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Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer

Frank J. Cavico

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ARTICLES

FRAUDULENT, NEGLIGENT, AND INNOCENT MISREPRESENTATION IN THE EMPLOYMENT CONTEXT: THE DECEITFUL, CARELESS, AND THOUGHTLESS EMPLOYER

FRANK J. CAVICO*

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* Associate Professor of Business Law and Ethics, Graduate School of Business and Entrepreneurship, Nova Southeastern University, Ft. Lauderdale, Florida; LL.M., University of San Diego, 1987; J.D., St. Mary's University, 1976; M.A., Drew University, 1973; B.A., Gettysburg College, 1972; Member, Florida and Texas Bar Associations.
The common law doctrine of fraud engenders many perplexing, yet engrossing, problems. Fraud gives rise to not only technical legal questions, but also to ethical, theoretical, and practical ones. Fraud emerges as a consequential common law precept because the occurrence of fraudulent-type conduct transverses the total compass of contracting and business transactions. Fraud, moreover, possesses both tort and contract ramifications; this raises the ancient dilemmas of differentiating tort from contract and precisely demarcating the boundary between the two seminal common law actions.

The legal, academic, and business communities call out for clarity in this important area of the law; yet the very word “fraud” is itself a misnomer. Fraud, or more properly, fraudulent misrepresentation, traditionally designated as “deceit,” represents just one part of the corpus of misrepresentation law. “Pure” fraudulent misrepresentation, grounded on an intent to deceive, forms
the foundation of the tort cause of action for fraud, called deceit. This type of intentional fraudulent misrepresentation also can serve as the basis to rescind a contract or as an affirmative defense to a lawsuit for breach of contract.

Liability for misrepresentation, however, can be predicated on more than intentional fraudulent misrepresentation. Misrepresentation can be separated further into negligent misrepresentation, based on careless misrepresentation, and innocent misrepresentation, supported by strict liability and express warranty rationales. The law of misrepresentation, therefore, is much broader than the cause of action for fraud.¹

As a result of the many meanings and applications of "fraud," there has been a great deal of unnecessary confusion in this prominent area of the law.² This confusion has been exacerbated by the overlapping of terminology, the overabundance of theory, and especially by the indiscriminate use of the inherently indefinite word, "fraud."³

As misrepresentation runs throughout the business as well as legal spheres, this article will spotlight one particular view of misrepresentation - the employment sector. Employer liability for misrepresentation, in particular, has been the subject of considerable recent litigation. This article, therefore, will review the current case law on misrepresentation to ascertain when, what type, and how a misrepresentation claim will lie against an employer.

This article strives to sort through the sundry ramifications of the law of misrepresentation. Accordingly, the three major classifications of misrepresentation - fraudulent, negligent, and innocent - will be differentiated clearly and then examined extensively. The elements constituting each category of misrepresentation action will be explained and illustrated. The article will focus upon the nature and extent of the tort action available to an aggrieved party who was induced to enter into a transaction or relationship by the misrepresentation of another. This tort analysis will include not only the traditional cause of action of deceit, but also the emerging tort of negligent misrepresentation in the employment context. The article will also attempt to ascertain the

² KEETON ET AL., supra note 1, § 105, at 727-29.
³ KEETON ET AL., supra note 1, § 105, at 727.
efficacy of the cause of action of innocent misrepresentation in an employment setting.

Substantive law, including damages and defenses, and procedural law, including pleading and proving, will be explicated. The rescissionary and "defensive" nature of misrepresentation also will be addressed. The article, finally, will offer advice on how to properly plead and prove misrepresentation.

As a misrepresentation claim can be made in an employment situation, as in any business or contracting transaction, it is essential to set forth plainly the literal meaning and composition of the various misrepresentation causes of action, commencing with the dominant tort action of deceit.

II. TYPES OF EMPLOYMENT MISREPRESENTATIONS

When defendant employers have made false representations, and employees have pursued misrepresentation lawsuits therefor, it is very interesting to examine the various types of employment misrepresentations allegedly committed by employers as well as to discern the degree of success by employees in bringing legal actions therefor. The kinds of employer misrepresentations scrutinized herein can be classified into seven general categories, as follows: (1) when the employer makes misrepresentations, regarding the terms and conditions of employment or the fact of employment itself, to an applicant during the hiring, interviewing, and recruitment process, presumably for the purpose of persuading the applicant to accept employment with the employer;⁴ (2) when the employer expresses false statements regarding the employer's financial condition, profitability, future sales, or economic stability, or the employee's income potential;⁵ (3) employer misrepresentations concerning continuing employment, promotions, project approval, transfers, job security, or salary increases designed to induce employees to remain in the employer's employ, not to seek employment elsewhere, not to retire, or to forgo business opportunities or employment with other employers;⁶ (4)

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employment misrepresentations intended to do the opposite, that is, to cause an applicant not to apply for a position, or induce an employee to resign or retire from employment, not to initiate a dispute, or to settle some dispute with the employer;⁷ (5) when an employer disciplines or discharges an employee after falsely representing that the employee would not be retaliated against or terminated if he or she cooperates with an investigation of workplace wrongdoing, admits guilt to some infraction, or "blows the whistle" on employee misconduct;⁸ (6) employer's false statements regarding the legality, propriety, or fairness of employment practices and procedures or the employee's status or conduct, or the safety and security of the workplace;⁹ (7) employer's misrepresentations, finally, concerning paying salary or commissions, providing benefits, pensions, or insurance, rewarding employees for meritorious service or ideas, or according an employee full-time status.¹⁰

In order to recover for any of the preceding employment misrepresentations, the plaintiff employee must be very careful in drafting his or her complaint, especially if the employee's cause of action is one for intentional, fraudulent misrepresentation.

III. FRAUDULENT MISREPRESENTATION - DECEIT

A. Nature and Basis of Liability

Since the early common law, the cause of action for deceit, or presently, as customarily designated, fraudulent misrepresentation, has been identified with intentional misrepresentation.¹¹ Liability for intentional misrepresentation requires a showing that the defendant was aware that he or she was consciously and purposefully deceiving the victim.¹² A defendant, therefore, who makes a careless, incompetent, heedless, or inadvertent misrepresentation is governed by other legal theories and remedies.¹³

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¹¹ KEETON ET AL., supra note 1, § 107, at 740.
¹² RESTATEMENT (SECOND) OF TORTS § 528 cmt. a (1977).
¹³ RESTATEMENT (SECOND) OF TORTS § 528 cmt. a (1977).
In order to sustain a viable tort cause of action for deceit, that is, intentional, fraudulent misrepresentation, the common law generally requires that the following elements be pleaded and proved: (1) a false representation of material fact made by the defendant; (2) with knowledge or belief as to its falsity, or with reckless disregard as to its truth or falsity; (3) with an intent to induce the plaintiff to rely on the misrepresentation; (4) justifiable reliance on the misrepresentation by the plaintiff; and (5) damage or injury caused to the plaintiff by the reliance.¹⁴

A fraudulent misrepresentation claim can be made in any employment context, so long as the preceding elements are supported properly by the evidence.¹⁵ In a typical case, an employer purposefully induces some detrimental action or inaction on the part of an employee or prospective employee by means of an intentionally made false statement of material fact.¹⁶

Fraud, in the employment sector or otherwise, is founded on the misrepresentation, that is the falsity of the statement; but in order to show a false statement, a plaintiff must first demonstrate that a representation in fact was made by the defendant.

B. Misrepresentation

1. Affirmative Misrepresentation

a. Representation

A representation that will serve as the basis of a fraudulent misrepresentation claim against an employer ordinarily consists of oral or written words.¹⁷ In Clement-Rowe v. Michigan Health Care Corporation,¹⁸ the plaintiff accepted a position as an employee health care nurse, and the court held that the defendant's person-


¹⁷. Keeton et al., supra note 1, § 106, at 736; Restatement (Second) of Torts § 525 cmt. b (1977); see also Clement-Rowe, 538 N.W.2d 20.

nel director's oral statement to the plaintiff that money was allocated for her position was a "representation" by the defendant-employer.¹⁹

A representation does not have to consist of written or oral words, but also may encompass conduct that equates to an assertion not in accordance with the truth.²⁰ In Russ v. TRW, Inc.,²¹ the plaintiff-employee, a sociology major, had minimal accounting background and training, but was hired by the defendant-corporation to work in the corporation's accounting division.²² The responsibilities of the plaintiff-employee included "costing" the company's defense contracts.²³ The plaintiff-employee claimed that the company's fraudulent representations regarding the accounting procedures exposed him to potential criminal liability.²⁴ The court held: "The overt manner in which the illicit pricing practices were pursued was clearly calculated to project an illusion of normalcy.... Such activities are considered representations of legitimacy in themselves...."²⁵

The representation, moreover, must be communicated to the plaintiff employee - directly or indirectly.²⁶ An example of an indirect communication took place in Johnson v. Mel-Ken Motors, Inc.²⁷ There, the plaintiff-employee was an injured heavy line auto-mechanic.²⁸ The defendant-corporation's insurer hired a vocational expert, and the defendant-corporation informed the vocational expert that the plaintiff-employee would have perma-

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¹⁹. Id. at 22-23.

²⁰. KEETON ET AL., supra note 1, § 106, at 736; RESTATEMENT (SECOND) OF TORTS § 525 cmt. b (1977); see also Russ v. TRW, Inc., 570 N.E.2d 1076, 1083-84 (Ohio 1991).

²¹. 570 N.E.2d 1076 (Ohio 1991).

²². Id. at 1084.

²³. Id.

²⁴. Id.

²⁵. Id.

²⁶. In order for plaintiff to prove the element of misrepresentation, he must produce evidence that defendant (1) made a representation to plaintiff, or (2) made a representation to an agent of plaintiff, or (3) made a representation to (a third party) with the intention that it be communicated to and acted upon by plaintiff, or under circumstances that entitled plaintiff to believe that defendant had authorized (third party) to communicate the representation to plaintiff.


²⁸. Id. at 545-46.
nent employment with the defendant-corporation. The court construed the representation by defendant-corporation to the vocational expert as a "representation" conveyed to the plaintiff-employee.

If no representation were made by the defendant employer, there obviously cannot be a cause of action for fraudulent false representation. In Bibbs v. MedCenter Inns of Alabama, Inc., the plaintiffs, servers at the defendant-corporation's banquet facilities, sued for misrepresentation. The court held:

We emphasize that [their] theories of recovery are based on the allegation that they were not being paid the percentage of gratuities orally agreed upon. However, those plaintiffs all testified to the effect that the defendants never discussed with them what share they were to receive in gratuity compensation. Viewed in any light, this would logically negate . . . that the defendants untruthfully represented to them that they were receiving the amount they were entitled to under such an agreement.

b. Falsity

A representation, in order to be the predicate for the lawsuit of fraudulent misrepresentation, must be, in fact, false. A "false" representation consists of words, oral or written, or conduct that render a statement or assertion untruthful and thus cause an

29. Id.
30. Id.
31. Bibbs v. MedCenter Inns of Ala., Inc., 669 So. 2d 143, 145 (Ala. 1995);
The Mayor [defendant, prospective employer] argues that she never . . . represented to [plaintiff] that she had the authority to hire him for the press secretary position knowing or consciously ignorant of the fact that the City Council had to approve his being hired. The Mayor asserts that [plaintiff's] own evidence clearly establishes that she made no misrepresentation because he admitted in his deposition that she never expressly told him she had the sole authority to hire him . . . . Accordingly, the Mayor argues, [plaintiff] has failed to establish the initial element of his cause of action by clear and convincing evidence . . . . We agree with the mayor that even viewing the evidence in the light most favorable to [plaintiff], he has failed to establish the initial elements of fraudulent misrepresentation.

32. 669 So. 2d 143 (Ala. 1995).
33. Id. at 144.
34. Id. at 145.
aggrieved party to reach an erroneous conclusion.\textsuperscript{36} Consequently, when an employer makes a representation to an employee, and it is false, there may be liability for fraudulent misrepresentation.\textsuperscript{37} In \textit{Russ},\textsuperscript{38} where the plaintiff-employee was hired to work in the accounting division, the court found the defendant-corporation liable and held:

In the case at bar, all the elements of common law fraud have been satisfied. The overt manner in which the illicit pricing practices were pursued was clearly calculated to project an illusion of normalcy. Whether such activities are considered representations of legitimacy in themselves or whether the pattern of conduct was calculated to obscure their unlawful nature is immaterial from a legal standpoint. Either characterization leads to the conclusion that the scheme constituted a false representation which was designed to mislead [employee, a sociology major in an accounting position], a man of limited knowledge, experience, and authority, into believing that such practices were legitimate.\textsuperscript{39}

\begin{footnotesize}
\textsuperscript{36} Restatement (Second) of Torts § 525 & cmt. b (1977); see also Russ, 570 N.E.2d at 1084 ("false representation" is one "designed to mislead").

\textsuperscript{37} Russ, 570 N.E.2d 1076; Clement-Rowe, 538 N.W.2d 20; Palmer v. Beverly Enters., 823 F.2d 1105, 1112 (7th Cir. 1987) (plaintiff contended defendant corporation misrepresented that it would purchase plaintiff's Illinois home after he commenced working for defendant in California; plaintiff was terminated by defendant not long after he requested defendant to purchase his unsold home; defendant's written relocation policy required approval of President or Senior Vice President; for trier of fact to decide whether plaintiff, after his conversation with a company vice president, believed that such an approval was or could be obtained).

\textsuperscript{38} 570 N.E.2d 1076 (Ohio 1991).

\textsuperscript{39} Russ, 570 N.E.2d at 1084. See also Clement-Rowe, 538 N.W.2d at 23 (plaintiff accepted an offer to become corporation's employee health nurse; she sold her home and moved to employer's locale, but one month after hiring her, defendant, in response to a severe financial crisis, terminated plaintiff and others; plaintiff claimed defendant misrepresented its financial condition to her) ("The statement, if made, constitutes a material misrepresentation which proved to be false. If [defendant's personnel director] made the statement responding to plaintiff's specific inquiry, he may have known it was untrue or made it without any knowledge of its truth. Presumably, he made it in order to allay plaintiff's hesitancy to accept the job offer because of concern about the financial health of the company."); Palmer, 823 F.2d at 1112 (plaintiff contended defendant corporation misrepresented that it would purchase plaintiff's Illinois home after he commenced working for defendant in California; plaintiff was terminated by defendant not long after he requested defendant to purchase his unsold home; defendant's written relocation policy required approval of President or Senior Vice President; for trier of fact to decide whether plaintiff, after his conversation
\end{footnotesize}
However, if an employer makes a representation and it is not untrue, incorrect, or misleading, then the employee’s fraud cause of action fails. In *McNierney v. McGraw-Hill, Inc.*, the defendant-employer made a job offer to the plaintiff and he accepted the offer with the understanding that the defendant-employer would not pay the relocation expenses incurred. The offer of employment was rescinded for misrepresentation by the plaintiff after with a company vice president, believed that such an approval was or could be obtained.

40. McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853 (D. Md. 1995). See also Bandy v. Mills, 454 S.E.2d 610, 611 (Ga. Ct. App. 1995) (defendant’s agent made representation to employee that she would participate in the Executive Bonus Plan during her employment beginning with not less than $20,000 for the remainder of 1992; plaintiff alleged fraud when she received $20,000 for 1992 but received nothing for 1993 although she remained in employment until September) ("[H]er contended understanding does not create a jury issue as to meaning. The only representation made concerning her right to a bonus was that she would receive $20,000 for 1992. She did not allege, nor was there any evidence, that the plan grants a vested right to a bonus or a pro-rata bonus if employment is terminated before a bonus is declared."); Fort Washington Resources v. Tannen, 901 F. Supp. 932, 942 (E.D. Pa. 1995) (plaintiff, a doctor, was promised a salary of $100,000 a year and also stock in the event a new drug application with the FDA was successful; plaintiff contended defendant misstated when its representative assured plaintiff that $2.5 million was available for the project) ("[W]e are not convinced that the representation was untrue. While Dr. [plaintiff] has introduced bank statements and tax returns which show that [company] did not have that level of funding on hand, [its representative] testified persuasively that money was raised on an as-needed basis, and that investors were standing ready to fund the project to the $2.5 million level, if required.").

Plaintiff’s claim for fraud appears to be based on an assertion that the defendant knew that the plaintiff had a right to worker’s compensation benefits, but that defendant persisted in paying her through the disability plan, and contested her right to workers’ compensation. Plaintiff in her fraud claim has not specified the statements or representations made by the defendant that were incorrect or misleading. The evidence before the court is totally barren of any implication of fraudulent dealing by the defendant. The plaintiff’s medical records show that it is not in fact certain which injury of the plaintiff’s is preventing her from working. Plaintiff has presented nothing other than the bare assertion that the defendant knew that she was entitled to benefits and still contested her claim.


42. Id. at 856.
the plaintiff, who was expressly told that the company was not paying the relocation expenses, represented to the employee in the Travel and Relocation Department that the company was paying the expenses of the relocation.\textsuperscript{43} The plaintiff alleged that the defendant "made tortious misrepresentations by offering him employment although there was no intent to hire him."\textsuperscript{44} The court noted that the first requirement of an intentional misrepresentation claim is that the representation made be false.\textsuperscript{45} The court held:

There is no evidence from which a fact finder could conclude that McGraw-Hill did not intend to have McNierney come to work when the statements at issue were made. The fact that, later, the intention changed is not evidence that the statement of intent was untrue when made.\ldots The bottom line is that no fact finder could find that the statements at issue were false.\textsuperscript{46}

c) Fact v. Opinion and Law

The representation necessary for fraudulent misrepresentation not only must be a false one, but also must be a false representation of "fact."\textsuperscript{47} Accordingly, the representation must concern either a past or present event, circumstance, or occurrence.\textsuperscript{48} A statement of opinion, however, is not a representation of fact; thus, as a general rule, a false or incorrect opinion cannot be grounds for a fraudulent misrepresentation cause of action.\textsuperscript{49}

Although the general rule is easy to state, precisely ascertaining whether a statement is one of "fact" or "opinion" emerges as a difficult task since there is no clear line dividing the two categories.\textsuperscript{50} The "usual explanation," moreover, that "an opinion is merely an assertion of one man's belief as to a fact,"\textsuperscript{51} does not provide much guidance. Facts, presumably, are based on objec-

\textsuperscript{43. Id.}
\textsuperscript{44. Id.}
\textsuperscript{45. Id. at 860.}
\textsuperscript{46. Id. at 860-61.}
\textsuperscript{47. KEETON ET AL., supra note 1, § 109, at 755; RESTATEMENT (SECOND) OF TORTS § 525 cmt. e (1977).}
\textsuperscript{48. RESTATEMENT (SECOND) OF TORTS § 525 cmt. e (1977).}
\textsuperscript{49. KEETON ET AL., supra note 1, § 109, at 755.}
\textsuperscript{50. Compare Harlan v. Intergy, Inc., 721 F. Supp. 148, 150 (N.D. Ohio 1989) (statement that firm was a "profitable company" regarded as factual) with Dugan v. Bell Tel. of Pa., 876 F. Supp. 713, 727-28 (W.D. Pa. 1994) (statement that manager would be placed in a permanent position construed as opinion).}
\textsuperscript{51. KEETON ET AL., supra note 1, § 109, at 755.}
tive, verifiable, actual, positive knowledge; whereas opinions, at
times called "sales talk" or "puffing," are only an expression of
one's personal views, feelings, judgments, beliefs, or conclusions,
perhaps connected to facts, but usually subject to some doubt, con-
trary opinion, or conflicting views. For example, statements
regarding quality, value, and authenticity ordinarily are regarded
as mere "opinions," which the reasonably prudent person should
realize and treat as potentially self-interested and self-serving
statements.

The "fact" - "opinion" dichotomy appears in the employment
context. If the employer's statement to the employee is regarded
as "fact," then liability for fraudulent misrepresentation is con-
ceivable. In Harlan v. Intergy, Inc., the defendant-company's
personnel director assured the plaintiff, during his interview, that
the firm was a "profitable company." The plaintiff accepted the
position of Director of Industrial Sales and moved from Seattle to
Cleveland. Several months after beginning the new job, the
plaintiff was laid off and eventually replaced. Although the
defendant-corporation argued that the statements of the financial
well-being made to the plaintiff were "mere projections or opin-
ions," the court found that the statements about the financial situ-
uation were factual, and held:

In the case at bar, the Defendants' representative made factual
statements about the corporation's current financial condition
without explaining that his description of the firm as 'profitable'
was contingent upon a very limited time frame. He failed to
inform the Plaintiff that the company had lost money in the prior
two years, 1983 and 1984, and had lost money during the first
three months of 1985.

If the employer's statement is interpreted as an opinion, the
employee's fraud cause of action fails. In Dugan v. Bell Tele-
phone of Pennsylvania, the plaintiff-employee, a supervisor of a record storage facility, was assured by various representatives of defendant-employer that plaintiff-employee would be placed in a permanent position in another facility of defendant’s when the plaintiff’s facility closed. The court held that “any statements made by the employer regarding plaintiff’s future term of employment were no more than puffing.”

Statements of law commonly are regarded as mere statements of “opinion” and are insufficient as a basis for fraudulent misrepresentation. One reason put forward to support this rule is that “no (one), at least without special training, can be expected to know the law, and so the plaintiff must have understood that the defendant was giving him nothing more than an opinion.” There are, of course, exceptions to the general rule. A misrepresentation of law made by an attorney or one with special knowledge as to the law may be deemed actionable. An assertion, in addition, that a particular statute has been enacted or repealed or that a particular decision has been rendered may be treated as a statement of fact.

A most interesting exception, with ramifications in the employment sector, arises when a court feels inclined to find statements of fact “implied” in representations of law. An employer’s assertion, for example, as to the legal effect of a statutory scheme on its employees may be construed to contain a sufficiently factual determination, thus providing the premise for misrepresentation liability. In Bemmes v. Public Employees Retirement System of Ohio, the Director of Board Clinics told each plaintiff-applicant that he or she would be an employee of the Board working under contract for a government agency, and that he or she would be eligible for membership in the Public Employees Retirement System. The defendant argued that the Director’s misstatement

62. Id.
63. Id. at 727-28.
64. Id. at 727.
65. KEETON ET AL., supra note 1, § 109, at 758.
66. Id. at 759.
67. Id. at 760-61.
69. KEETON ET AL., supra note 1, § 109, at 759-60.
71. Id.
72. Id. at 35.
was a misstatement of law and therefore not actionable, but the court held that the "[defendant's Director's] misrepresentation (as to the eligibility to participate in the Public Employees Retirement System) encompassed a factual determination that [plaintiffs] would meet PERS eligibility criteria by virtue of employment at the Agency."73 Such an interpretation may be morally meritorious, but if followed to its logical conclusion it results in the undermining of the "law" - "fact" distinction and the collapse of the general rule. After all, what legal representation, assertion, statement, application, or conclusion does not contain some fact.

d. Prediction, Future Promises, and Intention

Statements of prediction are situated similarly to opinions in misrepresentation law. Predictions are viewed as mere non-factual statements as to the course of future events; thus, as a general rule they will not support an action for fraudulent misrepresentation, even if erroneously, incorrectly, or disingenuously expressed.74 One court explained that, especially in a business setting, since predictions or "projections" "are subject to the uncontrollable economic influence of the marketplace, such projections are generally considered expectations or predictions and are not ironclad guarantees, regardless of their persuasive effect."75 Another court reasoned that since predictions "fall within the class of statements whose truth or falsity cannot be precisely determined, [they] are not, therefore, actionable as misrepresentations of fact."76

In the employment context, consequently, when an employer advances a "prediction," for example, as to a prospective

73. Id.
74. RESTATEMENT (SECOND) OF TORTS § 525 cmt. f (1977); Advent Elecs., Inc. v. Buckman, 918 F. Supp. 260, 265, n.2 (N.D. Ill. 1996) ("predictions . . ., where not based on fraudulent misrepresentations of preexisting or present facts, do not readily fit within the concept of . . . fraud."); Kary v. Prudential Ins. Co. of Am., 541 N.W.2d 703, 705 (N.D. 1996) ("generally, expressions of . . . predictions of future events are not actionable in fraud"); Gorham v. Benson Optical, 539 N.W.2d 798, 802 (Minn. Ct. App. 1995) ("a past or present fact" is a required element for fraud, "not a future, unpredictable event"); Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 641-42 (11th Cir. 1986) ("Florida law is consistent with the general rule that an actionable misrepresentation must involve a false statement of a past or existing fact . . . ." Thus there is no liability for "predictions," "expectancies," or "projections.").
75. Varnum, 804 F.2d at 642.
76. Kary, 541 N.W.2d at 706.
employee's suitability for a managerial position with the company, such a statement, even if inaccurate, ordinarily is not considered as a statement of actionable fact. Similarly, when an employer makes a prediction to an employee or prospective employee of future sales, earnings, or profits, such a statement ordinarily is not an actionable misrepresentation.

There is, of course, an exception to the general "prediction" rule. Predictions have been interpreted to contain an implied representation that the "predictor" knows of no facts, past or presently existing, that are inconsistent with the prediction or that will make the fulfillment of the prediction impossible or highly improbable to achieve. In a business setting, therefore, an employer's predictions or projections of business success and future profits, when expressed by an employer representative with exclusive or superior knowledge of the underlying facts, can con-

77. The claim based upon the effect on [plaintiff's] employment of [defendant's representative's] decision fails because [plaintiff] cannot establish that the employees who made the representations knew what the ultimate outcome would be. Hindsight now proves that the statement became false, but [plaintiff's] fraud claim requires that [defendant], at the time of the statement, misrepresented 'a past or present fact,' not a future, unpredictable event. (emphasis in original).

Gorham, 539 N.W.2d at 800, 802 (plaintiff left employ of one optical chain based on statement by defendant optical chain's representative, who said he had been offered chief operating officer position at defendant's, that plaintiff had the potential of, and should schedule an interview for, an area manager position with defendant optical chain; but defendant's representative, whom plaintiff had dealt with, declined the chief operating officer position; and plaintiff subsequently denied employment with defendant by different top management team because of a "change in the requirements of the Area Manager's position" and because plaintiff's "skills and abilities did not satisfy the requirements for the new direction in which the company was going").

78. Kary, 541 N.W.2d at 705-06, 708 (no fraud liability when defendant employer, a securities firm, through one of its managers, told plaintiff, prospective employee for security planner position, that he could expect to make $40,000 the first year and $100,000 by the third year; and plaintiff accepted position but only made $22,000); Advent Elecs., Inc., 918 F. Supp. at 264-65 (plaintiff, sales employee, alleged that defendant employer's president misrepresented that company would produce gross sales of at least $1,300,000.00 and as much as $1,500,000.00 in the state of Missouri in each of the four years of the employment agreement; defendant employer terminated and sued plaintiff in part for failing to meet specified sales and profit goals in the employment agreement; plaintiff employee counterclaimed for fraud, but court deemed representations to be mere "forecasting" of future sales and not actionable).

stitute fraudulent misrepresentation if the "predictor" knew or should have known that the facts in his or her possession invalidated the prediction which he or she asserted. 

In Varnum v. Nu-Car Carriers, Inc., the plaintiff, a truck driver, sought employment with the defendant-employer. The plaintiff was required to buy a certain type of tractor-trailer costing $60,000. The defendant-employer provided the plaintiff with computer printouts indicating the average gross monthly income for truckers with the defendant-employer. The plaintiff was not told, however, that defendant-employer was shifting from a "first-in-first-out" basis of assigning work, which provided equal opportunities for truckers, to a seniority-based dispatch system. The court held:

Presentations of false projections of business performance would fall within actionable misrepresentation under Florida law as a false statement of past fact. Further, substantial discrepancies between profit and loss statements presented to induce plaintiff to enter into a franchise agreement and the actual performance records of other franchisees may reasonably support the inference that the defendant had knowledge of facts which would prevent the attainment of the projections.

The failure to perform a promised action or agreement in the future or the failure to perform a contractual promise, although at times referred to as "promissory fraud," as a general rule, is not

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80. Varnum, 804 F.2d 638. See also Berger v. Security Pacific Info. Sys., Inc., 795 P.2d 1380, 1384 ( Colo. Ct. App. 1990) (employer failed to disclose "substantial, known risk" that project employee was being hired for was to be discontinued; and employee soon terminated) ("We also find no merit in [employer's] argument that, because the information contained future contingencies, there was no duty to disclose. The undisclosed information was a then-existing known risk of a future contingency. Under the facts and circumstances of this case, [employer] had a duty to disclose that risk to plaintiff.").

81. 804 F.2d 638 (11th Cir. 1986).

82. Id. at 642-43.

83. Id.

84. Id.

85. Id.

86. Id. at 642.

To regard a “promissory fraud” claim as fraudulent misrepresentation would not only violate the “past or existing fact” requirement, but also, the courts warn, would invariably convert the typical breach of contract case into a fraud lawsuit as well. An employer, therefore, who fails to perform a future act, promise, agreement, or contract with an employee is not liable for fraud for the non-performance alone.

Future promises are contractual and do not constitute fraud (citation omitted). In the case at bar, the alleged misrepresentations do not concern the essential viability of defendants nor any other existing fact extraneous to the contract of employment. Rather, the alleged misrepresentations go to the defendants’ expectations concerning plaintiffs’ performance or defendants’ intentions regarding plaintiffs’ employment, either of which would only be realized in the future.

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91. *Advent Elecs., Inc.*, 918 F. Supp. at 264 (employer’s promise regarding guaranteeing sales not actionable); *Pegram*, 667 So. 2d at 701 (Plaintiff employee’s “misrepresentation claim (based on employee’s testimony that defendant employer’s CEO had promised to allow plaintiff-employee to always remain in charge of material management and procurement) was based on a promise of future performance, with respect to which there was evidence of only a breach (i.e., no evidence of an intent, at the time the promise was made, not to perform).”).

*McCreery*, 921 F. Supp. at 492-93 (plaintiff-employees alleged that defendant consulting firm’s representatives fraudulently told plaintiffs that they were being hired because of their expertise and not because of their ability to bring major corporate clients to defendant and that “sufficient funding” would be available); *Sargent*, 914 F. Supp. at 730 (defendant-employer promised to plaintiff employee to make certain ownership interests available to employee for opening and managing a regional office; but no successful cause of action for fraud because “in general, promissory statements do not give rise to an action for fraud”); *Shelton*, 459 S.E.2d at 857 (processing plant employee, discharged after security reported that employee and another were smoking marijuana in plant parking lot, alleged that employer fraudulently failed to abide by policies and rules in employee handbook) (“[Employee’s] claim is essentially one for breach of a promise of fair treatment. Proof that [employer] made a promise and then broke that promise four years later (in subsequent employee handbook) is simply not evidence of fraud. To support a fraud claim, an alleged misrepresentation must be one of an existing fact, not merely promises or statements as to future events which later were unfulfilled.”); *Fiqueroa v. West*, 902 S.W.2d 701, 707 (Tex. Ct. App. 1995) (employee, discharged after a series of disciplinary problems,
Yet there is a major qualification to this rule - but one that is very difficult to demonstrate feasibly as well as legally. The failure to perform a future act, promise, or agreement, contractual or otherwise, may be suitable grounds for a fraudulent misrepresentation action, but only when there is a showing that the defendant employer possessed the actual, specific, preconceived intent not to perform the act, promise, or agreement at the time the representation to perform was made to the employee. This exception is

unsuccessfully contended that employer fraudulently failed to abide by the “general representations of fair treatment” in employee handbook).

92. RESTATEMENT (SECOND) OF TORTS § 530 cmt. a (1977) (“A false representation of the actor's own intention to do or not to do a particular thing is actionable if the statement is reasonably to be interpreted as expressing a firm intention and not merely as one of those ‘puffing’ statements which are so frequent and so little regarded in negotiations for a business transaction as to make it unjustifiable for the recipient to rely on them.”).

‘Promissory fraud’ is a subspecies of the action for fraud and deceit . . . An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into the contract. (Citations omitted.) . . . In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. (Citations omitted.) [Plaintiff's] allegations, if true, would establish all the elements of promissory fraud . . . . [Plaintiff] alleges that, in order to induce him to come to work in California, [defendant-employer's vice-president] intentionally represented to him he would be employed by the company so long as he performed his job, he would receive significant increases in salary, and the company was strong financially. [Plaintiff] further alleges that [defendant's] representations were false, and . . . that [defendant's vice-president] knew its representations regarding the terms upon which he would be retained in [defendant's] employ . . . were false at the time they were made . . . . These allegations adequately state a cause of action for promissory fraud as traditionally understood.

Lazar v. Superior Court, 909 P.2d 981, 985 (Cal. 1996); Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109 (5th ed. 1984); Telesphere Int'l, Inc. v. Scollin, 489 So. 2d 1152, 1154 (Fla. Dist. Ct. App. 1986) (plaintiff was employed by defendant corporation as its Director of International Operations, specifically to market overseas a projected hotel call accounting system; due to difficulties in the development of the system, defendant determined to abandon entirely the project and make no further efforts to perfect or market the system; consequently, plaintiff's position was eliminated and he was discharged; plaintiff alleged that defendant's representative fraudulently induced him to join defendant by deliberately failing to inform plaintiff, before the employment agreement was entered into, that defendant's representative was then aware both of the real potentiality that the system would fail and that, if this indeed occurred, plaintiff would be discharged) (Court concluded that fraud committed, noting that the record demonstrated that defendant “deliberately and in order to
deceive [plaintiff] (citation omitted), failed to inform him both of the potential difficulties of developing the system and of its own then-existing intention to terminate him if the adversities actually came to pass." (citations omitted);

[Defendant] argues that an employer's false promise to a prospective employee regarding future acts, such as the right to permanent employment secure from conditions such as layoffs, is merely promissory in nature and relates to a future act, and . . . such a situation is not actionable . . . (citations omitted). This position is not, however, applicable to the instant case. Although Florida courts acknowledge the general rule of law that the fraud alleged must refer to a present or existing fact, 'the cases recognizing an exception where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform.' (citations omitted).

Hamlen v. Fairchild Indus., Inc., 413 So. 2d 800, 801-02 (Fla. Dist. Ct. App. 1982) (plaintiff, formerly a quality control technician at Westinghouse contended that he was induced by agents of defendant, who promised plaintiff permanent employment, to leave Westinghouse's employ and to join defendant's workforce; plaintiff laid off, after working for defendant employer for a short period of time; and plaintiff unable to obtain work with either Westinghouse or defendant);

To defeat plaintiff's fraud claim, defendant argues that any promises made to plaintiff about the sale of his house were 'promises of events to occur in futuro and would not give rise to a cause of action for fraud. However, California law supports plaintiff's claim notwithstanding that the sale in question was to be a future happening (citation omitted). 'It is well settled that a promise made with no intention of performing is actionable fraud where the other party relies upon it as an inducement to enter into an agreement' (citation omitted). It is for the trier of fact to determine whether [employer's president] promised on defendant's behalf to purchase plaintiff's house and, if so, whether [employer's president] knew that promise to be false at the time of its making or soon discovered it to be false and failed to disclose that fact to plaintiff.

Palmer v. Beverly Enters., 823 F.2d 1105, 1112-13 (7th Cir. 1987) (defendant employer's vice-president promised to plaintiff that when he became defendant's acquisitions director for its Western Division in California, defendant would purchase plaintiff's home in Illinois; plaintiff terminated by defendant not long after plaintiff requested defendant to purchase his unsold house in Illinois);

Can fraud be predicated upon a future event? The answer is yes, under certain circumstances. The rule that fraud cannot be based on predictions or expressions of mere possibilities in reference to future events (citation omitted) is subject to the well-known exception that fraud may be predicated on a representation concerning any event in the future or acts to be done in the future if such representations are falsely and fraudulently made with an intent to deceive (citations omitted).

Mueller v. Union Pacific R.R., 371 N.W.2d 732, 739-40 (Neb. 1985) (plaintiffs, special agents or guards for defendant railroad employer, had information concerning the misappropriation of railroad funds and services by their supervisors; plaintiffs were assured by railroad management that they need fear no retaliation when they were questioned about the alleged misconduct of their
based on the rationale that since a promise or agreement carries with it an implied factual assertion of a present intent to perform, the law logically can construe a promise or agreement made without such an intent as factually fraudulent of the maker's intentions; and thus potentially actionable as fraudulent misrepresentation.93

The mere fact, however, that a future act, promise, or agreement is not performed is inadequate evidence in and of itself to prove that a defendant employer fraudulently misrepresented its intent to an employee.94 Rather, the plaintiff-employee must

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93. RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (1977); Lazar, 909 P.2d at 985; Hamlen, 413 So. 2d at 802 ("Actually, this principle is not so much an exception to the general rule that the misrepresentation must be of a past or present fact, as it is a recognition that a misstatement of a material and subsisting fact of the promisor's intentions in regard to performance may be actionable under the modern theory of fraudulent misrepresentation.").

94. RESTATEMENT (SECOND) OF TORTS § 530 cmt. d (1977) ("The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance, nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into."); Pegram, 667 So. 2d at 703 ("Failure to perform, alone, is not evidence of an intent not to perform at the time the promise was made.") (no fraud liability when defendant employer's CEO promised that all corporate principals would have equal rank, salary, and authority, but plaintiff transferred
shoulder the heavy burden of showing fraudulent intent by presenting other credible evidence that sufficiently indicates that the defendant employer misrepresented its intention to perform the act, promise, or agreement. This burden, however, is to some measure lessened by allowing the plaintiff-employee to

from vice-president of materials and procurement to vice-president of marketing and sales, which plaintiff perceived as a demotion; Sargent, 914 F. Supp. at 731 ("To be sure, in May 1990 [defendant-employer] did promise to make certain ownership interests available to [plaintiff-employee]; to date, it has not done so. There is no evidence to suggest, however, that the company made promises it never expected to keep. What evidence exists suggests the contrary: that [defendant] later discovered business reasons for changing course."); National Sec. Ins. Co., 664 So. 2d at 876 ("plaintiff must show more then that the defendant failed to fulfill the promised act"); Fiqueroa v. West, 902 S.W.2d 701, 707 (Tex. Ct. App. 1995) (plaintiff, discharged after a series of disciplinary problems, alleged that employer fraudulently failed to comply with "general representations of fair treatment" in employee handbook) ("[W]e instead focus on the evidence of [employer's] intent. [Employee] produced no evidence that [employer] never intended to abide by the vague fairness provisions of the handbook. At best, [employee] produced some evidence that [employer's] conduct ultimately failed to conform to these arguable representations. Evidence of post-representation non-conformity is alone no evidence of fraud." (citation omitted)).

95. RESTATEMENT (SECOND) OF TORTS § 530 cmt. d (1977) ("The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that (the promisor) would not be in funds to carry out his promise.").

SEE, e.g., A CASE WHERE THE PLAINTIFF MET THE BURDEN:

Contrary to [defendant-employer's] contention, there was credible evidence that [defendant] made the promise of employment with knowledge of its falsity. Because [defendant's vice-president] testified that he would have had no authority to make the promise of employment, the jury could have concluded that [defendant's vice president] failed to disclose that he lacked the authority to do so and that [defendant] never intended to fulfill the promise. The jury also could have concluded from all of the circumstances of (plaintiff's) employment with [defendant] that it intended to employ him to reduce inventory and then to fire him.

Boivin, 578 A.2d at 189 (defendant-employer's vice-president asked plaintiff to accept employment with defendant as a manager of an injection molding department, with a specific job function to reduce inventories, telling plaintiff that he could stay with the company until he was 65 and could remain after that if he chose to; plaintiff accepted employment, reduced inventories, but was told the injection molding department was moving to another state; plaintiff expressed a willingness to move and take over the job as manager in the new location, but another person was chosen for that management position; plaintiff's employment soon discontinued).

SEE, e.g., THE FOLLOWING CASES WHERE THE PLAINTIFF EMPLOYEE FAILED TO MEET THE BURDEN:
Advent Elecs., Inc., 918 F. Supp. at 264-65 ("[S]pecifically, the 'scheme exception' applies where the party promises performance . . . but the promisor never intended to keep the promise (citations omitted). This 'broad' exception is itself however tempered by pleading and proof hurdles under Illinois law. . . . [Plaintiff] fails to point to 'specific, objective manifestations' showing that [employer] never intended to keep the alleged guaranty of future sales and the promises made in the Employment Agreement. Although [employee] argues that the promises were broken, such evidence is insufficient by itself to support a promissory fraud claim (citations omitted)."; Service By Medallion, Inc., 52 Cal. Rptr. 2d at 655 (defendant promised that it would terminate its union contractor and hire plaintiff) ("The first allegation does not constitute an actionable misrepresentation because it states no fact conveying the falsity of its . . . purpose. The complaint fails to allege that [defendant] did not in fact intend to terminate its current service provider, or that [defendant] intended in fact to retain union personnel. The only alleged fact related to [defendant's] goal of using a non-union contractor is that [defendant] actually carried out its stated intention by hiring [plaintiff].");

Viewing the facts in the light most favorable to [plaintiff-employee], however, there is insufficient evidence to raise a genuine issue on this [fraud] claim. No cognizable evidence suggests that [defendant-employer] formed a specific intent to defraud [plaintiff-employee] at the time the parties entered into their employment contract or at any other subsequent point in time. To be sure, in May 1990 [defendant-employer] did promise to make certain ownership interests available to [plaintiff] [for opening and managing a regional office]; to date, it has not done so. There is no evidence to suggest, however, that the company made promises it never expected to keep. What evidence exists suggests the contrary: that [defendant] later discovered business reasons for changing course. But, regardless of defendant's business-related explanations, plaintiff is required to present something beyond speculation to support his claim of a contemporaneous intent to defraud in response to defendant's motion for summary judgment.

Sargent, 914 F. Supp. at 731 (emphasis added).

[The law places a heavier burden in those fraud actions where one attempts to prove fraud based on a misrepresentation relating to an event to occur in the future. In those 'promissory fraud' actions, the plaintiff must prove that, at the time the representation was made, the defendant had an intention not to perform the act promised and had an intention to deceive the plaintiff (citations omitted). Employer's president's alleged misrepresentations - that [plaintiff] would be promoted to vice-president after the previous vice-president . . . retired, and that [plaintiff] would have permanent employment with [employer] - are promises of acts to be performed in the future. Therefore, because these are allegations of promissory fraud, [plaintiff] had the burden to produce evidence to show that [employer's president] had a deceitful intention not to perform those actions (citations omitted). Viewing the evidence most favorable to [plaintiff], we find no evidence to suggest that, if [employer's president] made the alleged statement regarding [plaintiff's] promotion to vice-president, he made that statement with
prove the employer's intent circumstantially and inferentially.96

Although we recognize that 'intent is an act or emotion of the mind seldom, if ever, capable of direct proof' (citation omitted), there was no evidence submitted from which the jury could infer that, at the time the alleged misrepresentation was made, [employer's president] intended to deceive [plaintiff] and intended not to make him vice-president. Indeed, [plaintiff's] excellent work record during the period when [employer's president] made the misrepresentations could support a finding that, at that time, he had intended to promote [plaintiff] to vice-president, but later failed to do so.

*National Sec. Ins. Co.,* 664 So. 2d at 876.

Although there is ample evidence in the record to show that [employer] failed to keep the commitment made to [employee] by [employer's president and sole shareholder], there was no evidence which showed the promise to pay a bonus was false when originally made or that [employer's president] knew it was false when he made it (citation omitted). Because the evidence failed to support this element of the fraud cause of action, the trial court did not err in directing a verdict on the fraud claim.

*Central Tex. Micrographics v. Leal,* 908 S.W.2d 292, 299 (Tex. Ct. App. 1995) (employee worked for employer as a salesperson selling Kodak products; employer, pursuant to an oral employment agreement with employee, promised employee that if he continued working for employer, and worked full-time on the employer's lawsuit against Kodak, employee would receive an unspecified share of the proceeds of the litigation).

96. The jury could have inferred that [defendant's president's] course of conduct in agreeing to a bonus plan when faced with the prospect of losing [plaintiff] . . . and the inconsistency of [president's] insistence on an oral employment contract and on a written bonus plan is circumstantial evidence that [president] never intended to implement a bonus plan. The inference is strengthened by [president's] testimony at trial that his other bonus plans were 'all being honored to the letter.'

*Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 435 (Tex. 1986). *See also National Sec. Ins. Co.,* 664 So. 2d at 876, quoting Russellville Prod. Credit Ass'n. v. Frost, 484 So. 2d 1084, 1087 (Ala. 1986) ("Unless a plaintiff puts forth some proof that there was . . . something upon which a jury could infer that at the time the promise was made the defendant had no intention of performing it, it is error to submit a fraud claim to the jury.");

Although the evidence does indicate, as [plaintiff] argues, that [defendant's CEO], sometime around the time of the public stock offering, formed the intent to transfer or discharge him, it would stretch the concept of reasonable inference beyond the breaking point for one to conclude that [defendant's CEO] entered this business venture in 1983 with an elaborate plan to humiliate [plaintiff] and defraud [the company]. The directed verdict with respect to the misrepresentation claim was, therefore, proper.

*But see* Pegram v. Hebding, 667 So. 2d 696, 703-04 (Ala. 1995) (defendant-employer's CEO promised that all corporate principals would have equal
In *Spoljaric v. Percival Tours, Inc.*, the plaintiff-employee, vice-president of finance and accounting for the defendant-employer, was promised a bonus plan by the president of the company. The court noted the impossibility of finding direct proof and held: "Since intent to defraud is not susceptible of direct proof, it invariably must be proven by circumstantial evidence. 'Slight circumstantial evidence' of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent. (Citations omitted)." As an example of allowing circumstantial evidence, the court in *Spoljaric* permitted the employee to introduce evidence of the employer's subsequent acts after the representation was made on the "intention" issue. The court treated an employer's denial that it ever made a promise as a factor indicating a lack of intent to perform when the promise was made, and deemed that the lack of a "pretense" of performance

authority, rank, and salary, but plaintiff transferred from vice-president of materials and procurement to vice-president of marketing and sales).

97. 708 S.W.2d 432 (Tex. 1986).
98. Id. at 435.
99. Id.
100. Id.

As [defendant corporation and its subsidiary] point out, mere nonperformance of a promise is not enough to establish fraud (citation omitted). Rather, "[o]ther circumstances of a substantial character must exist which would support an inference of wrongful intent at the time of making the representation" (citation omitted)... [Plaintiff president] has presented evidence (1) that he was never fully endowed with the power to act as (subsidiary's) president, although that was what the employment agreements contemplated; (2) that (subsidiary) terminated his employment only four months into a three year contract; (3) that (corporation and its subsidiary) devised a mechanism for early termination on the eve of the asset purchase closing; and (4) that his successor at (subsidiary) is paid substantially less than he was to be paid under the employment agreements. Under these circumstances, [defendants'] knowledge and intent are questions of fact which must be decided by the jury. Giving plaintiff the benefit of all favorable inferences, . . . the Court cannot say as a matter of law that [plaintiff's] evidence is insufficient to prove fraud. While the evidence is arguably thin in some respects, the Court cannot hold as a matter of law that no reasonable jury might find it clear and convincing evidence of fraud.

*See also Central Tex. Micrographics, Inc.,* 908 S.W.2d at 299; *Eckholt v. American Bus. Info., Inc.*, 873 F. Supp. 526, 532 (D. Kan. 1994) (plaintiff, president of corporation's subsidiary, sued corporation and its subsidiary for fraudulently promising to employ him pursuant to an employment agreement and employment modification agreement).

101. *Spoljaric*, 708 S.W.2d at 435 (citations omitted).
by the defendant employer is an additional factor showing an absence of intent.\textsuperscript{102} Of course, to juxtapose two conflicting rules, at times in the same decision,\textsuperscript{103} one holding that the failure to perform is not evidence of intent not to perform, and the other maintaining that making no pretense to perform is a factor in showing intent not to perform, engenders the altogether unedifying notion that non-performance is not evidence of fraudulent intent, but non-non-performance is!

2. Fraudulent Concealment

Even though a defendant has not made an affirmative false representation to the plaintiff, a defendant nonetheless may be liable for fraudulent misrepresentation by engaging in fraudulent concealment.\textsuperscript{104} Fraudulent concealment, at times called fraudulent "suppression,"\textsuperscript{105} arises when a defendant actively conceals the truth.\textsuperscript{106} The concealment can be effectuated by words, actions, or conduct which create a false impression covering up the truth or which prevent the plaintiff from otherwise discovering a material fact.\textsuperscript{107}

In an employment setting, if an employer actively conceals the truth with the purpose of hiding, covering up, or repressing the truth, or preventing or hindering the employee from learning the truth, the employer may be liable for fraudulent misrepresentation.\textsuperscript{108} In Millison v. E.I. du Pont de Nemours and Com-

\textsuperscript{102. Id.}
\textsuperscript{103. Id.}
\textsuperscript{104. KEETON ET AL., supra note 1, § 106, at 737.}
\textsuperscript{105. Duck Head Apparel Co., Inc. v. Hoots, 659 So. 2d 897, 904-05 ( Ala. 1995); Pegram v. Hebding, 667 So. 2d 696, 701-02 (Ala. 1995); Eisert v. Town of Hempstead, 918 F. Supp. 601, 615 (E.D.N.Y. 1996).}
\textsuperscript{107. KEETON ET AL., supra note 1, § 106, at 737; Eisert, 918 F. Supp. at 615 ("intentional suppression of the truth . . . may be effected by words, conduct, or the exhibition of documents.").}
\textsuperscript{108. Millison v. E.I. du Pont de Nemours and Co., 545 A.2d 213, 221-22 (N.J. Super. 1988), aff'd, 558 A.2d 461 (N.J. 1989) (defendant employer's managers and doctors engaged in a "conspiracy" of concealment by providing employees with little or no information about health dangers and symptoms and by continually advising plaintiff-employees that employees had no relevant health problems and therefore must return to the asbestos work environment); During the interview, [defendant's corporate recruiter] told plaintiff that [defendant] had recently been acquired from a company in bankruptcy,}
pany, the defendant-employer’s managers and doctors engaged in a “conspiracy” of concealment by providing the employees with little or no information about health dangers and symptoms [related to asbestos contamination]. The manager and physicians continually advised plaintiff-employees that the employees had no relevant health problems and, therefore, returned them to the asbestos-contaminated work environment. The employer may be liable for fraudulent misrepresentation, even though an affirmative false representation of fact technically was not made.

and that it was losing money, although he did not say how much. When plaintiff asked [corporate recruiter] about the company’s financial status, he told her that [defendant] had no detailed financial records but that it was a wholly owned subsidiary of [parent corporation], and he referred her to an annual report showing [parent corporation] to be a multi-million dollar company. [Corporate recruiter] also referred [plaintiff] to a magazine article which stated that [defendant] had so many Recovery Plus customers that it had to turn away business. In fact, [defendant] had only two or three regular customers under contract for disaster recovery services. Although [corporate recruiter] knew that his own job was at risk because of the company’s poor performance, he told [plaintiff] that his corporate life at [defendant] was just beginning. He also told her he had a strong personal commitment to Recovery Plus, but did not tell her of the risk that the project might be discontinued in March.

Berger, 795 P.2d at 1383 (The plaintiff was hired by defendant in January, and was terminated some eight months later, after project she was hired to manage was discontinued. The court held that sufficient evidence was present to support a jury verdict for fraudulent concealment. Id. at 1385.; Duck Head Apparel Co., Inc., 659 So. 2d at 900, 904-05 (defendant and its representatives committed fraudulent suppression and concealment by making it appear that commissions were not due and owing to defendant’s sales personnel, for example, by tampering with orders, changing the codes on orders, changing the accounts on orders, holding orders that were received, and promulgating but selectively enforcing a rule that orders would not be entered unless fully completed on defendant’s order forms); Pegram, 667 So. 2d at 701-02 (fraudulent suppression claim regarding illegal accounting scheme properly should have been brought by shareholder in a derivative suit and not in personal capacity).

110. Id. at 221-22.
111. Id.
112. Harlan v. Integry, Inc., 721 F. Supp. 148, 150 (N.D. Ohio 1989) (plaintiff, living in Seattle, Washington, was granted an interview by defendant employer; defendant’s personnel director assured plaintiff during the interview that defendant was a “profitable” firm, which in fact at the moment it was; plaintiff offered position as Director of Industrial Sales; plaintiff accepted, moved himself and family to Ohio, but was laid off several months later) ("In the case at bar, the
3. Failure to Disclose

Traditionally, a party to a business transaction was not held to an affirmative duty to come forward and to disclose any pertinent facts to an “opponent,” since the essence of fraud was construed as the affirmative deception of the aggrieved party by the deceiver. Consequently, “mere silence,” or the passive failure to disclose facts, cannot serve, as a general rule, as the basis for a cause of action of fraud. As one court postulated: “Surreptitiousness is not synonymous with fraud.” So long as there is no affirmative misrepresentation, one party to the transaction legally can remain silent, knowing that the other party was ignorant of even absolutely essential facts, and thus take advantage of the “victim’s” ignorance. This general rule “of course reflected the dubious business ethics of the bargaining transactions with which deceit was at first concerned, together with a touch of the old tort notion that there can be no liability for nonfeasance, or merely doing nothing.”

An employer, therefore, who refrains from disclosing facts unknown to the employee or prospective employee, even facts that would significantly alter the employment contract or relationship, ordinarily does not commit fraud thereby. An employer, for example, neither is held to an affirmative duty to disclose possible future changes in the terms and conditions of employment, nor

Defendants’ representative made factual statements about the corporation’s current financial condition without explaining that his description of the firm as ‘profitable’ was contingent upon a very limited time frame. He failed to inform the Plaintiff that the company had lost money in the prior two years, 1983 and 1984, and had lost money during the first three months of 1985. There are material questions of fact as to whether this partial disclosure of facts pertaining to the firm’s financial condition constituted concealment.

113. KEETON ET AL., supra note 1, § 106, at 737.
115. KEETON ET AL., supra note 1, § 106, at 737. See also Glasgow, 901 F. Supp. at 1193.
116. Glasgow, 901 F. Supp. at 1193 (plaintiff, a manager at one of defendant employer’s stores, alleged that employer committed fraud by not advising employee, when employer’s representative met with plaintiff and obtained a statement from him, that employer was aware of alleged misconduct by plaintiff, especially with an allegation that plaintiff had stabbed another employee at a previous meeting).
is obligated to disclose its financial condition to every job applicant it interviews.\textsuperscript{118}

There are, of course, many exceptions to the general rule of no liability for non-disclosure - "some of which are as yet very illdefined, and have no very definite boundaries."\textsuperscript{119} These exceptions, nonetheless, for the most part have been applied in the employment context to impose on the employer a duty to disclose, and thus concomitant fraud liability for not disclosing. The court in \textit{Spoljaric v. Percival Tours, Inc.},\textsuperscript{120} where the plaintiff-employee was promised a bonus plan by the president, explained the basic rationale supporting the exceptions: "When the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation."\textsuperscript{121} For example, if an employee addresses specific questions and inquiries to the employer, especially concerning the "economic well-being and financial stability of a potential employer [which] is an important factor in accepting a job offer,"\textsuperscript{122} an employer clearly is held to a duty to disclose, and is not permitted to avoid liability by failing to divulge factual information.\textsuperscript{123} In \textit{Clement-Rowe}, the plaintiff accepted an offer to become the health nurse for the defendant's employees.\textsuperscript{124} During the hiring process, the plaintiff made inquiries to the defendant regarding the defendant's financial health, and the defendant failed to disclose such information.\textsuperscript{125} One month after being hired, the plaintiff was terminated along with 150 other employees because of the defendant's severe financial crisis.\textsuperscript{126} The court held:

Today's employments market is both tenuous and difficult. Nearly all employment is employment at-will. The economic well-being and financial stability of a potential employer is an important factor in accepting a job offer . . . . Neither may (employer) be permitted to avoid liability after omitting to disclose, when asked, known

\textsuperscript{119} \textit{Keeton et al., supra} note 1, § 106, at 738.
\textsuperscript{120} 708 S.W.2d 432 (Tex. 1986).
\textsuperscript{121} \textit{Id.} at 435.
\textsuperscript{123} \textit{Id.} at 24.
\textsuperscript{124} \textit{Id.} at 22.
\textsuperscript{125} \textit{Id.} at 22-23.
\textsuperscript{126} \textit{Id.} at 22.
economic instability which later leads to economically-based layoffs.127

Another often stated exception to the general rule arises when the parties to a transaction stand in some type of confidential or fiduciary relationship with one another.128 Such a relationship requires "the utmost good faith, and full and fair disclosure of all material facts,"129 and thus may lead to fraud liability for the non-disclosure by the fiduciary. Interestingly, though, research did not reveal a case in which a court found that the conventional employer-employee relationship rose to the level of a confidential or fiduciary relationship,130 and only one case where a court explicitly entertained the prospect thereof.131

An important exception, with ramifications in the employment sector, can be called the "half-truth"132 or "partial and fragmentary" disclosure exception.133 Pursuant to this exception, when a party does speak, he or she must disclose sufficient information to prevent his or her words from creating any false or misleading impression that might have arisen from a partial or fragmentary revelation of facts.134 "In other words, half of the

127. Id. at 23-24.
128. Keeton et al., supra note 1, § 106, at 738.
129. Keeton et al., supra note 1, § 106, at 739, n.42.
130. See Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 616 (D. Mass. 1995) (negligent misrepresentation case, wherein the plaintiff employee successfully contended, inter alia, that defendant employer's representatives, who were employee's "direct supervisors," negligently failed to disclose the illegality of employee installing copyrighted software on their home computers; and the court held that silence "may be actionable where the relationship of the parties creates a particular legal or equitable obligation to communicate all the facts."); see Lubore v. RPM Assocs. Inc., 674 A.2d 547, 559-60, (Md. Ct. Spec. App.), cert. denied, RPM Assocs. v. Lubore, 683 A.2d 177 (Md. 1996) (negligent misrepresentation case, where "a close and potentially long lasting business relationship" was deemed sufficient to establish a "special relationship" from which defendant employer's representatives owed plaintiff employee, vice-president, a duty of care not to make negligent representations).
131. Lubore, 674 A.2d at 555-56 (Despite high corporate level of parties, the extensive period of time in dealing, and the close and potentially long lasting business relationship consummated, the court declared: "We agree that the complaint does not allege facts sufficient to support an inference that a fiduciary or confidential relationship existed between the parties whereby [defendant] owed an affirmative duty to disclose.").
132. Keeton et al., supra note 1, § 106, at 738.
133. Lubore, 674 A.2d at 556.
134. Keeton et al., supra note 1, § 106, at 738; Lubore, 674 A.2d at 556; Harlan, 721 F. Supp. at 150; Berger, 795 P.2d at 1384.
truth may obviously amount to a lie, if it is understood to be the whole." As one court explained, "imperfect information given in a way calculated to produce a false impression is the equivalent of concealment," thus, according to another court, the "legal situation is entirely changed." When an employer, therefore, does make any statement of fact, it is required to disclose adequate information to prevent its statement from being deemed an incomplete, ambiguous, misleading, or false assertion, and thus a potentially fraudulent, "half-truth." In Lubore v. RPM Associates, KEETON ET AL., supra note 1, § 106, at 738. Harlan, 721 F. Supp. at 150. Lubore, 674 A.2d at 556. We may reasonably infer from [plaintiff-employee's] allegations that [defendants] led [plaintiff] to believe that employment would be pursuant to those terms contained in the February 15, 1995 letter memorializing the parties' previous agreement, and that by not communicating the other terms contained in the Employment Agreement, [defendants] failed to tell the whole story. In other words, it is reasonable to infer from the allegations that [defendants] presented [plaintiff] with a partial or fragmentary representation, which was rendered misleading by virtue of the importance of the missing or omitted facts. Consequently, [defendants] owed a duty of disclosure. Lubore, 674 A.2d at 556.

Ohio law imposes a duty to make full disclosure of facts where it is necessary to dispel misleading impressions which might have been created by a defendant's partial revelation of facts (citations omitted)...

In the case at bar, the Defendants' representative made factual statements about the corporation's current financial condition without explaining that his description of the firm as 'profitable' was contingent upon a very limited time frame. He failed to inform the Plaintiff that the company had lost money in the prior two years, 1983 and 1984, and had lost money during the first three months of 1985. There are material questions of fact as to whether this partial disclosure of facts pertaining to the firm's financial condition constituted concealment and whether the remaining elements necessary to sustain a claim for fraud have been satisfied.

See also Harlan, 721 F. Supp. at 150 (plaintiff, living in Seattle, interviewed with defendant employer, accepted a job as Director of Industrial Sales, and moved himself and family to Cleveland; plaintiff told by defendant's representative that company "profitable," which was true, but for a limited time frame of one month and seventeen days; plaintiff was laid-off nine months after commencing work); Berger, 795 P.2d at 1383-84 (plaintiff interviewed for position of sales manager at defendant corporation's subsidiary; when plaintiff asked defendant's representative about company's financial status, he told plaintiff that subsidiary had no detailed financial records, but that it was a wholly owned subsidiary of defendant corporation, and he referred plaintiff to an annual report showing defendant to be a multi-million dollar company; representative failed to tell...
the defendant-employer's representatives failed to disclose to plaintiff-employee that they intended to condition his employment upon his acceptance of a fifteen page document entitled Employment Agreement which contained additional "unconscionable" terms. Because of the incomplete information, the court held that it was "reasonable to infer from the allegations that [defendants] presented [plaintiff] with a partial or fragmentary representation, which was rendered misleading by virtue of the importance of the missing or omitted facts," and that "[c]onsequently, [defendants] owed a duty of disclosure." Also, when a party, employer or otherwise, makes a statement, believing it to be true, but then subsequently acquires new information, which renders the statement untrue or misleading, the party is held to a duty to disclose the new information if he or she knows or believes the recipient is still relying and acting on the basis of the original version.

Above and beyond these traditional exceptions to the general rule, there is developing a potent exception that imposes an affirmative duty to disclose essential or "basic" facts in a business transaction where one party knows that the other is either ignorant of or mistaken as to these basic facts, and, because of the relationship of the parties, especially their unequal standing or one party's possession of superior knowledge, business customs, or other objective circumstances, it would be unreasonable not to disclose such facts. In any employment circumstance, moreover,
one is hard-pressed to think of a situation where the employer would not be deemed to have special or superior access to, and thus actual or inferential knowledge of, facts "basic" to the employer-employee relationship, prospectively as well as presently, compared to that of the employee or applicant. Therefore, good conscience, fairness, and reasonableness always would seem to compel, at the risk of fraud liability, full disclosure by the employer to the employee, thereby totally vitiating the general rule of no liability for non-disclosure in the employment context - or surreptitiously elevating the employer's disclosure duty to that of a fiduciary.

4. Materiality

A representation of fact, affirmative or otherwise, in order to form the predicate for a cause of action of fraudulent misrepresentation, not only must be false, it must be material.\textsuperscript{145} A representation of fact is a "material" one if it is of sufficient importance that it ordinarily would influence or induce a reasonable person in the plaintiff's position to enter into the contract or transaction in question.\textsuperscript{146} This test "[n]ecessarily . . . must be an objective one, and it cannot be stated in the form of any definite rule, but must

\footnotesize{\textsuperscript{failing construed as "basic" to the transaction, and thus subject to full disclosure to employee applicant); Telesphere Int'l., Inc. v. Scollin, 489 So. 2d 1152, 1154 (Fla. Dist. Ct. App. 1986) (employer's "superior knowledge" of, and employee applicant's lack of "equal opportunity to become apprised of the fact" of technical difficulties in hotel accounting system employee hired to market overseas, mandated employer duty to reveal); see also Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 616 (D. Mass. 1995) (negligent misrepresentation case; Massachusetts recognizes an exception to the "silence" general rule "where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the representations relate;" plaintiff employee successfully contended that, inter alia, defendant employer's representatives, who were employee's direct supervisors, negligently failed to disclose the illegality of employee installing copyrighted software on their home computers).


\textsuperscript{146.} KEETON ET AL., \textit{supra} note 1, § 108, at 753; \textit{Fort Washington Resources, Inc.}, 901 F. Supp. at 942 ("Materiality" test defined as: Could the representation have "reasonably induced" the plaintiff to accept the defendant's offer?).

\textsuperscript{http://scholarship.law.campbell.edu/clr/vol20/iss1/1}
depend upon the circumstances of the transaction itself.” Yet matters “which are so trivial, or so far unrelated to anything of real importance in the transaction, . . . entirely collateral to a contract, and apparently of no significance to any reasonable [person] under the circumstances” will be deemed immaterial.

An exception to the “objective” test for materiality arises, however, when the misrepresenting party knows that the specific recipient is “peculiarly disposed” to regard a matter as important, even though the standard “reasonable person” would not do so. A particular person, although idiosyncratic, may be known to attach importance to a matter that an average person would ignore or disregard as insignificant or frivolous.

The “materiality” rules, of course, have relevance to the employment sector. Consequently employer misrepresentations to job applicants concerning the “financial health” of the company, the “technical difficulties” of a major overseas marketing project, and the existence and nature of non-competition and liquidated damages provisions in an employment agreement, have been held sufficiently material; but a misrepresentation as to the level of funding for a project has been deemed immaterial because the information concerned an issue that exceeded the scope of the applicant’s employment. Although presented as

147. KEETON ET AL., supra note 1, § 108, at 753.
148. Id.
149. KEETON ET AL., supra note 1, § 108, at 754.
150. Id.
151. Clement-Rowe, 538 N.W.2d at 23.
152. Telesphere Int’l, Inc, 489 So. 2d at 1154.
154. With respect to the alleged misstatement regarding the availability of $2.5 million, the overriding difficulty we have with [doctor-plaintiff's] argument concerns the statement's materiality. As we have concluded, [doctor-plaintiff] was hired specifically to complete and file the (drug) application. The $2.5 million figure, on the other hand, referred to the level of funding available to take the project beyond the (application) stage and into the clinical phase. Thus, the representation regarding the $2.5 million could not have reasonably induced [doctor-plaintiff] to accept [defendant-employer's] offer, because the information concerned an issue that exceeded the scope of [doctor-plaintiff's] employment.

Fort Washington Resources, Inc. v. Tannen, 901 F. Supp. 932 (E.D. Pa. 1995) (applicant-consultant doctor promised $100,000 salary and stock if employer’s FDA drug application was successful; doctor demonstrated that employer misrepresented funding availability for project; accord, Crumley v. Stonhard, Inc., 920 F. Supp. 589, 595 (D.N.J), aff’d, 106 F.3d 384 (3rd Cir. 1996)
"reasonable," the materiality requirement to fraud, in the employment context or otherwise, does produce the untoward result of legally condoning lying, thus clearly pointing out the difference between legality and morality.

C. Scienter

A key element to a lawsuit for fraudulent misrepresentation is "scienter," or guilty knowledge, that is, the finding of a required intent to deceive, mislead, or to convey a false impression. In order to establish scienter, a plaintiff-employee must establish that the false representation was made by the defendant-employer either knowing or believing it to be false, without knowledge or belief as to its truth or falsity, with reckless disregard as to its truth or falsity, or knowing or believing that there is an insufficient basis for ascertaining the truth or falsity of the representation. Whether or not scienter is present is an issue for the trier of fact, usually the jury, to decide. The scienter rule, therefore, necessitates that "[t]he state of the speaker's mind, notwithstanding its elusiveness as a matter of psychology and its


156. Keeton et al., supra note 1, § 107, at 741-42; Restatement (Second) of Torts § 526 cmts. a and c (1977); Enowitz v. Sanwa Business Credit Corp., 902 F. Supp. 59, 64 (S.D.N.Y. 1995) ("known to be false at the time it was made" standard); Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990) ("knowledge of its falsity" standard); Weisman, 547 A.2d at 641 ("knowingly false" standard); Bemmes v. Public Employees Retirement Sys. of Ohio, 658 N.E.2d 31, 35 (Ohio Ct. App. 1995) ("[R]epresentations . . . at a minimum made with reckless disregard to truth."); National Sec. Ins. Co. v. Donaldson, 664 So. 2d 871, 876 ( Ala. 1995) ("[A] defendant's recklessness in making a false representation is sufficient to support a fraud claim; the actual intention to defraud is often not needed.").

157. Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 641 (11th Cir. 1986) (for trier of fact to determine if employer's representative, at the time he indicated to applicant that drivers typically grossed $7000 per month, knew that employer was planning to propose a change to a seniority-based dispatch system under which new drivers such as plaintiff would earn substantially less).
difficulty of proof, must be looked to in determining whether the action of deceit can be maintained.”

Demonstrating what the defendant employer knew or did not know at the time it made the representation is a burdensome task in many situations, of course. In McNierney v. McGraw-Hill,

158. Keeton et al., supra note 1, § 107, at 741.
159. There is no evidence from which a fact finder could conclude that [defendant employer] did not intend to have [plaintiff] come to work when the statements at issue were made. The fact that, later, the intention changed is not evidence that the statement of intent was untrue when made. . . . Furthermore, there is overwhelming evidence establishing that he intended to hire [plaintiff] changed only because of the relocation expense problem . . . . It follows from the fact that the statements at issue were true that there was no intentional misrepresentation and that there was no purpose to defraud [plaintiff].

McNierney, 919 F. Supp. at 860-61; McCreery v. Seacor, 921 F. Supp. 489, 490-93 (W.D. Mich. 1996) (Plaintiffs contended that they were told “unequivocally” by defendant consulting firm’s representatives that they were not being hired because of their prior work with large corporate client but because of their expertise; but fraud cause of action failed because plaintiffs could not show that defendants either knew their representations were false or made those representations recklessly without knowing they were true.); Potocnik v. Sifco Indus. Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995) (“There was no evidence that [defendant-employer] intended to mislead [plaintiff] by failing to disclose . . . [Defendant’s personnel manager] testified that she assumed [plaintiff] would know he had to report to work in time to get a doctor’s examination, because of the letter she sent him . . . . [She] also believed that it was obvious that an employee was expected to return to work as soon as the employee recovered, and did not have to wait until the end of the year.”); Enowitz v. Sanwa Bus. Credit Corp., 902 F. Supp. 59, 64-65 (S.D.N.Y. 1995) (plaintiff employee contended that defendant’s vice-president of its banking group misrepresented defendant’s financial health, but plaintiff only stated on “information and belief” that defendant knew these assurances of financial good health to be false, and plaintiff’s cause of action failed due to lack of evidence on “knowledge” issue); Bowman, 885 F. Supp. at 1158 (Plaintiff police officer contended that defendant city and its police chief misrepresented to plaintiff that he was an exempt employee under FLSA; and that without this representation, plaintiff would not have worked additional hours without overtime pay and plaintiff would not have been subjected to administrative charges and criminal proceedings; but no finding that defendants made representation with knowledge of its falsity, in part because plaintiff, in his reply affidavit, stated: “I was not arguing that the City had lied to me about being exempt. I simply believed that the City did not understand the regulatory requirements for exempting employees, but did not intend for me to be exempt.”); Zanone v. RJR Nabisco, Inc., 120 N.C. App. 768, 775, 463 S.E.2d 584, 589 (1995) (plaintiff claimed defendant employer’s Director of Organizational Development knowingly and intentionally misrepresented the terms of defendant’s Special Moving and Relocation Policy; but plaintiff’s cause of action failed due to lack of showing of fraudulent intent, in part because
where the offer of employment was rescinded because of the misrepresentation by the prospective employee, the court concluded that “[t]here [was] no evidence from which a fact finder could conclude that [defendant-employer] did not intend to have [plaintiff] come to work when the statements at issue were made.” Yet cases do exist in the employment context where the plaintiff employee sustained his or her burden on the scienter element. In *Patten v. ALFA Mutual Insurance Co.* the court found “substantial evidence that [defendant insurance company]
knew when it offered [plaintiff] employment that he would be expected to work in [a particular] County; that [defendant's district manager] led him to believe otherwise . . . .” Since the state of a defendant's mind rarely is susceptible to direct proof, the prerequisite intent invariably must be inferred from circumstantial evidence.

Contrary to [defendant-employer's] contention, there was credible evidence that [employer] made the promise of employment with knowledge of its falsity. Because [defendant's vice-president] testified that he would have no authority to make the promise of employment, the jury could have concluded that [employer's vice-president] failed to disclose that he lacked the authority to do so and that [employer] never intended to fulfill the promise. The jury also could have concluded from all the circumstances of [plaintiff's] employment with [employer] that it intended to employ him to reduce inventory and then to fire him.


163. 670 So. 2d 854 (Ala. 1995).

164. Id. at 857 (Ala. 1995).

165. KEETON ET AL., supra note 1, § 107, at 742; RESTATEMENT (SECOND) OF TORTS § 526 cmt. d (1977);

The record shows that [defendant employer's president] refused to give [plaintiff employee] a written employment contract after [plaintiff's] first contract expired, while he gave written contracts to . . . other employees in similar positions. Conversely, [defendant's president] insisted on a written bonus plan over an oral agreement to its terms. The jury could have inferred that [the president's] course of conduct in agreeing to a bonus plan when faced with the prospect of losing [plaintiff] . . . and the inconsistency of [president's] insistence on an oral employment contract and on a written bonus plan is circumstantial evidence that [defendant's president] never intended to implement a bonus plan. The inference is strengthened by [president's] testimony at trial that his other bonus plans were 'all being honored to the letter.'

Spoljaric, 708 S.W.2d at 435-36; Albrant v. Sterling Furniture Co., 736 P.2d 201, 203 (Or. Ct. App. 1987) (plaintiff, a salesperson, contemplating a move to another of defendant's stores in another city, was informed by defendant's sales manager of plaintiff's hours and commission rate; before accepting, plaintiff confirmed sales manager's earlier statements regarding commission and hours, and then plaintiff accepted the position; when plaintiff began work, she was informed that the sales of certain items would result in a lower commission rate and that she would be required to work evening hours) (“We also conclude that the record contains sufficient evidence to support an inference that when defendants confirmed the terms of plaintiff's employment before she accepted the job, they intended to impose different terms.”); Enowitz, 902 F. Supp. at 64-65 (plaintiff contended that defendant's vice-president misrepresented its financial health, but defendant's president and chief executive officer testified that when plaintiff was hired, defendant's portfolio of loans was in "decent" and "reasonably good shape" and with "no significant problems") (“The evidence offered by [plaintiff] does not allow a reasonable inference that [defendant] knew, at the time
Negligence alone, however, is insufficient for scienter; that is, an honest belief in the truth of the assertion, regardless if deemed unreasonable by the person of ordinary care and intelligence, is inadequate to form the basis for the requisite "bad" intent for fraudulent misrepresentation.\(^{166}\) Misrepresentation liability for the maker of a representation who honestly believes the representation to be true, but whose carelessness has rendered the representation false or misleading, is governed by the doctrine of negligent misrepresentation.\(^{167}\) Yet, to complicate further the scienter issue, "[i]t is of course clear that the very unreasonableness of such a belief may be strong evidence that it does not in fact exist."\(^{168}\) The degree of unreasonableness, therefore, may permit the trier of fact, ordinarily the jury, to infer a lack of honest belief; and thus that the defendant knew the representation was false, which knowledge then forms an adequate basis for scienter.\(^{169}\) The problem, of course, in determining scienter by an examination of the degree of the defendant's negligence is to obfuscate the two principal misrepresentation actions - fraudulent and negligent - particularly since "there is a certain amount of leeway in the direction of holding the defendant to something like a reasonable standard of judgment."\(^{170}\) Nonetheless, at some point, that crucial "reasonableness" line has to be drawn - that is, the demarcation

\(^{166}\) KEETON ET AL., supra note 1, § 107, at 742; RESTATEMENT (SECOND) OF TORTS § 526 cmt. d (1977).

\(^{167}\) See infra notes 155-171 and accompanying text.

\(^{168}\) KEETON ET AL., supra note 1, § 107, at 742.

\(^{169}\) Id. See also RESTATEMENT (SECOND) OF TORTS § 526 cmt. d (1977).

\(^{170}\) KEETON ET AL., supra note 1, § 107, at 742.

[plaintiff] was hired, that its operations in the New York office were in 'dire straits.' Because of the lack of evidence from which might be drawn an inference of knowledge on the part of [defendant-employer] . . . of its financial ill health, [defendant] is entitled to judgment as a matter of law on [plaintiff's] claim for fraudulent misrepresentation."); but see Pegram v. Hebding, 667 So. 2d 696, 704 (Ala. 1995) (plaintiff was transferred from vice-president of procurement and material management to vice-president of sales and marketing; and plaintiff alleged fraud based on statements by CEO and chairman of the board that all corporate principals would hold positions of equal rank and salary) ("[I]t would stretch the concept of reasonable inference beyond the breaking point for one to conclude that [CEO] entered into this business venture in 1983 with an elaborate plan to someday humiliate (plaintiff) and defraud [the company].").
between very-carelessly-intentionally-misleading and carelessly-negligently-misleading.171

D. Inducement and Causation

A plaintiff not only must prove that a defendant possessed the requisite intent to deceive, but also that the defendant intended to induce the plaintiff to rely on the misrepresentation and to act accordingly.172 Inducing an action thus emerges as a crucial component to the legal wrong of fraud. As the court in State Farm Mutual Automobile Insurance Co. v. Novotny173 explained, “there is an essential legal difference between a lie and fraud. Fraud requires inducing a person to take an action he has no obligation to take, nor intent to take without the misrepresentation.”174

A plaintiff-employee, therefore, must allege and prove that the defendant-employer had the intent to induce the employee to act.175 Failure to sustain this element of the fraudulent misrep-


174. Id. at 1213.

175. Lazar v. Superior Court, 909 P.2d 981, 985 (Cal. 1996) (Plaintiff's “allegations, if true, would establish all the elements of promissory fraud . . . . [Plaintiff] alleges that, in order to induce him to come to work in California, [defendant-employer] intentionally represented to him he would be employed by the company so long as he performed his job, he would receive significant increases in salary, and the company was strong financially.”); Duck Head Apparel Co., Inc., 659 So. 2d at 905 (plaintiff employee salespersons alleged that defendant employer fraudulently suppressed the fact that it was diverting the plaintiffs' orders to prevent paying commissions on them) (“Thus, the jury could have found that [defendant-employer] suppressed facts existing before the plaintiffs' resignations and that the plaintiffs were induced by that suppression to act.”); Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986) (“The record shows that [defendant's president] agreed to implement a bonus plan when he was faced with the prospect of losing two executive vice-presidents, [plaintiff and another]. Viewing this evidence and the inferences therefrom in
sentation cause of action will break down the employee's fraud case.176 In State Farm Mutual Automobile Insurance Co., the plaintiff-employee, a claims representative who was discharged for participating in a fraudulent claim scheme, alleged that her immediate supervisor misrepresented the nature and reason for support of the jury verdict, it is fair to say the jury reasonably believed [defendant's president] used the bonus plan as an inducement to keep [plaintiff and another] from leaving the agency."); Clement-Rowe v. Michigan Health Care Corp., 538 N.W.2d 20, 23 (Mich. Ct. App. 1995) (plaintiff accepted an offer to become an employee with defendant health care corporation; plaintiff sold her home in Saginaw and moved to Detroit; about one month after hiring her, in response to a severe financial crisis, defendant terminated the employment of about 150 of its employees, including plaintiff; plaintiff alleged that defendant misrepresented its financial condition to her) (“In her complaint, plaintiff alleged that defendant had a duty to disclose its adverse financial condition and intended to induce her to rely on the nondisclosure in accepting employment. Defendant asserts that it was not aware of the financial difficulties until after plaintiff was hired. However, we believe this is a question of fact sufficient to have withstood defendant’s motion for summary disposition.”); Russ, 570 N.E.2d at 1084 (plaintiff, with limited accounting experience and training, contended that defendant’s representatives’ false representations as to the propriety of defendant’s costing methodology for government military contracts resulted in plaintiff’s discharge and plaintiff’s status as a target of a federal investigation of defense contract fraud) (“In the case at bar, all of the elements of common law fraud have been satisfied. The overt manner in which the illicit pricing practices were pursued was clearly calculated to project an illusion of normalcy . . . . [T]he scheme constituted a false representation which was designed to mislead [plaintiff], a man of limited knowledge, experience, and authority, into believing that such practices were legitimate.”).

176. State Farm Mut. Auto. Ins. Co., 657 So. 2d at 1214. See also Haviland v. J. Aron & Co., 622 N.Y.S.2d 703, 704 (N.Y. App. Div. 1995) (plaintiff-employee, a commodities broker, failed to show that defendant’s misrepresentations regarding the enforcement of its own rules induced plaintiff to remain in defendant’s employ and that plaintiff thereby did not seek to avail himself of other employment opportunities); Fort Washington Resources, Inc. v. Tannen, 901 F. Supp. 932, 942 (E.D. Pa. 1995) (plaintiff employee, a physician, hired to help assemble and file a drug application with the FDA, contended that defendant’s representative fraudulently misrepresented that $2.5 million was available for the project) (“Dr. (plaintiff) was hired specifically to complete and file the IND (Investigational New Drug) application. The $2.5 million figure, on the other hand, referred to the level of funding available to take the project beyond the IND phase and into the clinical phase. Thus, the representation regarding the $2.5 million could not have reasonably induced Dr. [plaintiff] to accept [defendant’s] offer, because the information concerned an issue that exceeded the scope of Dr. [plaintiff’s] employment.”); McNierney, 919 F. Supp. at 860-61 (defendant’s statements regarding employment were not made with any intention or purpose to defraud; fact that plaintiff was not hired was caused by plaintiff’s misrepresentations regarding relocation expenses).
investigatory interviews being conducted by the defendant-employer. The court held that:

[i]n this case there was no evidence that [plaintiff's supervisor's] untrue statements were made to induce [plaintiff] to attend the interview. [Plaintiff's supervisor] falsely disclaimed knowledge of what was occurring. Although his statements were untrue, they were not made to induce an act on the part of [plaintiff]. At the time the statements were made, [plaintiff] already knew that employees were being interviewed and terminated, and she had already made the decision to go to the interview. She was, in fact, already there when [plaintiff's supervisor's] statements were made.

The existence of the inducement element, however, may be "fairly inferred" from the facts presented.

Closely related to the inducement component to fraud is the causation, or actual reliance, element; and interconnected to the causation or actual reliance requirement is the reasonable or justifiable reliance requirement. It is necessary, of course, to clearly differentiate, define, and explicate these essential, distinct, yet interrelated and interdependent, fraud concepts.

The causation element to fraud initially entails a finding of actual reliance; that is, that the defendant-employer's misrepresentation induced and caused in fact the plaintiff-employee to
The prevailing tests for causation in fact, in the employment context or otherwise, are the "but for" test and the "substantial factor" test. Accordingly, a plaintiff-employee will need proof that the employer's misrepresentation was a "substantial factor" in causing the employee's loss, as in Duck Head Apparel Company, Inc. v. Hoots where the employer suppressed the fact that it was diverting plaintiff-employees' orders to prevent paying commissions on them. The court held:

The jury could infer that [defendant-employer] anticipated that the highest-paid sales representatives would not accept its offer of employment and that it began making plans and taking steps to defraud them of their commissions in the event they resigned. Thus, the jury could have found that [defendant] suppressed facts existing before the plaintiffs' resignations and that the plaintiffs were induced by that suppression to act.

The plaintiff-employee can also present evidence that "but for" the employer's misrepresentation the employee would not have suffered his or her asserted damages, as in Patten where the defendant-employer's representative led the plaintiff to believe he would not be working in another county. In that case, the court found the causation element satisfied when the plaintiff, an insurance agent, testified that had he known that the defendant-employer planned for him to work in an additional county, he would not have accepted the position. Absent such evidence on the factual causation issue, the plaintiff-employee's


182. See Johnson, 918 F. Supp. at 548-49; Restatement (Second) of Torts § 546 cmt. a and § 548A cmt. a (1977); Keeton et al., supra note 1, § 41f, at 263.

183. Duck Head Apparel Co., 659 So. 2d at 905.

184. 659 So. 2d 897 (Ala. 1995).

185. Id. at 905.

186. Id.


189. Id. at 857.

190. Id.
cause of action fails. In *Service by Medallion, Inc. v. Clorox Co.*, the defendant-employer represented to the plaintiff that it wanted to terminate its union contractor and replace it with a non-union contractor, and thereafter plaintiff was hired. Concerning the cause of the detriment, the court held:

[T]he parties apparently performed their contractual promises: for several months [plaintiff] engaged in cleaning services and [defendant] made payments as the service agreement provided. . . . It was only when [defendant] terminated the parties' contractual relationship that [plaintiff] could have perceived reliance expenses as 'losses.' Thus, it was the termination, not the misrepresentation, that resulted in the alleged harm. We must conclude, therefore, that even if [defendant] falsely promised to take steps to ensure continued performance during a union campaign, [plaintiff's] reliance on that promise by entering into the contract and preparing to perform did not constitute 'detriment . . . caused' by [defendant's] conduct, as the tort of deceit requires.

Moreover, not all losses that are in fact caused by a defendant's fraudulent misrepresentation and inducement are legally, that is, proximately, caused thereby. A misrepresentation, therefore, is a legal, that is, proximate, cause only of those losses that

191. *Service By Medallion, Inc.*, 52 Cal. Rptr. 2d at 656-57. See also *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 616 (E.D.N.Y. 1996) (reliance-causation tests framed as follows: Could misrepresentation "have resulted in any damage in and of itself"; "assuming misrepresentations were never made, would . . . [plaintiff-employee] still be in the same place she was before?"); *Stafford v. Radford Community Hosp.*, Inc., 908 F. Supp. 1369, 1375-76 (W.D. Va. 1995), aff'd, 120 F.3d 262 (4th Cir. 1997) (plaintiff-employee's ultimate termination "was not a result" of defendant employer's misrepresentation regarding plaintiff's position being abolished);

Thus, even if we assume that Dr. [plaintiff] was mislead (sic) as to the scope of the assignment, and that he did not achieve a complete understanding of the task until four months after joining [defendant], he still represented to [defendant] that he would be able to complete the job before the deadline date. Accordingly, we conclude that the representation at issue did not cause the non-filing of the [new drug] application and Dr. [plaintiff's] subsequent termination, and as a result, it cannot be the basis for the claim.

193. *Id.* at 656-57.
194. *Id.*
are within the "foreseeable risk of harm" that the misrepresentation creates;\textsuperscript{195} but not of those losses that are produced by a direct intervening cause.\textsuperscript{196} In Johnson\textit{ v. Chesebrough-Pond's USA Co.},\textsuperscript{197} the employer's representative, plaintiff-employee's direct supervisor, misrepresented to plaintiff-employee, a new manager of an engineering division, facts regarding the employee's job stability and security, the company's activities involving plant closings, transfers and lay-offs, and the company's financial health.\textsuperscript{198} In explaining that there was an intervening cause, the court held:

Plaintiffs are apparently arguing: but for these misrepresentations, [plaintiff-employee] would not have accepted the job; but for his acceptance of the job, [plaintiff-employee] would not have been terminated from it; and but for his termination, plaintiff would not have suffered these injuries relating to the loss of his employment. . . Even if [defendant's representative] had intentionally misinformed [plaintiff-employee], those fraudulent misrepresentations were not the proximate cause of [plaintiff-employee's] termination. [Plaintiff-employee] was terminated because of [his direct supervisor's] opinion about his job performance. [Plaintiff employee's] job performance was the intervening direct cause of his termination. Because we find that the alleged misrepresentations were not the proximate cause of [plaintiff-employee's] damages, plaintiffs cannot adequately state a claim for fraudulent . . . misrepresentation.\textsuperscript{199}

Finally, even when the plaintiff-employee can satisfactorily establish misrepresentation, inducement, causation in fact - actual reliance, and legal causation - proximate causation, he or she still must demonstrate that his or her reliance on the misrepresentation was justifiable or reasonable.

\textbf{E. Justifiable or Reasonable Reliance}

The plaintiff employee not only must establish actual reliance and causation, but also must show that his or her reliance on the misrepresentation was reasonable, justifiable, or reasonably justifiable under the circumstances.\textsuperscript{200} However, "[t]here has been a

\textsuperscript{195} \textit{RESTATEMENT (SECOND) OF TORTS} § 548A cmt. a (1977).
\textsuperscript{196} \textit{Johnson}, 918 F. Supp. at 549.
\textsuperscript{197} 918 F. Supp. 543 (D. Conn. 1996), \textit{aff'd.}, 104 F.3d 355 (2nd Cir. 1996).
\textsuperscript{198} \textit{Id}. at 549.
\textsuperscript{199} \textit{Id}.
vast amount of misunderstanding regarding the basis for the requirement of justifiability of reliance, especially when plaintiff is required to prove or at least does prove an intent to deceive and therefore intentional misconduct on the part of the misrepresenter." Unfortunately, in the employment context, and perhaps elsewhere, there is very little case law that clearly explicates the reliance requirement. Some courts use a standard of “reasonable” reliance; others employ “justifiable”, and a few utilize the reliance standards interchangeably. However, practically all these courts fail to provide any meaningful guidance as to exactly what these significant terms mean.


201. Keeton et al., supra note 1, § 108, at 749.


206. See Trans Penn Wax Corp., 50 F.3d at 232 (“justifiable reliance” depends on “the conduct of the employee and the conduct and motivation of the employer”); Camp, 41 Cal. Rptr. 2d at 341 (whether employee “justifiably relied” based on “justifiable expectation” and “reasonable expectation”); Albrant, 736 P.2d at 203 (actual or “should have known” knowledge precludes employee’s reasonable reliance); Russ, 570 N.E.2d at 1084 (employee’s knowledge, sophistication, experience, and authority factors in determining employee’s reasonable and justifiable reliance); but see an amplified explanation of “justifiability of the reliance” requirement and standard, to wit:

The plaintiff’s conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility . . . [In some cases where the plaintiff’s reliance in fact, and his good faith, are unquestioned, it may still be held that his conduct was so foolish as to bar his recovery. If he is a person of normal intelligence, experience and education, he may not
What appears most interesting, concerning the oft-cited "reasonable" criterion, is that it may not necessarily equate to the traditional, objective, impersonal "reasonable person" or "reasonably prudent person" standard of general tort law. Rather, the term "reasonable" in the narrower fraud-reliance context seems to encompass individualistic, personal, and subjective factors. So, perhaps, the qualifying phrase "justifiable" emerges as the proper and preferable predicate for a reliance requirement for fraud.

Regardless of the standard used, and whatever it truly may mean, one point is quite clear as well as compelling: a successful plaintiff-employee must meet some "reasonableness" measurement in reliance, otherwise, his or her fraud cause of action put faith in representations which any such normal person would recognize at once as preposterous . . ., or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth, and still compel the defendant to be responsible for his loss . . . It is a sufficient indication that the person deceived is not held to the standard of precaution, or of minimum knowledge, or of intelligent judgment, of the hypothetical reasonable man, that people who are exceptionally gullible, superstitious, ignorant, stupid, dim-witted, or illiterate, have been allowed to recover when the defendant knew it, and deliberately took advantage of it. 'The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning . . .'. [T]he matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case . . .. The other side of the shield is that one who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and that one who has acquired expert knowledge concerning the manner dealt with may be required to form his own judgment, rather than take the word of the defendant.

Keeton et al., supra note 1, § 108, at 750-51.

207. Russ, 570 N.E.2d at 1084; Keeton et al., supra note 1, § 108, at 750-51.

208. Restatement (Second) of Torts § 545A and cmt. b (1977) (the Restatement uses the "justifiable" standard; yet the cases appear evenly divided between the two standards).

209. "In granting the motions for summary judgment, the trial judge determined that [plaintiff, insurance agent] had not presented substantial evidence of justifiable reliance . . . We disagree . . .. He argues that he justifiably relied on [defendant insurance company's] representation that his territory would be Tallapoosa County. He says that had he known that [defendant] planned for him to work in Coosa County as well . . ., he would not have accepted the position. The fact that [defendant] knew otherwise when it represented to him where his territory would be located, coupled with the fact that he relied on that
The "reasonable" reliance element may also be deemed to constitute substantial evidence to warrant submitting the issue of fraud to the jury."

See Patten, 670 So. 2d at 856-57; Albrant, 736 P.2d at 203 (plaintiff-employee reasonably relied on defendant employer's sales manager's misrepresentations regarding employee's hours and commissions in accepting employment with employer); Trans Penn Wax Corp., 50 F.3d at 231-32 (whether employees justifiably relied on employer's "guarantee" of job security if employees decertified their union treated as factual question to be resolved at state court level); Russ, 570 N.E.2d at 1084 (employer's representatives misrepresented to plaintiff employee, a sociology major with very limited accounting experience, working in defendant's accounting department, that defendant's pricing practices on defense contracts were proper; plaintiff indicted for defense contract fraud) ("In the case at bar, all of the elements of common-law fraud have been satisfied. . . . [T]he scheme constituted a false representation which was designed to mislead [plaintiff], a man of limited knowledge, experience, and authority, into believing that such practices were legitimate. That [plaintiff], given his level of sophistication, would reasonably rely on such representations is fully supported by the evidence.").

210. See Mudlitz v. Mutual Serv. Ins. Cos., 75 F.3d 391, 395 (8th Cir. 1996) (plaintiff employee, who received negative performance review, contended that defendant employer negligently misrepresented her opportunity to continue employment) ("[Plaintiff-employee] does not describe how she relied on the alleged misrepresentations made by [defendant-employer] . . . . [She] merely asserts that she 'justifiably and actually relied on the representations made by [employer]' . . . . While [plaintiff] continued working after receiving the Performance Warning, this alone is legally insufficient to act as reliance (citation omitted."); McCreery v. Seacor, 921 F. Supp. 489, 493 (W.D. Mich. 1996) (plaintiff environmental consultants alleged fraud by defendant consulting firm based on statements by defendant's president and vice-president that plaintiffs were being hired because of their expertise" and not because of their ability to bring a major corporate client to defendant) ("The plaintiffs' letters of engagement said that their employment could be terminated 'at will and at any time.' This fact contradicts the plaintiffs' claim that they would not be terminated if they did not deliver their former employer's customers. Plaintiffs chose to ignore the express language of the letters. In the face of this language, it cannot be said that plaintiffs 'reasonably relied' upon representations contrary to this written language.");

In this case, before the investigation [of workplace misconduct] was completed, [defendant's vice president of human resources] specifically told plaintiff that her identity would not be kept confidential permanently. Yet after being made aware that no permanent offer of confidentiality existed, the record demonstrates that plaintiff [a legal secretary] continued to actively participate in the investigation. Specifically, she gathered and provided additional documents for the investigation; prepared statements; and even drafted an affidavit for her own signature, in which she expressed a bitter resentment toward [an attorney in defendant's legal department and one subject of the
be lacking where the plaintiff-employee fails to make an investiga-

[87x580]tion. Moreover, we note that plaintiff was required from the beginning to participate in the investigation as set forth in her employee handbook. Under such circumstances, we hold that plaintiff cannot demonstrate that she justifiably relied on defendant's alleged promise of permanent confidentiality in cooperating in the investigation.

Turnbull v. Northside Hosp., Inc., 470 S.E.2d 464, 465-66 (Ga. Ct. App. 1996); [Plaintiff-employee] alleged that [defendant-employer] had a duty to disclose the fact that [plaintiff] had to report to [defendant's personnel manager] three weeks before the expiration of the leave, so that a doctor's appointment could be made. [Defendant] also allegedly had a duty to inform [plaintiff] that he could return to work before the one-year leave was over . . . . [Defendant's personnel manager] testified that she assumed [plaintiff employee] would know he had to report to work in time to get a doctor's examination . . . . [She] also believed that it was obvious that an employee was expected to return to work as soon as the employee recovered, and did not have to wait until the end of the year. Also, based on these facts, reasonable minds could not conclude that [plaintiff-employee] justifiably relied on these 'concealments'.

Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995); We must similarly reject [plaintiffs] argument that his reliance on the Mayor's misrepresentation that he had the job as press secretary without previously informing him that she needed to secure City Council's approval was justifiable. [Plaintiff] admitted that the Mayor did not expressly tell him she had the authority to hire him and that he just assumed that she had such authority. [Plaintiff] also agreed that he had been told by the Mayor that two members of City Council had to be told about her desire to bring him on board her administration. These were red flags which should have alerted [plaintiff] to at least seek further information or clarification of the hiring procedures (citation omitted).

Edmonson v. Zetusky, 674 A.2d 760, 766 (Pa. Commw. Ct. 1996); Eisert v. Town of Hempstead, 918 F. Supp. 601, 616 (E.D.N.Y. 1996) (employer misrepresentation that first and second highest scorers on exam declined position when in reality they were never offered the job, but no fraud because plaintiff-employee "did not lose any wages . . . leave another job to take this one and . . . not prohibited from seeking other work," and thus "reasonable reliance" requirement not met); Clark v. Helmsley Windsor Hotel, 625 N.Y.S.2d 159, 159 (N.Y. App. Div. 1995);

In essence, [plaintiffs] misrepresentation claim asserts nothing more than that she interpreted the alleged misrepresentations as a promise of continued employment. However, a promise to find an employee another position does not create a justifiable expectation that the employee will be continuously employed. Such a promise still allows for the possibility . . . that the employee will be discharged with or without cause after the promise is made . . . . Because the alleged misrepresentations did not create a reasonable expectation of employment for any specific period, [plaintiff employee] could not justifiably rely on those statements in deciding to forgo seeking employment with another employer.
tion or seek more information or clarification of the subject matter of the misrepresentation.\textsuperscript{211}

To exacerbate the confusion, numerous courts speak in terms of "reliance" without citing any qualifying standard whatsoever, thereby apparently addressing not the "reasonable reliance" requirement, but rather the prior fraud component of actual reliance, that is, factual causation.\textsuperscript{212} Of course, if actual reliance is found, and the plaintiff-employee ultimately prevails, one can

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\textsuperscript{211.} Edmondson, 674 A.2d at 766;

The trial court determined that, as a matter of law, [plaintiff] failed to demonstrate any reliance on [defendant's office manager's] comments that [he] earned over $100,000 a year and [another agent] earned more than $200,000 a year with [defendant] . . . . [Plaintiff] also revealed in his deposition that, during the entire time he worked at [defendant], data was posted from which he, or any other agent, could determine what others were earning in the company . . . . Through this deposition testimony, [plaintiff] concedes [defendant] gave him the information to determine other's incomes, but that he was not concerned enough to make the effort. We agree with the trial court that [plaintiff] has failed, as a matter of law, to show any reliance by him on [office manager's] statements.

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\textsuperscript{212.} Plaintiff-employee has not indicated that he refrained from applying for jobs outside [defendant-employer]. [H]e contends that his reliance consists of a decision not to apply for two administrative vacancies within the company. The two officials responsible for filling those vacancies have testified by affidavit that [plaintiff-employee] was not qualified for either job because he had no skill with the use of a computer, which was an essential component of these positions. [H]e offers nothing to substantiate a contrary position but his own bald assertion that he was qualified. The detriment allegedly accruing to [plaintiff] as a result of his purported reliance was in fact illusory, and thus insufficient to sustain these causes of action.

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Shenker v. Lockheed Sanders, Inc., 919 F. Supp. 55, 61-62 (D. Mass. 1996) (defendant's representatives made false statements regarding job security to plaintiff-employee); Fish v. Trans-Box Sys., Inc., 914 P.2d 1107, 1109-10 (Or. Ct. App. 1996) (plaintiff-employee held not to have a "right to rely" on defendant employer's promises of benefits because employee continued to work for employer after employee learned of benefit changes and thus employee was deemed to have accepted modified employment contract); Haviland v. J. Aron & Co., 622 N.Y.S.2d 703, 703-04 (N.Y. App. Div. 1995) (plaintiff-employee, recent law school graduate hired by defendant as a commodities broker, did not rely on defendant employer's promises of job security and promises that defendant would abide by its own rules when plaintiff did not seek to avail himself of other employment opportunities);
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\textsuperscript{49 CAVICO: FRAUDULENT, CARELESS, AND THOUGHTLESS MISREPRESENTATION IN THE EMPLOYMENT RELATIONSHIP. Published by Scholarly Repository @ Campbell University School of Law, 1997}
infer that the "reasonableness" thereof also was present. When the statements were made, [plaintiff] already knew that employees were being interviewed and terminated, and she had already made the decision to go to the interview. She was, in fact, already there when [her supervisor's] statements were made. Since there is no evidence that [plaintiff] relied on [her supervisor's] statements in going to the Holiday Inn for the interview, the fraudulent misrepresentation action must fail.

State Farm Mut. Automobile Ins. Co. v. Novotny, 657 So. 2d 1210, 1214 (Fla. Dist. Ct. App. 1995) (emphasis in original) (plaintiff's supervisor misrepresented nature of employer interviews of employees; plaintiff and others terminated for fraud); Whitson v. Ok. Farmers Union Mut. Ins. Co., 889 P.2d 285, 287 (Oklahoma 1995) (plaintiff employee contended that his supervisor had falsely denied his Worker's Compensation claim and had instructed another employee to deny knowledge of plaintiff's injury) ("[Plaintiff's] fraud claim must also fail. In order to establish a cause of action for fraud one must plead and prove... reliance... (citation omitted). Clearly, [plaintiff's supervisor] did not intend for [plaintiff] to rely on his statements to [employer's] workers' compensation insurer, and (plaintiff) did not rely on them. Thus, [plaintiff-employee] failed to state a cause of action for fraud.");

[Defendant-employer] was entitled to summary judgment on this claim. [Plaintiff's] entitlement to such retirement benefits... was expressly addressed in the negotiations leading up to the settlement agreement, and were negotiated out of the settlement agreement. [Plaintiff] cannot say that he relied upon [employer's] allegedly fraudulent misrepresentation that he would receive the retirement benefits in signing the settlement agreement. It is an essential part of a plaintiff's fraudulent misrepresentation case that plaintiff relied upon the alleged fraudulent representation to his damage (citation omitted). The absence of such reliance on [plaintiff's] part is clear from the record (citation omitted).


213. The trial court found that [employer's director] made the representations to [plaintiff-employees] concerning [public pension] eligibility... The court further found that, given the clarity of the [government] report, [director's] representations were at a minimum made with reckless disregard to their truth, that they were made with the intent of inducing reliance by [plaintiff-employees], then applicants, and that [plaintiffs] did rely on the representations to their detriment [by accepting employment and foregoing pension eligibility]. We find that there is competent, credible evidence contained in the record to support the trial court's conclusion that the Agency is liable to [plaintiffs] for [its director's] misrepresentation.

the plaintiff is an at-will employee, the reliance question becomes discouragingly puzzling, since some courts firmly declare that at-will status negates any possibility of reasonable reliance, while others, to the contrary, contend that such status does not necessarily mean that an employee cannot reasonably rely on an employer's misrepresentation.214

represented to plaintiff that money had been allocated for her position; plaintiff accepted employment, moved to new job, and was shortly thereafter terminated in response to "severe financial crisis") (plaintiff's assertion of "reliance" sufficient for a finding that "all the elements of a fraud claim are present"); Duck Head Apparel Co., Inc. v. Hoots, 659 So. 2d 897, 904-05 (Ala. 1995) (employer fraudulently suppressed the fact that it was diverting the plaintiffs' orders to prevent paying commissions on them) ("[Defendant-employer] anticipated that the highest-paid sales representatives would not accept its offer of employment and that it began making plans and taking steps to defraud them of their commissions in the event they resigned. Thus, the jury could have found that [defendant] suppressed facts existing before the plaintiffs' resignations and that the plaintiffs were induced by that suppression to act.").

214. Compare Clark, 625 N.Y.S.2d at 159 ("plaintiff's status as an at-will employee necessarily negated any claim of reasonable reliance on the alleged misrepresentations"); McNierney, 919 F. Supp. at 861 (plaintiff's offer of employment rescinded after defendant accused plaintiff of misrepresenting relocation expenses) ("Here, when [plaintiff] accepted McGraw-Hill's offer on June 15, the parties established an 'at-will' employment relationship. . . . Because, [plaintiff's] employment could be terminated 'at the pleasure of either party at any time' he was not justified in relying on McGraw-Hill's statement of intent to hire him (citations omitted."); McCreery, 921 F. Supp. at 493 ("The plaintiffs' letters of engagement said that their employment could be terminated 'at will and at any time.' . . . Plaintiffs chose to ignore the express language of the letters. In the face of this language, it cannot be said that plaintiffs 'reasonably relied' upon representations contrary to this written language."); and Tannehill v. Paul Stuart, Inc., 640 N.Y.S.2d 505, 506 (N.Y. App. Div. 1996) (plaintiff alleged that prospective employer's false representation that it would hire her for a retail position induced her to leave employment with another retailer) ("[I]t cannot be said that plaintiff reasonably relied on defendant's representation, because the offered employment was at will (citations omitted.") with Cole v. Kobs & Draft Advertising, Inc., 921 F. Supp. 220, 226 (S.D.N.Y. 1996) (plaintiff-at-will employee, an account supervisor in defendant's direct market advertising business, contended that her supervisor fraudulently stated that she would have a "great future" with defendant and be promoted, whereupon plaintiff turned down an offer from a competitor) ("Here, . . . plaintiff does not seek to hold her former employer liable for damages arising out of her termination, and therefore the employment-at-will doctrine is not implicated. Rather, [plaintiff] is seeking damages for injuries that occurred while she was still at [defendant's] - namely, the soured relationship with [her biggest account] and the injury to her reputation—and that arose independently of [defendant's] decision to fire her."); Mudlitz v. Mutual Serv. Ins. Cos., 75 F.3d 391, 395 (8th Cir. 1996) (dicta) (reliance may be found where at-will employee turns down offers of employment
Assuming the plaintiff employee has satisfied all the afore-said allied elements of inducement, factual causation, actual reliance, proximate-legal causation, and reasonable-justifiable reliance, he or she, finally, to prevail on the fraudulent misrepresentation claim, must show that an injury resulted therefrom.

F. The Injury Requirement

If the plaintiff employee seeks to recover damages based on the employer's intentional fraudulent misrepresentation, the employee must show a legally recognizable injury or loss as a result of the misrepresentation; and absent this element, the employee's cause of action fails. In Pegram v. Hebding, the plaintiff, a vice-president and member of the board of directors as based upon an employer's misrepresentations; and Albrant v. Sterling Furniture Co., 736 P.2d 201, 203 (Or. Ct. App. 1987) ("The fact that defendants were offering plaintiff a position which was terminable at will does not mean that she could not reasonably rely on representations they made. On the contrary, she had a right to rely until she knew or should have known that the terms had been modified.").


216. Pegram v. Hebding, 667 So. 2d 696, 698, 702 (Ala. 1995). See also Shenker v. Lockhead Sanders, Inc., 919 F. Supp. 55, 61-62 (D. Mass. 1996) (even though plaintiff-employee laid-off despite employer's assurances of job security, court deemed plaintiff's injury non-detritual and illusory because employee not qualified for remaining positions due to employee's inability to use computer); Sanford v. Meadow Gold Dairies, Inc., 534 N.W.2d 410, 413 (Iowa 1995) (plaintiff-employee misled by his supervisor as to his status as a non-probationary employee, and thus plaintiff did not take advantage of company grievance procedure; but no recovery for fraud in part because employee found other employment and lost no past or future wages as a result of his firing);

The alleged violation of [employee's] principles is not a legally cognizable injury. And his discharge was not caused by the alleged misrepresentations. As the district court noted, the termination of his employment at [employer] 'left [employee] exactly where he asserts he would have been without the misrepresentation(s): without a job at [employer].' Accordingly, [employer and parent company] are entitled to judgment as a matter of law on [employee's] misrepresentation claim (citation omitted).

Rafferty v. Nynex Corp., 60 F.3d 844, 851 (D.C. Cir. 1995) (company asserted it discharged employee for legitimate business reasons, including its decision to close the consulting division plaintiff-employee had been hired to run; plaintiff-employee contended that he was misled as to the extent and legality of the company's consulting services and revenues and that he was fired because of his
well as a shareholder of the defendant-employer, alleged that defendant-employer's CEO fraudulently suppressed an illegal accounting scheme. The court held that there was no viable cause of action for the plaintiff because the court viewed the damage as harming the corporation, and thus the cause of action had to be brought on behalf of the corporation by the plaintiff as a shareholder by means of a derivative suit.\textsuperscript{218} The loss ordinarily is a financial one;\textsuperscript{219} but other types of damages may be recoverable.\textsuperscript{220} In \textit{Patten v. ALFA Mutual Insurance Co.},\textsuperscript{221} the court recognized plaintiff-employee's expenses in winding up his business, expending funds for liability insurance coverage, advertising, and computer expenses based on defendant-employer's misrepresentations regarding plaintiff's employment as an insurance agent as sufficient injuries.\textsuperscript{222} In \textit{Rafferty v. NYNEX Corp.},\textsuperscript{223} the court determined that criminal prosecution and damage to one's professional reputation may be legally recognizable injuries.\textsuperscript{224} Of course, conventional damage rules apply, for example, the prescriptions against "speculative" damage awards\textsuperscript{225} and "plural" concerns that the company's consulting services violated an anti-trust consent decree).

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\item \textsuperscript{217} 667 So. 2d 696 (Ala. 1995).
\item \textsuperscript{218} \textit{Id.} at 698, 702.
\item \textsuperscript{219} \textit{Patten}, 670 So. 2d at 857. \textit{See also Lubore}, 674 A.2d at 557 (plaintiff-employee being lured away from and giving up lucrative employment position as a result of employer's fraudulently incomplete representations held to satisfy the damage element to fraud); LaFont v. Taylor, 902 S.W.2d 375, 377 (Mo. Ct. App. 1995) (lost employment opportunities, lost income, and lost business opportunities regarded as legally sufficient "injury"); \textit{Sanford}, 534 N.W.2d at 413 (the loss of past or future wages may be a sufficient "injury").
\item \textsuperscript{220} \textit{Rafferty}, 60 F.3d at 851. \textit{See also Russ}, 570 N.E.2d at 1081, 1084 (inexperienced accounting employee, a sociology major, misled by company's representatives as to legality of company's pricing practices on defense contracts) ("emotional harm" and "psychological injuries" stemming from "sense of betrayal," "termination under an ethical cloud," and "exposure...to potential criminal liability" demonstrated that employee suffered an "injury").
\item \textsuperscript{221} 670 So. 2d 854 (Ala. 1995).
\item \textsuperscript{222} \textit{Id.} at 857.
\item \textsuperscript{223} 60 F.3d 844 (D.C. Cir. 1995).
\item \textsuperscript{224} \textit{Id.} at 851.
\item \textsuperscript{225} \textit{Id.} at 851 ("'[I]t is elementary that 'speculative' damage will not support an action for common law fraud' (citation omitted). There is no evidence in the record that [employee] has been or will be charged with any criminal offense related to his activities at [employer] or that his professional reputation has been damaged" (citation omitted)); Cole v. Kobs & Draft Adver., Inc., 921 F. Supp. 220, 226 (S.D.N.Y. 1996) (damage to employee's reputation, the prevention
satisfactions of one injury, as well as the requirement that a plaintiff, employee or otherwise, mitigate his or her damages.

G. Burden of Proof, Standard of Evidence, and Role of Court and Jury

The employee, as plaintiff, has the burden of proving, by direct or circumstantial evidence, all of the elements of the cause of action of intentional fraudulent misrepresentation. This burden of proving fraud, according to some courts, is by a preponderance of the evidence. Most courts, however, demand that the plaintiff's evidence, if accepted and believed, must qualify as "clear and convincing" proof of fraud.

This "clear and convincing" evidence standard "is a lesser - more lenient - one than proof beyond a reasonable doubt . . . ." "Clear and convincing," aptly described as "amorphous" and "loose and confusing," is viewed by some courts as an "intermediate" standard between the higher "exacting" degree of "reasonable doubt" and the lesser level of "mere" "preponderance." This intermediate standard has been variously expressed as "clear and

of employee receiving superior employment opportunities, and damage to her "career path" deemed not necessarily speculative, despite "mere fact that quantification of such losses may be difficult"); see supra note 197 and accompanying text.

226. Sanford v. Meadow Gold Dairies, Inc., 534 N.W.2d 410, 413 (Iowa 1995) ("[Plaintiff-employee] did not show any damages on this [fraud] count beyond those already considered and either allowed or rejected on the retaliatory discharge count. . . . We have often held there can be but one satisfaction for an injury, even though there may be plural causes for recovery." (citations omitted)); Lazar v. Superior Court, 909 P.2d 981, 990 (Cal. 1996).


232. Weisman, 547 A.2d at 639.

233. Id. at 643.

234. See Johnson, 918 F. Supp. at 548; Weisman, 547 A.2d at 642-43.
satisfactory," "clear and unequivocal," "clear," "precise," "clear, cogent, and convincing," and even "indubitable" evidence. To confuse matters even further, some courts utilize different evidentiary standards for different components of the plaintiff's fraud cause of action.

What are the roles of the judge and jury in defining and applying these standards and, of course, in rendering the ultimate judgment? The judge is empowered to determine as a matter of law, before the case is submitted to a jury, whether the plaintiff-employee's evidence is sufficiently "clear and convincing" to establish the plaintiff's initial case. It is the responsibility of the trier of fact, ordinarily the jury, to determine, pursuant to the appropriate evidentiary standard, whether a false representation was made and whether the defendant knew the statement was false at the time of its making. The question of a defendant's knowledge and intent in making the alleged false representation is also a question of fact for the jury, "uniquely... because it so depends upon the credibility of the witnesses and the weight to be given to their testimony."

Other issues of fact for the jury to resolve are inducement, causation or actual reliance, reasonable or justifiable reliance, and damages. However, the issue as to whether a defendant had a duty to disclose a particular fact usually is regarded as a question of law for the court to resolve, but if there are disputed facts relevant to the existence of the duty, they are to be determined by the jury pursuant to appropriate judicial instructions as to the existence and scope of the legal duty. Whether a defendant


236. Johnson, 918 F. Supp. at 548 ("preponderance of the evidence" for damages and "clear and satisfactory" for the remaining elements).


owed a plaintiff a duty of care not to make negligent misrepresentations is viewed as a question of law for the court to decide. 244

IV. NEGLIGENT MISREPRESENTATION

When a party makes a false statement, not purposefully but carelessly, believing the misrepresentation is true, the doctrine of negligent misrepresentation arises. Pursuant to this doctrine, a misrepresentation made with an honest belief as to its truth nonetheless may be deemed negligent, and thus actionable. 245 A cause of action can arise due to a failure to exercise reasonable care and competence in ascertaining the true underlying facts, obtaining the information, communicating the representation, or due to a failure to exercise the knowledge, skill, or competence required of a particular business, profession, employment, or position, for example, by failing to undertake a proper investigation. 246 The fact, however, that the misrepresentation was made carelessly or incompetently does not render it fraudulent; and thus no fraudulent intent or scienter is required for this cause of action, merely negligence. 247 Accordingly, the courts are prone to treat this action as an ordinary negligence tort. 248 Yet, "[w]hat is reason-


246. KEETON ET AL., supra note 1, § 107, at 745-46; RESTATEMENT (SECOND) OF TORTS § 552(1) and cmt. e (1977); see, e.g., Hodgkins, 82 F.3d at 1233-34 (citing RESTATEMENT (SECOND) OF TORTS § 552(1)); Johnson, 918 F. Supp. at 548; Keenan, 889 F. Supp. at 1386.


248. KEETON ET AL., supra note 1, § 107, at 745; see, e.g., Johnson, 918 F. Supp. at 548-49; Hodgkins, 82 F.3d at 1234 (citing RESTATEMENT (SECOND) OF TORTS); McNierney, 919 F. Supp. at 862; Lubore, 674 A.2d at 558; Mudlitz v. Mutual Serv. Ins. Cos., 75 F.3d 391, 395 (8th Cir. 1996); Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 616-17 (D. Mass. 1995) (citing RESTATEMENT (SECOND) OF TORTS);

This court has long recognized liability for negligent misrepresentation. . . . The governing principles are set forth in similar terms in § 552 of the Restatement Second of Torts. . . . The defendants argue . . . that . . . [they] cannot be held liable in tort for negligent misrepresentation. For purposes of a cause of action for negligent
able is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. The question is one for the jury.”

The negligent misrepresentation action, therefore, contains the following tort and misrepresentation elements: a duty of care owed to the plaintiff by the defendant, a false statement of material fact by a defendant, negligently made (with negligence construed as a substitute for scienter), with the intent that the plaintiff rely on it, causation in fact (that is, actual reliance on the

misrepresentation, however, the plaintiff need not prove that the representations made by the defendants were promissory. It is sufficient to allege that the representation contained false information. The gravamen of the defendants’ alleged negligence is that the defendants made unconditional representations of their plans to rehire the plaintiff, when in fact the defendants knew or should have known that hiring plans would be contingent upon student enrollment levels for the following year.

D’Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch., 520 A.2d 217, 223 (Conn. 1987); Weisman, 547 A.2d at 638 (“the tort of negligent misrepresentation is alive and well in Maryland”); Keenan, 889 F. Supp. at 1386.

249. Restatement (Second) of Torts § 552 cmt. e (1977);
Washington has adopted the Restatement (Second) of Torts § 552 (1977) which sets forth the elements for a negligent misrepresentation cause of action. . . . Finally, while [employee] may have relied (seventh element), [employer] exercised reasonable care in communicating the alleged agreement (element eight). He negotiated with her, then set what he believed to be the agreement to writing. When [employee] refused it, he reasonably concluded that there was no agreement and did not consider the matter further.

accord Keenan, 889 F. Supp. at 1386; Weisman, 547 A.2d at 638 (“[T]here was sufficient evidence in this case to permit the jury to find that [employer] had a duty to [employee] not to make negligent misrepresentations of present or past facts about the position being offered . . . .”);

The court need not decide whether, under the circumstances, negligent promises are actionable under Kansas law. [Employee] has alleged no facts which support a claim of negligence, as it pertains to the employment agreements. [Employee’s] claim is that defendants were negligent in representing their then-current intent to employ him pursuant to the terms of the employment agreements. The record contains no evidence of negligence, however, and it appears to the Court that defendants either intended to carry out their promises, or they did not. To recognize a claim for negligent promise, on this record, would be to endow every breach of contract with a potential tort claim for negligent promise.

Eckholt, 873 F. Supp. at 532.
part of the plaintiff), justifiable or reasonable reliance, proximate causation, and damages. The negligent misrepresentation doctrine clearly is applicable in the employment context; and a corpus of case law exists, illustrating the preceding elements, wherein employees have attempted to recover from their employers or prospective employers pursuant to this legal theory. In one case,


251. Hodgkins v. New England Tel. Co., 82 F.3d 1226, 1233-34 (1st Cir. 1996). See also Johnson v. Chesebrough-Pond's USA Co., 918 F. Supp. 543 (D. Conn.), aff'd, 104 F.3d 355 (2nd Cir. 1996) (plaintiff-employee claimed he was given negligently false statements regarding job security; yet unsuccessful cause of action, even though causation in fact present, because proximate causation lacking due to presence of "intervening direct cause," namely plaintiff's poor job performance); McNierney, 919 F. Supp. at 862 (defendant's offer of employment not negligently false; plaintiff not hired due to plaintiff misrepresenting his relocation expenses); Lubore, 674 A.2d at 559-61 (defendant-employer's "fragmentary representation" which represented "only part of the truth," specifically that plaintiff's employment would be conditioned on a 15 page employment agreement which contained "unconscionable" terms, was a sufficient foundation for negligent misrepresentation claim); Mudlitz, 75 F.3d at 395 (plaintiff-employee received negative "Performance Warning" and contended that defendant employer negligently made untrue statements about her employment in the Performance Warning; but no successful cause of action because "[w]hile [employee] continued working after receiving the "Performance Warning," this alone is legally insufficient to act as reliance");

[Plaintiff] has not indicated that he refrained from applying for jobs outside Lockheed Sanders. [Plaintiff] contends that his reliance consists of a decision not to apply for two administrative vacancies within the company. The two officials responsible for filling those vacancies have testified by affidavit that [plaintiff] was not qualified for either job because he had no skill with the use of a computer, which was an essential component of these positions. [Plaintiff] offers nothing to substantiate a contrary position but his own bald assertion that he was qualified. The detriment allegedly accruing to [plaintiff] as a result of his purported reliance was in fact illusory, and thus insufficient to sustain these causes of action.

Shenker v. Lockheed Sanders, Inc., 919 F. Supp. 55, 61-62 (D. Mass. 1996) (plaintiff-employee claimed that he was negligently given false assurances of job security when plaintiff questioned supervisor about his being laid-off; but no recovery because reliance and injury elements absent); Florendo v. Archdiocese of N.Y., 642 N.Y.S.2d 31, 32 (N.Y. App. Div. 1996) (employee contended that employer negligently gave her erroneous immigration advice; but fact that advice was not given to plaintiff directly but to her sister by an unidentified employee was insufficient to raise an issue of fact on the "representation" element);
Hodgkins v. New England Telephone Co., 252 the plaintiff submit-

Whether [employee's] reliance was reasonable, however, presents a difficult question. Installing copyrighted software is unlawful. [Employee's] reliance on an individual's representation that [employer] would condone such unlawful conduct is problematic. On the other hand, these individuals were [employee's] supervisors. . . . Ordinarily, adhering to the instructions of an employee's immediate supervisor is reasonable. Making a reasonable inference from the complaint, no [employer] executive advised or implied to [employee] that his job was at risk. In fact, a number of defendants compensated or showed their appreciation to [employee] for his actions. Viewing the complaint in a favorable light, defendants therefore fail to establish that [employee's] reliance was unreasonable . . . .

Masso v. United Parcel Serv. of Am., 884 F. Supp. 610, 616-18 (D. Mass. 1995) (plaintiff-employee successfully contended that defendant employer's representatives, who were employee's supervisors, negligently misrepresented the legality of employee installing copyrighted software on their home computers) (whether employee reasonably relied on misrepresentations was a major issue, as well as whether there was legal causation, and the type of damages recoverable); Sandler v. New York News Inc. 721 F. Supp. 506, 516-519 (S.D.N.Y. 1989) (plaintiff-employee successfully contended that employer negligently and erroneously overstated the amount of pension benefits that employee was eligible to receive upon retirement) (several negligent misrepresentation elements at issue: whether information was erroneous and material, whether plaintiff unreasonably or unjustifiably relied thereon, and whether plaintiff suffered "economic detriment" thereby); Keenan v. Allen, 889 F. Supp. 1386, 1386, n.87 (E.D. Wash. 1995), aff'd, 91 F.3d 1275 (9th Cir. 1996) (plaintiffs contended that employer negligently made false representations and "reassurances" regarding the scope, nature, and longevity of employee's position as an administrator, as well as promises by employer concerning educational expenses and whether to investigate an "alleged affair") (several elements to negligent misrepresentation cause of action at issue: whether employer's statements were "then-false statements" of "presently existing fact" or "mere promises of future conduct," employee's actual and justifiable reliance thereon, employer's exercise of reasonable care in making communications, and evidence of pecuniary harm); D'Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch., 520 A.2d 217, 223 (Conn. 1987) (issue as to falsity of information provided by employer); Harlen v. Integry, Inc. 721 F. Supp. 148, 150-51 (N.D. Ohio 1989) ("Contrary to Defendants' argument, negligent misrepresentation is recognized as a basis for a cause of action under Ohio law.") (summary judgment not warranted on plaintiff employee's negligent misrepresentation claim when issue was whether defendant employer's expressions were statements of fact or "mere projections or opinions"); Fort Washington, 901 F. Supp. at 941-42 (lack of elements of falsity of statement, materiality, and causation precluded plaintiff employee's negligent misrepresentation action); Clark v. Helmsley Windsor Hotel, 625 N.Y.S.2d 159, 159 (N.Y. App. Div. 1995) (plaintiff-employee's status as an at-will employee negated any claim of "reasonable reliance" on the defendant employer's alleged negligent misrepresentation).

252. 82 F.3d 1226 (1st Cir. 1996).
ted cost saving ideas to defendant-employer's "Ideas at Work" suggestion program, which was accepted by defendant-employer. Plaintiff-employee planned for retirement based on the expected monetary award, but when the award was less than anticipated, plaintiff-employee sued the employer for negligently making misstatements in the program publications and employment newsletters. The court in Hodgkins held that "[plaintiff's] misrepresentation claim must fail... [because] namely, that specific statements in the IAW program publications and the [employment] newsletter, as well as the context in which they were read, clearly rendered [plaintiff's] alleged reliance unreasonable." The "duty" element of the negligence cause of action, however, may confront plaintiff-employees with a difficult barrier to overcome. Some courts may require "special circumstances" before imposing tort duties in an employment contracting context, as in McNierney where the court held that "... where parties have established a contractual relationship special circumstances are required to add tort duties of care to those imposed by their contract." Other courts may require a "special relationship or intimate nexus" between the parties before imposing tort duties in an employment contracting context, as in Lubore v. RPM Associates, Inc. where the court found a "special relationship" based on extensive negotiations between two high level executives which occurred over an extended period of time and which included "high stakes."

There is, moreover, another sizable problem area in the field of negligent misrepresentation, that is, the difficulty of determining accurately the scope of a defendant's liability. If the defendant's negligent misrepresentation causes physical harm to the plaintiff, the courts consistently agree that standard negligence

253. Id. at 1234.
254. Id.
255. Id.
256. McNierney, 919 F. Supp. at 862 ("Such duties of care have been imposed for the benefit of patients vis-à-vis physicians and clients vis-à-vis lawyers, etc. It is by no means certain that such duties would be imposed in the context of an at-will employment.").
258. Id. at 862.
259. Lubore, 674 A.2d at 559-60.
261. Id. at 559-60.
principles apply; and thus the plaintiff may seek damages for those harms factually and proximately caused by the negligent act. If the defendant’s negligent misrepresentation, however, only causes pecuniary harm to the plaintiff, as ordinarily is the case in the employment context, the negligence cause of action still can be maintained, but the scope of the defendant’s liability may be narrower than under conventional negligence-factual-proximate-causation rules. Specifically, the defendant’s liability may be limited to those persons for whose benefit or guidance the defendant intended to supply the information and to those persons to whom the defendant intended to rely on the information.

V. INNOCENT MISREPRESENTATION

When a party makes a representation that he or she honestly believes to be true, and there is no negligence in the formation of this belief, yet the misrepresentation actually falsely represents material facts, the misrepresenting party is only liable for an innocent misrepresentation, not a fraudulent or negligent one. If such an innocent misrepresentation occurs, the aggrieved party can rescind the contract or transaction as well as seek restitution, but the party cannot ordinarily recover damages. In an innocent misrepresentation case, there is no requirement of fault, intentional or careless, at all; rather, the plaintiff merely needs to demonstrate that a false representation was made with an intent to induce the plaintiff’s reliance thereon, and that the plaintiff did in fact justifiably rely on the information to his or her detriment.

The nature of the liability pursuant to the innocent misrepresentation theory is often described as appearing very close to the contract action of breach of an express warranty, the tort theory

262. Restatement (Second) of Torts § 552 cmts. a and i (1977).
263. Id.
264. Keeton et al., supra note 1, § 107, at 748-49; Restatement (Second) of Torts § 552C cmts. a, c and d (1977).
265. Keeton et al., supra note 1, § 107, at 748-49; but see Restatement (Second) of Torts § 552C(2) (1977) (damages are recoverable, but limited to the “difference between the value of what the other has parted with and the value of what he has received in the transaction”; and rule itself limited to business transactions involving “sale, rental, and exchange”).
266. Keeton et al., supra note 1, § 107, at 748-49; Restatement (Second) of Torts § 552C cmts. a, c, d, and e (1977).
267. Keeton et al., supra note 1, § 105, at 729 (relief based on “an implied obligation to guarantee the truth of the matter asserted”), and § 107, at 749
of strict liability,\textsuperscript{268} or even the contract doctrine of mutual mistake.\textsuperscript{269} Though, "[i]t would be easy to dismiss the question of whether the liability was tort or contract, were it not for the fact that there are some issues that will be affected by the theory upon which recovery is allowed, such as damages, the proper limitations period, . . . and defenses of one kind or another."\textsuperscript{270} Regardless of the confusing nature of the innocent misrepresentation theory, and its blurring of the line demarcating contract and tort, one point is clear; the law does allow rescission and restitution for an innocent misrepresentation, even in the business context of employment misrepresentation.\textsuperscript{271}

VI. REMEDIES

A. Damages

1. Introduction

The tort action for misrepresentation requires proof of actual damages, even when the misrepresentation was fraudulent, and regardless of how flagrant it may have been.\textsuperscript{272} Nominal damages are not awarded in misrepresentation cases; and thus proof of actual damages must be shown for a plaintiff to obtain any recovery.\textsuperscript{273} Consequently, if a defrauded plaintiff is "none the worse off" due to the misrepresentation, he or she cannot recover there-

\textsuperscript{268} KEETON ET AL., supra note 1, § 107, at 748-49; RESTATEMENT (SECOND) OF TORTS § 552C and cmt. b (1977).

\textsuperscript{269} RESTATEMENT (SECOND) OF TORTS § 552C and cmt. a (1977).

\textsuperscript{270} KEETON ET AL., supra note 1, § 107, at 749.

\textsuperscript{271} D’Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch., 520 A.2d 217, 223 (Conn. 1987) (dicta); Johnson v. Chesebrough-Pond’s USA Co., 918 F. Supp. 543, 548 (D. Conn.), aff’d, 104 F.3d 355 (2nd Cir. 1996) (dicta); RESTATEMENT (SECOND) OF TORTS § 552C and cmt. g (1977) ("There have been, however, occasional decisions in which the same rule has been applied to other types of business transactions . . . The law appears to be still in a process of development and the ultimate limits of the liability are not yet determined. The Caveat leaves open the question of whether there may be other types of transactions to which the rule stated here may be applied.").

\textsuperscript{272} KEETON ET AL., supra note 1, § 110, at 765.

\textsuperscript{273} Id.
for. The preceding rules, moreover, apply to actions for negligent misrepresentation.

2. Types and Measures of Damages

Assuming that the defendant's actionable fraudulent misrepresentation legally causes the plaintiff to suffer actual damages, the courts ordinarily allow the recovery of a "general measure" of compensatory pecuniary damages, frequently referred to as "direct" damages, as well as the recovery of "special," "consequential," or "indirect" damages that result from the misrepresentation. These latter damages are defined as those "that might reasonably be expected to result from reliance upon the misrepresentation." In a fraudulent misrepresentation case, there are two, at times competing, rules to measure the extent of the plaintiff's general damages: the "benefit of the bargain" rule and the "out of pocket loss" rule. The "benefit of the bargain" rule holds that the plaintiff is entitled to the benefit of the bargain or contract that he or she has made with the defendant. The rationale behind this measurement standard is to compensate sufficiently the plaintiff so as to place him or her in the position he or she would have been in if the defendant's representation was true.

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274. Id.
275. Id.
277. KEETON ET AL., supra note 1, § 110, at 766.
278. Id. See also RESTATEMENT (SECOND) OF TORTS § 549(1)(b) and cmt. d (1977); Berger, 795 P.2d at 1385 (actual damages included an amount representing losses on house plaintiff employee bought in new location due to defendant-employer's misrepresentations).
280. RESTATEMENT (SECOND) OF TORTS § 549 cmts. a, b, and cmt. 1 (1977); Lazar v. Superior Court, 909 P.2d 981, 990 (Cal. 1996).
281. RESTATEMENT (SECOND) OF TORTS § 549(2) and cmt. 1 (1977).
282. RESTATEMENT (SECOND) OF TORTS § 549 cmt. 1 (1977); see, e.g., Bemmes v. Public Employees Retirement Sys. of Ohio, 658 N.E.2d 31, 35 (Ohio Ct. App. 1995) (award of damages for pension loss in employment fraud case) ("The basic goal of tort damages is to place the injured party in the same financial position that he would have been in had there been no tort."); Bock v. American Growth Fund Sponsors, Inc., 904 P.2d 1381, 1382, 1384 (Colo. Ct. App. 1995) (initial standard measure of damages in an employment fraud case is the difference
The "out of pocket loss" rule maintains that the plaintiff can recover as damages the difference between the value the plaintiff received in the transaction and the value the plaintiff gave.283 Note, however, that pursuant to the "out of pocket loss" measurement standard, if the value the plaintiff receives through the fraudulent transaction is of equal or greater value than the value the plaintiff gave, then the plaintiff has suffered no loss and thus can recover nothing, regardless of the falsity of the defendant's representation.284 Similarly, if the position of the plaintiff employee is no worse than it would be if the employer's fraudulent misrepresentation had not been committed, there is no damage and no viable fraud cause of action,285 as in Stafford v. Radford

between the salary the plaintiff employee was paid and the salary that would have applied but for the misrepresentations);

[W]e find untenable defendants' contention that the only proper measure of damages in this case is what plaintiff would have earned under the contract. We refuse to adopt a rule that would leave a victim of fraud uncompensated merely because the misrepresentation involves a contract for employment at will. . . . In other words, although she cannot prove what she would have earned working for defendants, she may be able to prove what she lost by quitting her job in Klamath Falls and moving to Eugene. We conclude that those damages would be recoverable in a fraud action.


283. RESTATEMENT (SECOND) OF TORTS § 549(1)(a) and cmt. b (1977); Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships' (citation omitted) fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the-bargain damages (citations omitted). For example, a fraudulently hired employee, as [plaintiff] has alleged himself to be, may incur a variety of damages 'separate from the termination' itself, such as the expense and disruption of moving or loss of security and income associated with former employment.

see Lazar, 909 P.2d at 990.


The alleged misrepresentation is that [defendant-employer's] secretary advised [plaintiff] that [two other job candidates] the first and second highest scorers on the civil service examination declined the position when in reality they were never offered the job. . . . The misrepresentation could not have resulted in any damage in and of itself. . . . [T]he plaintiff did not lose any wages, she did not leave another job to take this one and she was not prohibited from seeking other work. Assuming the misrepresentations were never made, [plaintiff] would still be in the same place she was before.
Community Hospital, Inc.,\textsuperscript{286} where the plaintiff, an occupational health nurse and patient representative, was falsely informed by the hospital that it was abolishing her position.\textsuperscript{287} Plaintiff, thereupon, instituted a job search.\textsuperscript{288} Plaintiff was ultimately terminated, but the court found that the plaintiff was not damaged because instituting the job search "did not significantly worsen her condition."\textsuperscript{289}

Regardless of the measure used, the damages must be established by competent and credible evidence,\textsuperscript{290} with reasonable certainty; and neither can be "conclusionary"\textsuperscript{291} nor "speculative."\textsuperscript{292} The fact, however, that the plaintiff employee's losses are difficult to quantify does not necessarily preclude the plaintiff from recovering damages,\textsuperscript{293} as in \textit{Cole v. Kobs & Draft Advertising, Inc.},\textsuperscript{294} where the court held that damage to the employee's reputation, the prevention of employee from obtaining "superior employment opportunities," and damage to her "career path" were not "too speculative" as measures of damages in this fraudulent inducement case.\textsuperscript{295} The plaintiff-employee, finally, as is any other plaintiff, is required to mitigate his or her damages.\textsuperscript{296}

\textsuperscript{287} Id. at 616.
\textsuperscript{288} Id. at 1369 (W.D. Va. 1995), aff'd, 120 F.3d 262 (4th Cir. 1997).
\textsuperscript{289} Id. at 1375.
\textsuperscript{291} See \textit{Mudlitz v. Mutual Serv. Ins. Cos.}, 75 F.3d 391, 395 (8th Cir. 1996) (employee's assertions of damages deemed "purely conclusionary" and insufficiently factual).
\textsuperscript{293} \textit{Cole}, 921 F. Supp. at 226.
\textsuperscript{295} Id. at 226.
\textsuperscript{296} The defense of failure to mitigate damages applies when a plaintiff has failed to exercise reasonable care and diligence to minimize or lessen damages occasioned by defendant's conduct (citations omitted). A plaintiff's failure to mitigate damages is excused, however, if there were reasonable grounds for the failure. A defendant's assurances that a wrong will be remedied is a sufficient justification for a plaintiff's failure to mitigate, if there were reasonable grounds for believing the assurances (citations omitted). Here, after [defendant-employer] discontinued [project], [defendant], the president of the company, told
If, however, the misrepresentation action is one of negligent misrepresentation, the plaintiff is permitted to recover only his or her “out of pocket loss,” as well as consequential damages, but not the “benefit of the bargain.” The reason for denying “benefit of the bargain” damages in such a case is explained as “considerations of policy that have led the courts to compensate the plaintiff for the loss of his bargain in order to make the deception of a deliberate defrauder unprofitable . . . do not apply when the defendant has had honest intentions but has merely failed to exercise reasonable care in what he says or does.”

If, moreover, the plaintiff is seeking recovery only for economic loss caused by the negligent misrepresentation, some courts may impose additional requisites, such as a requirement that the “alleged wrongdoer must supply the information in the course of business and the information

[plaintiff-employee] that she need not be concerned about her job and that she would always have a place with the company. On appellate review, we cannot conclude that [plaintiff's] reliance on those assurances was unreasonable.

See, e.g., Berger v. Security Pacific Info. Sys., Inc., 795 P.2d 1380, 1385-86 (Colo. Ct. App. 1990); Cole, 921 F. Supp. at 226 (plaintiff, employee-at-will, victim of fraudulent inducement scheme, mitigated her damages by seeking and obtaining other employment after her termination, but allowed to sue for damages caused to her reputation, loss of superior employment opportunities, and harm to her “career path”); see supra note 145 and accompanying text.

297. RESTATEMENT (SECOND) OF TORTS § 552B and cmts. a and b (1977);

Damages for the tort of negligent misrepresentation are set forth in section552B of The Restatement (Second) of Torts (1977). . . . This rule generally restates the traditional ‘out of pocket’ measure of damages which is more consistent with the restitutory nature of tort remedies’ (citation omitted).

. . . .

[D]amages for the tort of negligent misrepresentation include any pecuniary loss resulting from [employee's] reliance on the implied representation that [employer] would not terminate him for installing the copyrighted software on the home computers of the [employer's] executives. [Employee's] damages also include any pecuniary loss for which the misrepresentation is a legal cause. At a minimum, therefore, [employee] is entitled to any loss of money or loss of something which money could acquire suffered as a consequence of reliance on the representation. Inasmuch as such damages conceivably could include ‘money damages’ sought in the complaint other than lost future income, this court need not decide the issue of whether [employee] can recover such future income.


must be supplied to guide others in their business transactions with third parties”299 or a requirement that the misrepresentation arise out of a “special relationship or intimate nexus.”300

When the misrepresentation action is based on an innocent misrepresentation, the plaintiff's recoverable damages are described as merely “restitutionary in character,” thereby entitling the plaintiff to his or her “out of pocket loss” but not any “benefit of the bargain” or consequential damages.301

3. Punitive Damages

When the misrepresentation is committed purposefully and fraudulently by the defendant employer, an award of punitive damages, representing an amount over and above the actual compensation for the loss, may be granted to the plaintiff employee.302 The purposes of punitive damages, of course, are to punish the intentional wrongdoer and to deter others from engaging in similar fraudulent misconduct.303

Even if a cause of action for intentional fraudulent misrepresentation is pled and proved, in an employment setting or otherwise, the courts still may impose additional prerequisites for a punitive damage recovery. Most courts will require the showing of sufficiently flagrant conduct above and beyond the “ordinary”

300. Lubore v. RPM Assocs., Inc., 674 A.2d 547, 559 (Md. Ct. Spec. App.), cert. denied, RPM Assocs. v. Lubore, 683 A.3d 177 (Md. 1996) (“In an arm's length commercial transaction involving only economic loss, the duty of care for the tort of negligent misrepresentation may rise out of a 'special relationship or intimate nexus.'” (citations omitted)).
301. RESTATEMENT (SECOND) OF TORTS § 552C and cmt. f (1977).
303. See Verway, 698 P.2d at 379.
fraudulent nature of the misrepresentation. In *Kelly v. DeFoe Corp.*, the court held:

It is well settled that punitive damages are not available 'in the ordinary fraud and deceit case. Punitive damages may only be recovered in a fraud action where the fraud involves high moral culpability. Moreover, the conduct alleged by the plaintiff must be shown to be so 'willful and wanton,' outrageously immoral, or criminal as to warrant an award of punitive damages.

Malice, for example, is a sufficient predicate for an award of punitive damages. Malice can be "express" or "actual malice," that is, malice existing when the wrongful "conduct is motivated by ill will toward a particular plaintiff," or "implied," that is, based on wrongful conduct so outrageous that malice toward the plaintiff harmed as a result of the misconduct can be implied. Conduct, moreover, which is "reprehensible in the extreme" or an "extreme deviation from reasonable standards" together with an "extremely harmful state of mind," will sustain an award of punitive damages, as will conduct by the employer that amounts to "conscious indifference to the rights of others,"

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306. *Id.* at 124.
308. *Id.*
309. See *Boivin*, 578 A.2d at 188-89 (defendant employer's vice-president's misrepresentations to plaintiff, that he could stay with company until he was 65 and could remain after that if he chose to, deemed fraudulent but not sufficiently "outrageous" for a punitive damage award).
310. *Duck Head Apparel Co., Inc.*, 659 So. 2d at 914 (employer's pattern of fraudulent misrepresentation and suppression, designed to deprive plaintiff-employees of their commissions, deemed "reprehensible in the extreme" by the jury so as to support a "substantial" punitive damage recovery).
311. Under the facts of the present case, the trial court did not err in refusing to direct a verdict on the issue of punitive damages. The record reflects sufficient evidence to raise a factual question as to [defendant-employer's] fraudulent intent . . . . The jury could have concluded that [defendant-employer] fraudulently misrepresented to [plaintiffs] that they would have permanent positions, thereby inducing some of them to quit their jobs, intending all along to use them only as strikebreakers and to terminate their positions when the strike was settled.
312. *Spoljaric*, 708 S.W.2d at 434-36 (misrepresentations by employer regarding employer's intent to implement a bonus plan deemed to be made with "conscious indifference").
"willful or wanton" misconduct. Malice, or its equivalent, is ascertained by the finder of fact, ordinarily the jury; and ordinarily must be proven by the plaintiff by "clear and convincing" evidence.

Some courts, however, find that the "fraud" itself necessarily encompasses sufficient egregiousness for a punitive damage award. In Berger v. Security Pacific Information Systems Inc., the court held that "[t]he jury's finding that the elements of fraud were established also established the 'circumstances of fraud' required for punitive damages" (citation omitted). The courts, finally, will insist that the punitive damage award be based on a predicate of actual compensatory damages or at the least on an award of nominal damages.

If the cause of action is one of negligent misrepresentation, the law is not clear whether punitive damages can be recovered. Research did not disclose a case in the employment context where punitive damages were awarded to a plaintiff employee for a defendant employer's negligent misrepresentation. Perhaps if the misrepresentation was "grossly" made, conventional tort rules would authorize a punitive award. Yet, if the defendant employer's representation was so grossly and carelessly committed, the misrepresentation may have been "recklessly" made,

314. Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 639, 641 (11th Cir. 1986) (whether defendant employer, a common carrier, which fraudulently misrepresented to plaintiff applicant the nature of its dispatch system, and which fraudulently failed to disclose that it was changing its dispatch system from a first-in-first-out basis to a seniority-based system, was liable for punitive damages was a question for the jury); Boivin, 578 A.2d at 189; Duck Head Apparel Co., Inc., 659 So. 2d at 914; Spoljaric, 708 S.W.2d at 434-35 (employer's misrepresentations concerning implementation of bonus plan deemed to exhibit "conscious indifference" sufficient to support $750,000 punitive damage award).
315. Boivin, 578 A.2d at 189; but see Berger, 795 P.2d at 1386 ("plaintiff must prove circumstances of fraud beyond a reasonable doubt." (citation omitted)).
316. Berger, 795 P.2d at 1386. See also Spoljaric, 708 S.W.2d at 436 (fraudulent inducement, in and of itself, is "enough to support a least a finding of conscious indifference," which is predicate for punitive damage recovery (citing Trenholm v. Ratcliff, 646 S.W.2d 927, 933 (Tex. 1983))).
319. Id.
320. KEETON ET AL., supra note 1, § 2, at 14.
321. KEETON ET AL., supra note 1, § 34, at 212.
which is sufficient scienter for purposeful fraud, which of course is a considerably more solid foundation to base a punitive award. \(^{322}\)

B. Rescissionary, Restitutionary, and Defensive Uses of Misrepresentation

Regardless of the nature of the misrepresentation, that is, whether fraudulent, negligent, or innocent, the law allows the aggrieved party to rescind the contract or transaction and to be restored to his or her original position. \(^{323}\) The purposes of these remedies are to restore the parties to the status quo and thus to prevent the misrepresenting party from securing a benefit from the improper transaction. \(^{324}\)

Damage to the plaintiff, moreover, is not an essential requirement for the rescissionary and restitutionary remedies; rather, "damage is merely one factor to be evaluated in determining whether it is appropriate to permit the deceptive transaction to stand." \(^{325}\) If the aggrieved party has suffered actual damages, however, the fact of rescission and restitution does not prevent him or her from suing to recover those losses incurred as a result of the misrepresentation. \(^{326}\)

Misrepresentation, finally, whether fraudulent, negligent, or innocent, may be used as a defense when the victim thereof is sued on a contract that he or she asserts was induced by false representations. \(^{327}\)

VII. Misrepresentation and Agency

Misrepresentation law itself is an altogether ample intellectual and practical challenge; yet when misrepresentation law intersects with the law of agency, exceedingly complicated legal entanglements ensue. In particular, if the false representation is perpetrated not by the defendant-employer directly but by its officer, agent, or employee, one also must solve the "agency" issues

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\(^{322}\) See supra note 205 and accompanying text.

\(^{323}\) Keeton et al., supra note 1, § 105, at 729-30, 732, and § 110, at 765-66; Restatement (Second) of Torts § 549 cmt. e (1977).

\(^{324}\) Keeton et al., supra note 1, § 105, at 729.

\(^{325}\) Keeton et al., supra note 1, § 110, at 766 (Despite a misrepresentation, "[t]he plaintiff will not be permitted to rescind where he has received substantially what he bargained for, or where subsequent events have made the representation good.").

\(^{326}\) Restatement (Second) of Torts § 549 cmt. a (1977).

\(^{327}\) Keeton et al., supra note 1, § 105, at 731-33.
before deeming a defendant employer vicariously liable for the misrepresentation. Although any in-depth analysis of agency law is beyond the scope of this article, one always must bear in mind the importance and pervasiveness of "agency" relationships as well as the essentials of agency law.

Pursuant to agency law, a defendant-employer may be held liable for the misrepresentations - intentional, negligent, and innocent - expressed by its officers, agents, and employees if the plaintiff-employee can demonstrate: a corporate, agency, or employment relationship existed; the corporate officer, the agent, or employee was actually or apparently authorized to make representations; and the officer, agent, or employee made the misrepresentations while acting within the course or scope of his or her duties.328

As the employment of agents and employees to conduct business transactions, and thus to make representations, is a very common practice in the business community, and indispensable in the instance of a corporation which obviously cannot "speak" for itself, extensive case law exists that imputes legal fault to a defendant-employer for the false representations committed by its officers, agents, and employees.329

328. See Bemmes v. Public Employees Retirement Sys. of Ohio, 658 N.E.2d 31, 37 (Ohio Ct. App. 1995); Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 614 (D. Mass. 1995); see also Bock v. American Growth Fund Sponsors, Inc., 904 P.2d 1381, 1384 (Colo. Ct. App. 1995) ("Generally, notice coming to an officer or agent of a corporation within the scope of his duties is notice to the corporation. . . . [A] corporation is on notice of fraudulent acts of its officers or agents when it benefits from the fraud even though the officer or agent may have personal motives.").

VIII. DEFENSES

A. Contributory Negligence

Assuming the defendant-employer is "guilty," directly or vicariously, of committing a misrepresentation wrong, does the employer possess any defenses to assert against the plaintiff-employee's lawsuit? Even though a plaintiff-employee is contributarily negligent in relying on a misrepresentation, such negligence decidedly will not stand as a viable employer defense to a lawsuit for fraudulent misrepresentation. To hold otherwise, "where there is an intent to mislead, . . . is clearly inconsistent with the general rule that mere negligence on the part of a plaintiff is not a defense to an intentional tort." The plaintiff's reliance, of course, must be deemed "justifiable" (or its equivalent), but this requirement does not mean that the plaintiff's conduct must meet the ordinary negligence standard of the "reasonably prudent person."

Contributory negligence, however, clearly is a valid defense to a lawsuit for negligent misrepresentation. Since the underlying representation is not attacked as fraudulent, but merely negligent, the plaintiff's cause of action is predicated solely on negligence; and thus the conventional tort rules as to negligence liability and defenses thereto apply. The contributory negligence of a plaintiff employee, therefore, in relying on a misrepresentation negligently made by the defendant employer should preclude, or perhaps reduce, the plaintiff's recovery.

330. Restatement (Second) of Torts § 545A cmt. a (1977); Keeton et al., supra note 1, § 108, at 750.
331. Keeton et al., supra note 1, § 108, at 750; accord Restatement (Second) of Torts § 545A cmt. a (1977).
332. See supra note 123 and accompanying text.
333. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct in all cases. Negligent reliance and action sometimes will not be justifiable, and the recovery will be barred accordingly; but this is not always the case. There will be cases in which a plaintiff may be justified in relying upon the representation, even though his conduct in doing so does not conform to the community standard of knowledge, intelligence, judgment or care.

Restatement (Second) of Torts § 545A cmt. b (1977).
334. Restatement (Second) of Torts § 552A (1977); Keeton et al., supra note 1, § 108, at 750.
335. Restatement (Second) of Torts § 552A cmt. a (1977).
Contributory negligence, one recalls, is an antiquated, absolute, harsh, common law doctrine that can act as a complete bar to a plaintiff's recovery, even if the plaintiff was only slightly negligent.\textsuperscript{336} Dissatisfaction with the doctrine steadily has increased; and consequently contributory negligence rapidly is being superseded by the more modern and equitable doctrine of comparative negligence,\textsuperscript{337} at least with respect to physical harms caused by the defendant's negligence.\textsuperscript{338} Comparative negligence enables a partially negligent plaintiff to recover proportionate "accident" damages,\textsuperscript{339} yet whether the doctrine of comparative negligence will be extended further to lawsuits by partially negligent plaintiffs who seek relief only for pecuniary losses, such as in the employment fraud context, remains a highly debatable and problematic question.\textsuperscript{340}

B. Preemption

A considerably greater defensive challenge confronts the plaintiff-employee, however, when the defendant-employer's false representation relates either to a pension or benefit plan, collective bargaining agreement, or to a job-related injury. In such a situation, the plaintiff-employee runs the very serious risk of a court ruling that the plaintiff's common law fraud cause of action has been preempted by either federal pension law,\textsuperscript{341} federal labor law,\textsuperscript{342} or state workers' compensation law.\textsuperscript{343}

\textsuperscript{336.} Keeton et al., supra note 1, § 65, at 451.
\textsuperscript{337.} Keeton et al., supra note 1, § 67, at 468-70.; Restatement (Second) of Torts § 552A cmt. b (1977).
\textsuperscript{338.} Restatement (Second) of Torts § 552A cmt. b (1977); Keeton et al., supra note 1, § 67, at 470-71.
\textsuperscript{339.} Keeton et al., supra note 1, § 67, at 470.
\textsuperscript{340.} Restatement (Second) of Torts § 552A cmt. b (1977).
Although an extensive analysis of federal and state "preemption" law is beyond the scope of this article, even a succinct discussion of basic preemption doctrines and their depiction in the employment fraud setting should suffice to underscore the severity and complexity of the plaintiff-employee’s "preemption defense" problem.

1. Preemption by State Workers’ Compensation Law

Workers’ compensation statutes typically limit the liability of the employer and its insurer to those claims prescribed under the statute for job-related injuries. These statutes, moreover, have been construed by the courts as precluding most causes of action predicated in tort which are connected or related to a workers’ compensation claim. Workers’ compensation statutes, however, are not designed to "shield an employer or its insurer from the entire field of tort law." Accordingly, a lawsuit for intentional fraud may be an exception to the exclusivity provisions of workers’ compensation statutes.

2. Preemption by Federal Labor Law

Section 301 of the federal Labor Management Relations Act preempts state causes of action, whether arising in contract or tort, that address issues regarding what the parties to a labor agreement agreed as well as what legal consequences were intended to result from breaches of that agreement. Therefore, when resolution of a plaintiff-employee’s state law claim depends upon an analysis of the terms, meaning, or interpretation of a labor agreement, arises out of the same conduct that is the

344. See Fla. Stat. Ann. § 440.015 (West 1993) (“The workers’ compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike.”); Fla. Stat. Ann. § 440.11(1) (West 1993) (“The liability of an employer... shall be exclusive and in place of all other liability of such employer... to the employee...”).


347. See Crean, 889 F. Supp. at 463 (In view of exclusivity clause, plaintiff employee required to meet higher evidentiary standard of “clear and convincing” with regard to fraud case against an employer, fellow employee, or employer’s insurer.).


basis for the federal labor law claim,\textsuperscript{350} is "inextricably inter-
twined" with the consideration of the terms of a labor agree-
ment,\textsuperscript{351} or is "based upon and intimately related to" the
agreement,\textsuperscript{352} Section 301 of federal labor law will preempt the
claim.

it was able to and would fulfill its obligations under the collective bargaining
agreement and that defendant and employer and union conspired to defraud
plaintiffs in negotiating, entering into, and administering labor agreement)
("Because the fifth and sixth Causes of Action all depend on interpreting the
Agreement and because they arise out of the same acts that are the basis for the
Section 301 claim, they are preempted."); Milton v. Scrivner, Inc., 53 F.3d 1118,
1120 (10th Cir. 1995) (plaintiff-employees' fraud claim preempted because it was
based on the defendant employer's actions, in establishing new production
standards, that were alleged to be in violation of the collective bargaining
agreement);

Essentially, Plaintiffs' claims... for Breach of Contract and Fraudulent
Misrepresentation are based upon a contention that United promised to
protect Plaintiffs from harassment visited upon them by union members
after the 1985 strike. . . . [I]t appears that the actual promises and
duties of United to confront the post-strike harassment are specifically
addressed only in the context of the CBA. . . . Additionally, Plaintiffs'
claims would require an evaluation of whether United even had the
contractual right under its collective bargaining agreement to discipline
individual pilots for post-strike harassment. . . . This is precisely the
problem that is meant to be avoided by the doctrine of federal pre-
emption in the labor law setting; therefore, the Court finds these claims
pre-empted.

aff'd, 112 F.3d 1532, \textit{reh'g denied}, 121 F.3d 724 (11th Cir. 1997) (permanent
replacement pilots alleged that defendant airline made fraudulent promises to
protect them from harassment by union members after strike) (The United
States Supreme Court accords RLA pre-emption with the pre-emption standard
for Section 301(a) of the Labor Management Relations Act (citation omitted);
thus, where interpretation of the collective bargaining agreement is required to
adequately address and resolve a dispute, federal law must pre-empt state law.)

351. See Milton, 53 F.3d at 1121.
352. Plaintiff's first amended claim of fraud states that [employer]
represented that it would retain former employees of [auto transport
company], including plaintiff, when it intended to dismiss such
employees. This claim arises from plaintiff's right to continuous
employment absent cause for discharge. Thus, it is based upon and
intimately related to the collective bargaining agreement. Similarly,
plaintiff's second amended fraud claim pertains to a matter contained in
the collective bargaining agreements. . . . ('No employee shall be
required to take any form of lie detector test as a condition of
employment.') . . . [P]laintiff's complaint must therefore be dismissed
Despite the need for uniformity in the interpretation of collective bargaining agreements and consequently the preemptive reach of Section 301, a state law cause of action will not be preempted if it can be resolved without interpreting the collective bargaining agreement itself; and thus be deemed "independent" of the agreement, "merely peripheral" to the labor agreement or labor law concern, not substantially dependent upon the terms of the agreement and thus not a violation of duties assumed in the

with prejudice as the underlying claims, as identified in the amended complaint, are preempted by federal law.


354. See Blanchard v. Simpson Plainwell Paper Co., 925 F. Supp. 510, 516-17 (W.D. Mich. 1995) ("Plaintiffs base their fraud claim on the allegation that they were promised that if they confessed to illegal drug activity, they would not lose their jobs. . . . None of these elements [of common law fraud] requires consideration of the [employer]-Union agreement because the allegation regards individual promises made wholly apart from the collective bargaining agreement."); Duncan, 873 F. Supp. at 581-82 (plaintiff-employee contended employer fraudulently induced employee to resign by misrepresenting results of employee's drug test; collective bargaining agreement contained instructions on the proper procedure when testing employees for use of illegal drugs) ("In the case at bar, Plaintiff contends that defendants fraudulently induced him to resign. [Plaintiff-employee] asserts that the disposition of this cause requires a factual probe into Defendants' conduct and motivation and, therefore, an interpretation of the CBA is not necessary. The Court finds that the Plaintiff's position is sound."); Service By Medallion, Inc. v. Clorox Co., 52 Cal. Rptr. 2d 650, 655 (Cal. Ct. App. 1996).

355. Service By Medallion, Inc., 52 Cal. Rptr. 2d at 653 ("The ongoing union campaign and resulting negotiations were only the backdrop against which the alleged misrepresentations occurred. The NLRB would not be concerned with [defendant's] false promise to [plaintiff], nor would it be able to provide [plaintiff] any relief."); Service By Medallion, Inc., 52 Cal. Rptr. 2d at 655 ("Any adjudication by the NLRB in issues arising from these activities would be independent of [plaintiffs'] grievance against [defendant] for misrepresenting its intention to hire and retain a nonunion janitorial service. We therefore conclude . . . that this action was not preempted by federal law.").
agreement, or involves conduct that occurred prior to the employee’s acceptance of employment.

3. Preemption by Federal Pension Law

Federal pension law, specifically Section 514 of ERISA, acts to supersede “any and all State laws” that “relate to any employee benefit plan.” ERISA’s “deliberately expansive” language was intended “to establish pension plan regulation” as an exclusive federal responsibility. Accordingly, a state law relates to an

356. We reject [defendant-employer’s] general contention that because the ‘foundation’ of plaintiffs’ state tort and contract claims—job security in the face of layoffs or discharge—is a mandatory subject of collective bargaining under federal labor law and is covered in their bargaining agreement, the claims are preempted. The employees have not alleged [employer] violated the terms and conditions of the collective bargaining agreement. While the state law claims relate to job security, they are grounded in the guarantee given the employees by [employer]. The collective bargaining agreement does not mention the individual employment contracts, nor does [employer] explain how the claims are substantially dependent on analysis of the collective bargaining agreement.

See Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 230-232 (3rd Cir. 1995) (plaintiff-employees contended that employer made fraudulent written guarantees of job security on the eve of a union decertification election); Blanchard, 925 F. Supp. at 516-17.

357. The essence of [plaintiff-employee’s] complaint is that, because [defendant-employer’s] representative knew that [defendant] was planning to implement a seniority-based dispatch system, his representation that [plaintiff] could expect to gross about $7,000 per month was fraudulent. . . . The district court misconstrued the essence of appellant’s complaint. Appellant did not complain about the seniority dispatch system itself but, rather, complained about the failure of [defendant] to inform him of the impending change while inducing him to accept employment. Thus, appellant’s complaint did not go to a term of employment covered by the collective bargaining agreement. Instead, the complaint involved [defendant’s] conduct prior to appellant’s accepting employment. Because the complaint focused on conduct that occurred prior to the plaintiff’s accepting employment, the case . . . is not preempted by Section 301 (citations omitted).


employee pension or benefit plan if it has a "connection with or reference to such a plan." A state law, moreover, can relate to a plan "even if the law is not specifically designed to affect such plans, or if the effect is merely indirect." When a state law does "relate to" an employee pension or benefit plan, it is, of course, preempted. The scope of this preemption, in addition, has been deemed "very broad" by the courts.

Consequently, an employee who seeks to sue his or her employer for fraud or misrepresentation likely will find that the cause of action has been preempted by federal law if the basis for the fraud or misrepresentation claim "relates to" the employee’s benefit or pension plan.


361. See Schachter, 923 F. Supp. at 1451 (citations omitted); Carlo, 49 F.3d at 793 (citations omitted).

362. See Crumley v. Stonhard, Inc., 920 F. Supp. 589, 594 (D.N.J.), aff’d, 106 F.3d 384 (3rd Cir. 1996) (“A state law claim may also ‘relate to’ a plan if the claim ‘affects relations among principal ERISA entities - the employer, the plan, the plan fiduciaries and the beneficiaries’ (citation omitted).”); Schachter, 923 F. Supp. at 1451; Carlo, 49 F.3d at 793; Tabron, 881 F. Supp. at 515-16; Holdbrook, 905 F. Supp. at 370-71.

363. Tabron, 881 F. Supp. at 514-515 (phrase “relate to” should be given its “broad common-sense meaning”); Crumley, 920 F. Supp. at 594 (“broad common-sense meaning”; broad preemption clause).

364. See Schachter, 923 F. Supp. at 1451-52 (plaintiff, daughter of deceased employee, sued defendant health care organization for fraud for allegedly inducing her mother to rely on defendant for health care) (“The Court agrees with [defendant] that the fraud claim alleged by [plaintiff] ‘relates to’ the employee benefit plan and is preempted by Section 514(a) of ERISA.”);

We find that [employee’s] claims are preempted because they have a ‘connection with or reference to’ [employer’s] ERP. If the [plaintiffs] were successful in their suit, the damages would consist in part of the extra pension benefits which [employer] allegedly promised him. To compute these damages would require the court to refer to the ERP as well as the misrepresentations allegedly made by [employer]. Thus, part of the damages to which the [plaintiffs] claim entitlement ultimately depends on an analysis of the ERP. To disregard this as a measurement of their damages would force the court to speculate on the amount of damages. Consequently, because the ‘court’s inquiry must be directed to the plan,’ the [plaintiffs] claims are preempted. Carlo, 49 F.3d at 794 (employee contended employer’s representative negligently misrepresented the amount of pension benefits employee would receive if employee selected employer’s early retirement plan); Crumley, 920 F. Supp. at 594-95 (plaintiff-employee contended that defendant’s representatives fraudulently and negligently misrepresented that company was not for sale, and that eventual sale substantially affected the value of employee’s units under employee benefit plan; but plaintiff’s misrepresentation causes of action preempted because they required the court to
The courts, however, do express concern that the expansive reach of ERISA preemption may leave plaintiff employees without a remedy in these fraud and misrepresentation pension and other benefit cases.\textsuperscript{365} These courts have noted: "That a statute whose clear purpose was to benefit employees has become widely used as a shield to protect employers from any deceptive and wrongful acts they may have committed against their employees is an irony

to examine the terms of the plan and because they clearly involved the relations between principal ERISA participants, and thus "related to" the plan);

[Plaintiff] asserts that his claims relate solely to ERISA pension benefits, not to the ERISA plan itself, and should therefore escape the preemptive effect of ERISA. However, the Fifth Circuit has held that a claim which seeks damages which are measured by pension benefits provides a sufficient ‘connection’ to an employee benefit plan for preemption purposes. . . . Clearly, [plaintiff’s] damages are measured by pension benefits.

\textit{Holdbrook}, 905 F. Supp. at 370 (plaintiff bank employee alleged that defendant employer negligently misrepresented that he would be eligible for a lump sum payment of benefits should his participation in the retirement plan end);

The court concludes that plaintiff’s claims directly relate to the employer’s benefit plan, and that her state law claims are preempted by ERISA. Plaintiff alleges that she was eligible for benefits, that her application was improperly processed, and that as a result her benefits were denied. Her claim at a minimum requires an examination of the benefit plan’s eligibility requirements and a determination of whether plaintiff was otherwise eligible for benefits if her claim had been processed as she believes it should have been. . . . Plaintiff [also] contends that her claims are not preempted because she seeks damages from only the named defendants and does not seek benefits from the ERISA plan. This contention, however, does not succeed in divorcing plaintiff’s claims from [defendant-employer’s] benefits plan. If plaintiff is successful in her claims, the amount of her damages would necessarily be based on what she would have received in benefits under the plan. This is the only rational method for computing damages. The damages sought by plaintiff therefore demonstrate that her claims are closely related to the benefit plan itself.

\textit{Tabron}, 881 F. Supp. at 515-16 (plaintiff employee alleged that defendant employer fraudulently failed to advise her that by accepting early retirement she would be ineligible for benefits under the disability plan and that defendant falsely represented to plaintiff that her disability benefits application would be processed in a timely fashion).

\textsuperscript{365} See \textit{Geller v. County Line Auto Sales, Inc.}, 86 F.3d 18, 22 (2nd Cir. 1996) ("[T]he intent of Congress 'was not to foreclose every state action with a conceivable effect upon ERISA plans.'"); \textit{Carlo}, 49 F.3d at 794; \textit{Greenblatt v. Budd Co.}, 666 F. Supp. 735, 742 (E.D. Pa. 1987).
we find unacceptable"; 366 "[T]his Court is persuaded that the plaintiff would be without a remedy under ERISA. As such, it would defy logic to presume that Congress intended to preempt the common law action of fraud in a situation of this type. Protection against fraud is a classically important state function which the Court does not find expressly or impliedly preempted by ERISA"; 367 "[F]ederal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction." 368 Therefore, although "ERISA preemption is notoriously broad, . . . several recent cases have held that it has reasonable limits." 369

Accordingly, there is judicial authority validating state common law fraud and misrepresentation claims involving pension or other benefit plans despite the ERISA preemption doctrine. 370 If the state law claim's relation to pension or other plan benefits and resulting impact on ERISA is merely "small" or "tangential," 371 "too remote" or "too tenuous," 372 "too attenuated," 373 "too periph-

367. Greenblat, 666 F. Supp. at 742 (citation omitted).
369. Farr v. U.S. West, Inc., 58 F.3d 1361, 1365 (9th Cir. 1995) (citing Bogue v. Ampex corp., 976 F.2d 1319, 1322 (9th Cir. 1992)).
371. Sandler, 721 F. Supp. at 511;
The plaintiffs' common law fraud claim, which seeks to advance the rights and expectations by ERISA, is not preempted simply because it may have a tangential impact on employee benefit plans. . . . [A]lthough the defendants improperly administered the plan, the essence of the plaintiffs' fraud claim does not rely on the pension plan's operation or management. The 'bare bones' of the claim are that 1) the defendants fraudulently misrepresented that [defendant-officer's girlfriend] was a full-time employee and 2) in reliance on the defendants' representation, the plaintiffs paid out more than $104,000 on her behalf. The plan was only the context in which this garden variety fraud occurred.
Geller v. County Line Auto Sales, Inc., 86 F.3d 18, 23 (2nd Cir. 1996).
372. Farr, 58 F.3d at 1366; Sandler, 721 F. Supp. at 511; Greenblatt, 666 F. Supp. at 741.
373. [Plaintiffs'] state law-based claim of detrimental reliance (i) does not seek to recover benefits under a . . . plan (nor damages for the wrongful withholding of benefits rightfully due under a plan); (ii) does not proceed against the plan administrators (nor pursue any recovery from plan
eral," or "only incidental" and "not essential," the state law assets); and (iii) is premised upon an employer's misrepresentation that was made outside the routine course of pension administration and could as easily have concerned economic benefits unrelated to ERISA as it did covered benefits. In view of these distinctive factors, the court holds that this cause of action bears too attenuated a relation to ERISA to warrant preemption under Section 514(a).

Sandler, 721 F. Supp. at 514-15 (plaintiff-employee contended that employer negligently made misrepresentation in the form of an overstatement of the amount of monthly pension benefits plaintiff was eligible to receive upon retirement).

Plaintiff-employees' fraud claim was based on defendant employer's alleged fraud concerning the tax consequences of lump sum distributions rather than fraud concerning the benefits plan itself. Moreover, the damages that plaintiffs may recover under the state law fraud claim will be determined with reference to the Internal Revenue Code, not the [employer's] Pension Plan. In the present case - in which ERISA applies only peripherally, if at all - it would defy common sense to allow ERISA to preempt this straightforward state law fraud claim. . . . The state law fraud theory upon which plaintiffs in this case proceed is that the tax advice [defendant-employer] gave them was misleading, incomplete, and fraudulent. They do not claim that [defendant-employer] misrepresented anything about the pension plan itself, and their theory is thus independent of that plan. We hold that plaintiffs' state law claims are not preempted.

Farr, 58 F.3d at 1366-67;

[Plaintiffs'] detrimental reliance claim is not equivalent to an action for benefits improperly denied him under the [employer's] Plan in which he was a participant. Indeed, he concedes that he presently receives the amount of pension owed him pursuant to the Plan rules. Plaintiff proceeds on quite a different theory. He sues not as a participant, seeking recovery of benefits from the Plan, but as an employee seeking economic damages from his employer alleged to arise from his relinquishment of his position at the paper. The predicate for those damages is not wrongful benefit denial, but rather the allegation that plaintiff detrimentally relied on false financial information negligently communicated to him by his employer, while he was engaged in the process of deciding whether to accept his employer's pending termination offer. Consistent with this theory, [plaintiff's] suit is brought against his employer, . . . as distinguished from the individuals who compose the Plan's administrative board.

See also Sandler, 721 F. Supp. at 512-13.

The cause of action for misrepresentation alleged by plaintiff . . . should not be preempted because, simply put, the premise underlying this action was that plaintiff was deceived by the verbal statements made and the actions taken by his employer. That the subject of the deception concerned pension benefits is only incidental and not essential to the plaintiff's cause of action. . . . That this action . . . does not 'relate to' an
fraud or misrepresentation claim does not warrant preemption. When, moreover, the state law claim does not arise out of an action taken in the execution, implementation, or administration of the plan, or resolution of the claim neither would determine whether any benefits would be paid, nor directly would affect the primary administration of benefits function under the plan, or when the "benefits" issue can be considered separately from the plan and without reference to the plan, the plaintiff's state law fraud or misrepresentation claim does not relate to ERISA and thus is not preempted. Thus, despite the broad reach of the fed-

employee benefit plan is supported also by the fact that the representations at issue were made by plaintiff's superiors, as his employers, and not as plan fiduciaries. Similarly, the representations at issue were made to plaintiff in the ordinary course of business and not in the course of administering a [defendant-employer] pension plan. Moreover, if the plaintiff succeeds in proving these allegations, the compensatory damages would be paid directly to him by the [defendant-employer]. There is no principled basis for the conclusion that compensatory damages should be paid out of any [defendant-employer] employee pension benefit plan.

Greenblatt, 666 F. Supp. at 742 (plaintiff-employee asserted that employer misrepresented to him that the pension benefits he was receiving under the Trailer Division Pension Plan would be made equal to those available to comparable salaried management employees under the Corporate Pension Plan).


Applying these standards, plaintiff's claims do not 'relate to' defendant's pension plan. As plaintiff explains, he does not seek benefits under the plan, or even damages for defendant's failure to provide such benefits. Rather, the damages he seeks are for losses suffered due to (1) defendant's allegedly wrongful failure to bridge his employment gap and to retain him as an employee long enough to acquire a pension, and (2) defendant's alleged misrepresentation of its intention to arrange for such a bridge and to continue his employment until his pension vested. McNamee, 692 F. Supp. at 1479-80.

378. [Plaintiff] is not suing for disability benefits that [defendant] owes her under its [ERISA] plan. Rather, [plaintiff] is suing [defendant] for vested benefits that she had acquired while employed with her original employer, but then relinquished in reliance upon [defendant's] alleged misrepresentations. Thus, [plaintiff's] entitlement to benefits under [defendant's] ERISA plan can be considered separately from the question whether [defendant] misled her into believing that she would be entitled to benefits under that plan; the former question requires reference to [defendant's] plan, while the latter focuses on what [defendant] told her.

See Smith, 84 F.3d at 157.
eral and state preemption doctrines, and their potentially grave consequences to the plaintiff-employee's "fraud" case, there nonetheless appears to be sufficient flexibility to these "preemption" rules to enable the careful pleader to escape their grasp and to advance the employee's misrepresentation complaint.

IX. RECOMMENDATIONS

A. Pleading Fraud

An axiom of the law is that the circumstances constituting a cause of action for fraud must be pled in the complaint with certainty, clarity, specificity, particularity, and objectivity. The allegations in the complaint, moreover, must include facts that demonstrate why the statements were in fact false; because any mere conclusionary or speculative allegations as to fraud will be deemed insufficient to satisfy the "particularity" requirement. The allegations, of course, must satisfy all the elements of the appropriate misrepresentation cause of action. A plaintiff-employee, therefore, who fails to explicitly and specifically set forth and describe the time, date, place, and nature of each alleged misrepresentation, as well as the other components of the fraud cause of action, confronts the serious risk of a court dismissing his or her lawsuit. Yet, there is authority pertaining to the negli-


380. See Mudlitz, 75 F.3d at 395 (Plaintiff-employee "merely asserts that she justifiably and actually relied on the misrepresentations made by [defendant-employer]," and 'suffered damages as a result of her reliance on the representations made by [defendant-employer].' . . . [Plaintiff-employee's] assertion of damages are purely conclusionary and she alleges no facts upon which the findings of damages could be based."); Sargent v. Tenaska, Inc., 914 F. Supp. 722, 731 (D. Mass. 1996), aff'd, 108 F.3d 5 (1st Cir. 1997) ("Plaintiff is required to present something beyond speculation to support his claim of a contemporaneous intent to defraud."); Jeffers, 636 F. Supp. at 1344.

381. See Mudlitz, 75 F.3d at 395 (plaintiff-employee failed to supply the necessary elements of reliance and damages for her prima facie case; plaintiff did not meet her burden; and summary judgment granted to defendant).

382. See Mudlitz, 75 F.3d at 395 ("Reliance and damages are necessary elements of a prima facie case of misrepresentation. [Plaintiff-employee] does not describe how she relied on the alleged misrepresentations made by
gent misrepresentation cause of action that holds that the mere conclusion that defendants "negligently misrepresented" certain facts is sufficient to sustain that cause of action.\(^3\)\(^8\)\(^3\)

**B. Contract v. Tort Remedies**

It is axiomatic that tortious conduct may arise in relation to contractual undertakings. A single act or course of conduct may constitute not only a breach of contract but also a separate and independent tort. The tort would arise out of the contractual setting when an act of inducing or breaching the contractual agreement gives rise to a separate and independent cause of action in tort.

Accordingly, in the employment context, if the purported fraud arose in a breach of contract situation, the plaintiff-employee must be able to plead and prove the independent tort of fraudulent or negligent misrepresentation in order to recover an award of tort damages.\(^3\)\(^8\)\(^4\) The plaintiff-employee, therefore, must strive to draft the complaint in terms of tort; if he or she does not precisely formulate the tort count of the complaint, and does not clearly differentiate the tort from contract claims, the plaintiff employee runs the risk of having a court dismiss the case, deny any recovery, or deny tort damages.\(^3\)\(^8\)\(^5\)

If the facts indicate that either an action in contract or one in tort is possible, the plaintiff employee must specifically plead an

\[\text{[defendant-employer], or what damages she suffered. . . . [S]he has failed to supply the necessary elements of reliance and damages for her prima facie case.} \]

\[\text{(citation omitted)); Advent Elecs., Inc., 918 F. Supp. at 265 ("Absent allegations based on specific, objective evidence that [defendant-employer] never intended to keep the promises, [plaintiff-employee's] amended counterclaim fails to state a promissory fraud claim. Thus, we deny leave to file Count II due to futility."); Jeffers, 636 F. Supp. at 1344.} \]

\[\text{383. See D'Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch., 520 A.2d 217, 219 (Conn. 1987) ("To the contrary, the case law in numerous jurisdictions suggests that courts liberally construe the pleadings in a way so as to sustain such a claim, particularly where the allegations in a complaint indicate, on their face, that an employer failed to exercise reasonable care in making representations to an employee on which the employee has relied to his detriment.").} \]

\[\text{384. See Lazar v. Superior Court, 909 P.2d 981, 990 (Cal. Sup. Ct. 1996).} \]

independent cause of action in tort,\textsuperscript{386} so as to avoid a court dismissing the tort claim as a mere “transparent repackaging” of a contract claim.\textsuperscript{387} As a practical matter, the plaintiff-employee should plead additional conduct as the basis for the tort claim; and avoid utilizing the same facts in the breach of contract claim as the fraud or negligent misrepresentation claim.\textsuperscript{388} The plaintiff-employee must be keenly aware that if his or her misrepresentation case arises in a contractual setting, the courts will be prone to limit relief to contractual remedies. A purposeful breach of contract, particularly during the performance stage, does not in and of itself establish the predicate for a misrepresentation action.\textsuperscript{389} Thus, if the misrepresentation conduct ascribed to the defendant-employer cannot be distinguished from, and made independent of, the events constituting the breach of contract, a tort misrepresentation remedy will not lie; merely contractual relief will.\textsuperscript{390} The plaintiff-employee, moreover, in order to help extricate the independent tort misrepresentation claim from the contractual context, specifically should plead an injury or damages greater than, and different in kind, from those sought in the contract claim.\textsuperscript{391}

\textsuperscript{386} See Grappo v. Alitalia Aeree Italiane, 56 F.3d 427, 434 (2nd Cir. 1995) (plaintiff-employee properly alleged “distinct” fraud claim “independent” of the contract).

\textsuperscript{387} See Shelton, 459 S.E.2d at 857 (Plaintiff-employee’s “claim is essentially one for breach of a promise of fair treatment. Proof that [defendant-employer] made a promise and then broke that promise four years later is simply not evidence of fraud.”).

\textsuperscript{388} See Tannehill, 640 N.Y.S.2d at 506 (“[T]he wrongful act alleged in support of the fraud claim does not differ from the purely contract-related allegation.”); National Sec. Ins. Co., 664 So. 2d at 876 (“[T]he plaintiff must show more than that the defendant failed to fulfill the promised act; otherwise, as has often been noted by this Court, a typical breach of contract claim would invariably contain a fraud claim as well.”).

\textsuperscript{389} See RESTATEMENT (SECOND) OF TORTS § 530 (1977).

\textsuperscript{390} See National Sec. Ins. Co., 664 So. 2d at 876 (“A plaintiff [must] put [sic] forth some proof that there was something more than a failure to perform.”).

\textsuperscript{391} See Tannehill, 640 N.Y.S.2d at 506;

Even though [plaintiff-employee] couched her complaint as fraud in the inducement rather than breach of contract, we believe her claim is still barred as it attempts to circumvent the bar to a breach of contract action based on an oral contract terminable at will. Since the parties clearly cannot be restored to the status quo that existed before the alleged contract, as might be sought in an action based on fraud in the inducement, the measure of damages [plaintiff-employee] sought here would be the same as breach of contract damages.
A well-crafted misrepresentation complaint, which sufficiently differentiates the tort from any contract remedies, and which is properly supported by the evidence, definitely will add substantial weight and jury appeal to what otherwise might be just another routine employment contract dispute. A cause of action for the tort misrepresentation also enables the plaintiff-employee to seek supplementary compensatory damages, such as "pain and suffering" awards, as well as punitive damages. Of course, if no contract was formed, or if the contract is unenforceable, he or she has no remedy for breach of contract, and then the tort misrepresentation action emerges as the employee's alternative remedy. If, moreover, the plaintiff is an employee at-will, he or she is at a distinct disadvantage in proceeding against the defendant employer on a breach of contract theory; but if the employee at-will can demonstrate that the employer intentionally or negligently misrepresented, concealed, or failed to disclose the true nature of the employment relationship and the circumstances of the employer, the at-will employee may have a viable misrepresentation tort claim.

C. Proving Fraud

Even the most carefully drafted misrepresentation complaint needs proof. The difficulty of obtaining such proof, particularly to sustain an intentional fraud count, should be apparent. This evidentiary difficulty is exacerbated due to the inherent confusion surrounding the "intent" requirement to fraud. One must be aware that the "intent" issue can arise in a variety of fraud settings, to wit: the intent not to perform an agreement at the time the representation was made, which is evidence of "promissory fraud"; the intent to induce reliance, that is, evidence that the defendant "intended" that his or her representation induce the reliance on the part of the plaintiff; and intent as "scienter," that is, evidence of a knowingly, purposefully, fraudulent state of mind.

The issue of whether the defendant intended his or her representation to induce the plaintiff's reliance must be kept separate and distinct from the question of whether the defendant actually possessed the knowledge that his or her representation was false, which must be differentiated from the issue of whether the defendant lacked the intent to perform the agreement when the agreement was entered into. At times, the burden of securing evi-
vidence on these essential "intent" elements seems so onerous as to render the intentional, fraudulent, misrepresentation cause of action almost academic. 392

Optimistically, the plaintiff-employee will be able to procure and produce some type of direct evidence, such as a document or witness, that will prove satisfactorily the specific intent requirement. Yet, "intent," "knowledge," and "state of mind" issues notoriously are not susceptible to direct proof; and thus can only be inferred circumstantially from the facts and circumstances of the case, which hopefully will yield for the plaintiff-employee a sufficient showing of reasonable and relevant evidence to permit the court to submit the case to the jury and then to enable the jury to render a factual finding of intent. 393

X. CONCLUSION

The principal purposes of this article were to examine and to clarify the legal concept of "fraud" in a particular context - the employment sector. Accordingly, it was necessary to differentiate the tort from contract ramifications of fraud, to define and distinguish fraudulent, negligent, and innocent misrepresentation, and, in particular, to emphasize and to analyze in detail the numerous requisite elements of, and defenses to, the various misrepresentation actions, notably by providing extensive employment case law illustrating the many legal requirements. It also was critical to

392. See McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853, 860 (D. Md. 1995) (no evidence from which a fact-finder could conclude that defendant-employer did not intend to have plaintiff come to work for it when statements offering employment were made) ("The fact that later, the intention changed is not evidence that the statement of intent was untrue when made.");

[A] claimant must be able to point to specific, objective manifestations of fraudulent intent - scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief. If the rule were otherwise, anyone with a breach of contract claim could open the door to tort damages by alleging that the promises broken were never intended to be performed. Presumably, it is this result that the Illinois rule seeks to avoid.


393. See National Sec. Ins. Co., 664 So. 2d at 876 (citing Russelville Prod. Credit Ass'n v. Frost, 484 So. 2d 1084, 1087 (Ala. 1986)) ("Unless a plaintiff puts forth some proof that there was something more than a failure to perform, something upon which a jury could infer that at the time the promise was made the defendant had no intention of performing, it is error to submit a fraud claim to the jury.").
underscore and to explain the difficulties in pleading and proving misrepresentation, fraudulent misrepresentation in particular.

Considering all the ambiguity and confusion inherent in this field of the law, the many legal "roadblocks" to recovery, and the seemingly insurmountable pleading and proof hurdles, one would think that fraud merely subsists as an academic "hornbook" notion and not as a real, sustainable, practical cause of action. Yet, surprisingly, research revealed that plaintiff-employees have been moderately successful (given the nature of the misrepresentation causes of action) in pursuing their "fraud" claims against their defendant-employers. 394

The ultimate lessons to be learned, therefore, from the employment "fraud" study presented are simple, yet fundamental, ones: firstly, to heed the advice repeatedly given to every first year law student, "know your cause of action" and "know your elements," that is, discern the difference between the common law contract and tort actions, the distinctions among fraudulent, negligent, and innocent misrepresentation, and be cognizant of the requisite components to each cause of action; secondly, follow the counsel given to the beginning legal practitioner, "sustain your burdens," that is, be sure not only to plead carefully the correct cause of action, but also be certain to introduce sufficient evidence to meet the burdens of persuasion and proof on each element of the cause of action. If these basic legal rules are recalled and

394. Although this article is not a "scientific" study, the research disclosed that of the 90 recent cases randomly surveyed, plaintiff-employees prevailed in 38 instances at some stage of the proceedings (for example, overcoming a motion to dismiss or motion for summary judgment, or sustaining a favorable jury verdict and judgment on appeal), for an approximate 34% "success" ratio. The numerical "breakdown" for the types of Employment Misrepresentation categories is as follows: (1) employment inducement representations concerning terms and conditions of employment - plaintiff employees were successful in 10 of 22 cases; (2) representations concerning profitability and finances - plaintiff employees were successful in 6 of 10 cases; (3) representations designed to induce employees to remain with employer - plaintiff employees were successful in 8 of 14 cases; (4) representations designed to cause the employee to leave employment - plaintiff employees were successful in 3 of 9 cases; (5) non-retaliation statements - plaintiff employees were successful in 2 of 8 cases (and which evident lack of "success" does not bode well for "whistle-blowers"); (6) representations regarding the legality or propriety of employment practices - plaintiff employees were successful in 3 of 11 cases; and (7) "reward" or "benefits" type representations - plaintiff employees were successful in 6 of 16 cases (and which "success" at all is surprising given the existence of the preemption doctrine). See supra notes 4-10 and accompanying text for these categories and representative cases.
adhered to, the case law examined herein clearly indicates that the “fraud” action, despite all its many formulations, requirements, formalities, problems, and perplexities, still can be a viable and powerful tool to redress and deter injustice in the workplace.