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WHEN THE HAND THAT FEEDS BITES: EXPLORING CLAIMS BY EMPLOYERS AGAINST EMPLOYEES

Matthew P. Holt*

INTRODUCTION

For years, case law involving employment claims largely involved employees suing employers. As a result, many of the legal principles relating to the employment relationship were developed to protect the weaker party: the employee. Over the last decade, however, employers have sued their employees—or former employees—with increasing frequency. But applying the standards developed to protect employees to claims brought by an employer may bring about unexpected and unfair results.

This article explores a number of such lawsuits, providing a survey of existing case law and theories. For example, in 2006, U.S. Card Partner Services, Inc. filed suit against its employee, Drew Scopelliti.¹ As a sales director, Scopelliti was responsible for U.S. Card Partner Service's efforts to market its credit cards and debit cards to educational institutions and to manage subordinate sales representatives.² After less than a year, U.S. Card Partner Services fired Scopelliti and then sued him, claiming that he had misrepresented his qualifications and had done a poor job.³ U.S. Card Partner Services sought to recover the wages it had paid Scopelliti, as well as the profits it claimed it would have made if he had done his job properly.⁴

U.S. Card Partner Services v. Scopelliti presented a previously atypical situation, in which a claim against an employee was made in a lawsuit initiated by the employer. Usually, employers bring actions against their former employees as counterclaims, perhaps under the theory that the best defense is a good offense.

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1. U.S. Card Partner Servs., Inc. v. Scopelliti, No. 06-283 JJF (D. Del. 2006) (Pacer).

2. Complaint and Request/Demand for Jury Trial, Legal Rescission, Declaratory Judgment, and/or Other Relief at 2, *Scopelliti*, No. 06-283 JJF.

3. *Id.* at 3–5.

4. *Id.*

Regardless of whether the claim is initiated by the employer or as a counterclaim to an action filed by an employee, the growing number of lawsuits by employers against their (former) employees requires that we examine the legal principles that are called upon to support such claims or counterclaims. *Employer v. Employee* represents a new trend, and many of the claims that have been brought—not to mention all of the claims that could be brought—have not yet been addressed by appellate courts. Thus, the article also analyzes potential claims under traditional legal principles in order to anticipate how such cases might be resolved under current employment law.

I. COMMON TYPES OF CLAIMS MADE AGAINST EMPLOYEES

A. *Claims for Lost Profits*

While claims have been made for decades by employers who allege that they did not make the profit that they expected and attribute that failure to their employees, it seems that the frequency of such claims is on the rise. Take, for example, the case of *Bhandari v. VHA Southwest Community Health Corp.*⁵ Ramdas Bhandari left a lucrative practice in Florida to work for a small hospital in Artesia, New Mexico.⁶ After about 14 months, Dr. Bhandari was fired.⁷ He sued for breach of contract. The hospital defended by saying that Dr. Bhandari had not been fired but had resigned.⁸ It also argued, in the alternative, that the hospital had good cause to fire Dr. Bhandari; it claimed that Dr. Bhandari frequently refused to see patients, that he failed to develop the medical practice, and that he spent time on other business ventures instead of devoting his full time to the practice of medicine.⁹

However, the hospital went beyond simply defending its actions. It filed a counterclaim against Dr. Bhandari, alleging again that the orthopedic practice that he had been hired to develop failed because of his refusal to see patients, failure to develop the medical practice, and failure to devote his full time to the practice of medicine.¹⁰ The hospital claimed

5. *Bhandari v. VHA Sw. Cmty. Health Corp.*, No. CIV. 09-0932 JB/GBW (D.N.M. filed Sept. 24, 2009).

6. See Complaint for Breach of Contract, Misrepresentation, Retaliatory Discharge, Economic Coercion/Intentional Infliction of Emotional Distress and Related Claims at 3, *Bhandari*, No. CIV. 09-0932 JB/GBW.

7. See *id.* at 7.

8. See Defendants' Original Answer and Counterclaim ¶ 79, at 8, *Bhandari*, No. CIV. 09-0932 JB/GBW.

9. See *id.* at 7.

10. See *id.* at 7–11.

that had Dr. Bhandari done what was expected of him, the hospital would have made a profit of more than \$2 million, and it demanded that Dr. Bhandari pay the hospital its expectation.¹¹

Like most cases, the lawsuit involving Dr. Bhandari settled,¹² so there is no guidance from the court on the propriety of the employer's claims. The case, however, typifies a growing trend in which employers sue their employees for business-related damages arising out of the employment relationship.

B. Claims for Return of Wages

In some cases, employers have sued their former employees, alleging that the employee was not doing what he was hired to do and should therefore return wages paid to him. For example, in *Astra USA, Inc. v. P.E. Bildman*, Astra USA sued its former president and CEO, alleging that he had failed to properly manage the company.¹³ Several female employees had claimed that Bildman had sexually harassed them.¹⁴ Bildman—on behalf of Astra—entered into a “consulting agreement” with a former secretary who had accused him of sexual harassment, paying her more than \$3,000 per month.¹⁵ Without telling his board of directors, Bildman authorized a \$25,000 payment to another woman who accused him of sexual harassment, \$50,000 to another woman, \$94,000 to yet another woman, and then \$100,000 to yet another.¹⁶

During a subsequent investigation, Astra learned that Bildman had threatened employees who were witnesses to the sexual harassment, had set up a five-person satellite office from which he shredded corporate documents, and had data on company-owned computers erased and documents removed from files.¹⁷ The destroyed and stolen files largely were composed of documentation that showed Bildman had employed Astra vendors to do extensive work on his residence and vacation home, had billed the charges to Astra, had chartered yachts for personal vacations as Astra's expense, and had used company money to hire young, attractive escorts for social functions. The list of transgressions went on.¹⁸

11. *Id.* at 8–9, 11; Interview with Blaine Mynatt, counsel for Ramdas Bhandari (January 20, 2012).

12. Clerk's Minutes of Settlement Conference, *Bhandari*, No. CIV. 09-0932 JB/GBW.

13. *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36, 44 (Mass. 2009).

14. *Id.* at 40–41.

15. *Id.*

16. *Id.*

17. *Id.* at 42–43.

18. *Id.* at 42–43 & n.13.

Not surprisingly, Astra fired Bildman.¹⁹ After Astra fired Bildman, the Equal Employment Opportunity Commission sued Astra as a result of Bildman's conduct as president of Astra.²⁰ The lawsuit resulted in a consent decree, pursuant to which Astra established a \$9.85 million fund to compensate victims of sexual harassment at the company.²¹

Astra then sued Bildman.²² The case involved both legal and equitable claims.²³ A jury heard the claim for damages.²⁴ Astra's demand that Bildman forfeit all wages paid to him was treated as an equitable claim and thus decided by the judge.²⁵ After a seven-week trial, the jury awarded Astra just over \$1 million in damages.²⁶ On the equitable claim, Astra asked that the judge require Bildman to repay the salary paid to him while employed at Astra—more than \$5.5 million in wages and more than \$1 million in bonuses.²⁷ The trial court conducted an evidentiary hearing to determine whether the amount Bildman received exceeded the value of his services and ultimately refused to award the equitable relief.²⁸

The Supreme Judicial Court of Massachusetts affirmed the jury's damages award in favor of Astra and reversed the trial court's decision with regard to the equitable issue, finding as a matter of law that Bildman should forfeit all compensation paid to him.²⁹ The court relied on the "faithless servant" doctrine, which holds that an employee who breaches the duty of loyalty to an employer should not be allowed any compensation.³⁰

C. Claims for Indemnification or Contribution

Unlike cases involving a claim for lost profits or for the return of wages, there is a long history of cases involving claims for indemnification. There is conflicting case law regarding the ability of employers to sue employees for indemnification and contribution, with some courts freely allowing such claims and others severely restricting them. The decision in *Bair v. Peck* provides an example of the reasoning courts typically

19. *Id.* at 43.

20. *Id.*

21. *Id.*

22. *Id.* at 44.

23. *Id.*

24. *Id.*

25. *Id.* at 45.

26. *Id.* at 39.

27. *Id.*

28. *Id.* at 45.

29. *Id.* at 47–48, 51.

30. *Id.*

use when allowing employer indemnification claims against employees.³¹ A patient sued two doctors for alleged malpractice and also sued the doctors' employer on the basis of vicarious liability.³² The appellate decision involved the validity of a state statute that limited liability.³³ In the course of discussing the statute, the court held that employers could sue their employees for indemnification:

The theory behind the common-law doctrine of vicarious liability was that the employer should be liable for the employee's negligence to assure that an innocent injured third party would not have to suffer the loss due to the inability of the tortfeasor employee to respond in damages. Indeed, as pointed out earlier, the employer's liability is secondary to that of the employee and only comes into play when the employee is financially unable to pay the damages. If an employer who is vicariously liable is required to pay damages for the tort of the employee, the employer has a cause of action against the employee to recover the amounts paid. It was never the purpose of the common law to impose liability on a non-negligent third party employer when the actual tortfeasor was financially capable of responding for the injured person's damages.³⁴

However, the idea that employers can sue their employees for indemnification is not universally embraced and in fact has been referred to as "anachronistic" by other courts. For example, in *Eule v. Eule Motor Sales*,³⁵ the New Jersey Supreme Court criticized the unlimited right to seek indemnification:

The theoretical liability of an employee to reimburse the employer is quite anachronistic. The rule would surprise the modern employer no less than his employee. Both expect the employer to save harmless the employee rather than the other way round, the employer routinely purchasing insurance which protects the employee as well. Except for the rare case in which the liability of the employee may serve as a stepping stone to reach someone else, the prospect of a claim for indemnity is only of academic significance.³⁶

31. *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991).

32. *Id.* at 1180.

33. *Id.*

34. *Id.* at 1190.

35. *Eule v. Eule Motor Sales*, 170 A.2d 241, 242 (N.J. 1961).

36. *Id.* at 242-43 (citations omitted).

D. Claims for Damages to the Employer's Property

Courts have consistently held that an employer can sue an employee who has negligently damaged the employer's property. For example, in *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad*, the court noted that it was a "well settled" principle of common law that an employer can sue its employees "for property damage arising out of ordinary acts of negligence committed within the scope of employment."³⁷

As noted by the court in *Stack*, however, such claims are relatively uncommon.³⁸ In at least some circumstances, such claims are unlikely simply because if an employer typically pursued such claims, it would discourage potential employees from working for that employer.³⁹ Moreover, a typical employee could not respond to any sizable judgment.⁴⁰ Still, employers do pursue such claims and are successful in at least some courts.⁴¹

II. THE TRADITIONAL LEGAL FRAMEWORK FOR CLAIMS AGAINST EMPLOYEES

Claims against employees have been brought both as contract claims⁴² and as tort claims.⁴³ As discussed below, the type of claim can, and should, impact the legal analysis of the merits of the claim.

A. Claims for Breach of Contract

The analysis of any claim for breach of contract begins with a review of the terms of the contract itself.⁴⁴ Employment contracts run the spectrum from agreements based on a handshake alone to written agreements that span dozens of pages. Regardless of the form or the sophistication of the agreement, the first point in the analysis is to determine what the

37. *Stack v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 615 P.2d 457, 459 (Wash. 1980).

38. *See id.*

39. *See id.*

40. *See id.*

41. *See, e.g., Cavanaugh v. W. Md. Ry. Co.*, 729 F.2d 289 (4th Cir. 1984).

42. *See infra* Section II.A.

43. *See infra* Section II.B.

44. "The relation of employer and employee can only exist by virtue of contract." *Norfolk Cmty. Servs. Bd. v. Berardi*, 84 Va. Cir. 310, 314 (2012). Because the covenant of good faith and fair dealing arises out of the contract, a discussion of claims arising from the duty are discussed here, although many courts find that a claim for an alleged violation of the covenant of good faith and fair dealing is a tort claim and not a contract claim. *See, e.g., Myers v. Alliance for Affordable Servs.*, 371 F. App'x 950, 956 (10th Cir. 2010).

employee promised to do. There are at least three different types of agreements.

In the first, an employee promises to do nothing except work. The employment relationship is the most basic of agreements: the employee works and the employer pays wages. There are, of course, many promises that are implicit in such an agreement. The first section below discusses whether the implicit obligations of an employee give the employer a right to sue a nonperforming or underperforming employee.

In the second type of agreement, an employee may make general but non-quantifiable promises to an employer, such as expressly agreeing to act in the employer's best interest, to not have conflicts of interest, and to devote the employee's full time to the interests of the employer. The second section below discusses the effects of these general promises.

In the third type of agreement, an employee may make specific promises to an employer about quantifiable work or results, such as promising a certain number of hours to be worked or certain revenue to be received. The third section below discusses claims against employees based upon such assurances.

1. Where There is No Express Promise by the Employee

Where an employee agrees to do nothing other than show up to work and collect a paycheck, any claim against her for breach of contract must be based upon some implied promise on the employee's part. Generally, courts have agreed that in an employment relationship there are implicit (1) promises of good faith and fair dealing⁴⁵ and (2) duties of loyalty.⁴⁶

a. Implied duty of good faith

Claims of a breach of the implied duty of good faith⁴⁷ are commonplace in lawsuits filed by employees against their employers. The exact

45. While New Mexico does not recognize a duty of good faith and fair dealing in at-will employment relationships, *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 22, 131 P.3d 51, 58, it does in other employment relationships. See *Bourgeois v. Horizon Healthcare Corp.*, 117 N.M. 434, 438–39, 872 P.2d 852, 856–57 (1994); *Kramer v. N.M. Emp't Sec. Div.*, 114 N.M. 714, 717, 845 P.2d 808, 811 (1992).

46. *Central Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 10, 918 P.2d 1340, 1345 (“An employee has a duty of loyalty to the employer.”). See *Salter v. Jameson*, 105 N.M. 711, 713–14, 736 P.2d 989, 991–92 (Ct. App. 1987); *Gelfand v. Horizon Corp.*, 675 F.2d 1108, 1110 (10th Cir. 1982); RESTATEMENT (SECOND) OF AGENCY §§ 387–398 (1958).

47. For an excellent survey of cases involving employees' duties of good faith, see Jeffrey M. Judd, *The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties*, 39 HASTINGS L.J. 483 (1988).

nature of the implied duties of good faith has not been clearly explained by courts.⁴⁸ As noted by Judge Posner in *Market Street Assoc. v. Frey*, while courts have been emphatic about the existence of the duty of good faith, they have been cryptic as to its meaning.⁴⁹ Courts generally have been consistent in finding that, at a minimum, the duty of good faith (1) protects the rights that are in contracts and (2) should be relied upon when the parties to a contract fail to anticipate some situation that ultimately arises. The duty is used to “approximat[e] the terms the parties would have negotiated had they foreseen the circumstances.”⁵⁰

Parties to an employment contract rarely reach agreement as to what level of performance is expected from the employee. It is likely that both would say that they expect the employee to perform in a reasonable manner. If an employee falls below this expectation, the implied duty of good faith might be relied upon to “approximate the terms the parties would have negotiated” had they thought of it. If a reasonable employee would spend his or her time working and not playing computer solitaire, an employer might then venture to claim the solitaire-playing employee has breached the implied duty of good faith and fair dealing.

There are, however, at least two problems in this analysis. The first problem is the assumption that the implied covenant of good faith and fair dealing exists in every contract. The second problem lies with assuming that simply because the parties would have agreed that the employee should spend her time actually working, that they also would have agreed that the employer could sue the employee who played solitaire.

There is no question that courts frequently say that the implied duty of good faith and fair dealing exists in every contract.⁵¹ Although they give lip service to this phrase, it routinely appears in cases where the implied duty does exist. In other cases, however, where there is a question as to whether such a duty exists, the courts tend to provide guidance that belies the ready claim that such a duty always exists.

48. Notwithstanding the moralistic overtones of the phrase “good faith,” the doctrine is not intended to inject moral principles into contract law. See *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 & n.6 (D.C. Cir. 1984).

49. *Market St. Assoc. v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991).

50. *Id.* at 595. See also *Bourgeois v. Horizon Healthcare Corp.*, 117 N.M. 434, 438–39, 872 P.2d 852, 856–57 (1994) (noting that the good faith doctrine was developed as “a kind of safety valve to which judges may turn to fill gaps and qualify or limit rights and DUTIES otherwise arising under rules of law and specific contract language.”) (quotations omitted).

51. See, e.g., *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 13, 202 P.3d 801, 805; *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 12, 954 P.2d 56, 60; *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 60, 801 P.2d 639, 642 (1990).

In *Wallis v. Superior Court*⁵² the appellate court in California set forth criteria to evaluate in determining whether a duty of good faith was owed:

(1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonproft motivation, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party “whole”; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.

These criteria having been met, the party in the stronger position has a heightened duty not to act unreasonably in breaching the contract, and to consider the interest of the other party as tantamount to its own.⁵³

Under this reasoning, only the party in the stronger position, which is almost invariably the employer, can be held liable in tort for the breach of the covenant of good faith.⁵⁴ If this is also the law in New Mexico, then the implied covenant of good faith could not serve as the basis for a claim by employer against employee. But there is no clear guidance in New Mexico as to whether the implied covenant of good faith applies only to the party in the stronger position. There is, however, a hint.

In *Richards v. Allianz Life Insurance*, a case involving the application of the doctrine of economic duress, the court—perhaps intentionally and perhaps not—linked the concepts of good faith and the idea that at least some protections are for the party in the weaker bargaining position.⁵⁵ The court asserted that “more modern cases” looked to determine whether someone had been coerced into a transaction by the wrongful acts of another.⁵⁶ It then cited case law for the proposition that there could have been no “good faith” settlement where there was no evidence of a real dispute.⁵⁷ It cited further case law for the proposition that the economic duress doctrine was intended “to discourage or prevent an individual in a stronger position . . . from abusing that power.”⁵⁸ While this

52. *Wallis v. Superior Court*, 207 Cal. Rptr. 123 (Ct. App. 1984).

53. *Id.* at 129.

54. *Id.*

55. *Richards v. Allianz Life Ins. Co.*, 2003-NMCA-001, ¶ 30, 62 P.3d 320, 327.

56. *Id.*

57. *Id.*

58. *Id.*

case clearly has no direct application, perhaps it foreshadows the courts looking to apply certain protections only to the weaker party in transactions.

It will, of course, be up to the New Mexico appellate courts to decide whether the implied covenant of good faith applies to employees. In making that decision, our courts will have to address confusion in existing case law. Existing case law states there is an implied covenant of good faith in every contract.⁵⁹ In other cases, however, our courts have said that there is no implied covenant of good faith in an at-will employment contract.⁶⁰ Given the reasoning employed by the courts in these latter cases, it appears that the New Mexico courts are confusing the concept of the implied covenant of good faith as a means of “approximating the terms the parties would have negotiated” with moral obligations of the parties.⁶¹ The courts will need to address these inconsistencies.

If the courts mean to provide the duty of good faith so as to keep a party from interfering with another party’s ability to perform or enforce a contract, or that the courts can “approximate” terms for conditions where neither party anticipated the circumstances, there seems little reason to apply the obligation of good faith only to the person in the weaker position.

While it may be reasonable to impose upon employees a duty to perform as a reasonable employee would perform, that does not mean that a poorly performing employee should be sued. As noted above, courts may “approximate” the contractual duties that the parties would likely have set for themselves if they had considered the circumstances.⁶² It may be that the parties would have agreed that the employee, in exchange for wages, would perform reasonably. But allowing suit for poor

59. See *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, 94 P.3d 179 (surveying existing precedent).

60. See *Callahan v. N.M. Fed’n of Teachers-TVI*, 2006-NMSC-010, ¶ 22, 131 P.3d 51, 58.

61. *Market St. Assoc. v. Frey*, 941 F.2d 588, 595. New Mexico is not alone in this confusion. Both courts and commentators have often assumed that the duty of good faith imposes upon parties a duty to act morally. See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). New Mexico courts, however, have made it clear that whatever the duty of good faith, it does not impose upon an employer a duty to terminate an at-will employee only in good faith. *Callahan v. N.M. Fed’n of Teachers-TVI*, 2006-NMSC-010, ¶ 22, 131 P.3d 51, 58. That our court does not equate the duty of good faith with a moral duty was made clear when the court said that the duty of good faith does not require an employer to “act nicely.” *Henning v. Rounds*, 2007-NMCA-139, ¶ 28, 171 P.3d 317, 323 (quoting *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 684 (Mass. 2005)).

62. See *Frey*, 941 F.2d at 595.

performance assumes that the parties would have agreed to such a suit. Given the paucity of cases by employer against employee and the significant attention that such cases get when they are filed, it would seem that neither employee nor employer would typically expect that the employee could be sued for poor performance. It is even clearer that courts should not assume that the employee would have agreed to such a provision.

While the better rule seems to be that the duty of good faith should apply to both parties and not just to the employer, for the same reason that the California court would impose the implied covenant of good faith only on the party with the greater bargaining power, it seems that “approximating” an unusual provision that favors one party should be done only in favor of the weaker party.

b. Duty of loyalty

In addition to claims involving the duty of good faith, courts deal with claims against employees involving the duty of loyalty and generally find that employees owe such a duty.⁶³ Although the scope of that duty seems to vary from jurisdiction to jurisdiction,⁶⁴ generally the duty is understood to require that the employee act for the employer’s benefit in all matters connected with the employment, which of course limits the employee’s ability to accept compensation from anyone except the employer, the employee’s ability to compete with his or her employer, and the employee’s ability to work for another employer if there is a conflict of interest between the two employers.⁶⁵

If an employee has a duty of loyalty, including a duty to act for the employer’s benefit in all things during the day, it would be no stretch to argue that an employee who instead of working decides to play solitaire has breached that duty of loyalty. Up to this point, courts have evaluated

63. See, e.g., *Central Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 4, 918 P.2d 1340, 1344–45 (Ct. App. 1996); *Salter v. Jameson*, 105 N.M. 711, 714, 736 P.2d 989, 992 (Ct. App. 1987); *Gelfand v. Horizon Corp.*, 675 F.2d 1108, 1110 (10th Cir. 1982); *Lamorte Burns & Co. v. Walters*, 770 A.2d 1158, 1169 (N.J. 2001); *In re Cross*, 2010 Bankr. LEXIS 2608, at *3 (Bankr. N.D.W. Va. Aug. 27, 2010); *In re Peterson*, 296 B.R. 766, 778 (Bankr. C.D. Ill. 2003); RESTATEMENT (SECOND) OF AGENCY §§ 387–398 (1958).

64. A full evaluation of the duty of loyalty and the differences in the interpretation of the concept from one state to another, are beyond the scope of this article. For additional resources, however, see Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL’Y J. 321 (1999); Tory A. Weigand, *Employee Duty of Loyalty and The Doctrine of Forfeiture*, 42 Boston Bar J. 6 (Sept/Oct 1998).

65. JEFFREY F. BEATTY & SUSAN S. SAMUELSON, LEGAL ENVIRONMENT 383–85 (South-Western, 4th ed. 2008).

the employee's duty of loyalty in determining whether there is good cause to terminate an employee, and there appear to be no reported cases that have allowed an employer to recover damages from an employee on a theory of breach of implied duties as a result of an employee's failure to work productively.⁶⁶

c. General responses to contract claims against employees when there is no express promise made by the employee

Most of the few published decisions involving contract claims by employer against employee do not dwell on the intricacies of the law. There are, for example, no published decisions clearly analyzing the import of the duties of good faith or loyalty in such a situation. There are, however, cases in which courts have considered generally whether an employee can be held liable to an employer for poor performance. Generally, without clearly articulating a legal reason for the decision, these courts have found that the employer's remedy is not to sue the offending employee but to fire him.

The clearest example of this reasoning was expressed in *Fried v. Aftec, Inc.*⁶⁷ Fried sued after he was fired from his position as vice president of sales and marketing, claiming he was entitled to a substantial termination bonus.⁶⁸ The employer counterclaimed, seeking to recover lost profits allegedly caused by Fried's failure to do what he was hired to do.⁶⁹

At trial, representatives of the employer testified that Fried failed to learn about the employer's products, failed to provide accurate sales projections, gave away a shop-floor computer to close a deal, and made unauthorized trade concessions to a large corporate customer after a sale had already been booked.⁷⁰ The employer claimed that Fried was wholly "ineffective in building a sales organization, and in fact, had abandoned an established network of third-party vendors in favor of hiring individual salesmen, although none of the new salesmen generated any appreciable

66. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the court concluded that an employer could sue an employee for certain breaches of the duty of loyalty, but for other breaches of loyalty it seemed to agree that the employer's remedy is to discipline or terminate the employee. It held that to be actionable, the breach of the duty of loyalty had to involve (1) competition with the employer; (2) taking profits, property or business opportunities which belong to the employer; or (3) breaching the employer's confidences. *Id.* at 515-16. The court expressly noted that an employee was not liable to the employer simply because he had performed a job inadequately. *Id.* at 516.

67. *Fried v. Aftec, Inc.*, 587 A.2d 290 (N.J. Super. Ct. App. Div. 1991).

68. *Id.* at 291.

69. *Id.*

70. *Id.* at 292.

sales.”⁷¹ Members of management testified that Fried made “grandiose sales projections upon which” the employer based its financial commitments, requiring the principals of the business to make additional capital contributions to the business.⁷²

The court held that the employer could not pursue claims against Fried for poor performance, reasoning that it should have supervised Fried and, if unsatisfied with his performance, fired him:

Absent a special agreement, an employee whose best efforts resulted in poor performance, causing a loss of profits, does not become liable for such losses in a breach of contract action. An employer cannot give an employee negative fitness reports, retain the employee, and later sue him for failure to perform the agreement or for overall negligence or carelessness, allegedly causing the company financial losses The employer’s remedy is to fire the employee for ineptness or lack of diligence.⁷³

The court in *Fried* is certainly not alone in this reasoning. Other courts that have evaluated whether an employer can hold an employee liable for lost profits as a result of poor performance have also found that the employee is not liable and that the employer’s remedy is to fire the employee.

For example, when a medical group sued its former employee, claiming that she had failed to send out bills to insurers and that it lost substantial income as a result, the court stated that “[i]f the [medical group] believed that the [employee] was not performing her job, its remedy would have been to discipline her or to terminate her employment”⁷⁴

Similarly, in *Senescu v. Pape & Sons Construction, Inc.*, the Washington Court of Appeals rejected the argument that an employer has a cause of action against its employee to recover lost profits caused by the employee’s poor performance.⁷⁵ The court considered the dicta in many cases suggesting an employer may sue an employee for negligence, but it concluded that those cases are limited to situations in which the employee

71. *Id.* at 293.

72. *Id.*

73. *Id.* at 297. Although the Superior Court ruled that Fried could not be held liable for not doing a good job, it agreed that the employer could proceed against Fried for fraud, based upon allegations that he had misrepresented his qualifications; those misrepresentations led the employer to give Fried more responsibility than he could handle, resulting in his poor performance. *Id.* at 297–98.

74. *In re Peterson*, 296 B.R. 766, 781 (Bankr. C.D. Ill. 2003).

75. *Senescu v. Pape & Sons Constr., Inc.*, No. 22585-9-II, 2000 Wash. App. LEXIS 437, at *1 (Mar. 17, 2000).

has caused property damage or personal injury and that those claims do not extend to claims for economic injury.⁷⁶

There are cases in which courts have at least implied that a different result could be obtained, but they are of questionable value. For example, in *Male v. Acme Markets, Inc.*, the court in dictum wrote that “[n]o one disputes that the employer may institute a lawsuit against his employee for loss occasioned by the employee’s negligence or conversion.”⁷⁷ *Male*, however, involved a claim based upon dishonesty, not negligence.⁷⁸ The court in *Fried v. Aftec* later pointed out that the facts in *Male* involved dishonesty rather than neglect and specifically noted that no New Jersey case had found that an “inept employee is responsible for general lost corporate profits.”⁷⁹

While the specific question of whether an employer can sue a poorly performing employee for lost profits has been litigated infrequently, some of the courts have allowed such a claim, and others have held that such claims should not be allowed to proceed. Whether they are allowed seems to be based not upon sound legal reasoning but instead upon a sense of justice. For example, *Astra* was allowed to recover from *Bildman*,⁸⁰ who engaged in outrageous conduct, while neither *Aftec* nor *Pape & Sons* were allowed to pursue claims against their former employees.⁸¹ The results in all of the cases may have been fair, but the reasoning of the courts does little to provide guidance for future cases. Moreover, the reasoning in the latter two cases suggests a different result should have obtained in *Astra USA v. Bildman*.

2. Where the Promise Is General and Non-Quantifiable

There is a lack of published cases involving claims against employees for lost profits stemming from general but non-quantifiable promises made by the employee in employment contracts. Vague and unspecific promises are typically unenforceable, however, under general principles of contract law.⁸²

One could draw an analogy between cases brought by employers based upon general and non-quantifiable promises and cases involving

76. *Id.* at *17–19.

77. *Male v. Acme Mkts., Inc.*, 264 A.2d 245, 246 (N.J. Super. Ct. App. Div. 1970).

78. *Fried v. Aftec, Inc.*, 587 A.2d 290, 297 n.8 (N.J. Super. Ct. App. Div. 1991).

79. *Id.*

80. *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36, 58 (Mass. 2009).

81. *Fried*, 587 A.2d at 290; *Senescu v. Page & Sons Constr., Inc.*, No. 22585-9-II, 2000 Wash. App. LEXIS 437, at *1 (Mar. 17, 2000).

82. *See, e.g.*, *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 (9th Cir. 2000); *Ruiz-Roche v. Lausell*, 848 F.2d 5, 8 (1st Cir. 1988).

the question of whether an employer of such an employee has good cause to fire the employee. One such case was decided by the New Mexico Supreme Court long ago.⁸³

In that case, R.J. Kiker was hired by a life insurance company and specifically promised “to devote his whole time, attention and ability to the soliciting of life insurance” on behalf of his employer.⁸⁴ The employer fired him, claiming that he breached this obligation when he “took a group of Taos Indians on certain vaudeville tours for exhibitions purposes”⁸⁵ The New Mexico Supreme Court noted that there was evidence that the tours were intended to promote the interests of the insurance company by way of advertising and making new contacts, and the agreement “to devote . . . whole time, attention, and ability” to the employer’s interest could not be taken literally but must be reasonably interpreted.⁸⁶ It was up to the jury to decide whether the employee was reasonably allowed to lead the tour.⁸⁷

The typical non-quantifiable promise is a promise to do good work, to work hard, and to work for only the employer. Simply, the typical non-quantifiable promise is to be loyal and to be diligent. As we know from the preceding section, employees have already implicitly promised to be loyal and to be diligent:

When a contract of employment has been entered into[,] it is an implied condition of such contract, if not otherwise expressed, that the employee is bound to act in good faith and is to exercise reasonable care and diligence in the performance of his duties. Failure to so act in the interest of his employer constitutes a breach of his contract.⁸⁸

Vague and non-quantifiable promises, therefore, add little if anything to the analysis.

Moreover, vague promises are normally unenforceable. *Prince, Yeates & Geldzahler v. Young*⁸⁹ is stereotypical of cases involving promises that are too vague to enforce. The case involved a law firm that sued a former associate, alleging he breached his fiduciary duty by repre-

83. *Kiker v. Bank Sav. Life Ins. Co.*, 37 N.M. 346, 23 P.2d 366 (1933).

84. *Id.* at 346, 23 P.2d at 367.

85. *Id.* at 346, 23 P.2d at 368.

86. *Id.* at 346, 23 P.2d at 367.

87. *Id.* at 346, 23 P.2d at 368.

88. *Continental Secret Serv. Bureau, Inc. v. Vogelsang*, No. L-82-072, 1982 Ohio App. LEXIS 11803, at *6 (Ohio Ct. App. June 25, 1982) (quoting *Ohio Cas. Ins. Co. v. Capolino*, 44 Ohio Law Abs. 564, 567 (1945)). See also RESTATEMENT (SECOND) OF AGENCY § 400 cmt. c (1958).

89. *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ 14, 94 P.3d 179, 183.

senting and billing clients directly to avoid accounting to the firm for the fees he made. Young counterclaimed that Prince, Yeates & Geldzahler had made unfulfilled oral promises to him about compensation and partnership.⁹⁰ It was clear that even if there was a promise, it was vague and indefinite and was little more than a promise to treat Young fairly and equitably.⁹¹ The court held there was no enforceable agreement:

In the absence of any consensus on actual numbers or adoption of a mutually satisfactory method of calculating "fair and equitable" compensation, Prince Yeates' stated desire to be "fair" to Young, standing alone, is too indefinite to create a contractual obligation. "So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all."⁹²

3. Where the Employee Makes a Specific, Quantifiable Promise

The case law discussed to this point has involved claims based upon implied duties or vague and non-quantifiable promises. While courts have generally ruled that employees cannot be held liable under such circumstances for damages arising from their poor performance, an entirely different result could occur where the contract has specific and quantifiable promises. Exactly what courts will do is speculative, as there appear to be no reported decisions involving such a claim.

Although courts have not had the occasion to report a case involving a claim against an employee for breach of some specific and quantifiable promise, it is clear that a contract can be used both to set the expectations imposed upon the employee and the remedies available to the employer:

A contract may also, in appropriate circumstances, *raise* or lower the standard of performance to be expected of an agent or specify the remedies or mechanisms of dispute resolution available to the principal.⁹³

90. *Id.* ¶ 7, 94 P.3d at 182.

91. *Id.* ¶ 17, 94 P.3d at 184.

92. *Id.*

93. RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (2006) (emphasis added). *See also* *Alitalia Linee Aeree Italiane, S.p.A. v. Airline Tariff Pub. Co.*, 580 F. Supp. 2d 285, 294 (S.D.N.Y. 2008); *Greenwood v. Koven*, 880 F. Supp. 186, 194 (S.D.N.Y. 1995).

Generally, employees do not make specific and quantifiable promises concerning their performance. But certainly there are cases where that will happen. An employment contract, for example, may provide that in exchange for a set wage, a lawyer promises to bill at least 2,000 hours per year. Or a doctor may promise that he will see at least eight patients per hour, on average. And if the lawyer or doctor breaches that contract, he may be held liable for resultant damages.

What are those damages? They certainly could be the profit that the firm would have made had the employee billed the requisite hours or seen the agreed-upon number of patients. But such a case should rarely arise. After the first months of the lawyer's employment, the managing partners at the firm should know whether the lawyer is likely to reach his goal. If they realize that he will not reach his goal and yet continue to employ him, have they implicitly agreed to a revision of the contract? If the medical practice that employs the doctor is supervising him appropriately, then it would know that he is not seeing an average of eight patients per hour, and if the medical practice allows him to continue his employment, then has it, too, implicitly agreed to revise the contractual obligations?⁹⁴ Or can the employer simply wait until the period of time set for a benchmark has passed, then sue to recover the damages that it claims it suffered due to the lack of performance?

4. Liquidated Damages

Another class of contracts contains a liquidated damage clause or something tantamount to it. A liquidated damage clause is "[i]n effect, . . . an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement."⁹⁵ A liquidated damages provision is not to be interfered with "absent some persuasive justification."⁹⁶

Again, because the law in this field is relatively new, there appear to be no reported decisions in which an employment contract contained a provision allowing an employer to recover liquidated damages from a non-performing or underperforming employee. There are, however,

94. Generally, a party has a duty to mitigate its damages. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981). The terms of the contract between the parties, however, may impact the analysis. If the employee is not an at-will employee, then careful analysis would be required to determine whether the lawyer or doctor could be fired because he or she will likely not be able to reach their goal. The best way to avoid the uncertainty, of course, is in the original drafting of the contract.

95. *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005) (citing *Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 361 N.E.2d 1015, 1018 (N.Y. 1977)).

96. *Bigda v. Fischbach Corp.*, 849 F. Supp. 895, 902 (S.D.N.Y. 1994).

many cases that consider whether to allow an employer to recover liquidated damages pursuant to a contract that provides for them in the event of a violation of a non-compete agreement.⁹⁷

Generally, liquidated damage clauses are valid if, at the time the contract was signed, the parties could reasonably anticipate that proving damages might be difficult and if the amount was reasonable in light of the anticipated loss that might be caused by a breach.⁹⁸ Courts have differed over the question of who has the burden of proving the validity of a liquidated damage clause. The majority of courts have held that such a provision is presumptively valid, and the party who contests the validity has the burden of proving the clause is invalid.⁹⁹ A minority of courts have held, to the contrary, that the party seeking to enforce a liquidated damage clause has the burden of proving that the amount of damages was reasonable.¹⁰⁰

B. Tort Claims

A wide variety of tort claims has been pursued by employers against former employees, including claims for negligence, misrepresentation, violation of the covenant of good faith,¹⁰¹ and fraud. Typically, courts have considered those claims in the traditional tort context, without regard for whether tort claims can be pursued against employees, and without re-

97. See, e.g., *Junkin v. Ne. Ark. Internal Med. Clinic, P.A.*, 42 S.W.3d 432 (Ark. 2001); *Burzee v. Park Ave. Ins. Agency, Inc.*, 946 So. 2d 1200 (Fla. Dist. Ct. App. 2006); *Willard Packaging Co., Inc. v. Javier*, 899 A.2d 940 (Md. Ct. Spec. App. 2006).

98. RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

99. E.g., *Rattigan v. Commodore Int'l Ltd.*, 739 F. Supp. 167, 170 (S.D.N.Y. 1990); *S. Brooke Purll, Inc. v. Vailes*, 850 A.2d 1135, 1138 (D.C. 2004); *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 194 (Md. Ct. Spec. App. 2005); *Wassenaar v. Panos*, 331 N.W.2d 357, 361 (Wis. 1983). See 24 WILLISTON ON CONTRACTS, § 65:30 (4th ed. 2002); James P. Fenton, Note, *Liquidated Damages as Prima Facie Evidence*, 51 IND. L.J. 189 (1975).

100. See, e.g., *Pacheco v. Scoblionko*, 532 A.2d 1036, 1039 (Me. 1987). Colorado seemed to have reached a middle ground when its Court of Appeals noted that "the burden of proving that the liquidated damages clause constitutes a penalty is on the party so asserting, unless it patently appears from the contract itself that the liquidated damages agreed upon are out of proportion to any possible loss . . ." *Little v. Rohauer*, 707 P.2d 1015, 1017 (Colo. App. 1985), *rev'd in part on other grounds*, 736 P.2d 403 (Colo. 1987).

101. See discussion *supra* Part II.A.1.a. The potential for such a claim is mentioned again here because some courts have treated claims for a breach of the implied covenant of good faith as tort claims rather than contract claims. See, e.g., *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434, 1437-39 (9th Cir. 1990).

gard for the interplay between the tort claim and the contractual relationship between employer and employee.¹⁰²

Not surprisingly, there is no law in New Mexico that tells us whether our courts would allow such a claim. The only reported decision that involved such a claim was *Daddow v. Carlsbad Municipal School District*.¹⁰³ Ms. Daddow was fired from the schools.¹⁰⁴ She sued and the school district counterclaimed, alleging that Ms. Daddow failed to fill out the right paperwork in connection with some federal funding the school had received, and as a result, the federal government insisted that the schools return about \$60,000.¹⁰⁵ Alleging that the school's repayment of the money was the result of Ms. Daddow's "negligent and wrongful" conduct, the school district's counterclaim was an effort to get that money back.¹⁰⁶

The court did not decide whether an employee can be sued by her employer. Instead, the court avoided having to answer the question by relying on the New Mexico Tort Claims Act, a statute governing lawsuits against governmental entities and employees.¹⁰⁷ The statute allows a claim by the government against an employee for reimbursement only in the event of fraudulent intent or intentional malice.¹⁰⁸ Since the school district was seeking reimbursement from a government employee, and since it had not alleged fraud or intentional malice, the court ruled the school district had no right to recover.¹⁰⁹

Although the court in *Daddow* did not say whether such a suit would otherwise be allowed, it did hint at the answer. Unfortunately, it actually gave two hints—which are diametrically opposed.

The first hint came when the court stated that while the school brought a negligence claim, the court saw the claim as a request for indemnification.¹¹⁰ The court wrote that an employer may bring an action against its employee for "whatever . . . damage is occasioned by the employee's failure to exercise reasonable care and diligence."¹¹¹ Implicit in this reference is the idea that employers can sue their employees for losses caused by negligence. But in the very next paragraph, without any

102. See discussion *infra* Part II.B.1 about the potential application of the economic loss rule. To date, few courts have even considered the effect of the economic loss rule in tort claims made by employees against their employers. *Id.*

103. *Daddow v. Carlsbad Mun. Sch. Dist.*, 120 N.M. 97, 898 P.2d 1235 (1995).

104. See *id.* at 99, 898 P.2d at 1237.

105. See *id.*

106. See *id.*

107. NMSA 1978, §§ 41-4-1 to -30 (1989).

108. NMSA 1978, § 41-4-17 (1989).

109. *Daddow*, 120 N.M. at 107, 898 P.2d at 1245.

110. *Id.*

111. *Id.* (quoting 53 AM. JUR. 2d *Master & Servant* § 108 (1970)).

explanation and without acknowledging that the court was making a 180-degree turn, the court cited *Fried v. Aftec, Inc.*,¹¹² a New Jersey case that concluded that an employer's remedy against a negligent employee is to fire the employee.¹¹³ The court quoted *Fried* for the proposition that an "employer's remedy is to fire the employee for ineptness or lack of diligence."¹¹⁴ Given the inconsistent signals sent by the court, it is wholly unclear how the New Mexico appellate courts would rule.

1. The Economic Loss Rule

The economic loss rule should be considered by a party before filing a tort claim against someone with whom there is a contractual relationship. The essence of the economic loss rule is to allow principles of contract, rather than tort, to govern relationships between parties when the claim arises out of a contractual relationship.¹¹⁵ The purpose of the economic loss rule is "to preserve the bedrock principle that contract damages be limited to those 'within the contemplation and control of the parties in framing their agreement.'"¹¹⁶

When New Mexico first embraced the economic loss rule in *Utah International, Inc. v. Caterpillar Tractor Co.*, the court of appeals reasoned that "in commercial transactions, when there is no great disparity in bargaining power of the parties," economic losses should be allocated as the parties anticipate and agree.¹¹⁷ If the economic loss rule is for cases in which there is no great disparity in bargaining power, it is certainly easy to imagine that because of the employer's superior bargaining power, it should not be allowed to limit an employee's claim against an employer. But this logic should not hold true when the employer is the complaining party, as it was the employer who held the superior position and could have drafted the contract to provide whatever remedies it wanted.

Courts that have addressed the question have generally agreed that the economic loss rule, or at least the principles behind it, severely limit the ability of an employer to sue an employee in tort. For example, in

112. *Fried v. Aftec, Inc.*, 587 A.2d 290 (N.J. Super. Ct. App. Div. 1991). See discussion *supra* Part II.A.1.c.

113. *Daddow*, 120 N.M. at 107, 898 P.2d at 1245.

114. *Id.*

115. See *SME Indus., Inc. v. Thompson, Ventulett, Stainback and Associates, Inc.*, 2001 UT 54, ¶ 32, 28 P.3d 669, 680.

116. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 550, 893 P.2d 438, 446 (1995) (quoting *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 446 (4th Cir. 1990)).

117. *Utah Int'l, Inc. v. Caterpillar Tractor Co.*, 108 N.M. 539, 542, 775 P.2d 741, 744 (Ct. App. 1989).

Hudson v. Moore Business Forms, Inc., the court concluded that an employer could not sue an employee for tort damages.¹¹⁸ One issue before the court was whether the employer could recover tort damages for breach of the duty of good faith and fair dealing.¹¹⁹ The elements described by the court, however, included a requirement that the parties be of relatively unequal bargaining power.¹²⁰ The court refused to allow such a claim, noting that the employer enjoyed greater power than the employee: "It is thus clear that only 'the party in the stronger position,' i.e., the employer, can be held liable in tort for breach of the covenant of good faith and fair dealing implied in an employment contract."¹²¹

2. Breach of Fiduciary Duty

The common thread in the few lawsuits brought against former employees for lost wages or lost profits is a claim for breach of fiduciary duty. For example, the employer in *U.S. Card Partner Services v. Scopelliti*¹²² claimed that its employee breached fiduciary duties. Because of the paucity of case law on point, there is no developed law. There are, of course, a number of cases dealing with other types of claims against agents for breach of fiduciary duty, and an analysis of those cases may be instructive.

The *Restatement (Third) of Agency* describes the fiduciary duty that agents owe to their principals: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."¹²³ The scope and breadth of the duty, however, remains unclear.

For more than a century, courts have held that agents owe a fiduciary duty to their principals,¹²⁴ and it has been clearly established that employees are agents and their employers are their principals.¹²⁵ From these long-established principles, courts have automatically stated that employees owe a fiduciary duty to their employers.¹²⁶

118. *Hudson v. Moore Bus. Forms, Inc.*, 609 F. Supp. 467, 479 (N.D. Cal. 1985), *vacated in part*, 827 F.2d 450 (9th Cir. 1987).

119. *Id.* at 478.

120. *Id.*

121. *Id.* at 479.

122. *U.S. Card Partner Serv, Inc. v. Scopelliti*, No. 06-cv-00283 JJF (D. Del. 2006) (Pacer).

123. RESTATEMENT (THIRD) OF AGENCY: GENERAL FIDUCIARY PRINCIPLE § 8.01 (2006).

124. *Isham v. Post*, 34 N.E. 1084 (N.Y. 1893); *Foster v. Essex Bank*, 17 Mass. 479 (1821).

125. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

126. *See, e.g., Moser v. Bertram*, 115 N.M. 766, 858 P.2d 854 (1993).

A fiduciary duty imposes upon the fiduciary several duties, including a duty of loyalty¹²⁷ and in some circumstances, a duty of confidentiality.¹²⁸ The scope of the duty of loyalty is not clear, although it prohibits an employee from competing with her employer,¹²⁹ from making a secret profit,¹³⁰ from acting for an adverse party,¹³¹ or from competing with the employer in any way.¹³² In general, the duty of loyalty requires an employee to “subordinate her own interests to those of the [principal]”¹³³ and prohibits an employee from doing anything that is detrimental to the employer’s interest. Many courts have gone further and held that an agent also owes a duty of care.¹³⁴ If an employee owes a fiduciary duty of care, then his failure to act competently is actionable under existing legal principles.

The idea that the agent owes a duty of competence is embodied in the *Restatement (Third) of Agency*:

Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.¹³⁵

127. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

128. *Eckhardt v. Charter Hosp. of Albuquerque*, 1998-NMCA-017, 953 P.2d 722 (recognizing that a hospital employee had a duty of confidentiality).

129. RESTATEMENT (THIRD) OF AGENCY § 8.04 (2006).

130. *Cf.* RESTATEMENT (SECOND) OF AGENCY: DUTY TO ACCOUNT FOR PROFITS ARISING OUT OF EMPLOYMENT § 388 (1958).

131. RESTATEMENT (SECOND) OF AGENCY § 390 (1958).

132. RESTATEMENT (SECOND) OF AGENCY § 393 (1958); RESTATEMENT OF RESTITUTION § 199 (1937).

133. Robert Cooter, Bradley Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1074 (1991) (citations omitted).

134. *See, e.g.*, *Arst v. Stifel, Nicolaus & Co.*, 86 F.3d 973 (10th Cir. 1996); *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981); *RTC v. Heiserman*, 898 P.2d 1049 (Colo. 1995); *Crossman v. Reeves*, 825 P.2d 1330 (Okla. 1992); *Mueller v. Zimmer*, 2005 WY 156, 124 P.3d 340.

135. RESTATEMENT (THIRD) OF AGENCY: DUTIES OF CARE, COMPETENCE, AND DILIGENCE § 8.08 (2006). *Accord*, *Scottsdale Ins. Co. v. Mkt. Finders Ins. Corp.*, 359 Fed. Appx. 888 (9th Cir. 2009); *Rasmussen v. Cent. Fla. Council BSA*, No. 6:07-cv-1091-Orl-19GJK, 2009 U.S. Dist. LEXIS 14272 (M.D. Fla. Aug. 28, 2009); *Triton*

The idea that an agent owes a duty of care is valid in many settings. An attorney, for example, holds a position of trust and confidence; her client relies on her to navigate complex and often arcane waters. Similarly, an accountant is trusted by the client with often complex financial affairs and tax matters. The same is true with doctors, architects, and a variety of other professionals. If these trusted agents do not exercise due care, then their principals can suffer devastating losses, and it seems fair and just that the principal can hold the agent liable for those losses.

However, the broad, sweeping language of many courts that all agents owe fiduciary duties to their principals—and that therefore all employees owe fiduciary duties to their employers—seems to be inconsistent with the underlying purposes and history of fiduciary duties. The genesis of the imposition of a fiduciary duty was to impose on one party a duty above and beyond the duties assumed by contract, usually because one of the parties to the relationship might be unable otherwise to protect himself. In fact, courts have noted that a fiduciary duty usually begins with a contract but is imposed because the relationship is not equal.¹³⁶

Indeed, courts that have analyzed questions of whether a fiduciary duty is owed have found that absent some special relationship (like attorney-client, partner-partner, or doctor-patient), whether a fiduciary duty is owed is a fact-intensive inquiry: “The problem is one of equity and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines.”¹³⁷

In general, fiduciary duties exist in relationships characterized by a special trust or dependency.¹³⁸ Courts are often guided by whether the

Const. Co. v. E. Shore Elec. Serv., No. 3290-VCP, 2009 Del. Ch. LEXIS 88 (May 18, 2009).

136. Roy Anderson & Walter Steele, *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 241–42 (1994).

137. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).

138. *See, e.g., Paul v. North*, 380 P.2d 421, 426 (Kan. 1963) (A fiduciary relationship exists “where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard for the interests of the one reposing the confidence.” As noted by the court in *Shooshtari v. Sweeten*, 2003 WL 21982225, at *2 (Tex. App. 2003), “[a] fiduciary relationship is an extraordinary one and will not be lightly created.”).

purported fiduciary has broad discretion to act for the other¹³⁹ and whether the purported fiduciary has dominance over the other.¹⁴⁰

Employees will rarely be found to be fiduciaries in any fact-intensive review. While certain high-level employees may enjoy a relationship of special trust or dependency, be vested with broad discretion on behalf of the employer, or have dominance over the employer, the vast majority of employees certainly do not. Instead, the rank-and-file of the employed are often little more than cogs in industrial machinery, performing the tasks assigned to them with varying degrees of competency and thoughtfulness.

Some courts, of course, recognize that the broad legal principles discussed in certain cases and in works like the *Restatement* are to be taken with a grain of salt. For example, the Texas Supreme Court noted that courts should “be careful in defining the scope of the fiduciary obligations an employee owes when acting as the employer’s agent . . .” and specifically noted that courts should question whether a fiduciary duty exists at all with respect to any particular occurrence or transaction.¹⁴¹

3. Unintentional Torts

In negligence-based cases, courts have generally looked to determine whether the employee acted reasonably, without regard to the economic loss rule and without regard to whether the employee owed a duty to the employer.¹⁴² While some early cases held that employers could sue their employees for negligence or lack of diligence,¹⁴³ cases decided during the past forty years seem to go out of their way to avoid deciding whether such a claim can be brought. For example, in *Dome Petroleum v. Employers Mutual Liability Insurance Co.*, the plaintiff, which was subro-

139. Deborah DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 901 (“If the relationship, as the parties structure it, does not confer discretion on the ‘fiduciary,’ then his actions are not subject to the fiduciary constraint.”); Austin Scott, *The Fiduciary Principal*, 37 CALIF. L. REV. 539, 541 (1949) (“The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty.”).

140. Anderson & Steele, *supra* note 136, at 244 (“The basis for fiduciary responsibility is dominance of one person over another.”); DeMott, *supra* note 139, at 902, (“In many relationships in which one party is bound by a fiduciary obligation, the other party’s vulnerability to the fiduciary’s abuse of power or influence conventionally justifies the imposition of fiduciary obligation.”).

141. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002).

142. Although there are precious few cases in which the employer has sued an employee for negligence, the cases go back many, many years. *See, e.g.*, *Standard Oil v. Entriiken*, 4 Tenn. App. 57 (1926); *Darman v. Zilch*, 186 A. 21 (R.I. 1936).

143. *See supra* note 82.

gated to the interests of a bank, brought suit against a bank's employees and the bank's insurance company, claiming that the insurance company had a duty to indemnify the bank's employees.¹⁴⁴ The district court dismissed the claims, concluding that as a matter of public policy, the bank could not sue its employees for negligence, and therefore the plaintiff could not sue the bank's insurance company.¹⁴⁵

On appeal, the Third Circuit did not agree that an employer was precluded from suing an employee for negligence, but the court held that the claim was barred given the facts of the case.¹⁴⁶ The court expressly noted that there was tension between earlier New Jersey cases on the issue of whether an employer could sue its employees, but it found that it need not reach that question because of the unique facts and contracts at issue.¹⁴⁷

*Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc.*¹⁴⁸ is another example of a court avoiding the issue. The employer sued its employee for negligence. The Chancery Court avoided the question of whether such a suit was permissible by simply noting that "[a]ssuming that [Employee] owed a duty of care to [Employer] regarding his project management responsibilities, [Employer] nevertheless has failed to demonstrate that [Employee] breached that duty."¹⁴⁹

144. *Dome Petroleum v. Emp'r Mut. Liab. Ins. Co.*, 767 F.2d 43, 44-45 (3rd Cir. 1985).

145. *Id.*

146. *See id.*

147. *See id.* at 48-49. The language of the court, however, indicated that it favored the employee. Although it had cited to *Male v. Acme Markets, Inc.*, 264 A.2d 245 (N.J. Super. Ct. App. Div. 1970) for the proposition that an employer may sue an employee for negligent losses and to *Eule v. Eule Motor Sales, Inc.*, 170 A.2d 241 (N.J. 1961) for the proposition that suits by employers against employees are anachronistic, it later cited to just *Eule* for the proposition that the natural expectation would be for "the employer to save harmless the employee rather than the other way round." *Dome Petroleum*, 767 F.3d at 48-49 (quoting *Eule*, 170 A.2d at 242). In fact, the court went on to say that: "[t]he general expectation is that the risk of loss will not be passed to employees. We believe that an interpretation of the subrogation clause that would pass the risk of loss to the employees, while saving the employer harmless, would be contrary to the ordinary understanding of reasonable businessmen." *Dome Petroleum*, 767 F.3d at 49. While the court avoided making a decision as to the right of employers against employees, the dictum endorses the language in *Eule* that "reasonable businessmen" expect to bear the losses caused by employees. *Id.*

148. *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, No. 3290-VCP, 2009 Del. Ch. LEXIS 88 (May 18, 2009).

149. *Id.* at *75.

Triton also points out the source of the duty upon which a claim for negligence is predicated is the fiduciary duty owed a principal by its agents:

To succeed on a claim for negligence, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff; the defendant breached that duty; and the breach proximately caused injury to the plaintiff. An agent owes a fiduciary duty to his employer or principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.¹⁵⁰

As noted in Section II.B.2, there is a substantial question as to whether every employee owes a fiduciary duty to her employer and, if so, the nature and extent of that duty.¹⁵¹ It necessarily follows that there is a question of what duty is owed in evaluating a claim of negligence. To the extent that the duty upon which a negligence claim arises is based upon a fiduciary duty, a claim for negligence is simply another label for a claim of breach of fiduciary duty.¹⁵²

In other cases, courts have gone out of their way to find that claims for negligence could not succeed on the merits. For example, in *Swafford v. Johnson*, an employer sued its former employee for negligence.¹⁵³ Swafford claimed severe financial loss because the employee failed to send a timely rent check for the right amount.¹⁵⁴ The jury found that the employer was 45 percent at fault and that the employee was 55 percent at fault and awarded damages accordingly.¹⁵⁵ On appeal, the employee argued that she could not be sued for negligence.¹⁵⁶ Although the court rejected that argument based upon *stare decisis*,¹⁵⁷ it rejected the

150. *Id.* at *74-75.

151. *See supra* Section II.B.2.

152. *But see* *Zastrow v. Journal Commc'n*, 2006 WI 72, 718 N.W.2d 51; *La Costa Beach Club Resort Condo. Ass'n v. Carioti*, 37 So. 3d 303 (Fla. Dist. Ct. App. 2010), both holding that there is no claim for a negligent breach of a fiduciary duty, which at least implies that only a willful breach of a fiduciary duty could be actionable.

153. *Swafford v. Johnson*, No. M1999-00463-COA-R3-CV, 2004 Tenn. App. LEXIS 471 (July 22, 2004).

154. *See id.* at *4.

155. *See id.* at *7.

156. *See id.* at *8.

157. The court's logic was tortured. In *Swafford*, the court noted a 1926 decision, *Standard Oil Co. of La. v. Entriken*, 4 Tenn. Ct. App. 57 (1926), in which—without thoughtful analysis—the court concluded that “an employee is liable to his principal or to his employer for acts of negligence causing damage to such principal or employer,” and concluded that it was bound by the earlier decision. In response to the employee's argument that “the age of this Court's decision in *Entriken* warrants its disregard in the face of current public policy,” the court responded by noting that

apportionment of fault attributed to the parties by the trial court and ruled that as a matter of law the employer was 50 percent at fault.¹⁵⁸ Under Tennessee's modified comparative fault system,¹⁵⁹ the employer was barred from recovery because the employee's negligence did not exceed its own negligence.¹⁶⁰

4. Intentional Tort Claims

In contrast to claims for negligence, courts have not struggled with the question whether an employer can sue an employee for an intentional tort but instead have consistently found that intentional misconduct is actionable.¹⁶¹ Whether or not an employee owes a fiduciary duty to his employer, it stands to reason that he should be held liable for any deliberate act to injure his employer. If, for example, an employee is trusted with confidential information and the employee deliberately gives that infor-

other courts had reached the same conclusion as it reached, and then cited to a case that was nearly as old. *Swafford*, 2004 Tenn. App. LEXIS 471, at *13-14. The court then sought to support its decision by citing to a line of cases, including *Darman v. Zilch*, 186 A. 21 (R.I. 1936), that dealt with the distinct question of whether an employer could sue an employee for physical damage to the employer's property. *See Swafford*, 2004 Tenn. App. LEXIS 471, at *15-16. *See also supra* Part I.D (discussing claims for damages to the Employer's Property).

158. *See Swafford*, 2004 Tenn. App. LEXIS 471, at *26-27.

159. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court of Tennessee adopted a system of MODIFIED COMPARATIVE FAULT. Under this system, a plaintiff may recover damages where the plaintiff's fault is less than the defendant's fault. The plaintiff's recovery of damages, however, is reduced to reflect his or her degree of fault. *Id.* at 57.

160. *See Swafford*, 2004 Tenn. App. LEXIS 471, at *27.

161. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999) (reasoning that a claim in tort could be brought against a disloyal employee if the disloyalty evinces an intent to act adversely to the interest of the employer). Even in New Jersey, where the court appears to have found that an employer's remedy generally is to fire an employee rather than to sue him, the court consistently has signaled that an employer can sue an employee for intentional torts. More than fifty years ago, the supreme court of New Jersey said that employer suits against employees were anachronistic. *See Eule v. Eule Motor Sales, Inc.*, 170 A.2d 241 (N.J. 1961). In *Eule*, the court did not, however, overrule the earlier case of *Male v. Acme Markets, Inc.*, 264 A.2d 245 (N.J. Super. Ct. App. Div. 1970), where the court in dictum said that "[n]o one disputes that the employer may institute a lawsuit against his employee for loss occasioned by the employee's negligence or conversion." *Id.* at 246. Since then, the two cases have been reconciled by noting that *Male* did not involve negligence but involved employee dishonesty. *Dome Petroleum v. Emp'r Mut. Liab. Ins. Co.*, 767 F.2d 43 (3rd Cir. 1985). It follows, of course, that the New Jersey courts would therefore allow an employer to sue an employee for a loss caused by the employee's intentional tort of dishonesty.

mation to a competitor, then the employee should not be surprised to be found liable for the resultant injuries.

C. *Claims for Indemnification*

The law has long been settled that an employer is vicariously liable for the torts of an employee that are committed in the course and scope of the employment. This well-entrenched principle is rooted in public policy as a way of passing to the employer the economic cost of injuries or losses caused by the business. Typically, businesses buy insurance to indemnify them in the event of a claim, often naming their employees as insureds under the policy.

Another long-settled rule of law is that a party that has not acted wrongly, but that is held liable to a third party because of some independent, preexisting legal relationship with the tortfeasor, has a right to be indemnified by the tortfeasor.¹⁶² It was commonly accepted that an employer that was held liable for the acts of its employee had a right to demand that the employee indemnify it:

The right to indemnification may arise through vicarious or derivative liability, as when an employer must pay for the negligent conduct of its employee under the doctrine of respondeat superior¹⁶³

There is, however, a tension between the rule imposing liability on the employer and the allowance of the claim by the employer against the employee for indemnification. The tension is that the rule of vicarious liability is based upon the idea that the risks of loss from business operations should rest on the business, which can insure against the loss, or pass those costs on to its customers. In contrast, the rule requiring an employee to indemnify the employer puts the loss back on the employee's shoulders.

Because of the inherent tension between these two principles, an employer should not be allowed to seek indemnification from its negligent employee absent special circumstances, and not all courts will allow an employer to seek indemnification. For example, in *Eule v. Eule Motor Sales*, a woman sued a partnership in which her husband was a member, alleging the partnership was liable because her husband had negligently

162. See *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F.2d 368, 370 (10th Cir. 1954); *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 436, 457 P.2d 364, 368 (1969).

163. *Amrep Sw., Inc. v. Shollenbarger Wood Treating, Inc.*, 119 N.M. 542, 546, 893 P.2d 438, 442 (1995) (citing *Rio Grande Gas Co.*, 80 N.M. at 436, 457 P.2d at 368).

injured her while acting for the partnership.¹⁶⁴ At the time, the law prohibited spouses from suing each other.¹⁶⁵ The wife argued that her claim was against the partnership, not her husband; the partnership responded by claiming that if it was held liable, it could seek indemnification from the husband, thus effectively allowing the wife to circumvent the rule that prohibited her from suing her husband directly.¹⁶⁶ The court rejected the partnership's position, ruling that it would not be able to sue the husband for indemnification, and thus the wife should be allowed to recover:

The theoretical liability of an employee to reimburse the employer is quite anachronistic. The rule would surprise the modern employer no less than his employee. Both would expect the employer to save harmless the employee rather than the other way round, the employer routinely purchasing insurance which protects the employee as well. Except for the rare case in which the liability of the employee may serve as a stepping stone to reach someone else, the prospect of a claim for indemnity is only of academic significance.¹⁶⁷

The court did not rest there but went on to point out that it is the employer's work that creates the opportunity for injury, and the economic reality that the employee cannot be expected to bear the loss of the injuries and losses that are certain to occur:

We should remember we are dealing with negligence which often is but a matter of split-second inadvertence. The concentration of people and machines means inevitably a substantial and predictable incidence of negligent injury. The employee can hardly carry that burden. Reflecting the commonly-held view that the enterprise should be the final repository of the inevitable risk of loss, the Legislature recently provided that an employee shall not be liable for negligent injury of a co-employee entitled to workmen's compensation benefits. We note also that the United States Supreme Court would not find the federal government could seek

164. *Eule*, 170 A.2d 241, 241.

165. *Id.* at 242.

166. *Id.*

167. *Eule*, 170 A.2d at 242-43 (citation omitted). *Accord, e.g.*, *Fried v. Aftec, Inc.*, 587 A.2d 290, 297 (N.J. Super. Ct. App. Div. 1991) ("New Jersey apparently follows the New York rule in not permitting an employer to seek indemnity from an employee for acts of negligence causing the employer losses. Rather, the employer usually indemnifies the employee."); *Brown v. United Cerebral Palsy/Atl. & Cape May, Inc.*, 650 A.2d 848, 850 (N.J. Super. Ct. Law Div. 1994) ("The employee should not, therefore, be required to bear that cost by way of indemnification to the employer.").

indemnity from its employee. As we have said, employers do not in fact seek to pass the burden to their employees.¹⁶⁸

The court's reference to claims that "serve as a stepping stone to reach someone else" was the basis of the decision in *Warren Hosp. v. Am. Cas. Co. of Reading*.¹⁶⁹ Warren Hospital employed a nurse, Tracy Lee, who cared for the plaintiff, Haggerty, while he was in the hospital.¹⁷⁰ As a result of allegedly substandard care provided by Lee, Haggerty required a temporary colostomy, and later filed suit against Warren Hospital and Lee.¹⁷¹ Haggerty claimed that Lee was negligent; his claims against Warren Hospital were based upon theories of vicarious liability stemming from the care provided by Lee.¹⁷² Warren Hospital assumed the defense of the Haggerty lawsuit on behalf of itself and of Lee.¹⁷³ Later, it settled the claims against both for \$425,000.¹⁷⁴

Warren Hospital was self-insured for the first \$1 million of liability and was then insured through Lexington Insurance for claims over \$1 million and up to \$5 million, with additional insurance by other carriers for amounts in excess of \$5 million.¹⁷⁵ Lee carried a separate policy, issued by American Casualty Company (ACC), with limits of \$1 million.¹⁷⁶ Warren Hospital sued ACC, claiming that it should pay the loss, as it insured the active tortfeasor, and that Lee should indemnify Warren Hospital.¹⁷⁷

Noting that the court in *Eule* expressly allowed a case for indemnification where the claim would serve as a "stepping stone to reach someone else," the court agreed that Warren Hospital's claims for indemnification would be allowed as a stepping stone to Lee's insurance

168. *Eule*, 170 A.2d at 243 (citing *United States v. Gilman*, 347 U.S. 507 (1954)) (citations omitted). There are, of course, cases in which it is entirely appropriate to allow an employer to pursue a claim against an employee for indemnification. If, for example, an employee of a hospital raped a patient, it is possible that the hospital could be found vicariously liable, because even though the tort was intentional, it was made possible by the employee's position. See *Samuels v. S. Baptist Hosp.*, 594 So.2d 571 (La. Ct. App. 1992). It would only make sense to allow the employer to seek indemnification for the loss from the employee.

169. *Warren Hosp. v. Am. Cas. Co. of Reading*, No. 07-558 (JLL), 2009 U.S. Dist. LEXIS 87975, at *8-9 (D. N.J. Sept. 23, 2009).

170. *See id.* at *1-2.

171. *See id.* at *2.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.* at *3.

177. *See id.* at *4.

coverage.¹⁷⁸ It did so not to make Lee personally liable but because doing so triggered a duty by Lee's insurer to pay.¹⁷⁹

In addition to the reasoning in the *Eule* case, there is yet another reason courts should be leery of allowing an employer to seek indemnification from its employee. When an employee's alleged tortious conduct causes injury to a third party, the plaintiff in the resultant lawsuit generally sues both the employee and the employer (hence the reason that the employer seeks indemnification). Claims against the employer may be based on respondeat superior liability as well as allegations that the employer was negligent in hiring, training, supervising, or retaining the employee.¹⁸⁰ When the employer is alleged to be both vicariously liable for the employee's conduct and liable because the employer, in essence, allowed the employee to be negligent, courts have generally held that an employer who admits that an employee was acting in the course and scope of employment is not subject to liability for claims of negligence in hiring, training, supervision, or retention:

The rationale for the rule is simple. Courts applying the rule argue that the additional theories of negligence impose no additional liability above and beyond the respondeat superior liability. Since the other theories impose no additional liability, but "merely allege a concurrent theory of recovery, the desirability of allowing these theories is outweighed by the prejudice to the defendants." This prejudice is the evidence of prior bad acts that is often presented to the jury in cases where negligent entrustment is alleged and that would constitute inadmissible propensity evidence if not for the additional negligence claims. There is concern that many plaintiffs' reason for pursuing the additional negligence claim is to put the potentially inflammatory evidence in front of the jury. As a result, most courts disallow a plaintiff's additional negligence.¹⁸¹

178. *Id.* at *8–9.

179. *See id.*

180. *See, e.g.,* *Delfino v. Griffo*, 2011-NMSC-015, 257 P.3d 917; *Lessard v. Coronado Paint & Decorating Ctr. Inc.*, 2007-NMCA-122, 168 P.3d 155; *Los Ranchitos v. Tierra Grande, Inc.*, 116 N.M. 222, 861 P.2d 263 (Ct. App. 1993).

181. J.J. Burns, Note, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 660 (2010-2011) (footnotes omitted).

While courts have not uniformly adopted this rule, the majority of courts that have considered the issue have adopted the same reasoning and ruling.¹⁸²

III. RETHINKING THE LAW: A PROPOSAL FOR AN ANALYTICAL FRAMEWORK

Clearly, the law in this particular field is inconsistent. The inconsistency is, in part, due to different policy considerations that are of varying importance to different courts. However, the bulk of the inconsistency seems to exist simply because courts have applied a variety of legal principles, developed in different times and for different purposes. The time has come to revisit the rules to be applied to claims made by employers against employees.

The proper development of the common law takes years. While I am as impatient as the next person and desire a result now, the simple fact of the matter is that no one can anticipate every situation that might arise, and only through the passage of time can we develop a body of law that will provide a fair, just, and consistent result. To that end, no one proposal will prove to meet the needs of every situation. We can, however, learn from the past, and therefore it is appropriate to create a working theory, one that should be modified and adapted over time, as the circumstances dictate.

There are a number of reasons to be concerned, some social and some legal, about whether employers are allowed to sue their employees. First, much of the law has been developed to protect the little guy from the big guy, to protect the disenfranchised from those in power, and to protect those who are not in a position to protect themselves.¹⁸³ One such group that has been the subject of virtually countless protections is the employee.¹⁸⁴ If anything, the current economic reality is that employees—now more than ever—are in need of protection.

It is not enough to answer this challenge by noting that an employee will not be found liable unless he has done something wrong. The mere fact that an employee has been sued has devastating consequences. In

182. See Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229 (2010).

183. See, e.g., Fair Labor Standards Act, 42 U.S.C. §§ 2000e to 2000e-17 (2006); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000); Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2006).

184. See *supra* note 183.

fact, a large body of case law concerning qualified immunity¹⁸⁵ has developed to protect public employees from certain types of lawsuits simply because courts have recognized that the lawsuit itself will damage an employee.¹⁸⁶

Second, an employer's ability, or at least willingness, to sue a former employee may be tied to the employee's claims against the employer. It is probably no coincidence that the overwhelming majority of reported decisions involving employers' claims against employees are brought as counterclaims. Many may have been brought in good faith, but one has to suspect that others are brought because the employer (or its attorney) believes that the best defense is a good offense. As the courts noted in *Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad*¹⁸⁷ and *Yoch v. Burlington Northern Railroad*,¹⁸⁸ the possibility of a lawsuit by employers against employees may discourage an employee from making a valid claim against the employer; any practice that discourages an employee from bringing a meritorious lawsuit against an employer should be viewed critically.

Congress and most state legislatures have enacted laws making it illegal to retaliate against an employee for presenting certain types of claims, most notably those brought under Title VII of the Civil Rights Act.¹⁸⁹ Courts have uniformly agreed that meritless counterclaims against a former employee are a form of retaliation.¹⁹⁰ It is but a small step to take that logic one step further and prohibit any retaliation against an employee for seeking to protect his rights, which means employers should always be barred from filing meritless counterclaims against employees who sue them. Employers will argue that their counterclaims are not meritless, leading to more litigation over whether the litigation was proper. Limiting an employer's right to sue a former employee will limit that self-generating litigation.

185. Qualified immunity is designed to shield government officials from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

186. Qualified immunity, therefore, is not just an immunity from a monetary judgment, but is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*

187. *Stack v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 615 P.2d 457 (Wash. 1980).

188. *Yoch v. Burlington N. R.R. Co.*, 608 F. Supp. 597, 598 (D. Colo. 1985).

189. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2006).

190. *See, e.g., Robinson v. Dean Foods Co.*, 654 F. Supp. 2d 1268 (D. Colo. 2009).

Third, the law is in a horribly confusing state. As discussed in this article, courts have made inconsistent rulings, some refusing to allow suits against employees and some allowing such claims. The courts that do allow such claims offer different rationales. Among those same courts, many go out of their way to claim to allow such suits but then find no merit in them.

Fourth, employers have the power to supervise their employees and to insist that the employee perform better or to fire the employee for unsatisfactory performance. There is no need to grant the employer the additional remedy of suing an employee for a lack of diligence or work ethic. Instead, as the court in New Jersey so plainly stated: "The employer's remedy is to fire the employee for ineptness or lack of diligence."¹⁹¹

The paragraphs that follow discuss each of the four types of claims discussed in Section I and offer as to each a modest proposal as a starting place from which to rethink lawsuits against employees.

A. *Claims for Return of Wages and Claims for Lost Profits*

I take these two types of claims together because they are analytically similar in many regards, and because the policy issues that necessitate a change in the law are the same for both types of claims. I tend to align myself with Professor Charles Sullivan, who explored the line of cases pertaining to the "faithless servant" and concluded that courts should do away with any remedy against an employee based upon the duty of loyalty, save and except for certain "higher level" employees.¹⁹² I would, in fact, go a bit further.

First, I would do away with most remedies¹⁹³ against an employee based upon a fiduciary duty. Certainly, at least some employees do owe

191. *Fried v. Aftec, Inc.*, 587 A.2d 290, 297 (N.J. Super. Ct. App. Div. 1991). The case was remanded for a new trial. Although the Superior Court ruled that Fried could not be held liable for not doing a good job, it agreed that the employer could proceed against Fried for fraud. Fried had misrepresented his qualifications, and the misrepresentations caused the employer to give Fried more responsibility than he could handle, resulting in the poor performance. The court agreed that Fried could not be held liable for his failed performance, except to the extent that his failures stemmed from the fact that he did not have the qualifications and experience that he claimed to have. *See id.*

192. Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777, 824 (2011).

193. Like the court in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), I would allow claims for the breach of the duty of loyalty when the breach involved (1) competition with the employer; (2) taking profits, property or business opportunities which belong to the employer; or (3) breaching the employer's confi-

such a duty. If a drug manufacturer paid a chemical engineer to develop a drug for high blood pressure and the employee had access to confidential and proprietary data about the years of research performed to date, surely that employee would have a duty of loyalty and could not work for another drug manufacturer while employed with the first. Surely, too, that employee would owe her employer a duty of confidentiality. But an employee hired to unload ships at a dock, to wash cars, or to sack groceries should be free to work for whomever he wants, without fear that he might be sued for breach of the duty of loyalty.

While there is much merit to the idea set forth by Professor Sullivan (that we treat the higher level employee working for the drug company differently than we treat the dock worker, the car washer, and the grocery sacker), allowing claims based upon the employee's line of work opens the door to litigation that will be fact intensive. One of the very reasons that I would limit the employer's right to recover is to free employees from the fear of a lawsuit, in much the same way as government employees are free from the fear of lawsuits pursuant to the doctrine of qualified immunity. Allowing fact-intensive legal determinations will not accomplish that goal as fully as possible.

Instead of allowing tort-based lawsuits, or lawsuits based upon a common-law fiduciary duty against high-level employees, I would impose upon employers a duty to draft employment contracts that specifically impose certain duties and burdens on their employees and would specifically allow for a suit for breach of contract. The contract, of course, could not be vague or indefinite but would clearly establish the employer's expectations. It would give the employee fair notice of what is required of him and the consequences of a failure to perform.

Substituting contractual obligations for fiduciary obligations would not be unduly burdensome. Relatively few high-level employees would be affected because employers would draft contracts with such specific provisions only when it is required to meet their needs, not for rank-and-file employees. It would provide certainty to both the employer and the employee. Moreover, it is consistent with cases that have held if there is a comprehensive written contract, there can be no claim for breach of fiduciary duties. Instead, the obligations and the remedies of the parties are found in the contract.¹⁹⁴

dences. *Id.* at 515–16. I would not hold that the employee was liable to the employer simply for performing a job inadequately.

194. *Alitalia Linee Aeree Italiane v. Airline Tariff Pub. Co.*, 580 F. Supp. 2d 285 (S.D.N.Y. 2008) (citing *Med. Research Assoc., P.C. v. Medcon Fin. Servs., Inc.*, 253 F. Supp. 2d 643, 649–50 (S.D.N.Y. 2003) (dismissing breach of fiduciary duty claim as duplicative of breach of contract claim)); *Brooks v. Key Trust Co. Nat'l Ass'n*, 26

I would also allow a claim by an employer against an employee for the return of wages or for lost profits when the employee has intentionally failed to perform as expected, allowing claims against people like the president in *Astra USA v. Bildman*, who clearly abused his position for personal gain.¹⁹⁵

B. Claims for Indemnification

As noted in Section I.C, above, the majority of courts allow claims against employees for indemnification and contribution. A handful of courts, however, reject such claims, noting that the employer should indemnify the employee, not the other way around.¹⁹⁶ In evaluating which rule makes the most sense, there are at least three important considerations.

The first concern is whether the employer should be allowed to be indemnified or whether it should absorb the loss as a cost of doing business. The typical claim for indemnification arises when the employer has been liable, by operation of law, for the employee's tort. Under the doctrine of respondeat superior, the negligence of the employee is imputed to the employer, which then is liable for the loss.¹⁹⁷ While there are a number of policy reasons behind the doctrine of respondeat superior, at least one is that the employer, through its efforts to make a profit, has set the stage for the negligence and should absorb the cost of the resulting injury as a cost of doing business:

Under the respondeat superior doctrine, an employer may be vicariously liable for torts committed by an employee. The rule is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business.¹⁹⁸

A.D.3d 628, 630 (N.Y. App. Div. 2006) (stating that the claim for breach of investment advisor's fiduciary duty "was properly dismissed" because the supporting allegations "are either expressly raised in plaintiff's breach of contract claim or encompassed within the contractual relationship."). Virginia follows the same rule. *Augusta Mut. Ins. Co. v. Mason*, 645 S.E.2d 290, 295 (Va. 2007).

195. See *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36 (Mass. 2009).

196. See *Eule v. Eule Motor Sales*, 170 A.2d 241, 242-43 (N.J. 1961).

197. See discussion *supra* Section I.C.

198. *Kephart v. Genuity, Inc.*, 38 Cal. Rptr. 3d 845, 852-53 (Ct. App. 2006) (citation omitted).

If the employer is allowed to be indemnified by the employee, then of course it is not absorbing the loss as a cost of doing business and instead is passing it off to an employee.

The second concern is whether allowing indemnification claims might dissuade an employer from the expense of buying insurance. If an employer can obtain reimbursement from its employees for any losses they cause, it might be less inclined to obtain insurance.¹⁹⁹ If there is a resultant loss, and neither the employer nor the employee has the assets to pay for the loss, then the victim goes uncompensated. If the employer knows that it alone is responsible for the loss, then the employer will be more likely to obtain insurance.

Moreover, the likelihood of a claim for indemnification under the current majority position is largely dependent on whether the employer did obtain insurance. The typical insurance policy issued to a business insures both the employer and its employees. If the insurance company pays for a claim, it could not then sue its own insured for reimbursement.²⁰⁰

There is also the potential for an unfair or unjust indemnification claim. When a business causes an injury, the resultant claim is often not against the employer solely on the theory that the employer is vicariously responsible for the negligence of its employee, but also on the theories that the employer was negligent in hiring the employee, negligent in training or supervising the employee, and negligent in the retention of the employee.

199. The chance of such a claim, of course, would increase with the chance of the collectability of a judgment. That means that employees with greater assets, or with insurance coverage, would be sued more than other employees. But the claim could also be used as a bargaining chip against an employee who is judgment proof but is pursuing an otherwise valid claim against his employer.

200. *See State ex rel. Regents of N.M. State Univ. v. Siplast Inc.*, 117 N.M. 738, 742, 877 P.2d 38, 42 (1994). The court reasoned that:

To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate these basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend the premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured.

Id. at 43, 877 P.2d at 743. *See also* Great Am. Ins. Co. v. W. States Fire Prot. Co., 730 F. Supp. 2d 1308, 1320 (D.N.M. 2009).

Such claims find their genesis in *Holladay v. Kennard*, in which the court held that an employer has a duty to exercise “ordinary care or diligence” in selecting his agent.²⁰¹ The court illustrated the principle:

Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be any want of ordinary care or diligence to entrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to entrust to such a person the cleaning or repair of a watch.²⁰²

Courts have held, fairly consistently, that if an employer is sued both for vicarious liability based upon the alleged tortious conduct of its employee, and for negligence in connection with hiring, training, supervising, or retaining that same employee, the negligence claims will be dismissed if the employer admits that the employee—at the time of the alleged tort—was in the course and scope of his employment.²⁰³

The basis for the rule limiting the employer’s liability is clear: if the employer already admits that it is liable for the employee’s negligence, it is wholly unnecessary, and often prejudicial,²⁰⁴ for the plaintiff to prove that the employer was negligent in hiring the employee.

When a plaintiff sues both the employee and the employer, the doctrine of collateral estoppel would prohibit the employee from later attacking the findings. This leads to the potential of a case in which an employee is found to be 100 percent liable (because the plaintiff was faultless), but the employer—who hired the employee knowing that he had a bad driving record and thus was negligent in training, supervising, and retaining the employee—is able to seek indemnification for 100 percent of the judgment from the employee.

Given the policy considerations, the same rule for property damage claims should be applied to claims for indemnification, and employers

201. *Holladay v. Kennard*, 79 U.S. 254, 258 (1870).

202. *Id.*

203. See J.J. Burns, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657 (2011); Richard A. Mincer, *The Viability of Direct Negligence Claims against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229 (2010).

204. If the injuries arise out of an automobile collision in which the employee is alleged to have been negligent, the employee’s prior driving history would be wholly irrelevant and inadmissible under Rule 404(b) of the Federal Rules of Evidence. If the plaintiff were allowed to pursue a claim for negligent hiring against the employer, however, he would be entitled to introduce evidence of the employer’s bad driving history.

should be allowed to pursue claims for indemnification against employees only when the loss was the result of the employee's gross negligence or intentional misconduct.

C. Claims for Damage to the Employer's Property

As noted in Section I.D,²⁰⁵ employers have been able to sue employees and recover for property damage to the employer's property. *Douglas v. Kinger*, a Canadian case, provides a basis for rethinking the wisdom of allowing such claims.²⁰⁶ Kinger was employed to do a variety of odd jobs, including mowing a lawn. He found a gas can in his employer's boathouse but was unsure whether there was enough gas in the can to fill the lawn mower, so he held a lighted match to the mouth of the gas can to peer inside. The resulting fire destroyed the boathouse. The employer's insurer paid the loss and then brought an action in subrogation against the employee.

The court held that, absent gross negligence or intentional misconduct, an employer could not recover from the employee.²⁰⁷ The court explained that its ruling was based upon sensible resource allocation and to avoid the requirement of double insurance. The ruling also was made in recognition of the fact that employees are generally not in a position to contract with employers or customers regarding their potential liability for damage, and it is the employer who is in a better position to take organizational measures to reduce risk and take out insurance.²⁰⁸

The Canadian courts may have the better rule. Employers are in the best position to avoid accidents that cause injury by hiring, training, and supervising the right people and providing the proper tools needed to perform the job. They are also in the unique position to deter accidents by discipline and discharge. Employers know accidents are going to happen. Like it or not, there are employees who make mistakes. Some are commonplace, like failing to notice an oncoming car and causing an accident; others are more noteworthy, like putting a lighted match to a gas can. Employers are in the best position to internalize the costs of the

205. See *supra* Section I.D.

206. *Douglas v. Kinger*, 2008 ONCA 452. The opinion of the Court of Appeal for Ontario can be found at <http://www.ontariocourts.ca/decisions/2008/june/2008ONCA0452.htm>.

207. *Id.* It would certainly be easy to imagine that putting a lighted match to a gas can constitutes gross negligence, but the employee in this case was only thirteen years old, and his age militated against a finding that his act was anything more than simple negligence. *Id.*

208. *Id.*

expected negligence, either by acquiring insurance or by passing on the costs of the losses that are certain to happen as a cost of doing business.²⁰⁹

Additionally, public policy strongly disfavors having the employee shoulder the risk of loss that is created by the employer's desire to make a profit. Most state laws require an employer to pay the wages due to an employee, without any deduction except as required by law or agreed to by the parties.²¹⁰ The net effect of allowing an employer to sue the employee for property damage is to allow the employer a judgment requiring the employee to pay back the money she has earned. Since the employer could not have kept the money earned by the employee in the first instance, it seems to defeat the purpose of requiring payment to the employee if the employer is later able to get the money back by means of a judgment.

Although there does not appear to be any case law directly considering this issue, there is case law addressing an analogous issue. The Federal Employers Liability Act (FELA) provides that benefits will be paid to injured workers and makes unlawful any "device" that would reduce such compensation.²¹¹ There have been a number of lawsuits in which injured workers who received or who were entitled to receive compensation under FELA were sued for damages to the employer's property. While some courts have allowed such suits,²¹² other courts have held that such a suit was a device that effectively reduced the employees' benefits and was therefore illegal.²¹³

Just as a suit against an FELA beneficiary is a device that reduces an injured worker's benefits, so, too, is a suit against a former employee a device that would take away the wages that were earned.

On balance, New Mexico courts would do well to adopt the position taken by the Canadian courts and refuse to allow a claim against an employee for property damage unless the damage was the result of gross negligence or intentional misconduct, or unless there was a specific agreement in the contract of hire that allowed such a claim.

209. Moreover, it is often difficult to tell whether damages to property are the result of neglect or of the normal wear and tear that is part of the cost of doing business.

210. *See, e.g.*, NMSA 1978, § 50-4-2.

211. Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (2006).

212. *See Cavanaugh v. W. Md. Ry. Co.*, 729 F.2d 289 (4th Cir. 1984).

213. *Stack v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 615 P.2d 457 (Wash. 1980); *Yoch v. Burlington N. R.R. Co.*, 608 F. Supp. 597, 598 (D. Colo. 1985).

CONCLUSION

Over the course of centuries, the law has developed as it was needed. There is precious little law that directly addresses the question as to the limits, if any, on an employer's right to sue his former employee. Cases thus far have largely relied upon general legal principles that were developed in other contexts. As more employers bring claims against their employees and former employees, courts should not blindly follow legal principles that have been developed in other contexts but should consider the unique and delicate relationship between employers and employees. The time has come to develop a thoughtful approach to dealing with claims made by employers.

Employers should be allowed to pursue claims for wages and lost profits only against employees who have intentionally and willfully failed in their duties, or employees working pursuant to a contract that clearly identifies the employees' goals and objectives and just as clearly provides a remedy for the employer if the employee breaches the contract. Employers should not be allowed to sue their employees for indemnification or for damage to the employers' property unless the loss to the employer was caused by the employee's gross neglect or intentional act, or unless there is a written contract clearly stating that the employee would be held liable under other circumstances, such as simple negligence.