A Study of the Interplay between Promissory Estoppel and At-Will Employment in Texas

Robert J. Conner
A STUDY OF THE INTERPLAY BETWEEN PROMISSORY ESTOPPEL AND AT-WILL EMPLOYMENT IN TEXAS

Robert J. Conner

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 580
II. BACKGROUND ........................................ 582
   A. PROMISSORY ESTOPPEL 582
      1. The History and Evolution of Estoppel 582
      2. The Birth of Promissory Estoppel 583
   B. THE EMPLOYMENT AT-WILL DOCTRINE 584
III. PROMISSORY ESTOPPEL IN AN AT-WILL ENVIRONMENT ........................................ 586
   A. THE CONFLICT IN THE TEXAS COURTS OF APPEAL 586
      1. The Roberts Decision 586
      2. Opposition to the Roberts Decision 587
   B. QUESTIONS REGARDING THE DECISIONS 588
IV. ANALYSIS OF THE ROBERTS DECISION 588
   A. PROBLEMS WITH THE PROMISE 588
      1. The Promise 588
         a. The Duty of Good Faith 589
         b. The Duty of Good Faith in Texas 589
      2. The Reliance on the Promise 590
      3. Courts Question the Promise 591
   B. THE PROBLEM WITH TIMING 593
      1. The Before/After Distinction is Drawn 593
      2. The Result of the Before/After Distinction 593
      3. Opposition to the Before/After Distinction In Texas 593
V. CONFUSION BEGINS IN THE COURTS OF APPEAL ........................................ 595
VI. HOW OTHER JURISDICTIONS APPROACH THE ISSUE ........................................ 596
   A. THE GOOD FAITH IMPLICATION 596
   B. THE EMPLOYMENT CONTRACT/EMPLOYMENT PROMISE DISTINCTION 599
   C. THE DISTINCTION BETWEEN PROMISED EMPLOYMENT AND ACTUAL HIRING 600
   D. THE EXPECTATION/RELIANCE DISTINCTION 602

579
I. INTRODUCTION

Imagine that you are a forty-year-old worker living in New York City and you are looking to move your family to Texas in the near future. You apply for a job in Houston with Company X and are called in for an interview. The interviewer finds you “suitably qualified” and informs you of this immediately. Company X then sends you to the doctor to have a physical examination according to company policy. After you fill out various employment-related forms, you also read and sign the company's employment agreement that states: “The employer may terminate the employee at-will for any reason, or for no reason at all.”

After signing all of the forms required, Company X informs you that you need to be on a plane returning to Texas in ten days, and they will send the tickets and other information to you. Relying upon the employment contracts and information you received from Company X, you return to New York City and immediately terminate your current employment. In addition, you pack up your family, withdraw your kids from school, hire a moving company, and put your house on the market.

A few days later, Company X calls and informs you that they have found someone better qualified to fill the position. You, of course, file suit against Company X seeking recovery in detrimental reliance (i.e., promissory estoppel). Does the court allow you to recover any damages for the expenses and foregone opportunities you incurred due to your reliance on Company X’s employment? The answer to this question in Texas is uncertain.

The role that promissory estoppel plays in contract law in general has received much attention. Some writers claim that promissory estoppel...
will "swallow up" the bargain theory of contract law. Other writers claim that courts have begun enforcing any promise made in "furtherance of an economic activity" or simply "serious" promises, whether the promisee relied on them or not.

Recently, Professor Robert A. Hillman issued an empirical and theoretical study contradicting several of these assumptions concurring how the courts are now applying promissory estoppel. Hillman's article shows that promissory estoppel is not the "be all and end all" of contract law; in fact, the article shows that promissory estoppel, as a theory, has been predominantly unsuccessful in the courts. According to the cases that Hillman compiled and analyzed, the highest number of promissory estoppel claims were brought within the employment context. Of those promissory estoppel claims brought within the employment context, only 4.23% of the cases decided on the merits actually succeeded. One would think that since the greatest number of cases based upon promissory estoppel have been brought in the area of employment, courts would have agreed upon a method of dealing with employee claims. But the use of promissory estoppel in the employment context, particularly in the area of employment at-will, seems to be an area of great confusion for some Texas courts.

The issue at stake in the Texas judicial system is whether the courts will allow the use of promissory estoppel to circumvent the employment at-will doctrine, possibly causing its gradual demise. For example, in the hypothetical mentioned above, you, as the employee, would hope there would be some form of relief in the courts that would allow you to recover the losses you incurred while relying on the promise of employment made by the employer. But the employer would claim that you agreed to an at-will employment relationship, a relationship that she was free to terminate at any time for any reason; therefore, there was nothing upon which you could rely. Which theory is correct? How do the roles of promissory estoppel and employment at-will interact with one another, or do they at all?

of reliance in successful and unsuccessful claims); Phuong N. Pham, The Waning of Promissory Estoppel, 79 Cornell L. Rev. 1263 (1994) (noting the decline in the use of promissory estoppel by the courts).
3. Farber & Matheson, supra note 1, at 905.
4. Yorio & Theil, supra note 1, at 113.
5. See Hillman, supra note 1.
6. See id. at 580.
7. See id. at 582-84 (explaining how the cases were compiled and analyzed by date, a 52 question coding sheet, and the subject matter, nature, dispute and posture of the cases).
8. See id. at 593.
9. See id. at 592.
This Comment takes an in-depth look into the role promissory estoppel plays in at-will employment cases in Texas. The Comment is divided into six sections. First, it briefly examines the evolution and history of both employment at-will and promissory estoppel in Texas. Second, it examines two leading Texas cases which have ruled both for and against promissory estoppel's use in the at-will context. Third, this Comment takes a more specific look at what factors one Texas court considered when allowing promissory estoppel to circumvent the at-will doctrine and why those factors are not appropriate considerations in Texas. Fourth, it takes a look into the justifications other jurisdictions use in allowing successful promissory estoppel claims and how that could affect Texas courts. Fifth, it examines the motives and authority of one Texas court that allowed promissory estoppel to circumvent the employment at-will doctrine. And finally, this Comment concludes by discussing the validity of the at-will doctrine and how the Texas Supreme Court should approach the issue if given the opportunity in the future.

II. BACKGROUND

A. Promissory Estoppel

1. The History and Evolution of Estoppel

The doctrine of estoppel that exists in the courts today is a collection of several hundred years of development.\(^1\) Estoppel's origin can be followed back to Medieval England where it was used for such things as estoppel by record\(^2\) and estoppel by deed.\(^3\) Even before the powerful "bargained-for-exchange" theory of consideration began to seemingly dominate contract law, promises were being enforced primarily upon reliance.\(^4\) The fundamental purpose of contracts was to protect justifiable reliance on a promise.\(^5\) But courts in the nineteenth century were not so forgiving when it came to relying on a promise due to the fact that it was such a common occurrence.\(^6\)

The nineteenth century's "bargained-for-exchange" theory focused on

\(^{11}\) See, e.g., J. Ewart, AN EXPOSITION OF THE PRINCIPLES OF ESTOPPEL BY MISREPRESENTATION I (1900); M. Bigelow, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 53 (1876); Michael C. Pitou, Equitable Estoppel: Its Genesis, Development and Application in Government Contracting, 19 PUB. CONT. L.J. 606 (1990).

\(^{12}\) See Pitou, supra note 11, at 607-08 (explaining that whatever was recorded in the King's court was accepted, could not be contradicted, and was also used to limit the duration of judicial pleadings serving as a modern day res judicata).

\(^{13}\) See id. at 608 (explaining that a party could be bound by prior written representations if they were under sign and seal).

\(^{14}\) See Jay M. Feinman, Promissory Estoppel and Judicial Method, 97 Harv. L. Rev. 678, 679 (1984) (stating that "promises were often enforced primarily because the promisee had relied on the promise to her detriment or to the promisor's benefit."). See generally Maddux, supra note 10, at 204.


\(^{16}\) See Warren A. Seavey, Reliance upon Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913, 924-925 (1951).
the need for consideration in promises made in contract formation\textsuperscript{17} rather than looking to reliance as the dominant factor. Thus, the first Restatement of Contracts focuses on consideration as the dominant factor.\textsuperscript{18} The bargained-for-exchange theory's unbending requirement of consideration in contract formation sometimes led to unjust results simply because the formal requirements of consideration were not met.\textsuperscript{19} The need to protect individuals who rely on future promises developed into what is known today as modern day "promissory estoppel."\textsuperscript{20}

2. \textit{The Birth of Promissory Estoppel}

The first person to introduce the term "promissory estoppel" was Samuel Williston.\textsuperscript{21} Although Williston was one of the dominant influences in drafting the first Restatement of Contracts,\textsuperscript{22} it was Professor Corbin who was determined to get promissory estoppel into the Restatement.\textsuperscript{23} Through continued discussion and debate, Professor Corbin prevented the complete ascendancy of consideration in contract law, and promissory

\textsuperscript{17} Justice Holmes' well known statement of the bargain theory:

\begin{quote}
[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.
\end{quote}


\textsuperscript{18} \textit{See Restatement (First) of Contracts} (1932).

\textsuperscript{19} \textit{See Seavey, supra note} 16, at 925. In order to protect the promisee that had relied upon a promise and did not meet the requirements of traditional consideration, the evolution of estoppel has been explained in one way as an excuse by the courts:

They had to find a new solution, or, at least, a new terminology. In such a situation the word that comes instinctively to the mind of any judge is, of course, "estoppel"—which is simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for the plaintiff. And in the contract cases after 1900 the word "estoppel," modulating into such phrases as "equitable estoppel" and "promissory estoppel," began to appear with increasing frequency.

\textit{Gilmore, supra note} 2, at 64; \textit{see also Maddux, supra note} 10, at 205.

\textsuperscript{20} Feinmann, \textit{supra note} 14, at 680 n.18 (stating that the distinction between promissory estoppel and equitable estoppel has been eliminated); \textit{see Maddux, supra note} 10, at 205; \textit{see also Seavey, supra note} 16, at 922-23 ("It has been said repeatedly that an action for fraudulent misrepresentation will not lie where the misstatement refers only to future events. It has now become clear, however, that every statement of the future includes some statement of present facts." (footnote omitted)).

\textsuperscript{21} \textit{See Gilmore, supra note} 2, at 60-64.

\textsuperscript{22} \textit{See id. at} 59.

\textsuperscript{23} Professor Corbin, at a meeting of the Restatement group, challenged the group's definition of consideration with numerous cases, holding their decision unexplainable:

Gentlemen, you are engaged in restating the common law of contracts. You have recently adopted a definition of consideration. I now submit to you a list of cases—hundreds, perhaps or thousands?—in which courts have imposed contractual liability under circumstances in which, according to your definition, there would be no consideration and therefore no liability. Gentlemen, what do you intend to do about these cases? . . . The Restaters, honorable men, evidently found Corbin's argument unanswerable.

\textit{Id. at} 63-64.
estoppel was formally recognized in Section 90.\textsuperscript{24}

The recognition of Section 90 into the Restatement (not requiring any bargained-for exchange), alongside Section 75(1)\textsuperscript{25} (explicitly requiring that the action or forbearance must be bargained for), has been referred to as an example of “the Restatement’s schizophrenia,”\textsuperscript{26} the “Restatement and the anti-Restatement,”\textsuperscript{27} or labeled the “Contract and anti-Contract.”\textsuperscript{28} The doctrine of promissory estoppel within Section 90 lacked the one element that Section 75(1) of the Restatement required—that the action or forbearance be bargained for.\textsuperscript{29} Nevertheless, Section 90 of the Restatement “recognizes the reliance element in the law of contracts and, to a modified extent, substitutes reliance for the bargaining element without which simple contracts are not normally enforceable.”\textsuperscript{30} Section 90 states:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.\textsuperscript{31}

B. THE EMPLOYMENT AT-WILL DOCTRINE

The original employment at-will doctrine was stated by the Tennessee Supreme Court in 1884:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe [sic] may exercise in the same way, to the same extent, for the same cause or want of cause . . . . All may dismiss their employes [sic] at will, be

\textsuperscript{24} Section 90 of the Restatement (First) of Contracts states:
A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

\textbf{RESTATEMENT (FIRST) OF CONTRACTS, supra note 18, at § 90.}

\textsuperscript{25} Section 75(1) of the Restatement (First) of Contracts reads:
Consideration for a promise is an act other than a promise, or a forbearance, or the creation, modification or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise.

\textbf{RESTATEMENT (FIRST) OF CONTRACTS, supra note 18, at § 75(1).}

\textsuperscript{26} \textit{Gilmore, supra} note 2, at 60.

\textsuperscript{27} \textit{Id.} at 68.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{See Restatement (First) of Contracts, supra} note 18, at § 75(1) (“Consideration for a promise is an act other than a promise, or a forbearance, or the creation, modification or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise.”).

\textsuperscript{30} Seavey, \textit{supra} note 16, at 925.

\textsuperscript{31} \textbf{RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).}
they many or few, for good cause, for no cause or even for cause
morally wrong, without being thereby guilty of legal wrong.\textsuperscript{32}

The modern-day employment at-will doctrine provides that an employ-
ment relationship for an indefinite term is "terminable at any time by
either party, with or without cause, absent an express agreement to the
contrary."\textsuperscript{33} In the words of Richard Epstein, "the phrase 'at will' is two
words long and has the convenient virtue of meaning just what it says, no
more and no less."\textsuperscript{34} Texas courts believe the same. Although other ju-
risdictions have been willing to at least partially abrogate the at-will doc-
trine,\textsuperscript{35} the Texas judicial structure and the Texas Legislature have been
very hesitant in allowing exceptions.

The Texas judicial structure has seemingly found every way possible to
preserve the at-will doctrine for both employers and employees. As a
result, there has been only one judicially-created public policy exception
to the doctrine in the last 105 years.\textsuperscript{36} In creating this public policy excep-
tion, the Texas Supreme Court held that public policy required an excep-
tion to the at-will doctrine when an employee has been discharged for
refusing to perform an illegal act ordered by his or her employer.

In addition, although the Texas Legislature has adopted several statu-
tory exceptions to the at-will employment structure, these exceptions are
narrowly defined and strictly interpreted. Statutory exceptions include
such things as: discharge based upon race, color, religion, handicap, na-
tional origin, age, sex;\textsuperscript{37} discharge based upon mental retardation;\textsuperscript{38} dis-
charge based upon union membership;\textsuperscript{39} discharge due to attending political
convention\textsuperscript{40} or jury service;\textsuperscript{41} and discharge for filing a worker's
compensation claim.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{32} Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 518-520 (1884), overruled on other
grounds by Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).
\item \textsuperscript{33} See, e.g., Federal Express Corp. v. Dutshmann, 846 S.W.2d 282, 283 (Tex. 1993);
Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991); Hussong v. Schwan's
Sales Enter., Inc., 896 S.W.2d 320, 324 (Tex. App.—Houston [1st Dist.] 1995, no writ);
Mott v. Montgomery County, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, writ de-
nied); Amador v. Tan, 855 S.W.2d 131, 133 (Tex. App.—El Paso 1993, writ denied).
\item \textsuperscript{34} Richard A. Epstein, \textit{In Defense of the Contract At Will}, 51 U. CHI. L. REV. 947, 955
\item \textsuperscript{35} States that have shown a willingness to at least partially abrogate the at-will doc-
trine are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii,
Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Min-
nesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New
York, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, West Virginia, and
Wisconsin. See Claudia E. Decker, \textit{The At-Will Doctrine: A Proposal To Modify The Texas
\item \textsuperscript{36} See Sabine Pilot Serv., Inc., v. Hauck, 687 S.W.2d 733 (Tex. 1985) (creating an
exception to the at-will doctrine where an employee is fired for not participating in an
illegal activity).
\item \textsuperscript{37} See \textit{TEX. LAB. CODE ANN.} § 21.051 (Vernon 1996).
\item \textsuperscript{38} See \textit{TEX. HEALTH & SAFETY CODE ANN.} § 592.015 (Vernon 1992).
\item \textsuperscript{39} See \textit{TEX. LAB. CODE ANN.} § 101.052 (Vernon 1996).
\item \textsuperscript{40} See \textit{TEX. ELEC. CODE ANN.} § 161.007 (Vernon 1986).
\item \textsuperscript{41} See \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 122.001 (Vernon 1997).
\item \textsuperscript{42} See \textit{TEX. LAB. CODE ANN.} § 451.001 (Vernon 1996).
\end{itemize}
As stated above, if an employer and employee have an at-will employment relationship, the employer or employee each has the right to terminate the employment relationship at any time, for any or no cause. In addition, any time an employee is terminated, an at-will relationship is presumed. However, if an employee can prove that their at-will employment relationship has been modified so that the employer is prohibited from terminating the employee, the at-will relationship is no longer effective.

III. PROMISSORY ESTOPPEL IN AN AT-WILL ENVIRONMENT

A. THE CONFLICT IN THE TEXAS COURTS OF APPEAL

The Courts of Appeal in Texas disagree on what role promissory estoppel should play in Texas’ powerful at-will employment doctrine. One Texas court of appeals allowed an employee who detrimentally relied on an employer’s promise of at-will employment to sustain a cause of action against the employer in promissory estoppel. Other Texas courts of appeal have strongly disagreed and harshly criticized that court for allowing an exception to the at-will doctrine that was not intended. The following are the two leading cases on each side of the issue.

1. The Roberts Decision

In Roberts v. Geosource Drilling Services, Inc., Roberts was an oil drilling worker living in Louisiana who sought overseas employment with Geosource Drilling Services. An interview was arranged in Houston, Texas, where Roberts was informed that he was “suitably qualified” for the position and was sent to have all of his vaccinations performed, employment-related forms filled out, and sign Geosource’s employment agreement. Geosource told Roberts that he would be leaving for his overseas assignment in about ten days and that plane tickets would be sent to him before then. Geosource knew that Roberts was currently employed. Roberts returned to Louisiana and terminated his current employment, informing his boss that he had another job. Several days later, Geosource contacted Roberts and told him they did not need him anymore because they had found someone better qualified to fill his position. Roberts filed suit against Geosource alleging detrimental reliance upon oral and written representations made by Geosource.

The Roberts court applied the Texas Supreme Court’s formulations of the required elements of promissory estoppel: (1) a promise, (2) the promisor’s foreseeability of the promisee’s reliance thereon, and (3) sub-
substantial reliance by the promisee to his detriment. The court held that because (1) Geosource made a promise of employment, (2) they foresaw Roberts relying on that promise, and (3) Roberts substantially relied on that promise by terminating his current employment to his expense and detriment, that Roberts had satisfied the requirements of promissory estoppel. The court went further in articulating its decision by explaining how Roberts was justified in relying upon the at-will promise by Geosource due to the fact that the promise actually imposed a duty on Geosource to employ Roberts, although not for a fixed duration, and that duty was breached:

[Geosource's] undisputed oral promise clearly imposed a duty on Geosource to employ Roberts—but not for a fixed duration—and that duty was breached by Geosource. It is no answer that the parties' written contract was for an employment-at-will, where the employer foreseeably and intentionally induces the prospective employee to materially change his position to his expense and detriment, and then repudiates its obligations before the written contract begins to operate.

If the appellant/promisee acts to his detriment in reliance upon the promise of employment, or parts with some legal right or sustains some legal injury as the inducement for the employment agreement, we hold that there is sufficient consideration to bind the employer/promisor to its promise.

The court reversed summary judgment and remanded the case to the trial court for further consideration.

2. Opposition to the Roberts Decision

The Roberts decision has been harshly criticized. One such example is found in Collins v. Allied Pharmacist Management, Inc., which concerned a situation similar to that in Roberts. The plaintiffs, Collin and Torry, were offered positions in a subsidiary of the defendant's company, Allied. Allied's president, Allison, offered Collins a position as vice president. The offer, as shown by a letter produced in court, outlined the benefits of the position including a base salary of $70,000. Collins claimed that he accepted the offer and immediately hired Torry. Both Collins and Torry submitted resignations to their current employers in reliance upon Allied's offer.

Similar to the Roberts case, the court found Collins and Torry to be at-will employees which could be terminated at any time for no cause and that Collins and Torry were terminated prior to the commencement of work with Allied. In responding to the plaintiff's request for relief under promissory estoppel, the court held that an at-will promise of employ-

47. See English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983).
48. See Roberts, 757 S.W.2d at 50.
49. Id. (emphasis added).
50. 871 S.W.2d 929 (Tex. App.—Houston [14th Dist.] 1994, no writ).
ment gives no assurance as to the employer's conduct and therefore cannot be relied upon:

A promise to provide employment which is subject to termination at any time or for any reason [at-will] does not provide any assurances about the employer's future conduct, and does not provide a basis for detrimental reliance as a matter of law. Moreover, promissory estoppel may not be applied to recover reliance damages when there is a valid contract terminable at will.\footnote{Id. at 937 (citation omitted).}

In support of their argument, the plaintiffs had relied on the holding of the court in \textit{Roberts}, to which the court replied that \textit{Roberts} was wrongly decided and would completely destroy the at-will doctrine in many cases if followed: "in our opinion, Roberts was wrongly decided; no Texas cases have cited it and we decline to follow it. Rather, we believe Roberts abrogates the employment at will doctrine in all cases where the employee must quit an existing job to accept a new offer of employment."\footnote{Id.}

\section*{B. Questions Regarding the Decisions}

Which court is correct in its holding? Should an employee be able to detrimentally rely on an at-will employment promise from an employer? What exactly is the employee relying on? Is there a difference between liability if the employer fires an employee before employment begins rather than afterwards? If the employer is held liable, what should she be liable for? Are these decisions correctly following the doctrines of promissory estoppel and employment at-will? An in-depth look into the questions the \textit{Roberts} court creates will provide us with some answers to these questions.

\section*{IV. Analysis of the \textit{Roberts} Decision}

\subsection*{A. Problems with the Promise}

\subsubsection*{1. The Promise}

In \textit{Roberts},\footnote{Id.} the court based their decision on the fact that Roberts acted "to his detriment in reliance upon the promise of employment . . . ."\footnote{Id.} Had Geosource made a "promise of employment"? The relationship between Roberts and Geosource was purely an employment at-will relationship; therefore, is not all that Geosource promised to Roberts that it could terminate the employment relationship at any time, for any or no cause? The answer to this question lies in the limitations that Texas courts place on employers when terminating their at-will employees. As discussed above, Texas follows the pure at-will employment doctrine with only limited exceptions.

\footnotesize{\begin{itemize}
  \item 51. \textit{Id.} at 937 (citation omitted).
  \item 52. \textit{Id.}
  \item 53. 757 S.W.2d at 50.
  \item 54. \textit{Id.}
\end{itemize}}
In *Roberts*, the employer apparently had not violated any of the statutory or judicial exceptions to the at-will doctrine allowed in Texas. Therefore, the *Roberts* court seemingly attempted to create a judicial exception of its own. The court described this "new exception" to the at-will doctrine as a "duty" by stating: "[Geosource's] undisputed oral promise clearly imposed a duty on Geosource to employ Roberts." What is this newly created "duty" and is it an exception to the at-will doctrine in Texas?

a. The Duty of Good Faith

One common implied exception to the at-will doctrine is the implied covenant (duty) of good faith. Courts that imply a good faith requirement in employment contracts hold that since the employment relationship is contractual, the implied covenant may accompany it. In *French v. Jadon, Inc.*, the court stated this position clearly: "[t]he covenant of good faith and fair dealing is implicit in at-will employment contracts . . . it requires at a minimum that an employer not impair the right of an employee to receive the benefits of the employment agreement." While other courts have followed, the majority of courts have refused to recognize any covenant of good faith and fair dealing with regard to at-will employment relationships.

b. The Duty of Good Faith in Texas

Texas, along with the majority, has refused to recognize the implied covenant of good faith and fair dealing in the employment context. In *Rios v. Texas Commerce Bancshares, Inc.*, plaintiff had taken a job with the defendant as an assistant vice president/commercial loan officer. After less than a year at work, the plaintiff received evaluations reflecting his performance as "less than satisfactory." After several additional poor performance evaluations, the plaintiff was fired for insubordination.

55. *Id.*
56. *Id.* (emphasis added).
59. *Id.* at 24.
61. *Id.* at 24.
62. *See, e.g.*, Aiken v. Employer Health Servs., Inc., 81 F.3d 172 (10th Cir. 1996) (showing no implied covenant of good faith in Oklahoma law); Dandridge v. Chromcraft Corp., 914 F. Supp. 1396 (N.D. Miss. 1996) (holding that an employee failed to state a cause of action based upon a good faith implied covenant); Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996) (showing a no exception rule for implied covenant of good faith).
63. 930 S.W.2d 809 (Tex. App.—Corpus Christi 1996, writ denied).
to his superior, poor job performance, and failure to comply with bank policy. Plaintiff filed several claims against the bank, including breach of the duty of good faith and fair dealing in an employment context. The court began its analysis of the case by affirming the fact that Texas follows the doctrine of employment at-will, and that employment may be terminated at will and without cause. The court more specifically stated 

"[a]bsent a specific contract term to the contrary, this doctrine allows an employee to quit or be fired without liability on the part of the employer or employee, with or without cause."64 In addressing the claim of breach of the duty of good faith and fair dealing, the court held: "[w]e further note that neither the legislature nor the supreme court has recognized an implied covenant of good faith and fair dealing in employment relationships."65 The court also refused to recognize any good faith requirement.

The Texas Supreme Court has also repeatedly affirmed the fact that there is absolutely no implied duty of good faith or fair dealing in the employment context in Texas.66 In McClendon v. Ingersoll-Rand Co.,67 the court held that to imply a duty of good faith in an employment context would violate its disapproval of placing restrictions on the free movement of employees in the workplace.68 In addition, the court noted that the massive amounts of legislation restricting an employer's right to terminate an employee compels the conclusion that any change in the employment at-will doctrine should be left to the legislature.69 The legislature has never implied a duty of good faith and shows no signs of doing so now.

2. The Reliance on the Promise

So what exactly did the Roberts court say Roberts was relying on? The court held, as one of the three elements needed to invoke promissory estoppel, that Roberts detrimentally relied on a "promise of employment" from Geosource.70 The court had previously determined that the employment relationship between Roberts and Geosource was an at-will

---

64. Id. at 814; see, e.g., Massey v. Houston Baptist Univ., 902 S.W.2d 81, 83 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Reynolds Mfg. Co. v. Mendoza, 664 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1982, no writ); Maus v. National Living Ctrs., Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

65. Rios, 930 S.W.2d at 815; see also English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983); McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 819 (Tex. App.—Houston [14th Dist.] 1988), rev'd on other grounds, 779 S.W.2d 69 (Tex. 1989).


67. 757 S.W.2d at 816; see also Watson v. Zep Mfg. Co., 582 S.W.2d 178 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (refusing to decide whether Texas implied a good faith requirement when neither the supreme court nor the legislature has done so).

68. See McClendon, 757 S.W.2d at 820.

69. See id.

Therefore, since employment at-will allows an employer to terminate an employee at any time and without cause, how could Roberts have relied on a “promise of employment”? Because Texas does not imply any good faith or fair dealing exceptions to the at-will doctrine, is not the only promise Roberts could have received was that he could be terminated at any time and without cause? The Roberts court further held “it is no answer that the parties’ written contract was for an employment at-will.” How could this not be an answer? The Texas Supreme Court and the Texas Legislature have affirmed that employees at-will may be terminated at any time for any reason.

In Collins, the facts were similar to the Roberts case in that an at-will employee was fired before he began employment and after he had detrimentally relied on the defendant for that employment. The court stated bluntly that any reliance upon an at-will employment agreement is unjustified and promissory estoppel cannot be used as a shield against termination: “[A]ny promise was illusory and reliance on it was based upon appellants’ subjective expectations and was unjustified. We find, that as a matter of law, neither promissory estoppel nor equitable estoppel is available to avoid termination at will. . . .”

According to Texas statutes and case law, although contrary to the holding in Roberts, Mr. Roberts should have had no promise of employment on which to rely and promissory estoppel should never have been invoked. The Roberts court attempted to create an exception to the at-will doctrine which does not exist in Texas and should not be found in the doctrine of promissory estoppel through reliance on an illusory promise.

3. Courts Question the Promise

Although Roberts is the only Texas case that has allowed promissory estoppel to circumvent the employment at-will doctrine, numerous other states which claim to adhere to the traditional at-will doctrine have done the same. Even though these courts have allowed the use of promissory estoppel to defeat the at-will doctrine, they continue to show their confusion and possible disapproval in mixing the two doctrines. For example, in Filcek v. Norris-Schmid, Inc., the plaintiff resigned from his current

71. See id. at 48.
73. See supra note 35 and accompanying text.
74. Roberts, 757 S.W.2d at 50.
75. See supra note 33 and accompanying text.
77. Id. at 938.
78. 757 S.W.2d at 48.
80. 401 N.W.2d at 318.
employment in order to take a position with the defendant. After he resigned his current employment position and before he began work with the defendant, the defendant informed the plaintiff that his position was no longer available. Plaintiff sued for breach of contract while the defendant claimed that he was not entitled to damages because it was an at-will relationship.

The court held there was no question that the employment, had it commenced, would have been at-will and terminable by either party. The court stated the rule in Michigan: “[C]ontracts for permanent or life employment are considered indefinite hirings which, absent distinguishing features or consideration in addition to the services to be rendered, are terminable at the will of either party.”

The court was persuaded to follow earlier courts since the Michigan Supreme Court had denied leave, in holding that since the employee gave up his current employment relying on the defendant’s promise of employment, this is considered a “distinguishing feature” and reliance damages must be given. The court showed its reluctance in allowing promissory estoppel to be used in an at-will relationship by comparing an at-will relationship, as altered by promissory estoppel, to a magic wand turning a cow into a horse:

It is difficult to perceive why an employer-employee relationship must be construed, as a matter of law, to be a contract of employment at will when the proofs are legally sufficient for submission to the fact finder to determine otherwise. With one sweep of the judicial wand, a cow was transformed into a horse.

The court went on to hold that because the plaintiff had detrimentally relied on the promise of employment by the defendant, plaintiff had a cause of action for breach of contract.

Again, upon what promise was the employee relying? The promise of employment was at-will meaning that the employee could be fired at any time for any reason. Texas courts, other than the Roberts court, have not created this exception to the at-will doctrine.

81. See id. at 319.
82. Id. (emphasis added).
83. Unable to find any Michigan case law on point, the court based their decision on the following passage:

A contract of employment to begin at a future time is totally broken by the employer's refusal to begin such employment at that time. On such refusal, the employee has a single action for his injury, measured by the full amount of salary or wages promised, less what he can earn by reasonable effort in other similar employment.

Id. at 319 (quoting 4 CORBIN ON CONTRACTS §§ 847, 958 (1964)).
84. Filcek, 401 N.W.2d at 319.
85. See id.
B. The Problem with Timing

1. The Before/After Distinction is Drawn

In addition to the question of what exactly the employee is relying on (i.e., what is the actual promise?), the analysis of the Roberts court has an additional problem. In its holding, the court seemingly drew a distinction between the time before an at-will employee has begun employment, and the time after an at-will employee has begun employment. Specifically, the court stated that it was no answer that the party was an at-will employee when the employer terminates the relationship before the written contract begins to operate:

It is no answer that the parties' written contract was for an employment-at-will, where the employer foreseeably and intentionally induces the prospective employee to materially change his position to his expense and detriment, and then repudiates its obligations before the written contract begins to operate.\(^{87}\)

"Before the written contract begins to operate" implies that the court acknowledged that Geosource had no duty to provide continued employment to Roberts due to his at-will status. This implication is further reinforced by the court's statement: "[Geosource's] undisputed oral promise clearly imposed a duty on Geosource to employ Roberts—but not for a fixed duration. . . ."\(^{88}\)

2. The Result of the Before/After Distinction

This reasoning brings forth the following conclusion: an at-will employee who is fired before she begins performance has a viable cause of action, while an at-will employee that is fired one second after she begins performance has no cause of action. Can this be possible? If one follows the Roberts court, the answer is seemingly yes. But a number of other Texas courts have answered differently.\(^{89}\)

3. Opposition to the Before/After Distinction In Texas

In Ingram v. Fred Oakley Chrysler-Dodge,\(^{90}\) the employee, Ingram, entered into an employment agreement as a service manager with a salary of $2,400.00 per month. In reliance on that agreement, he resigned from his then-current position at Big D Chrysler Dodge. Approximately two weeks later, he was informed that his service was no longer needed. Ingram did not find any other employment for several weeks. As a result,

---


\(^{88}\) Id.

\(^{89}\) See, e.g., Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561, 562 (Tex. App.—El Paso 1983, no writ); Collins, 871 S.W.2d at 929. "For purposes of the rule that an oral contract of employment at will is not enforceable by either party, there is no distinction between termination of employment before starting work and termination after employment has commenced." Patterson v. Leal, 942 S.W.2d 692, 694 (Tex. App.—Corpus Christi 1997, writ denied).

\(^{90}\) 663 S.W.2d at 561.
he filed suit admitting that he was an employee at-will but claiming that he was entitled to damages because of the defendant's anticipatory repudiation of the contract. The court denied recovery of all damages stating that the employment relationship was at-will, could be terminated by either party without cause, and the "loss of wages that the employee would have earned in the indefinite future is not a recoverable item of damages." The court continued by holding that there is "no reason to make a distinction between a termination of employment before one starts to work and a termination after employment has commenced." Other courts have agreed.

In Collins, the court cited Ingram in approval while holding that it would make no sense to allow or disallow a cause of action based upon whether the employer has begun working:

[W]e find it would be illogical to hold that an employee has no remedy if he is fired one week after commencing work, but may recover damages if the employer refuses to allow him to commence work at all. An employee may quit at any time, or may never start performance and suffer no liability . . . . It is this freedom that is the basis of our at-will employment rule . . . which . . continues to be endorsed by our supreme court.

What could the Roberts court have meant by making this distinction between allowing a cause of action before commencing work and not allowing one after? The Roberts court was again faced with a similar situation in Leach v. Conoco, Inc. The facts of this case differ from Roberts, though, because the plaintiff, Leach, was trying to recover losses based on an oral promise from the employer to relocate to Norway for a period of four years. The plaintiff was already an at-will employee with the defendant, Conoco of Texas, but had accepted the relocation assignment. The relocation assignment was offered and accepted through written letters, none of which contained any information regarding the duration of the expected employment. In reliance upon the oral employment agreement, the plaintiff had his wife resign from her current job, transported his car to Norway, made several trips to Norway to secure employment for the his wife, released the kids' nanny in expectation of the move, and purchased numerous items that were recommended for living in Norway. After less than three months of employment in Norway, the plaintiff was transferred back to his former position in Texas.

91. Id. at 562.
92. Id.
93. 871 S.W.2d at 929.
94. 663 S.W.2d at 561.
95. Collins, 871 S.W.2d at 937; see also Casas v. Wornick Co., 818 S.W.2d 466, 469 (Tex. App.—Corpus Christi 1991, rev’d, 856 S.W.2d 732 (Tex. 1993)).
96. 892 S.W.2d 954 (Tex. App.—Houston [1st Dist.] 1995, writ dism’d w.o.j.).
97. See id. at 956.
98. See id.
99. See id. at 957.
The plaintiff brought action against his employer in promissory estoppel and fraud. To support his promissory estoppel claim, the plaintiff relied upon this court's opinion in Roberts. The court distinguished the plaintiff's case from the Roberts decision because, "unlike Roberts, the facts of the present case show that the alleged oral employment agreement . . . was barred by the statute of frauds." Therefore, the court was not forced to explain why an employee at-will that is employed for any time period—seemingly even a nanosecond—would be barred from a cause of action, while an employee that never began employment could retain one.

V. CONFUSION BEGINS IN THE COURTS OF APPEAL

While only adding to the confusion, other courts have tried to distinguish their cases from the Roberts decision. In Patterson v. Leal, the court seemingly drew its distinction on an irrelevant point. The plaintiff, Leal, was working as a file clerk in Corpus Christi when she began searching for a new job. She forwarded her resume to the defendants, Patterson & Associates. The resume generated a phone call from someone at the Patterson office who asked about Leal's availability to begin work on the following Monday while inviting her to an interview on Thursday. Leal immediately resigned from her current employment in anticipation of the position at Patterson. After Leal's interview, she was instructed to call the office on Friday which she unsuccessfully tried to do. It was not until Monday that Leal was able to contact the Patterson office by telephone, during which time she was notified that the file clerk position had been filled by another applicant. Leal sued Patterson relying on Roberts.

The court began its analysis of Leal's case by stating that if there was an agreement of employment, which it did not have to decide, it would be based upon an oral agreement between the two parties during their telephone conversation. Because the oral agreement was for an indefinite time period, it would be considered an at-will relationship. The court then turned to Leal's claim for promissory estoppel. Leal argued that she relied upon an oral promise of employment and should receive reliance damages as in Roberts. The court distinguished Roberts by holding that the Roberts decision was based upon a written contract, while Leal had no written contract: "The Roberts case . . . is distinguishable from the case at bar because the Roberts case involved an employment agreement memorialized by a written contract. The nonexistence of a written contract in the case at bar renders the Roberts decision inapposite . . . ."  

100. Id. at 960.
103. Patterson, 942 S.W.2d at 694 (emphasis added).
Why does it render the Roberts decision an "inapposite?" An oral employment agreement for an indefinite time period passes the Statute of Frauds defense and is considered an enforceable at-will agreement in Texas just like a written employment agreement. Is the court simply using any excuse possible to distance itself from the Roberts decision? The court further explained its distinction by holding "[w]e therefore cannot create a cause of action for promissory estoppel when the underlying evidence consists of purely oral representations as to employment for an indefinite time period." Again, what is the difference between an enforceable oral at-will agreement and an enforceable written at-will agreement? The court finally showed its desire to distance itself from the Roberts decision by stating "[i]n any event, the Roberts decision was not tested on appeal and has been subsequently criticized as 'wrongly decided.'" This case only adds to the confusion.

VI. HOW OTHER JURISDICTIONS APPROACH THE ISSUE

A. The Good Faith Implication

Some courts that have allowed a party to recover damages in reliance upon an at-will promise of employment do so on the basis of an implied "good faith" obligation from the employer. The implication is that the employee would not be willing to do such things as terminate her current employment, incur numerous moving expenses, and reject other job opportunities, based on nothing. In other words, when an employee enters into a contract, they are doing so under the impression that they will at least be given a good faith chance to perform the job. Even if the employee enters the contract on the basis of at-will employment, they are still relying on, at the very least, a chance to commence performance of the contract. These courts imply this chance to commence performance as an exception to the at-will doctrine.

A straightforward example of this approach is found in Grouse v.

105. Patterson, 942 S.W.2d at 695 (emphasis added).
106. Id. at 694.
Group Health Plan, Inc. The plaintiff, John Grouse, was working as a retail pharmacist in Minneapolis when he began looking for a new pharmaceutical job that offered better benefits and a better work environment. He learned that the defendant, Group Health, was accepting applications. Grouse was interviewed at the time he turned the application in and again two weeks later. Approximately three months later, Grouse was offered a position as a pharmacist at Group Health. He immediately accepted, but informed them that he was required to give his current employer two weeks notice prior to his leaving. That afternoon, Grouse received another pharmaceutical offer which he declined in reliance upon the offer from Group Health. Two weeks later when Grouse called to report that he was free to report to work, Group Health informed him that his position had already been filled. Grouse had difficulty finding other employment and filed suit to recover lost wages and reliance damages for his foregone employment opportunities.

In determining the applicable theory of contract law, the court held that promissory estoppel applied which "[implies] a contract in law where none exists in fact." Group Health argued that the employment at-will doctrine could not support the application of promissory estoppel in this case because it would result in the rule that an employee who is terminated before he begins work has a cause of action, while an employee who is terminated after he begins does not. The court disagreed: "[w]e cannot agree [with Grouse] since under appropriate circumstances we believe section 90 would apply even after employment has begun."

The court went further to hold that Grouse assumed he would be given a good faith opportunity to perform his job, although this would not be the outcome in every case:

The conclusion we reach does not imply that an employer will be liable whenever he discharges an employee whose term of employment is at will. What we do hold is that under the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job. The analysis found in Grouse v. Group Health Plan was extended in Gorham v. Benson Optical. The plaintiff, Gorham, was employed as a store manager at LensCrafters when he was contacted by an employee for the defendant, Benson Optical. An interview was set up in Chicago

108. 306 N.W.2d 114 (Minn. 1981).
109. Id. at 116.
110. See id.
111. Id. (emphasis added). Compare to the Texas Supreme Court which held, in regards to promissory estoppel: "[i]t does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them." Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965).
112. Grouse, 306 N.W.2d at 116 (emphasis added). The court further noted: "[w]hen a promise is enforced pursuant to section 90 [t]he remedy granted for breach may be limited as justice requires." Id.
113. 539 N.W.2d 798 (Minn. Ct. App. 1995).
where Gorham traveled to interview. When Gorham called a few days
after the interview to inquire about the status of his application, he was
offered a job with Benson Optical that included a $50,000 salary package
and many other benefits. The employee that offered Gorham the job
promised that she would send him a confirmation letter and employee
packet. Gorham accepted the job over the phone and informed his cur-
rent employer of his resignation. When he did not receive the packet,
Gorham called and was assured that the “deal was finalized”\(^{114}\) and that
he should go ahead and give his notice of resignation. After resigning
from his job, Gorham flew to Minneapolis to report for work with Ben-
son Optical. By the end of that same day, Gorham was told that he did
not possess the skill necessary to become an area manager and was
terminated.\(^{115}\)

Gorham brought suit against Benson Optical seeking enforcement
through promissory estoppel. The court held that this case was the spe-
cific hypothetical that the Grouse court was discussing when it said,
“[u]nder appropriate circumstances we believe section 90 [of the Restate-
ment] would apply even after employment had begun.”\(^{116}\) The court
found no significant distinction between Gorham, who had reported for
one day of work, and Grouse, who was fired before even one day of work.
The court held that, “[b]oth men relied to their detriment on the promise
of a new job, only to discover that the opportunity had disintegrated
before they ever actually started working. Neither man had a ‘good faith
opportunity to perform his duties.'”\(^{117}\) The court went on to find that
Gorham was entitled to reliance damages on the theory of promissory
estoppel.\(^{118}\)

Although the implication of good faith and fair dealing has been used
in some jurisdictions, it is not likely the Roberts court based its decision
on the same implication. As discussed above, Texas has simply refused,
both in the supreme court\(^ {119}\) and in the legislature,\(^ {120}\) to imply a “good
faith and fair dealing” limitation in the employment at-will doctrine.\(^ {121}\)

114. Id. at 799.
115. See id. at 800.
116. Id. at 801.
117. Id.
118. See Gorham, 539 N.W.2d at 801.
119. See supra note 35 and accompanying text.
120. See supra notes 37-42 and accompanying text.
121. Many feel as though the Texas employment at-will doctrine is too harsh in its out-
come. One author even pleads:
Texas should alter her unquestioning acceptance of the employment-at-will
rule and follow the lead of her sister states who have re-examined this nine-
teenth century doctrine and found it wanting in light of the technological,
social, and economic realities of this century . . . . It is imperative . . . . that
the Texas Legislature [enact legislation] which adequately protects employees
from wrongful discharge, promotes public policy as reflected in Texas stat-
utes, and at the same time protects the employer from needless and unjusti-
fied intrusion into his business operations.
Claudia E. Decker, The At-Will Doctrine: A Proposal To Modify The Texas Employment
B. The Employment Contract/Employment Promise Distinction

Other courts have taken quite a different approach in allowing at-will employees to recover damages if terminated before employment. In order to allow some form of recovery for the termination of an employee before commencing work, while justifying their not allowing recovery after an employee has worked any, these courts have drawn a distinction between the "employment contract" and the "promise of employment."\(^{122}\)

In *Comeaux v. Brown & Williamson Tobacco Co.*,\(^{123}\) the plaintiff, Comeaux, applied for the position of a sales representative with the defendant, B&W. After several interviews with B&W, they made Comeaux an offer that was contingent upon, among other things, him moving "within five minutes of his first sales stop as soon as possible."\(^{124}\) In addition, he was required to give his current employer one week resignation notice and plan to begin work. Comeaux complied with all of B&W's requests and reported to work. When he arrived, a manager from B&W told him that his starting date would be a little delayed while assuring him that there were no problems with his employment. During this time, B&W ran a credit check on Comeaux that reflected a very poor credit history. B&W fired Comeaux before he ever began work. Comeaux filed suit against B&W alleging nine separate causes of action, two of which were breach of contract and promissory estoppel.\(^{125}\)

In examining the employment relationship, the court heard testimony from each of the parties. B&W contended that, according to the employment contract that Comeaux signed, their relationship was merely at-will and they could fire him at any time and free of liability. They further contended that the at-will basis of employment began the moment he signed the agreement so that they could terminate the relationship immediately if so needed. This particular provision in the contract read as follows:

> It is agreed and understood that by assigning me work with such salary as may be incident thereto, that this application shall constitute the terms of the contract of employment and... a hiring at will, terminable by either of the parties thereto.\(^{126}\)

The court concluded that, by the precise terms of the employment agreement, the at-will relationship did not begin until Comeaux was assigned "work and a salary."\(^{127}\) Therefore, because he was never assigned work,
the at-will relationship was not controlling. More specifically, the court held "[t]he writing does not deal with termination of the relationship prior to B&W's assignment of work and salary to Comeaux. Only upon such assignment does the writing show that the contract was supported by independent consideration."128

The court then examined the "promise for employment" that had come from the oral agreement the parties had reached on the phone before the contract was signed. They found that the express conditions of the offer from B&W were that if Comeaux would (1) move, (2) terminate his current employment, and (3) pass a physical examination, they would assign him work and salary on August 18.129 These express oral agreements, together with the written contract, formed the employment agreement between the parties. But because B&W did not assign Comeaux work and a salary, the court found that they breached their contractual agreement (the promise to employ) and the at-will analysis was immaterial.130 B&W was held liable for reliance damages.131

The Roberts court would have a hard time trying to prove their decision was based on the theory found in Comeaux.132 First, the contract that Roberts signed did not contain any provisions requiring the parties to do anything, except sign, in order for the contract to be effective.133 Second, even if there was some question as to whether the employment relationship was at-will, Texas implies an at-will presumption to all employment contracts.134

C. The Distinction Between Promised Employment and Actual Hiring

This theory was used again in Bower v. AT&T Technologies, Inc.135 The appellants were twenty-three AT&T workers who were laid off from their jobs. AT&T specifically requested that appellants continue working in their jobs until the actual layoff and promised to rehire them if they did. The new jobs they were promised would be non-union at-will positions in the company. Along with being rehired, appellants would continue to receive all pension and other benefits. During the period of the actual layoff, the appellants were constantly reassured jobs at AT&T and were

128. Id.
129. See Comeaux, 915 F.2d at 1270.
130. In its conclusion, the court stated:

[B]ecause B&W never assigned Comeaux work and a salary, the parties never reached the point in time when the writing would begin to govern termination of the relationship. Therefore, whether or not Comeaux's ultimate employment would have been at will is immaterial to our analysis of whether the contract was breached before Comeaux's employment began.

Id.
131. See id. at 1271.
132. Id. at 1264.
133. See supra note 76 and accompanying text.
135. 852 F.2d 361 (8th Cir. 1988).
encouraged to wait. Appellants turned down job offers and delayed job searches in reliance upon these promises; however, when AT&T began hiring for the new positions promised to appellants, none of the appellants were rehired. The appellants sued seeking $50,000 each in compensatory damages and injunctive relief that each be reinstated to their past positions.

In addressing the appellants' claim of promissory estoppel, the court found that AT&T was liable for any detrimental reliance the appellants incurred as a result of their reliance on the promise of employment. The court began its analysis by distinguishing between a case in which an employee at-will is terminated after hire and before work begins from an employee that is prevented from assuming promised at-will employment. The court found that “[s]hould [an] employer decide after hire to discharge the employee or change the terms of employment, she is completely within her rights and in utter compliance with her promise." But the court found that when an at-will employee is promised employment and never hired, that employee is entitled to recovery. The court further held that if AT&T had hired the employees at-will and then fired them they would have been within their rights, but since they never actually hired the employees, they were bound by their promise to employ them:

In the present dispute, AT&T has promised . . . at-will positions. That AT&T may shortly thereafter fire them at-will . . . does not fully eradicate the binding quality of its promise. Clearly, a contract which by its terms can be immediately terminated after it is commenced precludes a claimant from maintaining an action upon discharge after hire. This, however, does not prevent the claimant from recovering damages sustained in reliance on a clear and unambiguous promise that is broken.

The court acknowledged the fact that distinguishing between the two theories may be difficult, but the simple answer is that an employer that hires and fires has kept its promise while an employer who has never hired has not:

While, in practical effect, it may be hard to distinguish between the case in which an employee is fired a day after beginning work from the situation in which a potential employee is prevented from assuming a promised at-will position, the cases are different. In the former case, the employer has completely fulfilled his promise; in the latter, the promise has not been kept in any respect.

In both of the cases above, the courts distinguished between the employer's "promise to employ" versus the employer's "employment agreement" and the employer's "promise to employ" versus the "actual hiring." The courts made this distinction in slightly different ways. In the

136. Id. at 363 (emphasis added).
137. See id.
138. Id.
139. Id. at 363-64.
former case, the court found that there was an actual contract which was formed by a combination of the parties express oral promises and their written contract agreement. The "promise to employ" was separated from the "employment agreement" because the court found that the employment agreement, which included the at-will provision, was breached by the employer. This allowed the court to hold that the at-will provision of the employment agreement was not binding upon the employee and find reliance on the oral promises made separate from the writing. In the latter case, there was no actual contractual agreement found. The "promise to employ" was separated from the "employment agreement" (actual hire) because the employees were never actually hired. The employees had simply relied upon promises of employment made by the employers.

The analysis followed in the case above could not be used to justify the Roberts decision either. In Roberts, it was clear, and the court held, that Roberts was already hired and under a written contract of employment with Geosource.140 Therefore, there was no question as to whether Roberts had actually been hired.

D. The Expectation/Reliance Distinction

Another way courts have distinguished at-will employees who are terminated before commencing work from those terminated after commencing work is through damages. The basic idea is this: if you are an employee at-will, you should not be able to recover expectation damages because you cannot expect anything since you could be fired the minute you walk in the door; but, you should be able to collect reliance damages based upon any detrimental reliance incurred in preparation for the job. Some courts even hold that reliance damages are available for at-will employees who are terminated even after some length of employment.141 The following cases help illustrate these points.

In Pepsi-Cola Bottlers, Inc. v. Woods,142 Woods, an employee, was interviewed and hired by Pepsi as a route settlement clerk. It was discovered in the interview that Woods had a boyfriend who was currently working at Coca-Cola, but she was assured that would not be a problem. After the interview, Pepsi informed Woods that she was to start her new job on March 26 and should terminate her current employment accordingly. Before Woods was to report to work, Pepsi informed her that she

---

141. See Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981). In response to an employer’s claim that allowing reliance damages to an at-will employee who was fired before commencing performance, while barring the same employee from any remedy if he was allowed to work for one day, would be unfair, the court responded: “[W]e cannot agree since under appropriate circumstances we believe section 90 would apply even after employment has begun.” Id. The court is likely implying that even if the at-will employee was terminated after his first day at work he would still be allowed to recover reliance damages. For further analysis on this point see Melvin A. Eisenberg, Probability and Chance in Contract Law, 45 UCLA L. REV. 1005, 1029 (1998).
was discharged because she would be exposed to confidential information at Pepsi. Woods had already terminated her current employment so she sued to recover her damages.

In determining Pepsi's responsibility to Woods, Pepsi claimed they were not liable for any damages because Woods was employed at-will and could be terminated any time. The court agreed with Pepsi's argument, but only in relation to expectation damages, holding that Woods was an at-will employee and could have been fired at any time while incurring little or no damages:

The only thing . . . Pepsi promised was that Woods could work for Pepsi until either party decided to terminate their relationship. . . . We have no way to determine the amount of wages to which Woods was entitled, since under the circumstances Pepsi could have discharged her after a single day's work without incurring liability.143

The court did, however, find that Woods was entitled to reliance damages under the doctrine of promissory estoppel.144 Because Woods relied on the promise of employment given by Pepsi, she was found to be entitled to those damages. In this particular case, however, Woods was not awarded any reliance damages because she had insufficient proof of those damages.145

A clearer example is shown in D&G Strout, Inc. v. Bacardi Imports, Inc.146 D&G was a distributor of liquor in Northern Indiana. When D&G lost two of its biggest suppliers it knew it could either sell out while the market was still good, or attempt to compete on a smaller scale. Bacardi, one of D&G's other suppliers, was aware of D&G's predicament and promised them they would continue to use them as their Indiana distributor. Relying on this promise, D&G turned down a negotiated offer to sell the store. Bacardi, one week later, canceled their account with D&G. Faced with no other choices, D&G then sold the store at an amount $550,000 below the original offer. D&G sued Bacardi in promissory estoppel to recover the $550,000.

The relationship between D&G and Bacardi was found to be at-will.147 The United States Court of Appeals went on to state that although an employee could not sue for lost wages on an unfulfilled promise of at-will employment, lost wages are not the only damages that come from a broken promise.148 The court held that reliance damages are recoverable when the employer breaks a promise to an employee, even if the employment relationship is at-will.149 The court further explained the difference between expectation damages and reliance damages as being those dam-

---

143. Id. at 700.
144. See id.
145. See id.
146. 923 F.2d 566 (7th Cir. 1991).
147. See id. at 568.
148. See id.
149. See id.
ages which the employee could expect (zero), and those which the employee incurred as a direct result of the employers promise to employ:

In future wages, the employee has only an expectation of [future] income, the recovery of which promissory estoppel will not support in an at-will employment setting. In wages foregone in order to prepare for the move, as in moving expenses themselves, the employee gave up a presently determinant sum for the purpose of relocating. Both moving expenses and forgone wages were the hopeful employee's costs of positioning himself for his new job; moving expenses happen to be out-of-pocket losses, while forgone wages are opportunity costs. Both are reliance costs, not expectancy damages.\(^{150}\)

The court held that Bacardi's promise was one upon which D&G could have relied and damages should be given accordingly.\(^{151}\)

In *Lorson v. Falcon Coach, Inc.*,\(^{152}\) the court found that reliance damages should be given to an employee who was terminated before commencing performance. The employee, Lorson, was contacted by Falcon Coach concerning possible employment. After several interviews in different states with Falcon, Lorson accepted the job offer. In reliance on his new job, Lorson rented a house and arranged for a moving van to move his furniture to his new place. When Lorson returned home, he was informed by Falcon that he no longer had a job. Falcon further refused to pay any moving expenses incurred. As a result, the moving van, which included all of Lorson's furniture, refused to unload it at his new residence and instead took it to a storage facility where they left it. Lorson sued Falcon for all damages incurred as a result of the transaction.

The court found that because this was an employment at-will relationship, Lorson was not able to collect damages for lost wages (expectation).\(^{153}\) However, the court did hold: "[w]e believe the allegations of [Larson's] petition are sufficient to state a cause of action for damages for the breach of a quasi contract based upon plaintiff's reliance to his detriment on defendant's promise . . . and, thus, incurring moving expenses and storage costs."\(^{154}\)

The distinction between expectation damages and reliance damages is one possible explanation of the *Roberts* court's distinction between termination of an employee before and after commencing work. If the court was simply intending to distinguish between the amount of damages the parties could recover and not whether they actually had a cause of action, the distinction might be plausible. If, however, the *Roberts* court was implying that an at-will employee terminated before commencing work would sustain a cause of action while the same employee, if terminated after commencing work, would not, the result would be puzzling at best.

---

\(^{150}\) Id. at 569.

\(^{151}\) See id.

\(^{152}\) 522 P.2d 449 (Kan. 1974).

\(^{153}\) See id. at 457.

\(^{154}\) Id.
Setting the before/after distinction aside, the problem of finding a "promise" able to withstand reliance still remains. Without the element of reliance (due to the fact there was no guaranteed employment to rely upon), no employee has any cause of action in promissory estoppel. Therefore, even if the before/after distinction can be justified through damages, the Roberts court still had no promise on which to base allowing any reliance damages.

VII. THE MOTIVES BEHIND THE ROBERTS DECISION

The actions of the Roberts court in allowing an at-will employee to receive damages in reliance upon at-will employment simply cannot be justified by Texas laws regarding both employment at-will and promissory estoppel. The basis of promissory estoppel centers upon the finding of a promise that one party made to another. The Roberts court found that this promise was a "promise of employment." The problem is that Texas follows a "pure" employment at-will doctrine with only few exceptions—none of which applied in the Roberts case. Therefore, because an at-will employee can be terminated at any time for no cause, there simply was no "promise of employment" upon which Roberts could rely. In reality, the Roberts court tried to create an exception to what the court, and many others, perceive to be the often harsh results of the at-will doctrine.

VIII. THE AUTHORITY OF THE ROBERTS COURT

Whether you believe the exception created to the at-will doctrine in the Roberts decision was a valiant effort on the part of the court to provide justice to an individual or simply a misuse of promissory estoppel, the underlying reality is that the Roberts court may not have had the authority to make its decision. Lower courts in Texas may possess limited authority to create judicial exceptions to the at-will doctrine; yet, this is exactly what the Roberts court did.

In Jennings v. Minco Technology Labs, Inc.,155 the employee, Jennings, brought suit against her employer, Minco Technology Labs, Inc. (Minco), after they implemented a mandatory urinalysis for all employees while reserving the right to terminate any employee that did not participate. All employees of Minco, at the time, were at-will employees. Specifically, Jennings asked the court to create an exception to the freedom of the at-will doctrine. Jennings claimed the Texas court had the authority to modify the at-will doctrine when necessary to effectuate an important public policy, as was done by the Texas Supreme Court in Sabine Pilot Service, Inc. v. Hauck.156 The court responded by stating that Sabine Pilot does not stand for the proposition that lower courts have the right to create exceptions to the at-will doctrine; in fact, it stands for just the opposite:

155. 765 S.W.2d 497 (Tex. App.—Austin 1989, writ denied).

156. 687 S.W.2d 733 (Tex. 1985) (creating a narrow exception to the employer's right to terminate an employee who refuses to perform an illegal act).
The opinion in Sabine Pilot does not purport to be an obituary for the “at will doctrine.” . . . Sabine Pilot implies, without any doubt, that lower courts are not licensed in that opinion to modify the Supreme Court’s earlier decision . . . that lower courts are not free to create additional exceptions analogous to the ‘very narrow exception’ created in Sabine Pilot itself.\(^\text{157}\)

The court further added that courts are bound by *stare decisis* and should not act in this area unless given clear authority by the supreme court:

Notwithstanding the allure (and complexities) of judicial lawmaking, there is such a thing as *stare decisis* applicable to trial and lower appellate courts. The Supreme Court would have given clearer indications of its intention had it really meant in Sabine Pilot to free lower courts of their duty to obey the rule of contract law laid down . . . [in an at-will employment contract].\(^\text{158}\)

The court seemingly strengthened its stand disallowing judicial exceptions to the at-will doctrine in *Maus v. National Living Centers, Inc.*\(^\text{159}\)

The appellant, Sofia Maus, was a nurse’s aid in San Angelo for thirteen years. She was a loyal worker who commonly worked double shifts and showed a genuine concern for her patients. In 1979, National Living Centers purchased the nursing home. Immediately thereafter, Maus often complained to her superiors that the patients were receiving poor care and treatment. On one occasion, a patient had a stroke and Maus’s superiors allegedly refused to call a doctor. Maus personally performed CPR which kept the patient alive for several days. The patient eventually died. In alleged retaliation for her complaints, National Living Centers fired Maus, who was an at-will employee.

In her plea before the court, Maus explained to the court that not only was she concerned for her patients lives, but she was also required to report cases of abuse under a Texas statute.\(^\text{160}\) The statute requires nursing home owners and employees to report cases of abuse or neglect to the state licensing agency or to local law enforcement officers. In addition, failure to report is considered a Class A misdemeanor. The court quickly noted that the legislature, however, did not create any cause of action as a remedy for those fired in retaliation. Therefore, the court afforded Maus no relief stating: “[t]his Court must follow decisions of the Texas Supreme Court and leave any changes in the law to that Court.”\(^\text{161}\)

As shown in the cases above, lower courts in Texas are viewed by other courts as having virtually no authority to create judicial exceptions to the at-will doctrine. By allowing Roberts to proceed on a claim of promissory estoppel in reliance upon a “promise of employment,” the *Roberts* court attempted to create an additional exception to the at-will doctrine.

---

157. *Jennings*, 765 S.W.2d at 500-01.
158. Id. at 501.
159. 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref’d n.r.e.).
161. *Maus*, 633 S.W.2d at 675.
Seemingly, the only way any additional exceptions to the at-will doctrine will be created is through the Supreme Court of Texas or the Texas Legislature. Other legislatures, like the California Legislature, have enacted statutes that prohibit any person from influencing or persuading any person to come to work through knowingly false representations of the existence of work, the length of work, or the conditions surrounding the work. Any person who violates this statute may be liable for double damages resulting from the misrepresentations. But, as explained above, Texas presently has no such statutes.

IX. THE REALITY OF THE ROBERTS DECISION

The Roberts decision cannot be considered “good” law in Texas. As shown above, there are three main problems with the court’s decision in holding that a promissory estoppel action can circumvent Texas’ powerful at-will doctrine. First, there was no promise upon which Roberts could rely. Promissory estoppel is based on the idea that there must be a promise upon which a party has relied to their detriment in order to invoke estoppel. In Roberts the promise made by Geosource was merely an at-will promise, which is an illusory promise that could be freely broken at any time by either of the two parties. Therefore, the only thing that Roberts could have relied upon is that he could be terminated at any time for any reason. Since Geosource could terminate Roberts whenever they pleased, there was nothing upon which Roberts could rely.

Second, the Roberts decision cannot be considered valid because it would create an illogical outcome in a vast area of future case law in Texas. The Roberts decision implies that an employee who is terminated before beginning an at-will employment relationship should be allowed to collect reliance damages while an employee that is terminated after be-

---

162. California statute § 970 reads:

No person, or agent or other officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either:
(a) The kind, character, or existence of such work;
(b) The length of time such work will last, or the compensation therefor;
(c) The sanitary or housing conditions relating to or surrounding the work;
(d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

CAL. LAB. CODE § 970 (West 1989).

163. California statute § 972 reads:

In addition to such criminal penalty, any person, or agent or officer thereof who violates any provision of section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations. Such civil action may be brought by an aggrieved person or his assigns or successors in interest, without first establishing any criminal liability.

CAL. LAB. CODE § 972 (West 1989).
beginning work—seemingly for even a second—could not sustain a claim for any damages. This illogical result seems to defeat the entire purpose of the Roberts decision. The Roberts court intended to protect a "relying" employee that incurred expenses based upon future employment. The outcome above would seem to induce employers into delaying termination of an at-will employee until they had worked in their business for at least a minute. By delaying the termination, the employee would incur greater expenses and the employer would not be liable for any of them.

Finally, Roberts may have limited authority to create an additional exception to the at-will doctrine. Lower courts are bound by stare decisis and are not free to jump into the complexities of judicial lawmaking. The Texas Supreme Court and the Texas Legislature have continually affirmed the fact that Texas follows the "pure" at-will doctrine with few exceptions—none of which apply to the Roberts decision.

X. "PURE" EMPLOYMENT AT-WILL: STILL GOOD LAW?

The employment at-will doctrine has been the subject of great controversy since its beginning. Some believe the idea of allowing an employee to be terminated at any time for any reason is a doctrine and belief that should have left this country well before the twentieth century. They label it "archaic" and find the doctrine "wanting in light of the technological, social, and economic realities of this century."164 Still others find that the at-will doctrine follows along with the twentieth century by giving employers, as well as employees, the freedom to move freely throughout the marketplace. Below are some of the arguments and policy issues concerning both sides of the issue.

A. THE EMPLOYEE'S PERSPECTIVE

The risks associated with changing jobs while supporting a family are large enough without the added stress of absolutely no job security. Employees who accept job offers from employers on an at-will basis in Texas can potentially place their families in a position of financial instability from which they may not recover. For example, suppose the father of a family of four living in Utah receives a construction job offer in Texas that almost doubles his salary. Because the family is struggling to get by on its current salary, the father accepts the position immediately. In preparation for the move, the father terminates his current employment, sells the family house, rents a moving van for his furniture, withdraws his children from school, and purchases a home in Texas. When the family arrives in Texas, the father is informed that he is no longer needed for the job and there are no other positions available. What is he to do?

All of the expenses mentioned above are modest at best. Relocating to a new state or another area of the same state is a major financial decision

164. Decker, supra note 121, at 684.
in one's life. In a pure employment at-will state like Texas, unless an exception is made to the at-will doctrine, the person and his family in the hypothetical above have no recovery of their expenses. They simply “relied” (gambled) on the fact that the employer would give them a chance to work and prove themselves. Can this possibly be fair?

In addition to the financial difficulties in which employees can be placed, the employment at-will doctrine has led to other seemingly harsh results. Employees could be forced to stay in a verbally abusive situation by a power-hungry supervisor for fear of losing their jobs. Other employees might be encouraged to refrain from reporting certain illegal acts for fear of retaliation. Recall Maus v. National Living Centers, Inc., where the appellant, a nurse, was terminated in an alleged retaliatory action taken against her because of her continual complaining about poor care that patients in the nursing home were receiving. Recall also that in one instance a patient suffered a stroke and later died as a result of that stroke, while National Living Center allegedly refused to call a doctor. Maus personally kept the patient alive with C.P.R. for several days. Because Maus was an employee at-will and Texas had no exceptions to the doctrine forbidding retaliatory termination, the court held for National Living Centers and offered Maus nothing.

Still other opponents to the at-will doctrine suggest that the at-will employment structure may have worked in the nineteenth century when jobs were plentiful and required less skill, but the twentieth century, with its increased technology, has made “job-hopping” much more difficult. A higher number of jobs today require a skill that is not common to everyone, thereby making it more difficult to remain flexible in the job market.

In addition, the twentieth century has seen an increase in the number of large corporations that seemingly dominate entire labor markets. Allowing these powerful economic entities to control the less mobile and dependent individual without justification allows these individuals to be exploited.


166. See Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (refusing to recognize a public policy exception to the at-will rule even though plaintiff was terminated for giving truthful testimony in an anti-trust suit against defendant), reh’g denied, 671 F.2d 860 (5th Cir. 1982); see also Maus, 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref’d n.r.e.) (refusing to create a public policy exception to the at-will doctrine for appellant who was fired for reporting her abusive and neglectful nursing home operator/employer to the authorities, even though she was required by statute to do so).

167. 633 S.W.2d at 674.


169. See id.

170. See generally Epstein, supra note 34, at 974 (examining myths of the contract at-will while discussing the benefits it brings to everyone).
Finally, the argument has been made that the "risk" in hiring new employees should be placed on the employer, rather than the employee, during the time before the employee begins work. In many other areas of the law, the law shifts the risk onto the person that has the better chance of avoiding it in the first place. Employers are viewed as being in a better position to avoid the risk by evaluating their circumstances and the ability of the employee before they offer a new job. By not offering the job until the employer is absolutely sure they need the worker, the entire situation would be resolved—for the employee.

B. THE EMPLOYER'S PERSPECTIVE

There are three commonly argued points in favor of the at-will doctrine from the standpoint of the employer. First, the risks to an employer associated with offering a job to an at-will employee are often overlooked. In addition to the normal transaction costs that follow the hiring of a new employee, there are additional costs such as training the individual, the potential loss of any unprotected trade secrets, the possibility of an employee "learning the ropes" and then leaving with some of the company's clients, and any foregone opportunities to hire additional highly qualified individuals in the job market.

Second, the at-will employment doctrine has been argued to be a positive influence on the workforce. The idea that an employer can fire an employee at any time for any reason increases productivity and efficiency in the business. Employees that enjoy the protection of certain job security have a tendency to put forth the minimal effort during the day and rush out at night instead of continually striving to do their best.

Finally, the at-will doctrine has been praised for its allowance of the freedom to contract. Employer's have special needs in their businesses and they have to keep personnel on their staff that can meet those needs. By allowing them to freely contract around provisions that would alter the at-will employment relationship, employers are free to shape their businesses as they choose. Otherwise, employers could potentially face situations where an employee that hurt their business could not be terminated for fear of a lawsuit. The threat of major lawsuits are real and are, in a sense, deterred by the at-will doctrine.

XI. CONCLUSION

The employment at-will doctrine in Texas is as strong as ever, and it appears that the Texas Supreme Court and the Texas Legislature intend to keep it that way. Although it seems that many harsh results have and will come from the continued support of the doctrine, employment at-will has allowed a freedom in employment relationships that has benefited the labor market. When an employee is not performing to the level that

---

171. See generally id. at 947 (defending the contract at-will).
172. See id. at 953-54.
they were hired to achieve, perhaps even deterring business, employers can freely terminate that employee without the fear of a frivolous lawsuit. When employees get a chance to take a better job in a business across the street or in another state, they can take that increased salary or better position without fear of lawsuits or penalties for leaving early. However, employers and employees alike must protect themselves against the possibility of losing an employee or their job.

Employers can protect themselves from losing a valuable employee by providing them with reasons for staying. Opportunities for promotions or advancement, a chance to earn bonuses or recognition amongst piers, and a way to voice their concerns about the company can all help. But employers must be extremely careful not to make any verbal or written communication that could be construed as representations about the employee’s length of employment. Phrases such as, “You keep it up and we’ll keep you around for a while,” and “We need people like you at this company for a long time,” can terminate the at-will relationship and lock employers into a binding employment agreement.

Employees can also protect themselves from possible disappointment or even devastation by not getting locked into one position. Employees should try to learn as many aspects of the job as they can while picking up particular skills such as computer literacy. In addition, employees should be careful not to get too relaxed on the job, thereby only performing at a minimal level.

In conclusion, Texas law surrounding the area of employment at-will remains virtually unchanged after one hundred years of employment. The holding of the Roberts court is a mere example of a court’s desire to lessen the sometimes harsh effects of the at-will doctrine, but in no way creates an additional exception to the at-will doctrine. Exceptions to the at-will doctrine can only be made by the Texas Supreme Court or the Texas Legislature. If the Texas Supreme Court has an opportunity to hear a case concerning the issue, it should take that opportunity to put an end to the confusion caused by the Roberts decision.