. Rochlis, 23 Cal. Rptr. 2d at 797.
447. Id. at 797-98. The opinion is not clear about what evidence the plaintiff was relying on to establish an implied-in-fact contract. Thus, it is difficult to tell if there was any call to discuss questions left open by the earlier opinions.
448. 41 Cal. Rptr. 2d 329 (Ct. App. 1995).
449. Id. at 333.
450. Id. at 332.
451. Id. at 333.
452. Id.
453. Camp, 41 Cal. Rptr. 2d at 335.
454. Id.
In affirming summary judgment, the court rejected the plaintiffs' implied contract claims based on the fact that they signed a document acknowledging their at will employment status shortly after they were hired.\textsuperscript{455} Citing Gerdlund, the court reasoned that "[t]he express term [was] controlling even if it [was] not contained in an integrated employment contract."\textsuperscript{456} The court also stated that the plaintiffs could not raise a triable issue of material fact as to the existence of an implied contract with Mrs. Camp's deposition testimony that the firm "promised" to place her in another position after she reported the alleged insider trading, that she quit her prior job to accept a position with the defendant, or that both Mr. and Mrs. Camp switched from temporary to permanent employment.\textsuperscript{457} The court reasoned that this evidence did not create a legitimate expectation of job security.\textsuperscript{458}

The significance of the Camp opinion is twofold. Obviously, the fact that the court was willing to accept the defendant's argument that the acknowledgment forms precluded the plaintiffs' implied-in-fact contract claims reflects an expansive interpretation of the Shapiro-Gerdlund rule. This issue did come up before in Wagner, but in Wagner the acknowledgment form was reinforced by at will language both in the plaintiff's employment application and in the defendant's handbook.\textsuperscript{459} This observation also follows from the court's explicit holding (in marked contrast to a majority of the earlier opinions) that the at will acknowledgment form was controlling regardless of whether it was an integrated employment contract.\textsuperscript{460}

\textsuperscript{455} Id. at 332.

\textsuperscript{456} Id. at 334. The court cited Shapiro as authority for the proposition that there cannot be an express and implied contract covering the same subject but requiring different results. Id.

\textsuperscript{457} Id. at 334-35. With regard to the evidence that Mrs. Camp quit her prior job to accept employment with the defendant, the court explained that "[a]lthough a job offer may give rise to a good cause termination standard if it includes assurances of long-term employment, a simple offer, without more, is not sufficient." Id. at 335. The absence of these assurances, the court reasoned, distinguished the Camps' case from McLain v. Great Am. Ins. Co. Id.

\textsuperscript{458} Camp, 41 Cal. Rptr. 2d at 335. The court also rejected the plaintiff's remaining claims. Id. at 335-41.

\textsuperscript{459} See supra text accompanying note 304.

\textsuperscript{460} Camp, 41 Cal. Rptr. 2d at 329. Since the Camp court did not discuss the parol evidence rule, citing Gerdlund rather than Shapiro here was a bit strange. It is likely, however, that the court cited Gerdlund, because Gerdlund expressly states this proposition. See supra note 261.
Additionally important is the fact that the court’s modified opinion discards language endorsing the Wagner dicta.\textsuperscript{461} Recall that Wagner strongly suggests that a written at will agreement \textit{can be} modified by the parties’ postexecution conduct.\textsuperscript{462} Of course, the reason the \textit{Camp} court dumped the Wagner dicta is not clear. However, appreciating the spirit in which the opinion was written, a reasonable argument can be made that the court was rejecting this theory.

This is an aspect of the \textit{Camp} opinion which contrasts sharply with \textit{Haggard v. Kimberly Quality Care, Inc.},\textsuperscript{463} the more recent of the two decisions. In that case, the plaintiff was originally hired by Quality Care, Inc. in January 1986.\textsuperscript{464} She was promoted to a management level position in 1987, and retained following a merger between Quality Care and Kimberly, Inc. in 1988.\textsuperscript{465} Significantly, when the two companies merged, the plaintiff was required to sign an agreement stating that she was an at will employee and that the terms of the agreement could only be changed by a formal written agreement signed by the president of the company.\textsuperscript{466} Approximately two years later, the plaintiff signed a form acknowledging the receipt of the most recent version of the defendant’s handbook.\textsuperscript{467} Like the written agreement, the handbook stated that the plaintiff was an at will employee.\textsuperscript{468} The plaintiff subsequently brought suit against the defendant when she was discharged based on a knowing violation of the defendant’s policies in 1992.\textsuperscript{469} The plaintiff, who suffered from multiple sclerosis, countered that the reason asserted

\textsuperscript{461} The court’s original opinion cited Wagner for the proposition that: “The express term is controlling \textit{unless} it has been modified by subsequent events.” The court’s modified opinion states instead: “The express term is controlling even if it is not contained in an integrated employment contract.” \textit{Camp}, 41 Cal. Rptr. 2d at 334.

\textsuperscript{462} Wagner v. Glendale Adventist Medical Ctr., 265 Cal. Rptr. 412, 418 (Ct. App. 1989).

\textsuperscript{463} 46 Cal. Rptr. 2d 16 (Ct. App. 1995).

\textsuperscript{464} Id. at 19.

\textsuperscript{465} Id.

\textsuperscript{466} Id.

\textsuperscript{467} Id. at 20.

\textsuperscript{468} Haggard, 46 Cal. Rptr. 2d at 20.

\textsuperscript{469} Id. The plaintiff sued for breach of contract, wrongful termination in violation of public policy, discrimination, intentional and negligent infliction of emotional distress, and invasion of privacy. Id. Only the contract and disability discriminations claims went to the jury. Id.
for her termination was merely a pretext for disability discrimination.\footnote{470} On appeal from a verdict for the plaintiff on her breach of contract claim,\footnote{471} the defendant argued that the trial court should not have submitted this theory to the jury.\footnote{472} The defendant claimed that the signed at will agreement barred the plaintiff's contract claim as a matter of law.\footnote{473} The court agreed and reversed.\footnote{474} Relying on Gerdlund, the court held that parol evidence was inadmissible to establish an implied-in-fact agreement \textit{predating} the plaintiff's partially integrated post-merger employment contract.\footnote{475} Relying on Malmstrom and Tollefson, the court held that the agreement was not subject to an implied-in-fact or written modification.\footnote{476} The court reasoned that, based on the express modification provision, the "plaintiff could not \textit{reasonably} have relied on

\footnote{470. \textit{Id.} The trial court denied the defendant's motion \textit{in limine} to exclude parol evidence of the alleged implied-in-fact contract, the defendant's motion for non-suit, and the defendant's motion for judgment notwithstanding the verdict. \textit{Id.} at 20 n.1.} \footnote{471. \textit{Id.} at 21.} \footnote{472. \textit{Id.}} \footnote{473. \textit{Haggard,} 46 Cal. Rptr. 2d at 21.} \footnote{474. \textit{Id.} at 26.} \footnote{475. \textit{Id.} at 21-24. The court also rejected the plaintiff's claim that the post-merger agreement was invalid for lack of consideration. The court explained that this argument was based on the erroneous assumption that the plaintiff was not an at will employee before signing the post-merger agreement, i.e., that she surrendered the right to a just cause determination before she was discharged without receiving any corresponding benefit from the defendant. \textit{Id.} at 22-23. In this respect, the court noted that the plaintiff signed no fewer than three at will agreements \textit{before} the merger, and, in any event, that the plaintiff's argument was contrary to the well established principle that courts will not inquire into the adequacy of consideration. \textit{Id.} The court concluded that the agreement was partially integrated because, inter alia, "[t]he plain language of the Agreement indicate[d] that it cover[ed] various conditions related to [the] plaintiff's employment." \textit{Id.} at 23.} \footnote{476. \textit{Id.} at 24-26.}
an alleged implied contract, which was not in a writing signed by the president, to modify the Agreement.”

IV. REASONABLE EXPECTATION CONTRACT THEORY

Reading all of these opinions together, it becomes clear that courts are still divided over some of the important issues here. Murky areas include the need for integration, the value of an at will employment application, and the continued viability of the implied-in-fact modification theory. This is due in large measure to disagreement over the scope and mechanics of the Shapiro-Gerdlund doctrine. Cases like Wagner treat the Shapiro-Gerdlund doctrine as the functional equivalent of the parol evidence rule; cases like Malstrom and Haggard treat the doctrine and parol evidence rule as discrete theories. Cases like Wilkerson turn on the issue of integration; cases like Camp forcefully reject this requirement. Nonetheless, the opinions can be interpreted to stand for a unified proposition, namely that substantial, material evidence of a reasonable expectation of job security is necessary to overcome a written at will employment agreement. I submit this is a proposition, which can be justified in terms of conventional "reasonable expectation" contract theory. The analysis is as follows.

A. Principles of Contract Interpretation

According to standard principles of contract interpretation, the parties' agreement largely defines their contract-

477. Id. at 24. The court also rejected the plaintiff's argument that the agreement was modified by language in an employee handbook distributed in 1991. The thrust of the plaintiff's argument was twofold. First, that the handbook called for progressive discipline procedures and contained language promising to treat employees "very well." Id. Second, "that the handbook reserved the right to change any and all employment policies." Id. The court's response was, one, that the handbook repeatedly indicated that the employment relationship was at will, and thus was entirely consistent with the terms of the written contract, two, the handbook expressly stated that the progressive discipline procedure was not waiving the defendant's right to terminate the relationship without cause. Id. at 25.


The California Supreme Court has clearly indicated that standard contract principles apply to employment contracts. See supra note 16. Professor Corbin disagrees. Challenging this view, his influential treatise argues that:
A "contract" terminable at will by either party without further obligation or right flowing to either is repugnant to the term "contract" itself, which carries with it implications of performance and duty, expectations based upon promises. The only way such an arrangement may be seen as a "contract" is through the rear-view mirror of obligation to pay for services already rendered. If there is nothing more, then the analytical differences between "employee" and "independent contractor" have disappeared.


479. For examples of California cases embracing this "promissory" theory of contractual obligations, see Robinson v. Magee, 9 Cal. 81, 83 (1858) ("A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing. The only end and object of the contract, is the doing or not doing the particular thing mentioned."); Bundsen v. Workers' Compensation Appeals Bd., 195 Cal. Rptr. 10, 11-13 (Ct. App. 1983) (expressly rejecting formalistic, elemental approach to principles of contract formation); Parkinson v. Caldwell, 272 P.2d 934, 937 (Cal. App. 1954) ("A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the very time of its creation no good reason occurs to us why they may not do so."). See also Cal. Civ. Code. § 1549 (West 1982) ("A contract is an agreement to do or not to do a certain thing."); Seamen's Bank For Sav. v. Superior Court, 236 Cal. Rptr. 31, 36 (Ct. App. 1987) (citing California Civil Code § 1549 for the definition of a contract); Ehrler v. Ehrler, 178 Cal. Rptr. 644, 647 (Ct. App. 1981) (same); Jaffe v. Carroll, 110 Cal. Rptr. 435, 438 (Ct. App. 1973) (same); Leo J. Meyberg Co. v. Bd. of Trade, 342 P.2d 395, 398 (Cal. App. 1959) (same); Stevens v. Dillon, 168 P.2d 492, 494 (Cal. App. 1946) (same); McClintock v. Robinson, 64 P. 2d 749, 752 (Cal. App. 1937) (same). The Restatement similarly defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981) (emphasis added). For examples of California opinions citing the Restatement definition, see Schaefer v. Williams, 19 Cal. Rptr. 2d 212, 213-14 (Ct. App. 1993) (citing Restatement (Second) of Contracts § 1); A-Mark Coin Co. v. General Mills, Inc., 195 Cal. Rptr. 859, 865 (Ct. App. 1983) (citing Restatement (Second) of Torts § 766 cmt. f: "The word 'contract' connotes a promise creating a duty recognized by law."); Friedman v. Jackson, 172 Cal. Rptr. 129, 132 (Ct. App. 1968) (same).

Promissory contract theory is rooted in the concepts of individual liberty and freedom of contract. Collins, supra note 49, at 207 (commenting that the "the ideal of individual liberty ... gives rise to a presumption that the parties should be free to choose the terms of their contract"); Claude D. Rohwer, Terminable-At-Will Employment: New Theories for Job Security, 15 Pac. L.J. 759, 759 (1984) ("According to the theory of freedom of contract, the sole purpose of contract law is to enforce the bargain made by the parties."); Charles Fried, Contract as Promise: A Theory of Contractual Obligation 19 (1981) (commenting that "the promise principle was embraced as an expression of the principle of liberty"); see also Foley v. Interactive Data Corp., 765 P.2d 373, 384 (Cal. 1988) ("We begin by acknowledging the fundamental principle of freedom of contract: employer and employee are free to agree to a contract terminable at will or subject to limitations."); Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 557 (Ct. App. 1990) (acknowledging this same point).
will be heard to argue that the defendant failed to honor a specific contractual commitment, the plaintiff is therefore required to show that the defendant assumed the specific commitment (or "promise") in the first place. To accomplish this, the plaintiff must satisfy an affirmative evidentiary burden to demonstrate that, based on the defendant's words or conduct, a reasonable person would have believed the defendant was promising to act or refrain from acting in a specific way. In turn, this objective test is entirely consistent with the fundamental notion that the realization of reasonable expectations induced by promises is the main purpose of contract law. As explained by Professor Corbin:

480. The creation of an enforceable obligation is governed by statute in California. California Civil Code § 1428 provides in pertinent part that: "An obligation arises from [either]: [¶] One-The contract of the parties; or, [¶] Two-The operation of law." Cal. Civ. Code § 1428 (West 1982). "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." Id. at § 1427. See also Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 784 (9th Cir. 1990) (Kozinski, J., dissenting) ("It is the most fundamental principle of contract law that there can be no legally enforceable obligation without a promise, a commitment to future behavior.").

481. See, e.g., Bianco v. H.F. Ahranson & Co., 897 F. Supp. 433, 440-41 (C.D. Cal. 1995) (granting summary judgment and holding the plaintiff simply failed to offer evidence demonstrating the defendant "promised, or made any commitment, not to terminate [her] employment except upon good cause"); see also Restatement (second) of Contracts § 2(1) (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

482. For an example of a California case commenting that an objective test is used to determine whether a promise has been made, see Findleton v. Taylor, 25 Cal. Rptr. 439, 440 (Ct. App. 1962) (observing that "words which would be understood by a reasonable person as importing a promise may establish a contract despite the subjective intent of the party using them"). See also Restatement (second) of Contracts § 2 cmt. b (1981) ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:2, at 10 (4th ed. 1990) ("[W]hether a manifestation of intention by the promisor rises to the level of a promise is largely dependent upon how the promisee understands the manifestation. That manifestation, however, is to be judged by an objective standard."); § 1:3, at 15 ("The nature of agreement requires a manifestation of mutual assent, and the concept of manifestation generally requires an objective indicium of mutual assent. This objective indicium may be evidenced by words or any other conduct, including, in an appropriate case, silence."); COLLINS, supra note 49, at 210 ("A contract has been concluded if a reasonable person would infer from words and conduct that a decision to enter a contract had been made."); VICTOR MORAWETZ, AN ESSAY ON THE ELEMENTS OF A CONTRACT AND A STATEMENT OF PRINCIPLES GOVERNING ITS FORMATION § 2, at 11 (1926) ("Any
The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform.\(^4\)

The analysis prescribed by the Shapiro-Gerdlund doctrine comports with this basic rule of contract interpretation. In a breach of employment contract action, the plaintiff typically claims that the defendant failed to honor a specific commitment not to terminate the relationship without good cause. What the Shapiro-Gerdlund doctrine says, in so many words, is that once the parties have memorialized the terms of their at will employment agreement in writing, the plaintiff has no right to assert a breach of contract action against the defendant without evidence which would lead a reasonable person to conclude that the defendant assumed a specific obligation to provide the plaintiff with job security.\(^4\) Thus,

\begin{quote}
communication to another party by words or acts sufficiently specifying an offer or a promise or an agreement is an expression to such party of intent to make the offer or the promise or to enter into the agreement if, in light of pertinent facts, the act of making the communication reasonably indicates [to the other party] that the communication is made with such intent and it appears that the other party so understands it.
\end{quote}

483. Corbin, supra note 479, § 1, at 2. Professor Corbin continues that;

\begin{quote}
It must not be supposed that contract problems have been solved by the dicta that expectations must be "reasonable." Reasonableness is no more absolute in character than is justice or morality. Like them it is an expression of customs and mores of men - the customs and mores that are themselves complex, variable with time and place, inconsistent and contradictory. Nevertheless, the term is useful, giving direction to judicial research, and producing workable results. The reasonably prudent [person], reasonable care and diligence, reasonable expectations, are terms that are not to be abandoned, at least until we can demonstrate that others will work better.
\end{quote}

Id. § 1:1, at 4.

484. Some opinions appear to embrace a per se rule, that is, a rule prohibiting implied-in-fact contracts as a matter of law where the plaintiff signs a written at will agreement. See, e.g., Gianaculas v. TWA, 761 F.2d 1391, 1394-95 (9th Cir. 1985) (affirming summary judgment and holding that the plaintiffs' at will employment applications foreclosed an implied-in-fact contract as a matter of law without discussing whether or not the plaintiffs offered evidence demonstrating an implied-in-fact contract). This is not a well reasoned approach to the problem. As explained by Professor Corbin:

\begin{quote}
The statement is frequently found that where the parties have made an express contract the law will not imply one. This is a misleading statement, even though some truth is concealed within it. It is more accurate, even though not very useful as a working rule to say that
this test, which is also clearly objective, is simply another way of asking whether the plaintiff satisfied the affirmative burden to show that the defendant made the specific promise in the first place.\textsuperscript{485} As one court put it, an at will "employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never provided for a continuation of its benefits in the first instance."\textsuperscript{486}

where the parties have made an express contract, the court should not find a different one by "implication" concerning the same subject matter if the evidence does not justify an inference that they intended to make one. Of course, even in the absence of any express promise or contract, an implied promise or contract should not be found to exist unless the conduct of the parties, under the existing circumstances, makes such an inference or implication reasonable. But the fact that an express contract has been made does not prevent the parties from making another one tacitly, concerning the same subject matter or a different one.

\textit{Corbin, supra} note 479, \$ 564 at 292-93 (emphasis added).

485. Professor Farnsworth suggests that this issue should be analyzed in terms of whether there has been an "offer" as opposed to whether the plaintiff has established an enforceable promise. \textit{Farnsworth, supra} note 179, at \$ 3.15a, at 242 ("The initial problem for the court is to determine if the employer has made an offer of employment on other than an at-will basis."). Since the analytical focus is essentially the same, the distinction between an offer and a promise is not really material. Professor Farnsworth notes that: "In the typical special contract case, the employee claims that at the time of employment, the employer gave assurances that the employment would be terminated only for cause. Employees who have succeeded with such claims have met the requirements of conventional reasoning, including a showing that the employee reasonably understood the employer to be making such assurances." \textit{Id.} (emphasis added).


Courts have embraced this same analysis for the purpose of claims for breach of the implied covenant of good faith and fair dealing. See, e.g., \textit{Mundy}, 885 F.2d at 544-45 (commenting that the duty imposed by the implied covenant of good faith and fair dealing depends largely on the parties' legitimate expectations); \textit{Foley} v. Interactive Data Corp., 765 P.2d 373, 389-90 (Cal. 1988) (same); \textit{Slivinsky} v. Watkins-Johnson Co., 270 Cal. Rptr. 585, 589 (Ct. App. 1990) (same); \textit{Tollefson} v. Roman Catholic Bishop, 266 Cal. Rptr. 550, 556 (Ct. App. 1990) (same); \textit{Sheppard} v. Morgan Keegan & Co., 266 Cal. Rptr. 784, 786-87 (Ct. App. 1990); \textit{Anderson} v. Savin Corp., 206 Cal. Rptr. 627, 631-32 (Ct. App. 1988) (holding that as a matter of law the plaintiff at will employee could not have reasonably believed he would be employed indefinitely except for good cause for termination, and affirming summary judgment against his claim for
It should be noted that this rule serves distinct practical concerns. Consider this scenario. Company X wants to hire Y as an at will employee. Knowing that written at will agreements have some inherent risk, what is X supposed to do? The likely company response is that X will begin to take measures necessary to avoid creating an implied-in-fact contract, including, for example, revising the employee handbook and rescinding the company’s progressive discipline policy. In this scenario, it is readily apparent that refusing to enforce the agreement threatens to undermine the job security the doctrine of implied-in-fact security terms was developed to protect. As explained by Judge Spencer Letts in Cox v. Resilient Flooring Div. of Congoleum Corp.: The increasing necessity for terminating employees at all levels has caused forward-thinking employers to address not only the perceived requirements of law, but also the ethical requirements imposed by basic institutional fairness and good business practice. Courts should not think that the policies of the major corporations, which are so often before them by virtue of alleged breach, are the norm in the business world at large. It may be that courts are seeing mainly the leaders. [In this sense], the interests of society are not served when judge-made law, the product of well-intentioned desire to achieve social justice, steps in front of those to whom the law applies and who are already leading the way in the same direction. To do so is to punish the leaders and reward the hindmost, when the better judicial course would be to assure that the laggards do not lag too far behind.

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breach of the implied covenant of good faith and fair dealing); Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 286-87 (Ct. App. 1987) (holding that it was error for the trial court to instruct the jury on the plaintiff's claim for breach of the implied covenant of good faith and fair dealing because the plaintiff was an at will employee, and explaining that the implied covenant only protects the legitimate expectations of the parties to the agreement); Brandt v. Lockheed Missiles & Space Co., 201 Cal. Rptr. 746, 748-49 (Ct. App. 1984) (explaining that the duty imposed by the implied covenant of good faith and fair dealing depends in large measure on the parties’ legitimate expectations). 487 See generally Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 920-22 (Ct. App. 1981).


489 Id. at 739 (emphasis added). Accord Van Komen v. Montgomery Ward & Co., 638 F. Supp. 739, 742 (C.D. Cal. 1986) ("Punishing an employer for granting its employees a 'second bite of the apple' when it was not required to do so inevitably raises the question whether it is wise ever to adopt such 'second bite' policies."). See also Davis v. Consolidated Freightways, 34 Cal. Rptr. 2d
B. A Brief Word on Integration

While the issue of integration has been dispositive in a number of opinions, this narrow focus was not always appropriate in cases where the plaintiff was attempting to establish an implied-in-fact agreement with evidence of postexecution words or conduct. By its express terms, the parol evidence rule applies to evidence of prior or contemporaneous agreements. More fundamentally, although courts have long dispensed with the traditional "four-corners-of-the-document test," the integration analysis still centers on evidence of the parties' contractual intent at the time the agreement was executed. As noted by the Haggard court: "In determining the intent of the parties regarding whether the written agreement is integrated, the court must attempt to place itself in the same situation in which the parties found themselves at the time of contracting." If one thing has become clear, however, it is that the reasonable expectation inquiry contemplates evidence relating to the complete employment relationship or "totality" of the circumstances. Courts restricting their analysis to the issue of integration are missing this important point. Whether the underlying contract is a complete and final expression of the parties' agreement is not the critical issue, but instead, whether taken together with the written at will agreement, all of the

438, 445 (Ct. App. 1994) (affirming summary judgment and rejecting the plaintiff's evidence of a progressive discipline policy as immaterial, because if relevant, "an employer would be forced purposely to terminate employees for any and every infraction - or none at all - in order to maintain the presumption of at-will employment."); Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230, 236 (Ct. App. 1990) (Compton, J., dissenting) ("The suggestion in some recent court decisions that somehow a binding contract of employment can be 'implied' by nothing more than satisfactory performance by the employee and praise and promotion by the employer stands traditional concepts on their heads and will discourage employers from praising or promoting employees for fear that in doing so they are locking themselves into a binding contract which neither party ever contemplated.").

490. CAL. CIV. PROC. CODE § 1856(a) (West 1983).

491. Masterson v. Sine, 436 P.2d 561, 563-67 (Cal. 1968) (rejecting the traditional rule that the terms of the parties' written agreement are dispositive on the issue of integration).

plaintiff's evidence demonstrates a reasonable expectation of job security.\textsuperscript{493}

V. Conclusion

In \textit{Brawthen v. H & R Block, Inc.},\textsuperscript{494} the defendant not only had the plaintiff sign an agreement which was silent on the grounds for termination, but later issued a written statement promising employees job security.\textsuperscript{495} In \textit{Wood v. Loyola Marymount Univ.},\textsuperscript{496} the defendant notified employees that they were employed on a year-to-year basis but then sent these same employees a memo stating that employment with the university was "continuous," subject to the parties' mutual satisfaction.\textsuperscript{497} In \textit{Panopoulos v. Westinghouse Elec. Corp.},\textsuperscript{498} the defendant had a published "Creed" promising employees "stability of employment to the greatest practical extent."\textsuperscript{499} Although this sort of scenario is becoming increasingly rare, employers and employees are likely to continue litigating breach of contract claims for a number of years to come. Recognizing this, some principled discussion about the scope and mechanics of the \textit{Shapiro-Gerdlund} doctrine would seem to be in order. Reasonable expectation contract theory is one direction that this discussion might take.

\textsuperscript{493} \textit{Haggard} may encourage implied-in-fact modification arguments. Note, however, that for this same reason, the implied-in-fact modification issue does not require any discrete analysis. The implied-in-fact modification inquiry focuses on evidence relating to the parties' relationship after the written agreement was executed. This, of course, is entirely consistent with the comprehensive analysis required by the \textit{Shapiro-Gerdlund} doctrine. The issue is essentially redundant. For examples of California opinions addressing the implied-in-fact modification issue outside of the employment context, see Garrison v. Edward Brown & Sons, 154 P.2d 377, 379-81 (Cal. 1944) (holding that there was no implied modification of the parties' written contract because the parties' conduct was consistent with the terms of the agreement); Daugherty Co. v. Kimberly-Clark Corp., 92 Cal. Rptr. 120, 124 (Ct. App. 1971) (reversing summary judgment in an action to foreclose a mechanic's lien and for compensation because there was a triable issue of material fact relating to whether the parties' conduct modified their written agreement).

\textsuperscript{494} 104 Cal. Rptr. 486 (Ct. App. 1972).
\textsuperscript{495} Id. at 488.
\textsuperscript{496} 267 Cal. Rptr. 230 (Ct. App. 1990).
\textsuperscript{497} Id. at 231-32.
\textsuperscript{498} 264 Cal. Rptr. 810 (Ct. App. 1989).
\textsuperscript{499} Id. at 813.