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# Promissory Estoppel and Oral Employment Contracts

is given to all factors.[39] Under the previous test the Board considered only those factors which favored severance. Now both the interests of the employer and of the craft employees can be protected.

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## PROMISSORY ESTOPPEL AND ORAL EMPLOYMENT CONTRACTS

A partly performed, oral employment contract for a term of years is unenforceable because it is "within" the "one year clause" of the statute of frauds.[1] Sometimes an employee, in reliance upon a prospective employer's promise to reduce their contract to writing, will accept the new job and perhaps substantially change his position, only to be discharged before the contract period has expired. In a resultant action on the contract, it is unsettled whether the employee's claim for relief based on the doctrine of promissory estoppel, or the employer's defense of the statute of frauds, will prevail.

In *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*,[2] Dr. Feldman, authorized spokesman for the new Biscayne Osteopathic Hospital in Miami, approached Dr. W. L. Tanenbaum in Allentown, Pennsylvania, regarding a job in radiology. To qualify for the job, Dr. Tanenbaum went to Florida and took state examinations in order to obtain the necessary license. According to Dr. Tanenbaum, the hospital offered employment for five years and promised to reduce the contract to writing. Although no writing was made, Dr. Tanenbaum accepted

[39]The federal courts will probably uphold the *Mallinckrodt* test. The Court of Appeals for the Fourth Circuit rejected the *American Potash* test and held that the Board has a duty to consider all relevant factors. Royal McBee v. NLRB, 302 F.2d 330 (4th Cir. 1962); NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959). The Court of Appeals for the Eighth Circuit held that the Board may consider all factors including the history of bargaining and integration of the production process. NLRB v. Lord Baltimore Press, Inc., 2 LAB. REL. REP. (64 L.R.R.M.) 2055 (8th Cir. Dec. 28, 1966). The Court of Appeals for the Eighth Circuit also held that a Board's decision regarding an appropriate bargaining unit is final unless it appears that the Board acted in a "capricious or arbitrary manner." NLRB v. Hurley Co., 310 F.2d 158, 161 (8th Cir. 1962).

[1]The essence of the original Statute of Frauds, Stat., 1677, 29 Car. II, c. 3, is statutory law in all of the states. The one year clause of the English act provided, "[N]o action shall be brought ... upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which action shall be brought, or some *memorandum* or note thereof, shall be in writing ...." WILLISTON, A SELECTION OF CASES ON CONTRACTS 373 (6th ed. 1954).

[2]190 So. 2d 777 (Fla. 1966).

the offer, resigned his position in Allentown, sold his house at a loss, and in September 1961, moved his family to Florida. He purchased a home in Miami and immediately began practice for Biscayne Hospital. In April 1962, he was notified, apparently without explanation, that his services would no longer be needed. After his discharge, he sold his Miami house at a loss and secured employment in Detroit, but at a lower salary.

Dr. Tanenbaum instituted a suit based on promissory estoppel against the Biscayne Hospital for damages for breach of the employment contract. Although the hospital relied on the statute of frauds, the trial court allowed the case go to the jury, which returned a $40,000 verdict for the doctor. However, upon motion, the court entered judgment for the defendant notwithstanding the verdict. The Third District Court of Appeal affirmed the judgment, and the Florida Supreme Court granted certiorari. In affirming, the Supreme Court, by a 4-to-2 decision, refused to adopt the doctrine of promissory estoppel. The majority noted that promissory estoppel never had been embraced by any Florida case and stated that it is the legislative—not the judicial— prerogative to adopt new provisions, especially ones which may have the effect of nullifying the statute of frauds.

The dissent gave three reasons for disagreeing with the conclusion of the majority. First, the majority failed to give sufficient weight to the fact that the promise upon which the plaintiff relied was not the promise to employ but a promise to execute and deliver the written five-year contract. Second, Florida recognizes as an exception to the statute of frauds the uncodified doctrine of part performance of oral contracts for the sale of realty by a vendee in possession[3] and likewise should recognize the uncodified doctrine of promissory estoppel. And third, the adoption of any legal principle such as promissory estoppel is more of a judicial prerogative than a legislative one.

The most widely accepted definition of the doctrine of promissory estoppel is that set forth in section 90 of the *Restatement of Contracts*:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[4]

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[3]Maloy v. Boyett, 53 Fla. 956, 43 So. 243 (1907).

[4]RESTATEMENT, CONTRACTS § 90 (1932). However, in the American Law Institute's proprosed new *Restatement* the drafters have deleted the phrase, "of a definite and substantial character," from the definition. RESTATEMENT, CONTRACTS § 90 (Tent. Draft No. 2 1965).

This *Restatement* definition contains four elements essential to establishing a claim based on promissory estoppel: (1) a gratuitous promise; (2) reasonable expectancy by the promisor that his promise would induce action or forbearance by the promisee; (3) definite and substantial action or forbearance by the promisee in reliance on the promise; and (4) resultant injustice if the promise is not enforced.

Courts have been inclined not to apply promissory estoppel in the few cases which have involved a promise to reduce to writing an oral employment contract. The employee has recovered in only three[5] of such cases, while relief has been denied in seven.[6]

Apparently there is no disagreement as to what is a gratuitous promise. It is gratuitous if no bargained-for consideration is exchanged for it. A naked promise to reduce to writing a pre-existing, valid contract is an example of this type of promise.

Likewise, the determination of what promises the promisor should reasonably expect to induce action or forbearance by the promisee has presented no particular difficulty.

Usually the courts consider the two elements of "action or forbearance of a definite and substantial character," such that "injustice can be avoided only by enforcement" of the gratuitous promise together under some rubric devised by the particular court,[7] such as "unconscionable injury."[8] A wrongfully discharged employee must always suffer some sort of monetary loss or great personal inconvenience.[9]

The two principal causes of monetary loss and personal inconvenience are (1) change of residence and (2) change of job. When an

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[5]Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909); Harmon v. Tanner Motor Tours, Ltd., 79 Nev. 4, 377 P.2d 622 (1963).

[6]Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D.N.Y. 1941); Offeman v. Robertson-Cole Studios, Inc., 80 Cal. App. 1, 251 Pac. 830 (1926); Standing v. Morosco, 43 Cal. App. 244, 184 Pac. 954 (1919); Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961); Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964); McCrillis v. American Heel Co., 85 N.H. 165, 155 Atl. 410 (1931); Kooba v. Jacobitti, 59 N.J. Super. 496, 158 A.2d 194 (App. Div. 1960).

[7]See, *e.g.*, Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 93-94 (1909) ("change of position;" "great injury and loss"); Offeman v. Robertson-Cole Studios, Inc., 80 Cal. App. 1, 251 Pac. 830, 836 (1926) ("sustained a loss"); McCrillis v. American Heel Co., 85 N.H. 165, 155 Atl. 410, 411-12 (1931) ("detriment to himself;" "hardship"); Kooba v. Jacobitti, 59 N.J. Super. 496, 158 A.2d 194, 197 (App. Div. 1960) ("prejudicial reliance").

[8]*E.g.*, Standing v. Morosco, 43 Cal. App. 244, 184 Pac. 954, 955 (1919).

[9]*Ibid.*

employee changes his residence, it must not be for the better.[10] Thus, in *Standing v. Morosco*,[11] where the employee sold his home and furniture in New York City and moved with his wife to Los Angeles, recovery was denied because the employee's property in New York might have been disposed of at a profit and the change of residence might have been an agreeable one. When an employee gives up another job to work for an employer, he must do more than allege that he "materially changed his position to his detriment in reliance upon said [oral] agreement."[12] He must have irrevocably lost his former job, as happened in *Seymour v. Oelrichs*,[13] where plaintiff resigned as captain of detectives in San Francisco and could not thereafter be restored to that position.

When an employee changes his residence *and* resigns from a job in reliance upon a prospective employer's promise to give him a written contract, relinquishment of particular earned privileges at his former job,[14] such as rights to continuous employment[15] or to long leaves of absence without prejudice to his tenure,[16] and change of residence from one state to another[17] may be sufficient to meet squarely the test set forth in *Restatement* section 90. However, recovery was granted in *Harmon v. Tanner Motor Tours, Ltd.*[18] despite the fact that there was neither change of residence nor change of job. Estoppel was invoked against the promisor after the employee-promisee partly performed the contract, prepaid the contract price for his franchise, and purchased two new airport limousines in reliance upon the promise to reduce the contract to writing.

It is generally conceded that all jurisdictions which recognize promissory estoppel require as operative facts at least the four elements set out by *Restatement* section 90. However, some jurisdictions require certain additional elements. Illinois requires that the promise to put the oral contract in writing be made by the employer with fraudulent intent.[19] In this respect, the doctrine of promissory estoppel coincides with the doctrine of estoppel in pais, commonly called equitable

[10]See Standing v. Morosco, 43 Cal. App. 244, 184 Pac. 954 (1919); B.F.C. Morris Co. v. Mason, 171 Okla. 589, 39 P.2d 1 (1934) (per curiam).

[11]43 Cal. App. 244, 184 Pac. 954 (1919).

[12]Kahn v. Cecelia Co., 40 F. Supp. 878, 879 (S.D.N.Y. 1941).

[13]156 Cal. 782, 106 Pac. 88 (1909).

[14]Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); see Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909).

[15]*Ibid.*

[16]Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954).

[17]*Ibid.*

[18]79 Nev. 4, 377 P.2d 622 (1963).

[19]See Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964).

estoppel, in which generally there must be a misrepresentation.[20] Thus, if the promise is made in good faith and then broken, no claim based on promissory estoppel will lie regardless of the extent of reliance by the promisee. On the other hand, New Hampshire not only demands detrimental reliance by the employee but also resultant undue benefit to the employer.[21]

Despite the apparent conflict between the doctrine of promissory estoppel and the statute of frauds, the *Restatement of Contracts* applies the doctrine to cases involving statute of frauds problems.[22] One provision of the statute of frauds requires agreements not to be performed within a year to be in writing. *Tanenbaum* involves an oral employment agreement not to be performed within a year and also an oral promise to reduce the agreement to writing.

There appears to have been no significant discussion concerning the difference between invoking the doctrine of promissory estoppel where the employer has orally promised to reduce to writing an oral agreement to employ, and where the employer simply has orally promised to employ. The dissent in *Tanenbaum* notes the distinction but does not discuss its significance.

Technically, it appears the doctrine is not applicable where an employee relies on his employer's promise to employ him because that promise is made in exchange for the promise to render services. Perhaps the bases for the distinction between a claim based on the promise to reduce to writing and a claim based on the promise to employ is one of justifiable reliance. A promise to reduce to writing is objective evidence of an attempt to comply with the statute of frauds, consequently an employee is justified in relying thereon. But

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[20]5 WILLISTON, CONTRACTS § 692 (3d ed. 1961).

[21]McCrillis v. American Heel Co., 85 N.H. 165, 155 Atl. 410 (1931).

[22]RESTATEMENT, CONTRACTS § 178, comment *f* (1932) says:

> Through there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the nonexistence of other facts essential for the establishment of a right or a defence may be precluded.... [A] promise to make a memorandum, if... relied on [by substantial action], may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

Professor Williston, who as Reporter largely drafted the *Restatement of Contracts*, clearly intended for promissory estoppel to apply to statute of frauds cases. See generally 4 ALI PROCEEDINGS 85-114 (App. 1926).

> [W]hen one considers the part Samuel Williston took in the formulation of the Restatement of Contracts and then examines Section 178, Comment f., one must conclude that there was an intention to carry promissory estoppel... into the statute of frauds if the additional factor of a promise to reduce the contract to writing is present.

Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954).

where there is no attempt to satisfy the requirements of the statute, there is little justifiable reason for relying on the promise to employ, it being a promise which forms an unenforceable contract. However, even though there has been no promise to reduce to writing, an employee who has changed position significantly has been granted relief frequently on grounds that it would be fraudulent or unconscionable to permit assertion of the statute.[23]

The decisions have varied as to the reasons for accepting or declining the use of promissory estoppel. When a court grants relief on the basis of the doctrine, its decision invariably reflects equitable considerations. The employer will not be allowed to repudiate his promise if such repudiation would result in working a manifest fraud upon the employee.[24]

The most frequent reason for denying the doctrine, aside from a failure of the allegations to support the claim,[25] is that part performance by the employee will not take the oral agreement out of the statute of frauds.[26] In these cases no significance is attributed to the promise to reduce the contract to writing.

The injustice which often may result from rigid application of the statute of frauds may be circumvented by holding an employer to his promise through the use of the doctrine of promissory estoppel. When the equities in favor of the employee are particularly strong and there is clear and convincing evidence that a contract actually was made, the doctrine should be applied even at the expense of strict adherence to the requirements of the statute of frauds. The *Restatement* definition is broad and general enough so that the doctrine may be used quite flexibly. Instead of refusing outright to adopt the doctrine of promissory estoppel, each jurisdiction should determine whether the equities in each case are sufficiently strong to warrant its application in counteraction to the statute of frauds.

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[23]Hunt Foods, Inc. v. Phillips, 248 F.2d 23 (9th Cir. 1957); Montgomery v. Moreland, 205 F.2d 865 (9th Cir. 1953); Fibreboard Prods. Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953); Marston v. Downing Co., 73 F.2d 94 (5th Cir. 1934); Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Sessions v. Southern Cal. Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935 (1941); Norman v. Nash, 102 Ga. App. 508, 116 S.E.2d 624 (1960); Alexander-Seewald Co. v. Marett, 53 Ga. App. 314, 185 S.E. 589 (1936).

[24]Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 96 (1909).

[25]*E.g.*, Standing v. Morosco, 43 Cal. App. 244, 184 Pac. 954 (1919); Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964); McCrillis v. American Heel Co., 85 N.H. 165, 155 Atl. 410 (1931).

[26]*E.g.*, Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961). See Annot., 6 A.L.R.2d 1053, 1083-95 (1949).