Introduction: The American Law Institute's Restatement of Employment Law: Comments and Critiques

Kenneth G. Dau-Schmidt

Indiana University Maurer School of Law, kdauschm@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Labor and Employment Law Commons

Recommended Citation

https://www.repository.law.indiana.edu/facpub/2669
I. INTRODUCTION

On November 18-19, 2017, the Labor Law Group hosted a conference at Indiana University – Bloomington on the American Law Institute’s (ALI’s) recently completed Restatement of Employment Law. This was in fact the third conference the Labor Law Group has sponsored to evaluate this project. The Labor Law Group had previously sponsored a conference at the University of California-Hastings on February 7, 2009 two to evaluate the first three drafts of the Restatement. 

Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University – Bloomington; M.A., J.D. 1981, Ph.D. (Economics) 1984, University of Michigan. I would like to thank Paul Newendyke and Casey Leech for their assistance on this introduction. In addition to being first rate Research Assistants, these young men were stellar students of labor and employment law. The more I reflect on my career as an academic the more I realize that the most significant accomplishment of my career is the small part I’ve played in my students’ success in their studies and careers.

1. RESTATEMENT OF EMP’T LAW (AM. LAW INST. 2015). Even though this is the ALI’s first restatement of employment law, in various drafts and writings the document is sometimes referred to as the “Restatement of the Law Third: Employment Law” or the “Restatement of Employment Law Third” following the ALI’s convention that all restatements published from 1987 to the present were part of the “Restatement Third series.” Apparently the ALI has recently changed this convention, so I will just refer to it as “Restatement of Employment Law.” Samuel Estreicher et al., Foreword: The Restatement of Employment Law Project, 100 CORNELL L. REV. 1245 n.1 (2015).

chapters in the *Restatement*'s draft and sponsored another at the American Bar Foundation in Chicago on November 18 and 19, 2011\(^3\) to evaluate later chapter drafts.\(^4\) The purpose of the two prior conferences was to critique preliminary drafts of the *Restatement* and perhaps influence and improve any resulting product. The purpose of this final conference is to take the measure of the final product and evaluate the success of the ALI’s Reporters in their efforts “to articulate a relatively precise and detailed set of principles that help explain most results in a particular field or, at the least, provide useful guidance for judges and practicing lawyers laboring in the field.”\(^5\) To this end we invited distinguished academics, judges, and practitioners from across the country and asked them to evaluate all nine of the *Restatement*'s chapters. All of the ALI Reporters for the *Restatement* project were invited to attend the conference and participate in the discussion, but all respectfully declined.

This volume of the *Employee Rights and Employment Policy Journal* contains the written essays and transcripts produced for the conference. It is hoped that this collection of essays and transcripts provides more than a scholarly critique, as the papers and presentations in this third conference are intended as a commentary for the future use of judges and practitioners in evaluating when and whether to follow the rules suggested in the *Restatement of Employment Law*.

**II. THE RESTATEMENT OF EMPLOYMENT LAW**

The *Restatement of Employment Law* had its genesis with the appointment of Dean Lance Liebman as the fifth Director of the ALI in 1999.\(^6\) Shortly after his appointment, Dean Liebman encouraged discussions of a possible *Restatement of Employment Law*.\(^7\) At its 2000 annual meeting, the ALI’s Council voted that the Institute should begin work on the project,\(^8\) and shortly after that, the Council appointed four Reporters to begin drafting: Professors Samuel VanderVelde, The Proposed Restatement of Employment Law at Midpoint, 16 EMP. RTS. & EMP. POL’.Y J. 359 (2012).


5. Id.

6. Id.

7. Id.

8. Id.
Estreicher, Michael Harper, Christine Jolls, and Stuart Schwab. After several years of slow progress Christine Jolls resigned as a Reporter and Sam Estreicher was elevated to Chief Reporter. The Reporters presented their initial draft of the first two chapters of the Restatement to the ALI Council at its 2006 annual meeting. At this point the project came to the attention of academics in employment law in general and the members of the Labor Law Group in particular. In 2008 Professors Matthew Bodie and Andrew Morris were added as Reporters, but Morris left the project after two years. By 2011, the Reporters had finished several more chapters that were considered in draft form by the ALI. By 2014, drafts of all of the Restatement's chapters had been finished and the ALI approved those drafts at its May 2014 annual meeting, subject to editing. By 2015 the final draft of the Restatement of Employment Law was done and it appeared in print in early 2016.

In drafting the Restatement, the objective of the reporters was to restate and clarify the common law of the employment relationship across the fifty American states in a way that was internally consistent and consistent with the ALI's other restatements, choosing the “better” statement of the common law where there were significant differences among the states. As stated by the Reporters:

The goal was to describe, clarify, harmonize, and modernize the law, but not to change it in a particular substantive direction. It was an “is, not ought” exercise. . . . Of course, Reporters are not simply scribes, either. When articulating, summarizing, and clarifying the law of fifty jurisdictions, choices had to be made, and

---

9. Estreicher et al., supra note 1, at 1245.
10. Dau-Schmidt, supra note 2, at 2.
11. Id. at 3; see also RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Discussion Draft 2006) (containing chapter 3 and part of chapter 4).
12. Id.
13. Estreicher et al., supra note 1, at 1246.
14. RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 1 2008) (containing chapters 1, 2, and part of 4); RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 2 2009) (containing chapters 1, 2, and part of 4); RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 3 2010) (containing chapter 8); RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 4 2011) (containing chapters 6 and 8).
15. RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 5 2012) (containing chapters 3, 7, and 5); RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Tentative Draft No. 6 2013) (containing chapters 4, 7, and 9); RESTATEMENT (THIRD) OF EMP'T LAW (AM. LAW INST., Proposed Final Draft 2014); RESTATEMENT OF EMP'T LAW (AM. LAW INST. 2015).
16. Dau-Schmidt, supra note 2, at 5.
we tried to make the better or wiser choices.\textsuperscript{17} The ALI’s 1923 Certificate of Incorporation states that “[t]he particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs.”\textsuperscript{18} Similarly, the ALI’s Reporters’ Handbook states, “Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court.”\textsuperscript{19} Furthermore, the ALI’s Reporters’ Handbook states “[i]t is important that Institute projects be not only internally consistent but consistent with each other.”\textsuperscript{20} The ALI represents that the intended audience for its reports is “the legal community as a whole,”\textsuperscript{21} while restatements are particularly aimed at “courts and others applying the existing law.”\textsuperscript{22}

As finally published, the \textit{Restatement of Employment Law} contains nine chapters on a broad variety of employment law subjects.

- Chapter 1 – Existence of Employment Relationship
- Chapter 2 – Employment Contracts: Termination
- Chapter 3 – Employment Contracts: Compensation and Benefits
- Chapter 4 – Principles of Employer Liability for Tortious Harm to Employees
- Chapter 5 – The Tort of Wrongful Discharge in Violation of Public Policy
- Chapter 6 – Defamation, Wrongful Interference, and Misrepresentation
- Chapter 7 – Employee Privacy and Autonomy
- Chapter 8 – Employee Obligations and Restrictive Covenants
- Chapter 9 – Remedies

\textsuperscript{17} Estreicher et al., \textit{supra} note 1, at 1247.
\textsuperscript{18} \textit{AM. LAW INST., CERTIFICATE OF INCORPORATION} 1 (1923), \textit{available at} <https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4e/certificate-of-incorporation.pdf>.
\textsuperscript{20} \textit{Id.} at 2.
\textsuperscript{21} \textit{Id.} at 1.
III. PAST COMMENTARY ON THE RESTATEMENT

Since its inception, the project of The Restatement of Employment Law has encountered criticism. Some of these criticisms posed larger questions about the viability and wisdom of the project while others concerned the specific content of chapters as adequate restatements of the common law. Although the ALI procedure includes a process of reading and review by a larger body of advisors as well as, theoretically, the ALI membership as a whole, probably the most pointed and detailed criticisms of the Restatement were generated in the Labor Law Group’s prior conferences on Restatement drafts. Perhaps this clash of cultures between the ALI and Labor Law Group was inevitable since the ALI is a large organization of practitioner and academics of general design, but with a strong interest in commercial and business topics, and the Labor Law Group is a much smaller collection of academics, and a few practitioners, focused solely on labor and employment law. Indeed, one recurring critique of the ALI’s efforts has been that, although the Reporters are all well respected academics, employer interests seemed better represented among the Reporters than employee interests, in no small part because the Chief Reporter, Samuel Estreicher, was counsel to a large firm representing employer interests. Although many of these criticisms went unheeded, some had an impact on the final form of the Restatement.

The Restatement project has previously been criticized for its timing, inadequate empirical basis, and its lack of adequate theoretical development. The employment relationship is currently undergoing fundamental changes as we transition from an economy based on industrial production to new methods and relationships using rapidly changing information technology. Along with these

24. ALI HANDBOOK, supra note 19.
26. Laura J. Cooper, Teaching ADR in the Workplace Once and Again: A Pedagogical History, 53 J. LEGAL EDUC. 1, 12 (2003); Dau-Schmidt, supra note 2, at 24.
changes in the means of production, the law of the employment relationship is rapidly evolving. Thus it would seem an inopportune time to "restate" existing employment law and perhaps chill further development. The Reporters have acknowledged this criticism, but argued that there is currently enough stability in the common law of the employment relationship to make a useful restatement. It has also been argued that the Restatement is empirically deficient and that the results in employment law cases across the fifty jurisdictions are much more varied and fluid than is represented in the Restatement. In particular it has been argued that the Restatement evinces a bias in favor of New York precedents, to the exclusion of other jurisdictions, for example California. The Reporters have argued that they have adequately reviewed all of the relevant precedents to make a valid restatement. Finally, it has been argued that in undertaking a Restatement of Employment Law it is necessary to develop an underlying theory of the employment relationship examining how this relationship is different from other commercial relationships and therefore a subject for a separate restatement. Establishing a theory of the employment relationship is the only way to develop a Restatement of Employment Law that is internally consistent and can adequately explain deviations from the general restatements of tort and contract in a way that is consistent, as is required by ALI processes.

Various authors have also evaluated the particular chapters of the Restatement. At the Labor Law Group's first conference on the Restatement, Professors Nolan, St. Antoine, Slater, and Goldman produced a report on the first chapter concerning the existence of the employment relationship, while Professors Finkin, VanderVelde, Corbett, and Befort evaluated the second chapter on termination, and Professors Grodin, Secunda, Bales, Corrada, Fisk, and Kim wrote

29. Dau-Schmidt, supra note 2, at 11.
30. Estreicher et al., supra note 1, at 1251-52.
32. Dau-Schmidt, supra note 2, at 4-5.
33. Estreicher et al., supra note 1, at 1250.
34. Dau-Schmidt, supra note 2, at 10.
35. Id.
on the (then) fourth chapter concerning the tort of wrongful discharge (later to become chapter five). 38 Professors Hyde, Arnow-Richman, and Zimmer wrote responses to these reports. 39 At the Labor Law Group’s second conference on the Restatement, Professor Finkin wrote on the defamation and privacy provisions in chapters six and seven, 40 while Professors Selmi, Fisk, and Berry wrote on the Reporters’ work on the duty of loyalty and covenants not to compete in chapter eight, 41 and Professors Hyde and Covington wrote on the restatement of remedies in chapter nine. 42 Cornell Law School also hosted a conference on the Restatement, and the Cornell Law Review published the resulting essays and transcripts. At the Cornell conference, Professor Hillman wrote on the employment contract provisions in chapter two, 43 Professor Willborn wrote about consent and the privacy provisions in chapter seven, 44 Professors Selmi and DeMott wrote on the duty of loyalty and restrictive covenant provisions in chapter eight, 45 and Professor Sullivan commented on the remedies sections in chapter nine. 46 The Cornell Law Review also published a transcript of the comments of Judges Berzon, Durham,

40. Matthew W. Finkin, An Excursion Through Strange Terrain: Chapters 6 (Defamation) and 7 (Privacy and Autonomy), 16 EMP. RTS. & EMP. POL’Y J. 465 (2012).
and Rosenthal on the *Restatement*.47

**IV. THE CURRENT CONFERENCE**

**A. General Themes**

The comments of the participants in this conference were varied, but at least three general themes were evident in our discussion of the Reporters’ work on the *Restatement*. The first was that people wondered about the utility of a restatement of the common law of the employment relationship when so much of the relationship is governed by federal and state statute. Mike Padgett volunteered that most of his practice on behalf of employers consisted of pursuing motions for summary judgment under federal statutes and then settling the cases where those motions failed. Professors Garden and Slater wondered at the differences between the *Restatement’s* treatment of unpaid work and the Department of Labor’s test under the Fair Labor Standards Act.49 Professor Duff questioned the utility of a *Restatement* section on tortious harm when the “overwhelming default regime” for harm in the employment relationship was workers’ compensation, although ultimately he found the exercise worthwhile.50 The entire thrust of Professor Bent’s contribution was that it was hard to restate the common law of employer liability without running into state and federal compensation statutes, the Occupational Safety and Health Act, and antidiscrimination statutes.51 Professor Harper, one of the Reporters on the *Restatement*, has attempted to answer such criticisms with an essay discussing the utility of common law doctrine in interpreting statutes.52

The second was that, in drafting the *Restatement*, the Reporters failed to account adequately for the asymmetry in bargaining power.

---

that exists in the employment relationship. Because of this asymmetry in bargaining power, any common law right that is waivable, for example in privacy or when based on implied contract, will almost certainly end up waived through boilerplate employer policies or disclaimers. Indeed it is because of this asymmetry in bargaining power that so much of the relevant employment law is statutory, because it is only through statute that employees can achieve non-waivable rights. Professor Casebeer criticized the Restatement’s assumption that employment contracts are “mere contracts,” without any discussion of the asymmetry of bargaining power and possible coercion, despite prior recommendations that the material address this issue.53 Professor Befort critiqued the Restatement’s affirmation of employer boilerplate disclaimers in employee handbooks, under a novel theory of “administrative agency estoppel,” rather than directly examining employee expectations based on the handbook.54 Professor Norton argued that the Restatement’s treatment of fraudulent misrepresentations fails to take account of the inequality of access to important information between employers and employees, in addressing the employer’s obligations of honesty and accuracy in important representations.55 Professor Finkin’s critique of the privacy provision of the Restatement addressed many issues, but often returned to the criticism that the Restatement’s employee privacy provisions were grounded in implied contract and could thus be easily disclaimed.56 Failure to address the inequality in bargaining power between employers and employees results in a Restatement that favors employer interests since they can use their bargaining power to negotiate around any contractual presumptions or waivable rights.

Finally, several speakers mentioned the ongoing transformation of the employment relationship with the rise of information technology and the impact of this change on the relevance of the Restatement of Employment Law. Professors Garden and Slater discussed the reorganization of production and the new forms of employment in the information age and questioned whether the

Restatement’s chapter on the existence of the employment relationship was adequate for dealing with these new relationships.57 Professor Finkin also argues that the Restatement’s treatment of employee privacy fails to take account of the new intrusions on employee privacy that are possible with recent advances in “data mining.”58 Professor Finkin argues that the Restatement could be usefully informed by European efforts in dealing with employee privacy problems.59 These criticisms once again raise the issue of whether employment law is ripe for a restatement of the existing common law.

B. Particular Contributions

In their contribution, Professors Charlotte Garden and Joseph Slater analyzed the Reporters’ work on Chapter 1 of the Restatement on “The Existence of the Employment Relationship.”60 Professors Garden and Slater discuss the Restatement’s treatment of the joint employer relationship, the use of unpaid interns, and the rise of the gig/app-based economy. With respect to the treatment of joint employment in the Restatement, the authors argue that the Restatement: 1) does not list the existing approaches on fissured work arrangements and therefore it does not take a position on which approach is best; and 2) the language of the definition does not resolve the key issue of whether an employer’s control over its employees must be regularly, actually exercised or whether indirect or potential control is sufficient.61 For unpaid interns, Garden and Slater argue that the Restatement should have recommended the Department of Labor’s approach for the Fair Labor Standards Act (FLSA) because most unpaid intern litigation arises under the FLSA and because the Department’s approach is the soundest.62 Additionally, Garden and Slater assert that the Restatement fails to deal adequately with this issue as it exists currently for a few reasons: 1) the Restatement’s discussion seems aimed at educational institution internships for students; 2) the first sentence of section 1.02(g) is misleading; 3) the Restatement does not define intern or clear promise

57. Garden & Slater, supra note 49.
58. Finkin, supra note 56, at 601-02.
59. Id. at 620-21 n.115.
60. Garden & Slater, supra note 49.
61. Id. at 266-67.
62. Id. at 284-88.
of future employment; and 4) the illustrations, 10 and 11, are not clear why one is an employee (10) and the other is not (11). Finally, with respect to the app-based economy, Garden and Slater argue that the Restatement does not articulate the purpose of the distinction between independent contractors and employees in various contexts and therefore it will not be of much use to decision-makers in these types of cases in the app-based economy. Garden and Slater believe the Restatement should have provided a purposive approach to applying the varying multi-factor employee/independent contractor tests instead of advocating for a particular rule.

In analyzing Chapter 2 of the Restatement, Professor Stephen Befort is in familiar territory discussing the legal significance of employee handbooks and their disclaimers. Professor Befort argues that the Restatement does not adequately account for legitimate employee expectations in outlining the law in the enforcement of employee handbooks and their disclaimers. He is also skeptical of the Restatement's adoption of the theory of "administrative agency estoppel" in deciding what handbooks to enforce, a theory for which there is no support in any American jurisdiction. Moreover, he argues that, the Restatement's recognition of employer disclaimers without a fact specific analysis of employee expectations is inconsistent with the Restatement's estoppel theory of enforcement and the weight of commentary against giving automatic effect to boilerplate disclaimers regardless of employee expectations. Professor Befort does not believe that the Restatement should give determinative weight to the insertion of boilerplate disclaimers in new and revised handbooks without regard to the overall promissory tenor of those documents or the reasonable expectations they might create in the employees.

Professor Kenneth Casebeer presented a general theoretical criticism of the work in Chapter 2 of the Restatement on the law governing employment contracts and terminations. Professor Casebeer argues that the Restatement's language is based upon the at-
will doctrine birthed in the nineteenth century and that it reinscribes a commitment to capitalism. Professor Casebeer also argues that, by excluding discussion on the inequality in bargaining power in the employment relationship, the Restatement "cleverly" avoids limitations on the termination of non-union, at-will workers and fails to mention other forms of employment relationships, such as democratic worker cooperatives. Professor Casebeer goes so far as to argue that the chapter on termination is neither a truthful restatement nor a best practice. It simply restates "blindly" the ideological choices and commitments of the nineteenth century as the line of good cause based on business need is not as certain as the Restatement portrays and those cases never truly explain why the good cause rules should be opposite in definite and indefinite term contracts.

Professor Lea VanderVelde examines the Restatement's discussion of the implied covenant of good faith and fair dealing (CGFFD) as it appears in Chapter 2. Professor VanderVelde argues that the Restatement's lack of a robust statement of this doctrine is a missed opportunity to bring states to align with best principles. Professor VanderVelde argues that, because there is no consensus on the issue, the Restatement Reporters had a much freer hand in drafting the CGFFD doctrine, but picked a weak form of CGFFD by giving preference to the at-will doctrine. Additionally, the Reporters failed to mention cases where the CGFFD has been more developed such as the Alaska line of cases and the classic Foley v. Interactive Data case. Professor VanderVelde also argues that the Restatement overlooked considering good faith protection of employees' legitimate claims of liberty, privacy, and autonomy in formulating a stilted definition of "good faith."

In her contribution, Professor Nadelle Grossman examines the treatment of the implied covenant of good faith and fair dealing in the Restatement's Chapter 3. Professor Grossman compares the treatment

71. Id. at 325.
72. Id. at 327.
73. Id. at 333.
75. Id. at 339-40.
76. Id. at 340.
77. Id. at 342. (citing Foley v. Interactive Data Corp., 765 P.2d 373 (Cal.1988)).
78. Id. at 354-61.
of good faith and fair dealing in the Restatement of Employment Law, with the treatment of the same topic in the Restatement of Contract Law to ensure the Restatement of Employment Law gave effect to the full scope of the implied duty in employment contracts. She finds that the Restatement of Employment Law has narrowed the concept from that contained in the Restatement of Contract law in three ways. First, the Restatement of Employment Law’s statement of the implied duty fails to describe the duty as normative in the main body, relegating any discussion of the normative purpose to the comments. Professor Grossman sees this as a problem because one of the implied duty’s important contributions is to guide parties in how to affirmatively act as they perform a contract, and not to merely guide them as to conduct from which to refrain under the standard of liability. Second, Professor Grossman argues that the placement of the implied duty only in the chapters on termination and compensation and benefits might limit it to those two contractual terms, rather than giving it full application to the entire employment relationship, for example in the drafting and application of covenants not to compete. Finally, Professor Grossman points out that the Restatement of Employment Law provides only a limited number of examples of bad faith, excluding other examples from existing cases, which could limit the scope of bad faith, with the consequence being employees might be less likely to bring legal claims against their employers for behavior that has been deemed bad faith in other contexts. Professor Grossman’s concern here is that without a more comprehensive list of bad faith conduct or a stronger normative signal as to what is expected in an employment contract, the implied duty becomes less effective at making employers act fairly, decently, and reasonably. Professor Grossman would recommend that the Restatement describe the implied duty as a normative standard and more broadly describe the conduct that amounts to bad faith.

Professor Scott Moss provides both an empirical analysis of the potential utility of restating the law and an analysis of the compensation provisions of Chapter 3 of the Restatement. With

80. Id. at 379.
81. Id.
82. Id. at 379-80.
83. Id.
84. Scott A. Moss, The Value of the Restatement of Employment Law, Based on 50-State
respect to his empirical tests, Professor Moss analyzes both employment contract cases and contract cases generally, and finds that citations to restatement projects increase over time and that citations to these projects are found disproportionately in states that are relatively new and have low population density and income, and thus have little case law on the subject.\textsuperscript{85} Professor Moss concludes that restatement projects are useful for states with little case law on the subject. Professor Moss then examines the specific provisions of the compensation provisions of Chapter 3. Although he finds that the reporters "occasionally cite inapt case law" and sacrifice some clarity by scattering substantive comments among the black-letter text, comments, illustrations and notes, he finds that these provisions of the Restatement uphold some important employee rights and provide some clarity. Professor Moss concludes that "[d]espite its imperfections, the Restatement of Employment Law makes a material contribution to clarifying employment law and nudging, on the whole, toward more robust employee rights."\textsuperscript{86}

In his article for the conference, Professor Jason Bent surveys the Restatement's treatment of employer liability to employees for injury and hazardous work conditions in Chapter 4 of the Restatement.\textsuperscript{87} Professor Bent characterizes the Restatement's provisions "at best curious and incomplete, and at worst misleading."\textsuperscript{88} In particular, Professor Bent is critical of the ALI's attempt to restate only the common law of employer liability for tortious harm to its employees, while failing to address the relevant statutes that dominate this area of law. As a result of these omissions – especially, the omission of OSHA – the professor argues that Chapter 4 of the Restatement adds very little to the field of employment law, as it merely restates relatively narrow gaps left by the statutes.\textsuperscript{89} In concluding, Professor Bent recommends that courts and practitioners be mindful of this limited reach of Chapter 4, and carefully avoid "extending Chapter 4's common law principles into the realm of state or federal statutory regulation."\textsuperscript{90}

\begin{flushleft}
\textit{Empirical Analyses and the Importance of Clarifying Disputed Issues – But with Caveats about the Restatement's Imperfect Work Product, 21 EMP. RTS. \\ & EMP. POL'Y J. 409 (2017).}
\end{flushleft}

\textsuperscript{85.} \textit{Id.} at 428-36.
\textsuperscript{86.} \textit{Id.} at 412.
\textsuperscript{87.} \textit{Bent, supra} note 51.
\textsuperscript{88.} \textit{Id.} at 486.
\textsuperscript{89.} \textit{Id.}
\textsuperscript{90.} \textit{Id.}
Professor Michael Duff also examined the Restatement's exposition of employer tort liability in Chapter 4 – in particular, sections 4.01 (general scope of employer's liability to employees), 4.02 (employer's direct liability to employees for its own conduct), and 4.06 (employer's liability for torts committed against employees). Although Professor Duff spends some time examining the black-letter language of these sections, he finds this inquiry into possible tort remedies as beside the point because workers' compensation is the exclusive remedy for the overwhelming majority of workplace injuries. In particular, Professor Duff is critical of the Chapter's failure to sufficiently acknowledge tort's remedial inadequacy in the employment context, the "grand bargain" that ultimately created workers' compensation, the increasing use of mandatory arbitration of workplace injuries, or the current dramatic shift in thinking about compensation for injured workers.

In their contribution, Professors Ann McGinley and Nicole Porter discuss Chapter 5 of the Restatement, which deals with the tort of wrongful discharge in violation of public policy. Notably, they express their view that courts that follow the recently-revised Restatement will also consider the authors' critiques and suggestions in determining how state common law should be interpreted in the context of wrongful discharge in violation of public policy. In their analysis, Professors McGinley and Porter focus on two main issues within the Chapter that they see as significant and problematic. First, they contend that the ALI erred in removing the discussion of wrongful discipline from the final draft of the Chapter; they argue that in addition to the tort of wrongful discharge (which is discussed), wrongful discipline claims should be actionable, and that the Restatement should have specifically included it in Chapter 5. Second, Professors McGinley and Porter assert that even though section 5.02 of the Restatement may have accurately restated the current law, they argue the ALI should have omitted the "reasonable" belief requirement; instead, they recommend that an
employee need only show a “good faith” belief that certain conduct would violate the law or harm the public in order to allow a public policy claim to proceed.97

The first day of the conference featured a panel discussion among employment law practitioners, some of whom represented employees and others who represented employers.98 John Roche, counsel for the Illinois Fraternal Order of Police Labor Council, saw renewed interest in a restatement of the common law of the employment relationship as Republican dominated state and federal governments rolled back employee statutory rights.99 He identified the doctrines of negligent hiring and employee privacy as of particular interest to police officers.100 Ryan H. Vann, a partner with the firm of Baker & McKenzie LLP, identified the amendment of employee handbooks and the broad definition of “employer” for example under the joint employer doctrine, as very important to his clients.101 He recounted a case in which a client of his had been bound by termination provisions that had been omitted from the company handbook years earlier because the employer had not given additional consideration for the change.102 Michael D. Ray, a shareholder with the firm of Ogletree Deakins, praised the ALI’s objective of increasing uniformity in the common law among the American jurisdictions.103 Mr. Ray acknowledged that courts were hesitant to enlarge torts in employment law cases that were already governed by state and federal statutes, for example whistle-blower statutes.104 Daniel J. Kaspar, Assistant Counsel for the National Treasury Employees Union, observed that the common law was a very thin slice of employment law practice, although he agreed with Mr. Ray that more uniformity among the states would be helpful.105 Dale Pierson, General Counsel for IUOE Local 150, agreed that the common law was a very small part of his practice, but saw the Restatement as a useful summary of the arguments in these areas.106

97. Id. at 528-42.
99. Id. at 546-48.
100. Id. at 548.
101. Id. at 549-50, 551-53.
102. Id. at 549-50.
103. Id. at 554.
104. Id. at 555-56.
105. Id. at 558-59.
106. Id. at 561.
Mr. Pierson ventured that the Restatement should have spent more time discussing the rules and impact of individual arbitration provisions in employee handbooks.\textsuperscript{107}

Professor Ruben Garcia examines Chapter 6 of the Restatement, specifically, the sections addressing the torts of defamation and wrongful interference.\textsuperscript{108} In addition to providing some background on the Restatement's discussion of the two related torts, Professor Garcia maintains that the Restatement missed a number of opportunities to address related procedural issues, as well as the existing imbalance of power between employers and employees.\textsuperscript{109} Finally, Professor Garcia proffers his own vision concerning the torts of defamation and wrongful interference in employment law, and he asserts that the Restatement should have better discussed the torts in the context of employment-at-will, taking into account the imbalance of power in the workplace.\textsuperscript{110}

In her article, Professor Helen Norton focuses on the sections in Chapter 6 of the Restatement of Employment Law that address employers' duties of honesty and accuracy in their communications to employees.\textsuperscript{111} Professor Norton's discussion begins with an overview of how and why the law imposes such duties on speakers who have information and power advantages over their listeners.\textsuperscript{112} Drawing on this, Professor Norton evaluates the Restatement's attention to information and power asymmetries in its text on employers' duties of honesty and accuracy.\textsuperscript{113} Professor Norton concludes that Chapter 6 does not adequately recognize these power advantages that employers enjoy — power advantages that can lead to employees' reliance on employers' misrepresentations. Finally, Professor Norton asserts that despite the Restatement's shortcomings, judges should nonetheless keep in mind the power dynamics between employers and employees when adjudicating claims of fraudulent or negligent misrepresentation in the employment context — as should policymakers when drafting legislation.\textsuperscript{114}

\textsuperscript{107} Id. at 562.
\textsuperscript{109} Id. at 564.
\textsuperscript{110} Id. at 573-74.
\textsuperscript{111} Norton, supra note 55.
\textsuperscript{112} Id. at 577.
\textsuperscript{113} Id. at 579-86.
\textsuperscript{114} Id. at 587.
Professor Matthew Finkin finds himself on familiar ground in evaluating the *Restatement*’s Chapter 7 on privacy and autonomy, using several metrics from the American Law Institute as guidance. In his essay, Professor Finkin aspires to evaluate Chapter 7 of the *Restatement* according to the criteria set out by the ALI itself: clarity, coherence, expository rigor, and transformative cogency. After surveying the *Restatement* provisions and the law on privacy and autonomy, Professor Finkin returns to the four criteria of the ALI and finds Chapter 7 wanting on all counts. On the important question of whether an employer can compel suspicionless drug tests of employees in non-safety sensitive positions, Professor Finkin finds the language and examples of the *Restatement* contradictory. Professor Finkin argues that the Reporters have given inadequate direction on important privacy concerns in data-mining and requests for past salaries. Professor Finkin argues that grounding the duty of employer confidentiality in contract, rather than tort, in the *Restatement* is a mistake because it will be too easily disclaimable by employers. Finally, Professor Finkin argues that the *Restatement* and its examples give inadequate attention to individual autonomy in the area of employee free expression. Professor Finkin concludes that Chapter 7 of the *Restatement* would “reify the status of employee as servant,” finding it lackluster in addressing the issues of privacy and autonomy, and characterizing it as “opaque, incoherent, [and] wanting in explanatory content or transformative cogency.”

Professor Hyde offers his analysis of the *Restatement*’s Chapter 8 on employee obligations and restrictive covenants. He notes the past criticisms of the *Restatement*’s representations on this topic and the changes that have been made from prior drafts based on those

---


116. Finkin, supra note 56, at 590.

117. Id. at 617-19.

118. Id. at 595-96.

119. Id. at 601-02.

120. Id. at 612-14.

121. Id. at 616-17.

122. Id. at 621.

Professor Hyde applauds that the Restatement disowns the doctrine of inevitable disclosure and increases the employer’s proof requirements in establishing an enforceable restrictive covenant. However he still believes that the Restatement is too quick to impose an implied duty of loyalty on employees, when no similar implied duties are imposed on employers. Professor Hyde is especially critical of the Restatement’s expansion of the implied duty of employee loyalty to include obligations respecting trade secrets. Professor Hyde also argues that the Restatement and existing case law is out of step with the economic imperative of employee mobility. Professor Hyde believes that the Restatement and the case law on which it selectively relies, are so out of step with the increasing incidence and economic benefits of employee mobility, and with the rapidly-emerging legal limitations on restricting mobility, that drafting, reading, and commenting on the Restatement Chapter 8 is “a waste of time.”

The second day of the conference highlighted a panel discussion among judges and employment law practitioners. Judge David Hamilton, of the United States Seventh Circuit Court of Appeals, acknowledged that the Restatement of Employment Law was different than most of the ALI’s other restatements because it is more contentious across entrenched divides of class, economic power, and politics, and because it is subject to so many state and federal statutes. Judge Hamilton also argued for a more even-handed application of implicit duties between employers and employees and careful narrow application of covenants not to compete. Judge Terry A. Crone, of the Indiana Third District Court of Appeals, acknowledged Professor Finkin’s concerns about developing adequate common law standards for privacy in a world in which information technology is so quickly advancing. Judge Crone saw the Restatement as an opportunity for both practitioners and judges to find “friendly” citations that supported their arguments, even if there

124. Id. at 624-26.
125. Id. at 631-35.
126. Id. at 629.
127. Id. at 644.
129. Id. at 646-47.
130. Id. at 652-55.
131. Id. at 657-58.
was no similar precedent in their jurisdiction.\textsuperscript{132} Michael W. Padgett, a partner in the firm of Jackson Lewis, agreed with Professor Hyde that he wondered what was the point of restating the common law of the employment relationship when so much of his practice was based on statute?\textsuperscript{133} He acknowledged that there might be some use in the section on the existence of the employment relationship and wished that the reporters had spent more time discussing when the employment relationship ends.\textsuperscript{134} Finally, Jeffrey A. Macey, a partner with the firm of Macey and Swanson, stated that his primary burden representing employees is to survive summary judgment by establishing why the case belongs in court.\textsuperscript{135} Under our system the presumptive remedy for mistreatment by your employer is to find another job. Mr. Macey saw the Restatement as another opportunity for him, outside of statute, to establish that the employer owed the employee some legal duty. From that perspective he saw a concise and well-organized Restatement as valuable.\textsuperscript{136}

V. CONCLUSION

This conference, and the prior conferences discussing the Restatement, provide an extensive discussion of the virtues and problems with the Restatement of Employment Law. Some of these criticisms go to the fundamental question of whether the project was a good idea at all, but most go toward improving the final draft of the project or to presenting alternative arguments and visions that can inform the rationalization of the common law on the employment relationship. The Restatement is now done and available for practitioners and judges to use, and the valuable commentaries produced in this and the other conferences are also available for argument and citation. We leave it now to the members of the bench and bar to judge the worthiness of the project and its usefulness in logically, consistently, and fairly outlining the primary common law doctrines of the employment relationship.

\textsuperscript{132} Id. at 659.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 663.
\textsuperscript{135} Id. at 665.
\textsuperscript{136} Id. at 668-69.