

1-1-2011

Private Ordering of Employee Privacy: Protecting Employees' Expectations of Privacy with Implied-in-Fact Contracts

Lindsay Noyce

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/lelb>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

1 Am. U. Lab. & Emp. L.F. 27 (2011).

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Labor & Employment Law Forum by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

PRIVATE ORDERING OF EMPLOYEE PRIVACY: PROTECTING EMPLOYEES' EXPECTATIONS OF PRIVACY WITH IMPLIED-IN-FACT CONTRACT RIGHTS

LINDSAY NOYCE*

With the growth of technology in the workplace, employee privacy is an increasingly significant legal issue. Employees, perhaps irrationally, often overestimate the amount of privacy they should expect in technological communication. A United States Supreme Court decision in June 2010, City of Ontario v. Quon, highlights the importance of privacy in the workplace and employees' privacy expectations. Although various constitutional, tort, and statutory causes of action protect employee privacy, each theory has limitations and ultimately fails to protect some reasonable expectation of privacy. Some courts have recognized an implied-in-fact contract theory in the context of employment law, often to protect job security. The implied-in-fact contract theory may be a valuable avenue for the protection of employee privacy. A court applying an implied-in-fact contract theory to protect employee privacy will determine whether the employer and employee reached an enforceable agreement, albeit an implied agreement, regarding the employee's privacy rights by considering the totality of the circumstances and the employee's reasonable expectations. Where other causes of action fail to protect an employee's reasonable expectation of privacy in the workplace, the implied-in-fact contract theory may be available as an alternative. To align employer and employee expectations, employers should consider this potential cause of action when establishing policies and practices bearing on employee privacy issues.

* J.D., University of Denver, Sturm College of Law. I am grateful to Professor Rachel Arnow-Richman for her invaluable help and encouragement in this project. I would also like to thank Professor Scott Johns, Paul Molino, and James Noyce for their insight and assistance.

I. Introduction28

II. Creating Privacy Rights in an At-Will Workplace.....30

 A. Employment At-Will and Its Exceptions.....32

 B. Employee Privacy Protection as an Exception to
 Employment At-Will34

III. Implied-in-Fact Employment Contracts: A Lesser-Known Vehicle
 for Enforcing Privacy Rights36

 A. Implied-in-Fact Contracts for Job Security36

 B. Potential for Implied-in-Fact Contracts Protecting
 Employee Privacy.....38

 1. The Implied Contract Doctrine:
 Rulon-Miller v. IBM Corp.42

 2. The Implied Covenant of Good Faith and Fair Dealing:
 Luedtke v. Nabors Alaska Drilling, Inc.45

IV. Privacy Rights of the Public Employee48

 A. *City of Ontario v. Quon*48

 B. An Implied-in-Fact Contract Theory after *Quon*?53

V. What’s Next?: The Value of Implied-in-Fact Contract Rights57

 A. An Open Field for Legislation:
 Off-Duty Conduct Statutes and Their Limited Impact on
 Employee Privacy Rights58

 B. The Limits of Implied-in-Fact Contract Rights61

VI. Conclusion.....64

I. INTRODUCTION

Technology continues to be an increasingly important part of American life inside and outside the workplace. E-mail is often the preferred form of communication between co-workers. In daily interactions, text messaging has taken over as a primary form of quick communication. Anyone familiar with technological communication may assume some inherent sense of privacy associated with these activities. Even when communicating in fora accessible by the public, such as social networking sites, employees often do not consider that their employers and co-workers can readily gain access to this information. If an employee working entirely from home maintains a social networking page on which her privacy preferences permit only certain people to view her information, is it reasonable for the employee to expect her information will be kept private from her employer and co-workers that do not have access to her information? Certainly, the employee should not expect privacy with respect to those to whom the employee has granted permission to view her networking page. There is an innate tension between an employee intentionally making information

public and feeling that her information is private. Yet, with the expansion of social networking, growing use of technology in the workplace, and feeble boundaries between work and home, employees' electronic privacy is a pressing legal issue. A recent United States Supreme Court case, *City of Ontario v. Quon*,¹ brought employee privacy issues to the forefront of current legal discourse.

Whether an employee has a reasonable expectation of privacy is a common theme in causes of action protecting employee privacy. When an employee accesses a password-protected e-mail account or sends a text message on a cell phone, even a company-issued phone, it is understandable that the employee instinctively feels a sense of privacy in the content of the communication.² But is it reasonable for an employee to expect privacy in the contents of e-mails sent while at work? Is it reasonable to expect privacy if the employee is on company time but off the work premises? Or in text messages sent using a company phone? Is it reasonable for an employee to expect privacy in messages, materials, or conversations that refer to off-duty activities, such as the employee's dating life? The circumstances of the workplace and the actions taken by the employer will dictate whether an employee's expectation of privacy is reasonable.³ When an employee does have a reasonable expectation of privacy and the employer breaches that expectation, the employee might assert breach of an implied contractual right to privacy. Where constitutional, tort, and statutory causes of action fail to provide a remedy for an employer violation of an employee's reasonable expectation of privacy, the implied-in-fact contract might fill the gaps left by these other causes of action.⁴ This breach of contract claim may be asserted irrespective of any adverse employment action being taken against the employee.

Whether an employee has a reasonable expectation of privacy is important in several causes of action that an employee may assert against

1. 130 S. Ct. 2619 (2010).

2. *But cf. id.* at 2629–30 (hesitating to declare that employees have reasonable expectations of privacy vis-à-vis employer-provided technological equipment, because courts must have knowledge and experience to weigh such expectations and cell phones and text messages are too recent of a development to predict the future consequences of a broad holding).

3. *Cf. id.* (noting that an employee's expectation of privacy is also influenced by "what society accepts as proper behavior" in the context of new technology).

4. See Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035, 1043 (2006) (suggesting that an implied contract right to privacy might alleviate the potential unfair practice of employers offering privacy rights through policy statements but then ignoring such policies when the employer finds it convenient to do so).

an employer, when the employee claims a protectable privacy interest.⁵ Those causes of action, particularly the implied-in-fact contract, and the importance of the employee's reasonable expectation of privacy will appear in the subsequent parts of this Article. Part II will explore the development of privacy issues in the workplace and the interaction of employee privacy rights with employment at-will.⁶ Part III will discuss the implied-in-fact employment contract as well as how such a contract may encompass privacy rights and create protectable employee privacy interests.⁷ Part III will also look at the related doctrine of the implied covenant of good faith and fair dealing that some courts have held is implicit in all employment contracts, including employment at-will contracts, and how this covenant might protect employee privacy.⁸ Part IV will explore the Fourth Amendment privacy rights of public sector employees, including the recent United States Supreme Court case *City of Ontario v. Quon*, and will suggest how the circumstances in *Quon* could support a successful claim for breach of an implied-in-fact contract right to privacy in many states.⁹ Finally, Part V will summarize the various sources of privacy rights in the employment context and discuss the importance of private ordering.¹⁰

II. CREATING PRIVACY RIGHTS IN AN AT-WILL WORKPLACE

With the growing use of technology in the workplace, employee privacy rights are an important legal concern for employers as well as employees. Before exploring any particular causes of action for employee privacy, it is necessary to understand how privacy fits within the law generally and how it specifically fits in the employment relationship. Privacy has become a common legal issue in various areas of the law, including employment law.¹¹ The evolution of a right to privacy began with an 1890 article by

5. See generally Robert Sprague, *Orwell was an Optimist: The Evolution of Privacy in the United States and its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83 (2008) (exploring the difficulties and development of the legal right to privacy as it developed in the United States).

6. See *infra* Part II (discussing both the common law and statutory exceptions to the at-will employment doctrine).

7. See *infra* Part III.A–B.1 (analyzing state court opinions that have sustained implied contracts as an exception to at-will employment).

8. See *infra* Part III.B.1–2 (noticing the subtle interplay between implied contracts and implied covenants of good faith and fair dealing).

9. See *infra* Part IV (arguing that in some jurisdictions the employee in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) might have prevailed in protecting his privacy rights under an implied contract theory rather than under the Supreme Court's current Fourth Amendment jurisprudence).

10. See *infra* Part V (concluding that when employees have a reasonable expectation of privacy, causes of action sounding in contract might afford them the most flexible legal protection).

11. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L.

Samuel Warren and Louis Brandeis, who urged courts to recognize a right to privacy that would protect citizens from intrusions by the press.¹² Warren and Brandeis described this right to privacy as “the right to be let alone[,]” deriving from the right to life found in the Due Process Clause of the Fifth Amendment to the United States Constitution.¹³ Since then, privacy has evolved and expanded in the United States, and legal privacy rights exist in common law, constitutional law, and statutes.¹⁴ Under each source of privacy protection, the proponent of the protection must have a reasonable expectation of privacy.¹⁵ An employee asserting a legal right to privacy, regardless of the source of that right, must demonstrate a reasonable expectation of privacy.¹⁶

Competing with an employee’s privacy expectation are the employer’s legitimate business interests. Courts balance these competing interests against one another to determine whether an employer violation of an employee’s reasonable expectation of privacy was unwarranted or unreasonable under the circumstances.¹⁷ Academic literature has recognized that privacy in the workplace is “difficult to reconcile” with employment at-will, the default in employment contracts.¹⁸ To understand

REV. 193, 195 (1890) (criticizing “instantaneous photographs and newspaper . . . [for] invad[ing] the sacred precincts of private and domestic life”); *See also* Selmi, *supra* note 4, at 1038–42 (calling privacy the “law’s chameleon, seemingly everywhere and nowhere at the same time” and suggesting that privacy has become a larger issue in employment law, in part, because lifetime employment historically facilitated trust but has become increasingly unlikely in today’s employment environment); James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 137 (2008) (arguing the demand for employers to supply non-work-related benefits, such as health care benefits, has invited employers into workers’ private lives in order for the employer to ascertain whether the employee’s private activities are costing the employer money).

12. *See* Warren & Brandeis, *supra* note 11, at 196 (“Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency.”).

13. *See id.* at 193 (“Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone.”).

14. *See* Sprague, *supra* note 5, at 93–109 (tracing the development of privacy rights in the United States).

15. *See id.* at 93 (noting that protecting the home and a reasonable expectation of privacy invaded by unreasonable intrusion are common themes in privacy causes of action).

16. *See id.* at 114 (explaining that a private employee may assert an “intrusion upon seclusion claim” instead of a direct Fourth Amendment claim, but the starting question is still whether the employee has a reasonable expectation of privacy).

17. *See id.* at 111–13 (discussing how other areas of law may lead some employers to intrude too far into monitoring employees in order to detect and stop behavior that may subject employers to liability).

18. *See, e.g.,* Selmi, *supra* note 4, at 1036 (“Another curious aspect of the privacy literature . . . is that . . . it frequently ignores workplace issues . . . [because] how can an employee assert a right to privacy when he or she has so few rights to begin with?”).

how privacy issues fit into employment law, it is essential to examine the employment at-will doctrine and its exceptions.

A. Employment At-Will and Its Exceptions

The increasing willingness of courts to acknowledge exceptions to employment at-will, including the implied-in-fact contract for job security, demonstrates that courts are likely to accept the implied-in-fact contract as a theory of protecting employee privacy. An implied-in-fact contract for employee privacy is an exception to employment at-will for an employee fired based on evidence obtained through a breach of the employee's reasonable expectation of privacy. It is a well-settled rule of law that, absent an express employment contract to the contrary, the employment at-will doctrine is the default rule in the vast majority of United States jurisdictions.¹⁹ The employment at-will rule provides that "either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law."²⁰ The *Payne* court, often cited for its articulation of the at-will rule,²¹ also held that the cause of termination could be morally wrong without attachment of legal liability.²² Although

19. See Matthew W. Finkin, *Shoring up the Citadel (At-Will Employment)*, 24 HOFSTRA LAB. & EMP. L.J. 1, 3 (2006) (describing the American Law Institute's draft restatement on the law of employment as construing the at-will employment rule as a "well established" default rule (quoting RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.01 cmt. a (Discussion Draft 2006))); Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place*, 13 EMPL. RTS. & EMP. POL'Y J. 143, 154 (2009) (suggesting it would be a waste of political capital for advocates of reform to debate whether employment at-will is in fact the default rule). But see Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-904(1)(b) (2009) (abrogating the at-will employment doctrine by making it a wrongful discharge for an employer to terminate an employee without good cause, provided that the employee has completed the employer's probationary period of employment).

20. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 517–19 (1884) (preferring that individual choice regarding whether to work govern the relationship between employer and employee, rather than a rule imposed by law), *overruled in part*, *Hutton v. Watters*, 179 S.W. 134 (1915); see also Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653–54 (2000) (defining employment at-will as allowing either party to terminate the relationship for any reason, without liability).

21. See, e.g., Ballam, *supra* note 20, at 687 (calling the *Payne* court's description the "classic exposition" of the employment at-will rule); Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 112 n.1 (2006) (citing *Payne* for the point that employers have an unrestricted right to terminate employees who do not have an employment contract for a definite term); Nadjia Limani, *Righting Wrongful Discharge: A Recommendation for the New York Judiciary to Adopt a Public Policy Exception to the Employment-at-Will Doctrine*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 309, 313 n.26 (2006) (relying on the *Payne* court's articulation of the at-will employment doctrine).

22. See *Payne*, 81 Tenn. at 519–20 (explaining that a threat to discharge is not an

most American employees are employed at-will, there are numerous common law and statutory exceptions to the doctrine. In fact, a right to employee privacy might be characterized as an exception to the employment at-will rule.

Despite employment at-will, common experience demonstrates that employers are not, in fact, empowered to terminate an employee for absolutely any reason. For example, an employer cannot lawfully terminate an employee because of the employee's race.²³ But employees often overestimate their legal protections and believe an employer would be liable for terminating an employee out of personal animus.²⁴ While it is arguably not a sound business practice,²⁵ under employment at-will, personal dislike is a perfectly valid reason for terminating an employee.²⁶ Up against this framework, one might presume that an employer can legally terminate an employee based on an employee's personal choices or conduct that an employer does not agree with, but the analysis is not so simple. The trend in employment law has been to invalidate the legality of terminations when there is no good cause.²⁷ Exceptions to the pure employment at-will rule are numerous and include federal and state statutes, discharges in violation of public policy, and implied contracts.²⁸

illegal act).

23. See, e.g., 42 U.S.C. § 2000e-16(a) (2006) (prohibiting employment discrimination on the basis of race, as well as color, sex, religion, and national origin).

24. See Cynthia L. Estlund, *How Wrong are Employees About their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 9 (2002) (discussing studies in which "approximately ninety percent of employees surveyed believed that it was 'unlawful' to fire an employee based on personal dislike (citing Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 456-67, 462 (1997))). "Over eighty percent believed that it was illegal for an employer to fire an employee in order to hire another willing to do the same job for a lower wage." *Id.*

25. See Erica Worth, *In Defense of Targeted ERIPs: Understanding the Interaction of Life-Cycle Employment and Early Retirement Incentive Plans*, 74 TEX. L. REV. 411, 411, 415 (1995) (observing that, even in the context of worker productivity and old age, early retirement incentive plans serve as a "relatively painless way [for employers] to ease older employees out of the work force" since "a worker who leaves happy is less likely to sue" than one who is fired outright—no matter how illegal such an act might be).

26. See Ballam, *supra* note 20, at 653 (recognizing that employers are able to terminate the employment relationship at their discretion). *But cf.* Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491, 491-92 (2001) (pointing out that although an employer may be able to terminate an employee out of simple dislike, a supervisor who acts out of "personal hostility" may be liable under a claim of tortious interference with business relations).

27. See Ballam, *supra* note 20, at 687 (predicting an increasing abrogation of the at-will employment doctrine in the twenty-first century).

28. See Ann L. Rives, *You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation*, 74 GEO. WASH. L. REV. 553, 555 (2006) (explaining that

The employment at-will rule applies only to the termination of the employment relationship, but an employee need not be discharged or experience any adverse employment action for the employee to assert a breach of an implied contractual right to privacy when the employer has violated the employee's reasonable expectation of privacy. In such a scenario, it is not accurate to characterize an implied-in-fact contract right to privacy as an exception to the at-will rule, because this right may operate independently of any change in the employee's employment status. Yet, when an employer terminates an employee in conjunction with a breach of the employee's privacy rights, such a cause of action essentially acts as an exception to employment at-will.

B. Employee Privacy Protection as an Exception to Employment At-Will

The growing concern over employee privacy rights has contributed to the erosion of the employment at-will doctrine.²⁹ If an employer could terminate an employee for absolutely any reason, it is impossible to discern how an employee could successfully exercise any right to privacy. For instance, if an employee refuses to submit to a drug test or reveal a piece of information to her employer, the employer could simply terminate the employee, leaving her without legal recourse.³⁰

With regard to employee privacy, there are federal and state constitutional protections;³¹ statutory protections, such as off-duty conduct statutes prohibiting employers from discharging workers for certain conduct occurring outside of work premises;³² common law privacy and

four major public policy exceptions protect employees: refusal to commit illegal acts, exercise of statutory rights, whistleblower activities, and performance of civic duties).

29. See Ballam, *supra* note 20, at 685–87 (discussing how the traditional at-will doctrine has been tempered through abusive discharge torts, public policy limitations, prohibitions on fraudulent inducements, promissory estoppel, and increasing concern for privacy rights).

30. See *id.* at 686–87 (suggesting an employee lacks privacy rights if she is unable to make free choices because she is fearful of losing her job).

31. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (holding that “[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.”).

32. See, e.g., COLO. REV. STAT. § 24-34-402.5(1) (2009) (making it an “unfair employment practice for an employer to terminate . . . any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours,” with certain exemptions). Additionally, there are various federal statutes protecting specific areas of employee privacy. See Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-09 (2006) (banning employer use of polygraph testing for pre-employment screening); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1 (Supp. II 2008) (foreclosing the use of genetic information in employment decisions by employers); Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12112 (2006) (prohibiting employers from inquiring about whether an applicant is disabled unless the inquiry is job-related and consistent with business necessity).

public policy tort protections;³³ and contractual protections.³⁴ It is possible to frame these as sources of employee privacy protection or as exceptions to employment at-will. The former is probably a more accurate characterization because an employer might infringe upon an employee's right to privacy absent termination.³⁵ In the employment context, there are three basic kinds of intrusions that may give rise to an employee privacy claim: surveillance, such as monitoring e-mail and telephone communications; testing, such as drug testing or medical testing; and inquiry into an employee's off-duty conduct, such as political and recreational activities.³⁶ Surveillance and testing involve more of an intrusion than inquiry into off-duty conduct, because—while perhaps not the employer's business—off-duty conduct involves personal facts more than it involves private information.

Privacy protections may be available to employees to defend against each of these intrusions. In the employment relationship, one possible source of employee privacy protection is an implied-in-fact contract.³⁷ When an employer's actions create a reasonable expectation of privacy for the employee, the implied-in-fact contract may be available to the employee to assert protectable privacy rights. An implied right to privacy can protect against each type of intrusion, whether surveillance, testing, or inquiry into off-duty conduct, if the employee has a reasonable expectation of privacy based upon the circumstances of the workplace. The success of

33. See, e.g., *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 613 (3d Cir. 1992) (relying on the common law tort of invasion of privacy to hold an employee's discharge contrary to public policy).

34. Cf. TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 301 (2007) (observing that parties can contractually agree to the extent of the employee's privacy rights through private ordering—which may be either express or implied).

35. For example, an employer might monitor an employee's communication in a manner that, based upon employer policies and practices, violates the employee's reasonable expectation of privacy, thereby violating the employee's right to privacy, regardless of any adverse employment action against the employee. The contract is breached by the intrusion of privacy rather than by terminating or disciplining the employee. See *infra* Part III (discussing causes of action based upon an implied contract right to privacy).

36. Case examples used in this Article will involve situations under each of these intrusions. See *infra* Part III.B-IV.A and accompanying text.

37. See Selmi, *supra* note 4, at 1043 (recognizing that, although privacy expectations are generally inconsistent with the employment relationship, an implied contract right may arise when “the employer tolerates or permits certain actions,” and it is “manifestly unfair for an employer to confer privacy rights through policies, written or implied, and then to turn around and ignore those policies when it is advantageous to do so.”); see also Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 715 (1996) (cautioning that proponents of market efficiency believe “. . . the parties to an employment relationship . . . [can] best . . . judge their interests[.]” and courts should leave privacy matters to private bargaining).

an alleged implied-in-fact contract right will depend heavily on the circumstances, but it is an available cause of action when the employer's conduct creates and subsequently violates an employee's reasonable expectation of privacy.

III. IMPLIED-IN-FACT EMPLOYMENT CONTRACTS: A LESSER-KNOWN VEHICLE FOR ENFORCING PRIVACY RIGHTS

While it is rare for parties to an employment relationship to bargain out of the at-will paradigm, the default rule allows for this opportunity.³⁸ The terms of an employment contract are those to which the parties agree, and as with other types of contracts, employment contracts may contain implied terms.³⁹ According to a 2007 survey, forty-five states recognize the implied contract as a common law exception to the employment at-will rule.⁴⁰ Differences in the law in this area exist because common law causes of action arising under state law differ from state to state. In some states, implied-in-fact contract theories can establish a right to job security.⁴¹ The 1981 California case, *Pugh v. See's Candies, Inc.*,⁴² is regarded as the seminal employment law case recognizing an implied employment contract.⁴³

A. Implied-in-Fact Contracts for Job Security

In *Pugh*, the issue was whether the plaintiff, a long term and loyal employee of the company, had an implied contractual right to for cause

38. See Matthew W. Finkin et al., Proceeding, *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMPL. RTS. & EMP. POL'Y J. 93, 110 (2009) (suggesting that the at-will default is likely to last because little negotiation occurs at the outset of most employment relationships, many workers do not understand or are not aware of the default rule, and there is often unequal bargaining power between the parties).

39. See *id.* at 114-15 (discussing the proposed text of a RESTATEMENT (THIRD) OF EMPLOYMENT LAW).

40. See Sonne, *supra* note 11, at 160 (noting that common law exceptions to employment at-will demonstrate a policy toward modifying the default rule for circumstances beyond the employee's control or for the public good).

41. See *id.* at 159-160 (discussing how many states rely on implied contracts, including those found in employer handbooks and manuals and oral representations, to limit the at-will doctrine).

42. 171 Cal. Rptr. 917 (Ct. App. 1981), *disapproved of by* *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. 2000).

43. See, e.g., Finkin et al., *supra* note 38, at 114-15 (illustrating, through *Pugh*, the factors courts consider in determining whether an implied employment contract exists); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 358 (2008) (noting that the California courts first addressed the implied employment contract issue four months prior to the *Pugh* decision in *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722 (Ct. App. 1980) but that *Pugh* is the "more famous decision").

termination.⁴⁴ The court laid out various factors to ascertain whether an implied-in-fact employment contract existed: payment of independent consideration; the personnel policies and practices of the company; the employee's longevity at the company; actions and communications of the employer; and industry practice.⁴⁵ Whether an implied-in-fact employment contract exists is a fact-specific analysis that requires considering the totality of the circumstances.⁴⁶ Looking to the "totality of the parties' relationship[.]" the *Pugh* court held that the employee had established a prima facie case that his employer breached an implied employment contract by considering the plaintiff's duration of employment; praise and promotions received; lack of criticism; oral assurances; and employer policies.⁴⁷ In other words, based on their implied-in-fact contract, the employer could only discharge Pugh if the employer had good cause.⁴⁸

Courts and commentators have recognized that the concept espoused by the court in *Pugh*—not requiring consideration independent of the worker's continued employment—correctly applies general contract principles to the employment context.⁴⁹ Allowing implied-in-fact contract terms in

44. See *Pugh*, 171 Cal. Rptr. at 918–920 (explaining that "[a]fter 32 years of employment with See's Candies, Inc., in which he worked his way up the corporate ladder from dishwasher to vice president . . . Wayne Pugh was fired.").

45. See *id.* at 925–26 (holding independent consideration—consideration other than the worker's continued employment with the company—to be but one factor of many to consider in the analysis).

46. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 388 (Cal. 1988) ("[T]he totality of the circumstances determines the nature of the contract."); see also *Dupree v. United Parcel Serv., Inc.*, 956 F.2d 219, 222 (10th Cir. 1992) (acknowledging that the inquiry regarding whether an implied contract right exists is normally a factual one); *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 780 (N.M. 1993) (examining written representations such as employee handbooks, oral representations, party conduct, and the combination of representations and conduct).

47. See *Pugh*, 171 Cal. Rptr. at 329 (remanding with the instruction that the employer had the burden of proving Pugh was terminated for cause); see also *Pugh v. See's Candies, Inc. (Pugh II)*, 250 Cal. Rptr. 195, 195, 214 (Ct. App. 1988) (affirming the trial court's determination that Pugh had been terminated for cause).

48. See 171 Cal. Rptr. at 926–28 (noting, however, that "where, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment.").

49. See *Foley*, 765 P.2d at 386 (observing that requiring "separate consideration as a substantive limitation" to the finding of an enforceable contract "would be 'contrary to the general contract principle that courts should not inquire into the adequacy of consideration.'" (quoting CALAMARI & PERILLO, CONTRACTS § 4-3 (2d ed. 1977))); *Pugh*, 171 Cal. Rptr. at 924–25 (noting that requiring consideration other than continued employment is inconsistent with the general rule for contract formation that courts do not inquire into the adequacy of consideration (citing CALAMARI & PERILLO, CONTRACTS § 4-3 (2d ed. 1977))). See also *Eales v. Tanana Valley Med.-Surgical Grp.*, 663 P.2d 958, 960 (Alaska 1983) (finding the independent consideration requirement unsound under common law contract rules, because "[t]here is no requirement of mutuality of obligation with respect to contracts formed by an exchange of a promise for performance."), Fineman, *supra* note 43, at 362 (explaining that *Pugh* and *Foley*

employment contracts will not negate the at-will rule; implied contract rights arise only when it appears from the circumstances that the parties intended to be contractually bound to implied contract terms.⁵⁰ In practice, courts differ in their degree of acceptance of implied-in-fact employment contract terms.⁵¹ Some courts formalistically require offer, acceptance, and consideration, while other courts adopt a more fact-specific approach focused on the employee's expectation. The Tenth Circuit Court of Appeals, applying Colorado law, rejected the argument that an employee can aggregate employer-issued documents into a legally binding contract without showing the elements of a contract were met as to each document.⁵² In contrast, some courts have held that implied contracts are enforceable based upon the employee's reasonable expectations.⁵³ Consequently, the jurisdiction will determine whether the employee's reasonable expectations will be sufficient to recognize and enforce an implied-in-fact contract or whether the exchange must formally meet all of the elements of a contract.

B. Potential for Implied-in-Fact Contracts Protecting Employee Privacy

Where employer actions and representations create reasonable expectations of employee privacy, jurisdictions that recognize an implied-in-fact employment contract would acknowledge an implied contract right to privacy because that right is negotiable and can be altered by contract.⁵⁴

applied general contract principles to the employment relationship).

50. See *Foley*, 765 P.2d at 387 ("Permitting proof of and reliance on implied-in-fact contract terms does not nullify the at-will rule, it [sic] merely treats such contracts in a manner in keeping with general contract law.").

51. See *Dupree*, 956 F.2d 219, 223 (noting a "[h]igh threshold for invoking the implied contract doctrine"); *Ball v. Ark. Dep't of Cmty. Punishment*, 10 S.W.3d 873, 876 (Ark. 2000) (requiring a manual or handbook to contain an express agreement to be sufficient to invoke the exception for an implied-in-fact employment contract); *Adams v. Pre Finish Metals, Inc.*, No. WD-96-039, 1997 Ohio App. LEXIS 2053, *12-13 (Ct. App. May 16, 1997) (holding that handbooks and manuals will rarely be sufficient to create an implied-in-fact contract right if the employee could not otherwise establish a promissory estoppel claim based on the same facts).

52. See *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1464-65 (10th Cir. 1994) (elaborating that, under Colorado law, the employee must be aware of the employer's policy and such policy must influence the employee's continued employment to constitute an acceptance). But see *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 n.10 (N.J. 1985) (holding that an employee need not rely on—or even be aware of—an employer policy in order to benefit from it and for it to create an implied contract right).

53. See *Fineman*, *supra* note 43, at 364 ("[T]he [*Foley* and *Pugh*] decisions also incorporate the idea that implied contracts are enforceable because of employees' reasonable expectations This is potentially a different inquiry than whether the employer's actions and policies express an intent to offer job protections.").

54. See, e.g., *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122, 1130-31 (9th Cir. 2000) (holding that an "objectively reasonable expectation of privacy" depends on

An implied-in-fact contract claim may arise when an employee has been terminated, and feels as though her privacy rights were infringed, because she had a reasonable expectation of privacy based upon the employer's conduct and policies.⁵⁵ The employee's claim can be framed as a narrow way of arguing that her at-will employment status was negated by an implied contract right to privacy.⁵⁶ The employee, however, need not be terminated in order to assert a breach of contract claim for violating the employee's right to privacy. For example, an employee may have a contractual right to privacy in the content of text messages sent using a company issued phone. If the employer accesses the content of an employee's text messages, the employee could bring suit against the employer for breach of contract, even if the employer did not terminate the employee based on those messages. It is the terms of the parties' contract that will determine what actions constitute a breach, and the employee's reasonable expectations will assist the court in ascertaining those terms.⁵⁷

An implied-in-fact contract for employee privacy may become enforceable when an employer makes representations to an employee that give rise to the employee's reasonable expectation of privacy in some aspect of her job or personal life and the employer breaches those representations. The employee may assert a cause of action for breach of an implied-in-fact contract protecting the employee's privacy. The more specific and definite the assurances given by the employer, the more likely it is a court will find that the assurances created an implied-in-fact contract right.

In 1992, the Tenth Circuit considered whether an employee acquired privacy rights based on an implied contract under Oklahoma law.⁵⁸ In *Dupree v. United Parcel Service*, two employees were terminated after

the deal struck between labor and employment because consent is usually a defense to a privacy action).

55. See, e.g., *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (stating that the employee had an asserted expectation to a right to privacy based on existing policies), *disapproved of by* *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. 2000).

56. In fact, a handful of employee-plaintiffs have advanced such an argument. See, e.g., *Vasey*, 29 F.3d at 1464 (asserting an implied-in-fact contract right based, in part, on written representations that the employer would respect the dignity and privacy of employees); *Dupree*, 956 F.2d at 222 (advancing an implied-in-fact contract right based on oral and written statements that employees would be treated fairly); *Greenrock v. Whirlpool Corp.*, No. 08-CV-404-TCK-TLW, 2009 U.S. Dist. LEXIS 36360, *1–2 (N.D. Okla. Apr. 28, 2009) (claiming employer actions violated an implied-in-fact contract right that employees be treated with respect and dignity).

57. See *Vasey*, 29 F.3d at 1465 (finding that a manual containing "vague assurances" did not create a contract because the employee could not have reasonably concrete expectations of what those assurances meant).

58. *Dupree*, 956 F.2d at 219.

word of their romantic involvement spread around the office.⁵⁹ The employees argued an implied contract voided their at-will status by creating certain privacy rights and based their claim on “representations [that] were made to them, both orally and in policy manuals.”⁶⁰ The Tenth Circuit enumerated the following five factors as critical to the evaluation of whether an implied contract exists under Oklahoma law: “(a) evidence of some ‘separate consideration’ beyond the employee’s service to support the implied term, (b) longevity of employment, (c) [provisions in] employer handbooks and manuals, (d) the employee’s detrimental reliance on oral statements and company policies and practices, and (e) promotions and commendations.”⁶¹ The court acknowledged the inquiry is a factual one typically to be decided by a jury, but stipulated “[i]f the alleged promises are nothing more than vague assurances . . . the issue can be decided as a matter of law.”⁶² The statement relied on by the employees in the company’s policy manual—“We Treat Our People Fairly and Without Favoritism”—was held by the court to be too vague, as a matter of law, to create an implied contract right to privacy.⁶³

Two years later, the Tenth Circuit approached a similar argument applying Colorado law in *Vasey v. Martin Marietta Corp.*⁶⁴ There, the employee worked for the employer for thirty-three years in various positions before being terminated in a round of layoffs.⁶⁵ The court discussed the procedural requirements for an implied-in-fact employment contract, holding that the employee must prove the employer made an offer to the employee and the employee’s initial or continued service qualified as acceptance and consideration.⁶⁶ Further, for a handbook or manual to

59. *Id.* at 220–21.

60. *Id.* at 222.

61. *Id.* But cf. *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (discussing that some jurisdictions do not require separate consideration and consider such a requirement to be contrary to general contract principles against inquiring into the sufficiency of consideration), *disapproved of by* *Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089 (Cal. 2000).

62. *Dupree*, 956 F.2d at 222.

63. *Id.*

64. 29 F.3d 1460, 1460 (10th Cir. 1994).

65. *Id.* at 1463.

66. See *id.* at 1464 (elaborating that to qualify as an offer, the employer must have “manifested his willingness to enter into a bargain in such a way as to justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee’s assent would conclude the bargain.”). *Dupree* and *Vasey* were both decided by the Tenth Circuit, but in *Dupree* separate consideration was a prerequisite to finding an implied employment contract whereas in *Vasey* the employee’s continued service could be sufficient consideration to support an implied employment contract. The difference is due to the *Dupree* court applying Oklahoma law and the *Vasey* court applying Colorado law.

constitute an offer under Colorado law, it must be communicated to the employee.⁶⁷ The employee in *Vasey* relied on statements in company memos that the employer was committed to “the dignity and privacy due all human beings,” to providing “a safe and healthy workplace,” and the employer “believes in the highest ethical standards.”⁶⁸ Like in *Dupree*, the court held these general statements were “vague assurances” and too indefinite to contractually bind the employer to an implied contract.⁶⁹

Another example of a court rejecting privacy assurances in an employee manual as too vague is the Oklahoma Supreme Court case *Gilmore v. Enogex, Inc.*⁷⁰ Gilmore was terminated for refusing to submit to a random drug test conducted on all employees.⁷¹ Gilmore asserted breach of an implied contract right to privacy based on the employee manual which provided: “[t]he Company will respect the privacy of its employees and will involve itself in their personal lives only to the extent that job performance or conflict of interest is involved or where assistance programs are made available on a voluntary participation basis.”⁷² The court recognized it is possible for an employee manual or handbook to give rise to an implied contract, but rejected that the cited provision was sufficient to implicate an implied contract right to privacy.⁷³ While arguably more specific than the handbook statements in *Dupree* and *Vasey*, the Oklahoma Supreme Court held that Gilmore’s implied contract claim was insufficient because the employee handbook provision did not contain any specific terms, only “vague assurances.”⁷⁴

67. See *id.* (elaborating that “an employer’s limited distribution of its employment manual or policy indicates the employer did not intend the manual to operate as a contractual offer to the employee (citing *Kuta v. Joint Dist. No. 50(J)*, 799 P.2d 379, 382 (Colo. 1990))). But see *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1268 n.10 (N.J. 1985) (observing that, with regard to employer policy manuals, “employees neither ha[ve] to read it, know of its existence, or rely on it to benefit from its provisions any more than employees in a plant that is unionized have to read or rely on a collective-bargaining agreement in order to obtain its benefits.”).

68. *Vasey*, 29 F.3d at 1465.

69. *Id.*

70. 878 P.2d 360 (Okla. 1994).

71. *Id.* at 362.

72. See *id.* at 368 (emphasis omitted) (looking to the text of the employee manual to identify if an implied contract existed). The employee’s original public policy argument was rejected because, “when [his] privacy concerns [were] balanced against Enogex’ legitimate interest in providing a drug-free workplace, his invasion-of-privacy claim fails to meet the law’s highly-offensive-to-a-reasonable-person test.” *Id.* at 366–67.

73. *Id.* at 368.

74. See *id.* at 369 (“This court, while willing to imply the existence of a contract and construe the terms, will not imply terms in the context of obscure or ambiguous language.”).

Although these cases failed to hold that an implied contract right to privacy was created, each of them did accept that such a right may exist where there were more definite assurances of privacy protection.⁷⁵ While the Tenth Circuit and the Oklahoma Supreme Court did not give any guidance as to what kind of statement would be sufficiently specific and definite to give rise to an implied contract right to privacy, these cases indicate some courts will require definite and specific promises of privacy from employers in order to find an implied contract right to privacy.⁷⁶ A question of the existence of an employee's implied contract right to privacy can be framed as whether the totality of the circumstances suffices to create a reasonable expectation of privacy for the employee.⁷⁷ For the employees in *Dupree*, *Vasey*, and *Gilmore*, the lack of specificity in the handbook made those provisions insufficient to create reasonable privacy expectations; it was not reasonable for these employees to rely on the handbook statements.⁷⁸ In contrast to the higher threshold required under Oklahoma and Colorado law to find implied contract rights with regard to employee privacy,⁷⁹ other courts have been more willing to invoke the doctrine.⁸⁰

1. *The Implied Contract Doctrine: Rulon-Miller v. IBM Corp.*

Contrary to the cases described above, courts occasionally find that an implied contract right to privacy exists. *Rulon-Miller v. IBM Corp.* has been cited as recognizing an implied contract for certain employee privacy protection.⁸¹ The *Rulon-Miller* court relied heavily on the employee's

75. *E.g., id.*

76. *E.g., Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1464 (10th Cir. 1994); *Dupree v. United Parcel Serv., Inc.*, 956 F.2d 219, 222–23 (10th Cir. 1992).

77. See, for example, *Dupree*, 956 F.2d at 222–23, which relied on the employee's understanding of employer-issued materials, as well as the representations of those materials for determining the existence of an implied contract.

78. When framed in terms of the employee's reasonable expectation of privacy, the analysis is similar to that of a Fourth Amendment analysis—protecting citizens from unreasonable searches and seizures by government actors—for public employees.

79. See *id.* (referencing the requirement of definite promises in order to create an enforceable contractual right (citing *Krause v. Dresser Indus., Inc.* 910 F.2d 674, 678 (10th Cir. 1990))); see also *Gilmore*, 878 P.2d at 368 (explaining the requirements of an implied contract).

80. See *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 533 (Ct. App. 1984) (upholding a jury verdict finding the employer breached an employee's implied contract right to privacy), *disapproved of by* *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. 2000).

81. See, e.g., *Selmi*, *supra* note 4, at 1043–44 (calling the court's recognition of an implied contract right of employee privacy the “most important aspect” of the case). See also Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 78 (1997) (discussing that *Rulon-Miller's* analysis of a breach of implied contract rights can be used in the

expectation of privacy, as influenced by the employer's conduct. Rulon-Miller worked her way through the ranks at IBM from receptionist to marketing manager.⁸² Before her final promotion, Rulon-Miller was in a relationship with an employee of an IBM competitor.⁸³ Rulon-Miller's superiors assured her the relationship was not an issue but later told her it created a "conflict of interest," and she must end it or lose her job.⁸⁴ A manager told her she had time to think it over, only to terminate her the following day.⁸⁵

Rulon-Miller, and the court, relied on an IBM memo issued to managers stressing the importance of employees' privacy in their off-the-job lives.⁸⁶ The court summarized the company policy as "one of no company interest in the outside activities of an employee so long as the activities did not interfere with the work of the employee."⁸⁷ While IBM claimed a "conflict of interest" as the reason for Rulon-Miller's termination, the court determined there was sufficient evidence to uphold the jury's finding that the romantic relationship did not create a conflict of interest.⁸⁸ The court upheld the jury's finding that Rulon-Miller had a right to privacy in her personal, romantic life based on "substantive direct contract rights . . . flowing to her from IBM policies."⁸⁹ In upholding that Rulon-Miller had an implied contract right to privacy, the court may have also relied on the

context of privacy rights); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 43 n.79 (2001) (describing *Rulon-Miller* as "[a] well-known case that can be understood on contract grounds" and citing the proposition that "[i]n the private sector . . . workers rarely succeed in their claims unless they can show that the employer held out the expectation of respecting privacy and then breached the expectation.").

82. *Rulon-Miller*, 208 Cal. Rptr. at 527–28.

83. *Id.* at 528.

84. *Id.*

85. *Id.* at 528–29.

86. *See id.* at 529–30 (stating that Rulon-Miller relied on company policies and, according to a memo issued to IBM managers, "IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy."). This policy does not appear any more specific than the statements relied on by the employee in *Gilmore*. *Contra* *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 368 (Okla. 1994) (discussing that the employee actually received and had knowledge of the employee manual containing a statement that "[t]he Company will respect the privacy of its employees and will involve itself in their personal lives only to the extent that job performance or conflict of interest is involved or where assistance programs are made available on a voluntary participation basis."). Yet, the California court in *Rulon-Miller* was willing to accept that an implied contract right to privacy existed while the Oklahoma Supreme Court was not. This divergence may be due to the courts' differing acceptance and willingness to invoke the implied-in-fact contract to protect employee privacy.

87. 208 Cal. Rptr. at 531.

88. *Id.*

89. *Id.* at 532.

assurances made by Rulon-Miller's supervisors that the relationship was not a problem.⁹⁰ In sum, the court found sufficient evidence to support that Rulon-Miller had a reasonable expectation of privacy based on the employer's conduct.⁹¹

The court clearly affirmed that company policy established that IBM had no interest in the off-duty conduct of an employee unless the conduct interfered with the employee's work.⁹² Assuming the *Rulon-Miller* court was in fact finding an implied contract right, the court primarily relied upon the written policy distributed to IBM managers.⁹³ Conceivably, the court could have based this conclusion on the fact that Rulon-Miller's superiors knew of and permitted the relationship when promoting her.⁹⁴ While a written policy will usually be stronger evidence of an implied contract right, an implied-in-fact contract takes all of the facts and circumstances into consideration in determining whether such a contract right exists.⁹⁵

90. *See id.* at 528 (recounting, in some detail, Rulon-Miller's supervisor's testimony informing her that he did not "have any problem with [her relationship]" prior to holding that she could reasonably rely upon IBM's written privacy policies).

91. Framing this issue as one of reasonable reliance is similar to a promissory estoppel analysis, which allows an employee to recover based upon reasonable reliance on a definite promise by the employer where reliance is to the employee's detriment and nonenforcement would be unjust. *See Estrin v. Natural Answers, Inc.*, 103 F. App'x 702, 705 (4th Cir. 2004) (listing the elements of a promissory estoppel claim as: "1. a clear and definite promise; 2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; 3. which does induce actual and reasonable action or forbearance by the promisee; and 4. causes a detriment which can only be avoided by the enforcement of the promise."); *Nguyen v. CNA Corp.*, 44 F.3d 234, 241 (4th Cir. 1995) (defining promissory estoppel as allowing "recovery even in the absence of consideration where reliance and change of position to the detriment of the promisee make it unconscionable not to enforce the promise.") (internal quotation marks omitted) (citation omitted); *see also Coats v. Cuyahoga Metro. Hous. Auth.*, No. 78012, 2001 Ohio App. LEXIS 1699, *22 (Ct. App. Apr. 12, 2001) (holding summary judgment to be appropriate on a promissory estoppel claim where the plaintiff did not have a reasonable expectation of privacy).

92. Rulon-Miller's "substantive direct contract rights" based on IBM's company policies makes the court's discussion of the covenant of good faith and fair dealing implicit in employment at-will contracts unnecessarily confusing. Perhaps in a jurisdiction that recognizes both causes of action, it is a legal distinction without a practical difference. Although it may be immaterial if the result is the same, it is unclear whether the court couched its analysis on a breach of an implied contract right derived from the circumstances or a breach of an implicit covenant of good faith and fair dealing. *See Rulon-Miller*, 208 Cal. Rptr. at 532.

93. *See id.* at 530 (enumerating the policy set forth by IBM's former chairman, clearly stating the employee's right to privacy).

94. *See id.* at 528 (recounting a conversation demonstrating management's knowledge of the relationship).

95. *See, e.g., Dupree v. United Parcel Serv., Inc.*, 956 F.2d 219, 222 (10th Cir. 1992) (acknowledging that the "inquiry [regarding] whether an implied contract right exists is [a] factual" one); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 388 (Cal. 1988) ("[T]he totality of the circumstances determines the nature of the contract.").

While the *Rulon-Miller* court did not explicitly discuss how the facts met common law contract requirements, the exchange—even absent the IBM policy—can fit within the contract definition of a bargained-for exchange consisting of an offer, an acceptance, and consideration. Prior to receiving the promotion, Rulon-Miller was promised by her superior that her romantic relationship was not an issue.⁹⁶ In offering her the promotion, it was an understood condition of her acceptance that she could continue the relationship. In accepting the promotion, Rulon-Miller was accepting, as a condition of her new employment contract, that she could stay in the relationship while working in her new position. Her continued service to the company in the promoted position constituted consideration.

The facts can be analyzed to meet the elements of a contract, but crucial to finding an implied-in-fact contract right to privacy is the employee's reasonable expectation. The assurances by her supervisors could induce a reasonable expectation that what the supervisors said was accurate, and the relationship was not a problem. Based on the representations by her superiors, Rulon-Miller did have a reasonable expectation that her relationship was not a matter of concern for her employer, and this reasonable expectation, shaped by her employer's conduct, created an implied contract right.⁹⁷ Under the facts of the case, it does seem Rulon-Miller was treated unfairly by her long time employer. The court indicated the implied covenant of good faith and fair dealing could provide Rulon-Miller with relief because IBM failed to afford Rulon-Miller the protection of a company policy. Similarly, other decisions have invoked the implied covenant of good faith and fair dealing to protect employee privacy rights.⁹⁸

2. *The Implied Covenant of Good Faith and Fair Dealing: Luedtke v. Nabors Alaska Drilling, Inc.*

The *Rulon-Miller* court made reference to the implied covenant of good faith and fair dealing present in employment at-will contracts.⁹⁹ The covenant of good faith and fair dealing is another cause of action an

96. Rulon-Miller testified her manager stated to her: "I don't have any problem with [the relationship]. You're my number one pick. I just want to assure you that you are my selection." *Rulon-Miller*, 208 Cal. Rptr. at 528.

97. See *Rulon-Miller*, 162 Cal. Rptr. at 528–29 & nn. 2–3 (recounting Rulon-Miller's trial court testimony of the conversations that took place between her and management).

98. See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1223–24 (Alaska 1992) (identifying a covenant of good faith and fair dealing as a qualification of the at-will employment rule).

99. See *Dupree*, 956 F.2d at 222 (discussing the *Rulon-Miller* court's handling of the implied covenant of good faith and fair dealing).

employee may assert against an employer to allege infringement of the employee's right to privacy.¹⁰⁰ Implied contract rights and the implied covenant of good faith and fair dealing are similar but distinct theories. While forty-five states recognized the implied contract theory as of 2007, only nine recognized the implied covenant of good faith and fair dealing theory.¹⁰¹ The implied covenant of good faith and fair dealing affords the employee the protection of employer policies without requiring the court to find that such policies created an implied contract.¹⁰² Thus, an employee might assert both causes of action with regard to the employee's privacy rights when a finding of such privacy rights is supported by an employer policy. As the name of the covenant indicates, courts often rely on fairness principles to determine if an employer violated the implied covenant of good faith and fair dealing even absent the employer's violation of a company policy.

Luedtke v. Nabors Alaska Drilling, Inc. is one case in which a court held that the employer violated the implied covenant of good faith and fair dealing. Luedtke was terminated after testing positive for marijuana.¹⁰³ The Alaska Supreme Court held that the covenant of good faith and fair dealing is implied in all at-will employment contracts, and its breach is determined by the employer's intent and bad faith.¹⁰⁴ While the court's analysis recognized that the drug test was a term of Luedtke's employment contract, it did not hold that an implied contract right to privacy prohibited the employer from drug testing him. Rather, the court held that the employer did not treat Luedtke fairly, noting that he was tested for drugs without notice when other employees were not similarly tested.¹⁰⁵ This analysis

100. See Sonne, *supra* note 11, at 145–46 (listing the limitations to employment at-will with regard to privacy, including implied contract rights and the covenant of good faith and fair dealing), Rives, *supra* note 28, at 555 (discussing cause for termination); see also Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV., Jan. 2001, at 3, 4 (analyzing the implied contract and the covenant of good faith and fair dealing as two of the three major common law exceptions to employment at-will, with public policy being the third major exception).

101. See Sonne, *supra* note 11, at 160, n.149 (citing JOHN F. BUCKLEY, IV & RONALD M. GREEN, 2007 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW § 5.02 tbl. 5.1 (2007)).

102. See, e.g. WILLIAM E. HARTSFIELD, *Wrongful Discharge*, 2 INVESTIGATING EMPLOYEE CONDUCT § 14:13 n.19 (2010) (surveying decisions recognizing the implied covenant of good faith and fair dealing regarding employee privacy), available at Westlaw IEMPC.

103. See *Luedtke*, 834 P.2d at 1222 (noting that the employee was given neither the opportunity to retest nor any other options).

104. See *id.* at 1223–24 (citing *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983)).

105. See *id.* at 1225–26 (“We agree that there is no evidence of subjective bad faith on Nabors’ part, but as we have already stated, the covenant of good faith and fair dealing also requires that the employer be objectively fair. The superior court found

focuses on fairness based on the employee's reasonable expectation of privacy due to the employer's actions—rather than fitting the circumstances into the requirements of contract formation. Luedtke had a reasonable expectation that he would not be tested for drugs because he was not given advance notice and no other employees were tested.¹⁰⁶

The covenant of good faith and fair dealing may afford an employee protection in some states when the circumstances do not amount to a mutually bargained-for exchange within a contract framework, the employer's conduct reasonably causes the employee to expect privacy, and the treatment of the employee is manifestly unfair.¹⁰⁷ Yet, most state judiciaries have rejected the implied covenant of good faith and fair dealing in employment contracts based on the justification that such a cause of action would deviate too far from the employment at-will doctrine.¹⁰⁸ The underlying inquiries in an implied-in-fact contract case and an implied covenant of good faith and fair dealing case are the same—did the employee have a reasonable expectation of privacy? Employee privacy expectations are central to other causes of action as well; public employees are afforded constitutional protection where the employee has a reasonable expectation of privacy based on the realities of the workplace.

that Luedtke was tested for drug use without prior notice, that no other employee was similarly tested, and that Nabors suspended Luedtke immediately upon learning of the results of the test. Nabors does not dispute these findings. We hold as a matter of law, these facts constitute a violation of the covenant of good faith and fair dealing.”).

106. *Id.*

107. According to a 2000 study, the following states recognized the implied covenant of good faith and fair dealing in employment at-will contracts: Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming. *See* Muhl, *supra* note 100, at 4, Ex. 1. The analysis for finding a breach of the implied covenant of good faith and fair dealing is similar to the implied-in-fact contract analysis in jurisdictions that focus on the employee's reasonable expectations rather than strictly requiring that the circumstances meet the elements of contract formation.

108. *See, e.g.,* *Murphy v. Bancroft Constr. Co.*, 135 F. App'x 515, 518 (3d Cir. 2005) (recognizing an implied covenant of good faith and fair dealing in employment at-will relationships in Delaware, but qualifying that this exception has a narrow application because the covenant “could swallow the doctrine of employment at will” (citing *Lord v. Souder*, 748 A.2d 393, 401–03 (Del. 2000))); *Pittman v. Larson Distribution Co.*, 724 P.2d 1379, 1385 (Colo. Ct. App. 1986) (declining to extend the covenant of good faith and fair dealing to employment contracts); *White v. State*, 929 P.2d 396, 407 (Wash. 1997) (en banc) (refusing “to adopt a broad ‘bad faith’ exception to the employment-at-will rule which would have implied a covenant of good faith and fair dealing in every employment contract” because such an exception would intrude too greatly upon the employment relationship). *But see* Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379, 382 (1998) (noting that an implied covenant of good faith and fair dealing on the employer's part is consistent with an at-will relationship, according to many state courts).

IV. PRIVACY RIGHTS OF THE PUBLIC EMPLOYEE

For public employees, the analysis can be quite different because the government-employer must comply with the protections of the Fourth Amendment to the United States Constitution guaranteeing the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by government actors.¹⁰⁹ Under the implied-in-fact contract analysis, whether the employee had a reasonable expectation of privacy is a hidden inquiry because courts have not explicitly stated what the standard is. In contrast, under the Fourth Amendment analysis for public employees, courts expressly inquire whether the employee had a reasonable expectation of privacy.¹¹⁰ The United States Supreme Court has held that “[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.”¹¹¹ Under the *Ortega* framework, in order to claim the protection of the Fourth Amendment, a public employee must have a reasonable expectation of privacy, and the government-employer’s intrusion must be unreasonable.¹¹² Whether the public employee has a reasonable expectation of privacy is a threshold analysis to be determined on a case-by-case basis considering all of the circumstances and “operational realities” of the workplace.¹¹³ This *ad hoc* determination may look similar to the analysis of whether an implied-in-fact contract exists as both require the court to take account of the totality of the circumstances including the employer’s policies, practices, and representations.¹¹⁴

A. City of Ontario v. Quon

Quon exemplifies the similarities and overlap of the privacy rights of

109. U.S. CONST. amend. IV.

110. See, e.g., *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 906 (9th Cir. 2008) (discussing a police officer’s reasonable expectation of privacy and holding it to be reasonable), *rev’d sub nom.* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). In *Quon*, the Supreme Court distanced itself from the holding that a reasonable expectation of privacy is a threshold requirement in Fourth Amendment employee privacy cases. See 130 S. Ct. at 2628-29. After *Quon*, it is unclear what the correct analytical framework is for a public employee Fourth Amendment claim.

111. *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) (emphasis in original).

112. *Id.* at 725-26.

113. *Id.* at 717-18.

114. For discussion regarding the totality of the circumstances analysis for an implied contract, see *supra* note 43-45 and accompanying text.

public employees under the Fourth Amendment and a cause of action for an implied contract right to privacy. Quon worked as a sergeant for the Ontario Police Department and received a two-way pager from his employer.¹¹⁵ Quon signed an acknowledgement of a policy regarding computer, Internet, and E-mail usage, which stated, in part, that “[u]sers should have no expectation of privacy or confidentiality when using these resources.”¹¹⁶ Quon was aware that, while there was no official policy regarding employer-issued pagers, the pager messages would fall under the computer, Internet, and E-mail usage policy.¹¹⁷ When an employee exceeded the contracted-for 25,000-character-per-month allotment, Lieutenant Duke, Quon’s supervisor, would collect payment from the user for these overages.¹¹⁸ Quon went over his pager’s character allotment several times and was told by Duke that so long as Quon paid for the overages, the department would not conduct an audit to determine whether they were personal or business in nature.¹¹⁹ Quon paid the overages for several months and his pager messages were not audited; however, an audit was later conducted by reviewing the pager transcripts, and Quon’s superiors found that many of his pager messages were personal and sexually explicit.¹²⁰ The principal harm suffered by Quon was that various persons within the department reviewed the content of the pager messages.

Quon filed suit asserting constitutional protections in the content of the pager messages under the Fourth Amendment, and the district court held that Quon had a reasonable expectation of privacy in the messages due to Duke’s informal policy of not auditing a pager if the employee paid the overuse charges.¹²¹ The United States Court of Appeals for the Ninth Circuit agreed and held that, although the employer had a policy purporting that there should be no expectation of privacy by employees, the

115. *Quon*, 529 F.3d at 895.

116. *See id.* at 896 (reserving for the government-employer the right to review employee’s “network activity” with or without notice, however cautioning that such systems should not be used for personal matters).

117. *See id.* (observing that, while Quon testified he remembered the meeting where the policy was announced, he did not recall his supervisor announcing that the Department’s e-mail policy would cover the pager messages).

118. *Id.* at 897 (“Under the City’s contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges.”).

119. *Id.* The parties’ descriptions of the exchange differed. According to Duke, he told Quon “that [Quon] had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, ‘It’s all business, I’m not paying for it,’ then I would do an audit to confirm that.” *Id.* Quon quoted Duke as stating the following: “if you don’t want us to read it, pay the overage fee.” *Id.*

120. *Id.* at 898. The stated purpose of the audit was to determine whether the 25,000 character allotment was sufficient to cover business use of the pagers. *Id.*

121. *Id.* at 899.

“operational reality” at the Department was contrary to this policy.¹²² The court relied on the “operational reality” of Duke’s informal policy, which he made particularly clear to Quon—that employee pagers would not be audited if the employee paid any overage fees.¹²³ In addition to relying on this informal policy, the court considered the employer practice of not auditing Quon’s pager messages for several months when Quon exceeded his monthly character allotment and paid for his overages.¹²⁴ Thus, the court considered the oral representations of the employer as well as its policies and practices and concluded Quon did have a reasonable expectation of privacy in the pager messages.¹²⁵

The United States Supreme Court granted certiorari and issued an opinion on June 17, 2010.¹²⁶ One of the questions presented to the Court was whether the employee had a reasonable expectation of privacy when the employer’s actual practice and informal policy differed from the official employer policy.¹²⁷ In their respective briefs, the parties agreed that the reasonable expectation of privacy test is a fact-specific inquiry but differed on which facts they advocated before for the Court. Quon urged the view that an employee’s expectation of privacy must be determined based on all the circumstances of the employment relationship and focused the Court’s attention to Duke’s informal policy and actual practice of not auditing the officers’ pager messages.¹²⁸ The employer, also using a “totality of the operational realities” test, urged the Court to concentrate on

122. *Id.* at 906–07.

123. *Id.* at 907.

124. *See id.* (“Quon had exceeded the 25,000 character limit ‘three or four times,’ and he had paid for the overages every time without anyone reviewing the text of the messages.”).

125. *See id.* (dismissing the City’s argument that Duke could not create a reasonable expectation of privacy because he was not a policymaker). Unimportant for the purposes of this Article, the Ninth Circuit also held that the search was unreasonable and thus violated Quon’s Fourth Amendment rights. *See id.* at 909 (concluding that reviewing the content of the text messages “was excessively intrusive in light of the noninvestigatory object of the search”).

126. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

127. *See* AM. BAR ASS’N, *Preview of United States Supreme Court Cases: April Cases 2009–2010 Term: City of Ontario, CA v. Quon*, Docket No. 08-1332, <http://www.abanet.org/publiced/preview/briefs/april2010.shtml> (last visited Nov. 29, 2010) (follow “Questions Presented”) (“Whether a SWAT team member has a reasonable expectation of privacy in text-messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.”).

128. *See* Brief of Respondent at 39–41, *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (No. 08-1332) (arguing that workplace circumstances are important and that an employer’s announcement that employees do not have a privacy expectation, without considering those circumstances, is not a legitimate regulation).

the factors diminishing Quon's expectation of privacy, including that the pager was issued by the employer and the department's formal no-privacy policy.¹²⁹

Justice Kennedy, writing for the Court, determined that the case "[could] be resolved by settled principles [to determine] when a search is reasonable" rather than delving into the reasonableness of the employee's privacy expectations.¹³⁰ The Court assumed Quon did have a reasonable expectation of privacy and avoided the "operational realities" issue.¹³¹ However, in dicta, the Court discussed the parties' disagreement over whether Quon had a reasonable expectation of privacy and noted that whether Duke's oral statements constituted a change in the Department's policy would bear on the reasonableness of Quon's expectation.¹³² The Court cautioned against the overexpansion of an employee's "reasonable expectation of privacy" in new forms of technology.¹³³ Yet, the Court noted that clearly defined employer policies will have an effect on employees' reasonable expectations.¹³⁴

Because the Court wanted to avoid a broad determination of employee

129. Brief of Petitioner at 41–45, *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (No. 08-1332).

130. *Quon*, 130 S. Ct. at 2624.

131. *See id.* at 2628–29 (sidestepping the two-part framework used in the *Ortega* plurality but stating "were we to assume that inquiry into 'operational realities' were called for," it would be necessary to consider the facts bearing on the legitimacy of Quon's expectation of privacy in his pager messages). After *Quon*, it is unclear whether the Court has rejected the *Ortega* plurality approach in favor of Justice Scalia's approach. "His opinion would have dispensed with an inquiry into 'operational realities' and would conclude 'that the offices of government employees . . . are covered by Fourth Amendment protections as a general matter.' But he would also have held 'that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.'" *Id.* at 2628 (alteration in original) (citations omitted) (citing *O'Connor v. Ortega*, 480 U.S. 709, 731–32 (1987) (Scalia, J., concurring)).

132. *See id.* at 2629. ("[I]t would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws.").

133. *See id.* at 2629–30 (elaborating that the evolution of technology as it relates to information transmission "is evident not just in the technology itself but in what society accepts as proper behavior," and "it is uncertain how workplace norms, and the law's treatment of them, will evolve."). "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." *Id.* at 2629.

134. *Id.* at 2630.

expectations of privacy in employer-provided communication devices, it assumed Quon had a reasonable expectation of privacy and held, more narrowly, that the search was reasonable and did not violate Quon's Fourth Amendment rights.¹³⁵ In discussing whether the search was too intrusive, the Court again considered the reasonableness of Quon's expectation of privacy and determined that Quon's conclusion that his messages were completely private in all circumstances was unreasonable.¹³⁶ The Court ultimately held that the Ninth Circuit erred in finding the search unreasonable.¹³⁷

While the Court did not directly address whether Quon had a reasonable expectation of privacy in the content of his pager messages, it did generally state the factors a court should consider when approaching the issue.¹³⁸ The Court's dicta regarding an employee's reasonable expectation of privacy may be persuasive in future breach of implied contract cases. The facts in *Quon* could potentially give rise to an implied-in-fact contract claim for a private sector employee for whom a constitutional cause of action is unavailable.

The conclusion by the Ninth Circuit that Quon had a reasonable expectation of privacy in the pager messages is similar to finding that Quon had an implied-in-fact contract right to privacy in the pager messages based on the oral assurances, policies, and practices of his public employer. The Court used the "operational realities" language from the *Ortega* Court's opinion¹³⁹ to refer to Duke's informal policy and practice of not auditing pagers when employees paid their overage fees.¹⁴⁰ The use of looking at

135. *Id.*

136. *Id.* at 2631 ("Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny.").

137. *Id.* at 2632–33. The Court elaborated that because "the employer had a legitimate reason for the search" and "the search was not excessively intrusive in light of that justification . . . the search would be 'regarded as reasonable and normal in the private-employer context'" *Id.* at 2633 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (plurality opinion)).

138. *See id.* at 2634–35 (Scalia, J., concurring) (criticizing the majority for its "recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question"). Justice Scalia warns that lower courts and litigants will read the Court's digression as an instruction to delve into arguments regarding "employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media." *Id.* 2635–36. These are the same fact-specific questions a court deciding an employee's implied-in-fact contract right to privacy case would consider; the implications of the Court's digression may spread further than Justice Scalia fears.

139. 480 U.S. at 717.

140. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 907 (9th Cir. 2008), *rev'd sub nom.* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

“operational realities” to enhance an employee’s expectation of privacy, rather than diminish it, is unique.¹⁴¹ This reasoning recognizes that the actual facts and circumstances of the particular workplace must be considered to determine whether an employee has a right to privacy predicated on her reasonable expectation of privacy. Under either a Fourth Amendment or an implied-in-fact contract framework, the underlying inquiry is whether the employee had a reasonable expectation of privacy.¹⁴²

B. An Implied-in-Fact Contract Theory after Quon?

Because Quon was a public sector employee, he was able to invoke Fourth Amendment protection against his employer.¹⁴³ The Supreme Court’s handling of the case may signal that a wider range of public employer conduct will be found reasonable under the Fourth Amendment. The Court distanced itself from the analytical framework that inquired, as a threshold matter, into the employee’s reasonable expectation of privacy.¹⁴⁴ This limitation on a public employee’s constitutional avenue for relief makes the implied contract theory an important alternative for public employees in many states. Depending on applicable state law, a public employee in Quon’s position may be able to assert a successful cause of action based on an implied-in-fact contract right to privacy.¹⁴⁵ As

141. *Cf. Lynch v. City of New York*, 589 F.3d 94, 103 (2d Cir. 2009) (stating that police officers do not have a reasonable expectation of privacy that would preclude breathalyzer testing because the “operational realities” of the workplace were such that the officers were already subject to drug testing as a condition of employment); *United States v. Esser*, 284 F. App’x 757, 759 (11th Cir. 2008) (holding that an employee did not have a reasonable expectation of privacy in her purse where a posted policy informed individuals that purses were subject to inspection on the property and all employees were required to read all posted policies); *United States v. Ziegler*, 456 F.3d 1138, 1143 n.9 (9th Cir. 2006) (reasoning that the company policy entitling personnel to administrative access of employees’ computers diminished the reasonable expectation of privacy in the contents of the employee-plaintiff’s computer), *superseded by* 474 F.3d 1184 (9th Cir. 2007).

142. *Quon*, 130 S. Ct. at 2628.

143. *Id.* at 2627.

144. *Id.* at 2633.

145. Public employees in many states can, in addition to a Fourth Amendment cause of action, assert a claim based on an implied employment contract. Such a cause of action is not limited in its application to private sector employees because public sector employees can enter into contracts with their government employers just as private sector employees can contract with their employers. *See, e.g., Bennett v. Marshall Pub. Library*, 746 F. Supp. 671, 679 (W.D. Mich. 1990) (finding that the public employee had a claim based on the common law implied contract doctrine); *Whittington v. State Dep’t of Pub. Safety*, 100 P.3d 209 (N.M. Ct. App. 2004) (reversing the trial court’s finding that “just-cause public employees do not have the right to sue their governmental employer for breach of an implied employment contract”); *Cabaness v. Thomas*, 2010 UT 23, ¶¶ 54–62, 232 P.3d 486, 502–04 (holding that, although the plaintiff was a public employee, an implied-in-fact employment contract was created based on an existing employee manual). *But see Bernstein v. Lopez*, 321 F.3d 903,

previously discussed, courts vary greatly from state to state in their recognition and acceptance of the implied-in-fact employment contract.¹⁴⁶ Like the Fourth Amendment reasonable expectation of privacy analysis employed by the Ninth Circuit and considered by the Supreme Court, an implied-in-fact contract analysis would be fact-intensive and scrutinize the employee's reasonable expectation of privacy.¹⁴⁷

In an implied contract analysis, a court would take into account the totality of the circumstances, including the oral assurances, policies, and practices of the employer.¹⁴⁸ The official policy of the police department in *Quon* was that of no expectation of privacy, but the informal policy and actual practice of the department was to refrain from auditing the pagers so long as the officer paid any overage charges for the pager text messages.¹⁴⁹ Duke orally assured Quon specifically that his pager messages would not be audited if Quon paid for the overage charges.¹⁵⁰ A court may find that Quon had a reasonable expectation of privacy in the content of his pager messages based on these facts—the Ninth Circuit reached that conclusion under its Fourth Amendment analysis.¹⁵¹ A court that accepts the existence of an implied-in-fact contract as an informal, open-ended question might find this reasonable expectation of privacy sufficient to give rise to an enforceable right to privacy in the content of the messages.

Some courts are more rigid in their implied-in-fact contract analysis, requiring the facts to formalistically meet contract formation requirements. It is possible the *Quon* facts qualify as a bargained-for exchange sufficient to establish an implied-in-fact contract for privacy in the content of the pager messages. Applying the facts to the elements of contract formation, Duke's oral representation was an offer by the employer.¹⁵² The terms of

905-06 (9th Cir. 2003) (“[I]t is a] long-standing principle of California law ... that neither an express nor an implied contract can restrict the reasons for, or the manner of, termination of public employment provided by California statute.” (citing *Portman v. Cty. Of Santa Clara*, 995 F.2d 898, 905 (9th Cir. 1993))).

146. See *supra* note 51 and accompanying text (discussing that courts differ in acceptance of implied-in-fact contracts).

147. The underlying issues in Fourth Amendment and implied-in-fact contract claims are quite distinct. Implied contracts are about an agreement—albeit an implied one—between the parties, while the Fourth Amendment is about a fundamental right to be free from unreasonable government intrusion. Nonetheless, these theories share a common theme in an employee's reasonable expectation of privacy.

148. See *Foley v. Interactive Data Corp.*, 765 P.2d 363, 388 (Cal. 1988) (“[T]he totality of the circumstances determines the nature of the contract.”). See also *supra* note 50–52 and accompanying text.

149. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 896-97 (9th Cir. 2008), *rev'd sub nom. City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

150. *Id.*

151. *Id.* at 906.

152. *Id.* at 897.

the offer were: if the employee paid for the overages, then his pager messages would not be audited.¹⁵³ By paying for the overages, the employee was accepting the offer.¹⁵⁴ Additionally, payment constituted the employee's consideration.¹⁵⁵ The employer's consideration was not auditing the pager messages when the employee met his end of the bargain. In some jurisdictions, the employee's continued employment could also be consideration for the agreement because the arrangement added an additional employment term to the parties' contract. It is not necessary to use continued employment as consideration in this case because payment to the employer for the pager overages provided a separate consideration.¹⁵⁶ The employee's contract right to privacy in the pager messages prohibited his employer from auditing the contents of those messages irrespective of any adverse employment action taken against the employee. In other words, the employer breaches the contract by reviewing the pager messages after the employee has paid the overuse charges, not by demoting or terminating the employee because of the contents of those messages.¹⁵⁷

While the facts can be analyzed in terms of offer, acceptance, and consideration, a court considers the totality of the circumstances to ascertain if an implied-in-fact contract right to privacy exists; an employee's reasonable expectation of privacy is integral to this assessment. As with the Fourth Amendment analysis articulated by the *Ortega* plurality and discussed in *Quon*, a reviewing court takes a fact-based approach to determine if a reasonable expectation of privacy exists. In *Quon*, the Court looked at whether the police department issued the pager and had an

153. *Quon*, 130 S. Ct. at 2625. Cf. *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1464 (10th Cir. 1994) (discussing that an offer occurs when "the employer manifest[s] his willingness to enter into a bargain in such a way as to justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent [will] conclude the bargain." (quoting *Cont'l Air Lines, Inc. v. Keenan*, 732 P.2d 708 (Colo. 1987)) (internal quotation marks omitted)).

154. See *Quon*, 130 S. Ct. at 2625 (noting that after *Quon*'s employer told him that he would not be audited so long as he paid, *Quon* paid for the overage charges); *Fineman*, *supra* note 43, at 382 (explaining that an employee can establish acceptance by performing the terms of the offer).

155. See *Fineman*, *supra* note 43, at 383 ("Under established law, no consideration beyond performance is required on the part of the promisee in accepting a . . . contract.").

156. As discussed in Part III, some courts do not accept continued employment as sufficient consideration to find an implied employment contract. Other courts have held that requiring separate consideration is contrary to the general contract principle that courts do not inquire into the adequacy of consideration. See *supra* note 46 and accompanying text.

157. See *Quon*, 130 S. Ct. at 2626 (mentioning that *Quon* was only "allegedly disciplined" for his excessive pager usage). Assuming *Quon*'s employment status was at-will, the department presumably could have terminated him for the excess pager use without auditing his pager and without breaching his right to privacy in the contents of the messages.

official policy of “no expectation of privacy or confidentiality” with regard to internet use and E-mail.¹⁵⁸ The balancing of these factors will determine whether the totality of the circumstances created an enforceable implied-in-fact contract right to privacy in the pager messages.

In a jurisdiction allowing an implied-in-fact contract theory for public employees, it is possible an employee in Quon’s position would succeed in a cause of action against his employer for breach of an implied-in-fact contract right to privacy.¹⁵⁹ Although the Supreme Court avoided the reasonable expectation of privacy issue in its Fourth Amendment analysis, under an implied-in-fact contract theory, the case turns on whether a court accepts that the circumstances created a reasonable expectation of privacy for the employee.¹⁶⁰ This depends on the importance a court places on the employer’s informal policy and actual practice of not auditing the pager messages when the employee paid for the overages. In reality, most employees probably rely on the actual practice of their employers in forming privacy expectations rather than formal policies—which most employees may have seen only once when commencing employment.¹⁶¹ This parallels the empirical findings that many employees believe their legal protection is greater than what at-will employment affords.¹⁶² Where constitutional protections are unavailable or inadequate, an employee, under circumstances similar to *Quon*, could argue breach of an implied-in-fact contract right to privacy.

158. *Quon v. Arch Wireless Oper. Corp.*, 529 F.3d 892, 896 (9th Cir 2008), *rev’d sub nom.* *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

159. The implied-in-fact contract cause of action was unavailable to the *Quon* plaintiffs because California law does not permit such a claim for public employees. *See Hoesterey v. City of Cathedral City*, No. 93-56239, 1995 U.S. App. LEXIS 23316, *11-12 (9th Cir. Aug. 18, 1995) (“California law prohibits all contractual arrangements which purport to alter the terms of a public employee’s employment.”). Many jurisdictions recognize an implied-in-fact contract cause of action for public employees. *See supra* note 148 and accompanying text.

160. *See, e.g., Foley v. Interactive Data Corp.*, 765 P.2d 373, 388 (Cal. 1988) (“[T]he totality of the circumstances determines the nature of the contract.”).

161. *See* Justin Conforti, Comment, *Somebody’s Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit’s Misapplication of the Ortega Test in Quon v. Arch Wireless*, 5 SETON HALL CIR. REV. 461, 485 (2009) (“Quon’s expectation was reasonable because any employee who would have been told that he could avoid an audit of his messages if he paid the overages himself would expect his messages to remain private if he kept paying.”).

162. *See supra* notes 24–26 and accompanying text (explaining that employees tend to genuinely believe it is unlawful to dismiss an employee because of the employer’s personal dislike of the individual).

V. WHAT'S NEXT?: THE VALUE OF IMPLIED-IN-FACT CONTRACT RIGHTS

The implied-in-fact contract may serve a gap-filling function to protect the privacy of public employees where a constitutional theory fails. While private employees do not have the constitutional privacy protections afforded to public employees, some states recognize a private employee's right to privacy in the workplace through the public policy exception to the at-will employment doctrine.¹⁶³ Recognition of an employee's right to privacy as a matter of public policy, however, is often narrowly construed.¹⁶⁴ Where the public policy exception fails to protect employee privacy, the employee may have recourse by pursuing a breach of an implied-in-fact contract right to privacy. Implied contract, implied covenant of good faith and fair dealing, and public policy are distinct causes of action; some court opinions have, however, merged these theories in the context of employee privacy protection. The overlap of these theories is exemplified in the *Rulon-Miller* decision with regard to the implied-in-fact contract and the implied covenant of good faith and fair dealing.¹⁶⁵ Another example of blended theories in the employment privacy context is *Luedtke*, where the Alaska Supreme Court recognized a public policy supporting protection of employee privacy and opined that an employer violation of that public policy could become a breach of the implied

163. See, e.g., *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621–23 (3d Cir. 1992) (holding that, under Pennsylvania law, if a discharge is “related to a substantial and highly offensive invasion of the employee’s privacy” when all of the facts and circumstances are considered, the termination is in violation of public policy and the employer may be liable for wrongful discharge); see also *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 57 (W. Va. 1990) (finding a public policy right to privacy whereby an employer may not “intrude upon this right of his employee absent some showing of reasonable good faith objective suspicion,” but granting an exception where the employee is in an occupation involving the safety of others). But see *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170, 176 (N.J. Super. Ct. App. Div. 1991) (concluding that privacy is an important societal value, but it is “too amorphous a standard” to be a public policy exception to the at-will employment doctrine).

164. See Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 74 (2000) (explaining that the public policy tort is narrow because it is only implicated when the health or safety of the public is sufficiently impacted). Finding that violating an employee's privacy affects the public sufficiently enough to give rise to a public policy cause of action is a broad understanding of the public policy exception, and many state courts have not accepted such a broad interpretation. See, e.g., *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 846 (8th Cir. 2002) (rejecting a public policy protecting employee privacy because “no well-recognized and clear Iowa public policy protects an at-will employee's privacy interest in a romantic relationship with a co-worker”); *Hennessey*, 589 A.2d at 176 (“privacy, though an important value of our society, is too amorphous a standard to qualify . . . as a clear mandate of public policy.”).

165. See *supra* notes 91–103 and accompanying text.

covenant of good faith and fair dealing.¹⁶⁶ A court might bring the implied covenant of good faith and fair dealing into an implied contract or a public policy analysis where the court finds that the employee was treated unfairly.

In addition to these common law causes of action, there are statutory exceptions to employment at-will that protect certain aspects of employee privacy. Like the public policy exception to the at-will doctrine, these statutes are limited in the scope of employee conduct protected and the employer actions prohibited; for this reason, the implied-in-fact contract cause of action is an important protection that an employee may assert when statutory protections are unavailable.

*A. An Open Field for Legislation:
Off-Duty Conduct Statutes and their Limited Impact on
Employee Privacy Rights*

Some states have attempted to clarify the law in the area of employee privacy by legislating for broad employee protection of legal off-duty conduct.¹⁶⁷ One of the broadest is Colorado's off-duty conduct statute, which makes it unlawful for an employer to terminate an employee for the employee's lawful conduct off-duty and off the employer's premises unless the conduct creates a conflict of interest or relates to a bona fide business purpose.¹⁶⁸ The Colorado statute protects a vast range of off-duty activity and departs from the Colorado courts' traditional support of the employment at-will doctrine.¹⁶⁹ These broader statutes can be viewed as protecting aspects of an employee's private life in which the employee will

166. *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1225 (Alaska 1992).

167. *See, e.g.*, COLO. REV. STAT. § 24-34-402.5(1) (2010) (making it unlawful for an employer to discharge an employee for engaging in any lawful activity off the employer's premises and during nonworking hours unless it relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest); N.Y. LAB. LAW § 201-d(2) (McKinney 2009) (making it unlawful for an employer to discharge an employee because of the employee's political activities, legal use of consumable products off work hours and off work premises, legal recreational activities outside work, or union membership). *See also* Sonne, *supra* note 11, at 170 (explaining that off-duty conduct statutes were first enacted in the 1990s as protection against workplace discipline for off-duty smoking but have evolved in some states into sweeping protection of all legal off-duty conduct).

168. *See* § 24-34-402.5(1).

169. *See generally* Jessica Jackson, Comment, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 148–58 (1996) (discussing cases which hold that §24-34-402.5(1) protects activities such as sexual orientation, membership in the Ku Klux Klan, and interoffice dating which “undermines and contradicts decades of strong support for employment at-will principles” by effectively giving employees the vast protection of an implied covenant of good faith and fair dealing recognized in other states but rejected by Colorado courts).

generally have a reasonable expectation to be free from employer intrusion and involvement.¹⁷⁰ For instance, employees typically expect that their participation in lawful product consumption or lawful recreational activities outside of work is not of their employers' concern when such lawful conduct does not impact job performance. Perhaps categorizing off-duty conduct statutes as protecting employee privacy is inaccurate.¹⁷¹ Off-duty conduct statutes protect personal facts and involvement in personal activities that may not exactly be private.¹⁷² While the conduct protected may not be relevant to an employee's job capabilities, whether an employee engages in a particular recreational activity is not really a private aspect of that employee's life.¹⁷³

Regardless of whether off-duty conduct statutes may accurately be described as protecting employee privacy, in certain situations, such statutes may diminish the need for an aggrieved employee to assert a cause of action based on an implied-in-fact contract for privacy.¹⁷⁴ Under the facts of *Rulon-Miller*, the employee would be protected by Colorado's off-duty conduct statute because Rulon-Miller was terminated for engaging in lawful, off-duty conduct—namely, having a romantic relationship with an employee of a competitor company.¹⁷⁵ Rulon-Miller's conduct did not create a conflict of interest or relate to a bona fide business interest of her employer.¹⁷⁶ Therefore, an employee in Rulon-Miller's situation in Colorado could assert protection under Colorado's off-duty conduct statute rather than arguing an implied-in-fact contract right to privacy. However, Colorado's off-duty conduct statute would not impact an employee under

170. *See id.* at 162 (“The Colorado legislature's justification for enacting such a broad statute was that employers should not be able to tell employees what to do on their own time.”); *see also*, Sonne, *supra* note 11, at 172 (stating that statutes were “justified by a seemingly innocuous appeal against ‘unreasonable intrusions into [workers'] lives away from work’” (alteration in original)).

171. *See* Sonne, *supra* note 11, at 172 (reasoning that “lifestyle” statutes are overbroad and encompass more than privacy abuses).

172. For example, whether or not someone smokes is not necessarily private information as it might be readily observable during non-work hours. However, “smokers’ rights” statutes have existed for well over a decade. *See* Jackson, *supra* note 169, at 143–45.

173. Stated differently, inquiry into an employee's lawful off-duty conduct is not as intrusive as surveillance or drug testing.

174. *See* Jackson, *supra* note 169, at 150–52 (discussing that while Colorado does recognize an implied employment contract theory based on an employer handbook, this theory will protect employee privacy only in rare circumstances whereas the Colorado “lifestyle discrimination” statute protects a wide range of legal activities).

175. *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 527–29 (Ct. App. 1984), *disapproved of by* *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. 2000).

176. *Id.* at 533.

the *Quon* facts because Quon's conduct was not off-duty.¹⁷⁷ Rather, Quon's conduct occurred while he was on-duty using company property.¹⁷⁸ Even the broadest off-duty conduct statutes cannot adequately protect an employee's reasonable expectation of privacy where the employer creates that expectation with respect to on-duty activities.

Off-duty conduct statutes are also limited in that they only protect employees from termination based upon the applicable conduct.¹⁷⁹ If an employee is merely disciplined, he does not have a cause of action under these statutes.¹⁸⁰ In contrast, if an employee has an employment contract—express or implied—protecting the employee's privacy, the employee will have a breach of contract cause of action against the employer based on the terms of the parties' contract without the prerequisite that the employee be terminated to assert her claim. While state legislatures are providing greater statutory protection to workers, there are limitations to these legislative protections that can be supplemented by common law causes of action like the implied-in-fact contract.

Due to the problems that the jurisdictional differences of state off-duty conduct legislation create for multistate companies, arguments have been made for the passage of federal legislation regarding employee privacy rights with respect to off-duty conduct.¹⁸¹ While such federal legislation

177. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2626 (2010) (observing that during the review of Quon's text messages, all messages Quon sent while off-duty were not reviewed during Quon's disciplinary procedures).

178. *Id.* To be sure, some of the conduct probably occurred off-duty because Quon had access to the pager during his non-working hours; however, because the pager was provided by the employer for business purposes, the conduct would fall under the statutory exception of being for a bona fide business purpose. See COLO. REV. STAT. § 24-34-402.5(1)(a) (2010) (exempting discharges that relate to the furtherance of a "bona fide occupational requirement").

179. Compare § 24-34-402.5(1) (limiting the statute's application to employee termination), with N.Y. LAB. LAW § 201-d(2) (McKinney 2009) (applying New York's off-duty conduct statute to refusals to hire, discharge, and discrimination).

180. Colorado's off-duty conduct statute would not protect Quon because he was not terminated after his employer's intrusion of his privacy interests. See *Quon*, 130 S. Ct. at 2626 (establishing that Quon was disciplined as opposed to terminated for his actions).

181. See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 680–83 (2004) (proposing uniform employee privacy legislation to address the significant variance of employee privacy issues across the country); see also Rives, *supra* note 28 at 554, 563–64 (calling for specific federal legislation protecting employees' right to engage in lawful off-duty conduct that would "standardiz[e] employee privacy rights across state lines"). Other commentators have opined that state off-duty conduct statutes were enacted prematurely and unnecessarily. See Sonne, *supra* note 11, at 183–84 (citing evidence that employers realize it is counterproductive to have overly intrusive policies with regard to employees' private lives). Additionally, survey data indicates that employers and employees have similar expectations with regard to what information is acceptable for an employer to gather

would advance the goal of standardizing the protection afforded employees in their activities outside of work, it would not protect employees' reasonable expectations of privacy in activities conducted while on-duty. Future legislation in this area likely will focus on discrete classes of information—as most privacy legislation does. There is not a comprehensive legislative answer, but the implied-in-fact contract may be available to fill some gaps left by attempted legislation that fails to protect employees' reasonable expectations of privacy.

B. The Limits of Implied-in-Fact Contract Rights

This Article has proposed that the central theme of employment actions brought by public and private employees asserting privacy protection is the presence of a reasonable expectation of privacy. Because of this commonality, the implied-in-fact contract theory can supplement where other causes of action fail to protect employee privacy. In determining whether an implied-in-fact contract right to privacy exists, courts look at the totality of the circumstances.¹⁸² Whether the employee had a reasonable expectation of privacy, or could “reasonably rely” on the employer’s assurances, policies, and practices, is important in deciding whether an implied-in-fact contract right to privacy exists.¹⁸³ The question is whether the parties had an enforceable agreement protecting the employee’s privacy; to answer that question, courts look at the circumstances and the employee’s reasonable expectations. If the employee cannot demonstrate a reasonable expectation of privacy based upon the employer’s actions, the employee will not prevail.¹⁸⁴ An employee that did not subjectively expect privacy will be less likely to feel wronged by what might otherwise be

and examine about an employee. Sonne, *supra* note 11, at 184–85. The lack of case law on the issue is probably the best evidence that sweeping, federal legislation would be an inefficient endeavor. *Id.* at 185. Shepardizing “COLO. REV. STAT. § 24-34-402.5(1)(a) (2010)” yields only 23 case results and 66 law review articles, indicating it is of greater academic concern that employees receive this protection than a practical problem. Statute last Shepardized using LexisNexis on February 21, 2011.

182. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 363, 388 (Cal. 1988) (“[T]he totality of the circumstances determines the nature of the contract.”).

183. See *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (discussing how an employee’s reasonable expectation of privacy will be important to an implied covenant of good faith and fair dealing claim because the employee’s reasonable expectation will impact the court’s determination of whether the employee was treated unfairly), *disapproved of by Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089 (Cal. 2000).

184. See Nancy J. King et al., *Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States*, 43 AM. BUS. L.J. 79, 122 (2006) (explaining that under other privacy causes of action which an employee can assert against an employer, such as the tort of intrusion upon seclusion, an employer can avoid liability by reducing employee privacy expectations).

considered the employer's infringement of such privacy and be less likely to sue the employer.¹⁸⁵

To avoid liability, employers should be cognizant of their employees' expectations of privacy and manage those expectations appropriately. When an employer is successful in this endeavor, it will not be subject to liability for violating employee privacy rights because the employee will not have a reasonable expectation of privacy on which to base a claim. If an employer, public or private, can successfully manage its employees' expectations of privacy, courts will be less inclined to find the employer liable, and the employee will be less likely to file suit against the employer in the first place. From the employer's perspective, managing employee expectations of privacy is the first line of defense against liability for alleged infringements of employee privacy; it is also in the best interest of the employee if the parties have similar expectations with regard to employee privacy.¹⁸⁶ Setting clear and definite company policies while ensuring that all employees are aware of these policies aligns the expectations of the parties and avoids employees' expectations of privacy from being inflated beyond what the employer intends. Additionally, employers may require that supervisors not deviate from the formal policies.¹⁸⁷

185. See generally Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 293 (2003) (explaining that when terminated or laid off employees perceive the process as fair, they are less likely to sue their former employer); Ann M. Anderson, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 826–27 (2000) (asserting that, in the discrimination context, when employer policies are implemented in good faith, employees are more receptive and less likely to file suit); Worth, *supra* note 25, at 415 (observing that “a worker who leaves happy is less likely to sue.”).

186. See Eric Krell, *Privacy Matters*, 55 HR MAG., no. 2, Feb. 2010 at 43, 44 (declaring that managing employee privacy expectations is an important matter for companies for many reasons because, “[t]he risks of mismanaging employees’ privacy can be severe: lost revenue, lost productivity, legal or regulatory actions, declines in brand value and shareholder value, and recruiting and retention problems.”). Besides legal ramifications, effective management in the area of privacy expectations will have benefits to a business in terms of productivity and company value. Human resource professionals realize it is important that privacy expectations of employers and employees be aligned, and it is a bad business practice for employers to be overly intrusive and unnecessarily monitor employee activities. See *id.* (noting the importance of aligning the privacy expectations of employers and employees). See also Declan C. Leonard & Angela H. France, *Balancing Business Interests with Employee Privacy Rights*, LEGAL REP. (Soc’y for Human Res. Mgmt., Alexandria, Va.), Jun. 1, 2003, at 2, available at http://www.shrm.org/Publications/LegalReport/Pages/CMS_005109.aspx (explaining that unnecessary monitoring can create poor employee morale, and companies should justify all monitoring in terms of protecting a legitimate business interest and communicate this to its employees). Effective communication between employees and employers is important to accomplishing these goals.

187. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (observing that, absent Duke’s contradiction of the department’s formal policy with his own informal policy, determining whether Quon had a reasonable expectation of privacy would likely

It may be in the best interest of the employer—in terms of morale and productivity—to intentionally provide employees with certain expectations of privacy. Inevitably, the realities of the workplace and actual practices cause managers and supervisors to deviate from formal company policies; as in *Quon*, there will invariably be situations where formal policies differ from realities in the workplace. When an employee has a reasonable expectation of privacy based upon the employer's conduct and policies, some courts will find that sufficient to recognize an implied-in-fact contract right to employee privacy.¹⁸⁸ Alternatively, contract rights for employee privacy need not be derived from the circumstances; employers and employees can explicitly agree to certain privacy rights in an express contract.

In an employment relationship, private ordering is perhaps the preeminent way for the parties to have coinciding expectations about their relationship. One way in which an employer can manage its employees' expectations of privacy is through private ordering.¹⁸⁹ While employment law has moved toward greater government mandates and regulation of the relationship,¹⁹⁰ the rules set by the parties' themselves are still important in defining their relative rights.¹⁹¹ Private ordering can be accomplished through an express contract between the parties and may provide an employee with privacy protection. While an express contract right to employee privacy is possible, it is unlikely that an employer will expressly

not have been a difficult issue for the Court to decide).

188. See Fineman, *supra* note 43, at 364 (explaining that some courts find that "implied contracts are enforceable because of employees' reasonable expectations.").

189. Private ordering is another term for the freedom of contract, or the ability of the parties to define the terms of their relationship. See, e.g., Steven H. Kropp, *Deconstructing Racism in American Society – The Role Labor Law Might Have Played (But Did Not) in Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 397 (2002) (discussing private ordering as one means for ending workplace racial prejudice).

190. See GLYNN ET AL., *supra* note 34, at xxv ("[T]he law governing the employment relationship has developed away from private ordering and toward greater government regulation.").

191. See Kohler & Finkin, *supra* note 111, at 382 (explaining that employment law in the United States is founded on a belief in the "efficiency of private ordering"). Under Fourth Amendment case law precedent for public employees, private ordering plays an integral role in the employee's privacy protection because the circumstances of the workplace determine the employee's reasonable expectation of privacy. Conforti, *supra* note 167, at 477 ("[B]ecause an employee's privacy expectation must be reasonable before he has any Fourth Amendment protection, and because the *Ortega* framework works on a contextual rather than a categorical approach, private ordering has defined workplace privacy. Therefore, employers may alter the context of a given workplace to eliminate employee privacy expectations."). This assessment may be incorrect in light of the Court's decision in *Quon* to refrain from embracing the analytical framework set forth by the *Ortega* plurality. See *supra* note 134 and accompanying text (explaining that *Quon* abandoned the *Ortega* approach).

contract to give employees privacy protection.

When an employer fails to adequately manage employee expectations of privacy, the implied-in-fact contract cause of action may be claimed where there are no applicable statutory, constitutional, or tort protections. Because the circumstances of the parties' relationship determine an employee's reasonable expectation of privacy, the interaction of the parties and the terms set by the employer and the employee define the employee's privacy rights. Naturally, employees acquire expectations based on the day-to-day practices of the workplace and reasonably expect that employers will act in accordance with prior conduct. If an employer consistently acts in a manner contrary to a formal policy, as was the situation in *Quon*, an employee's expectation may reasonably align with the actual practices of the workplace rather than the formal policies of the company.¹⁹²

When an employer acts inconsistently with prior representations or practices, the employer sets itself up for potential liability for breach of an implied contract right because the employer's actions may be at odds with the employee's reasonable expectation of privacy. An implied-in-fact contract cause of action is available to employees based on the terms of the contract set by the parties, and a court will ascertain those terms by considering the circumstances of the workplace and whether the employee has a reasonable expectation of privacy.

VI. CONCLUSION

Regardless of any statutory, constitutional, or tort protection available to an employee, an implied-in-fact contract cause of action may be available when the employee has a reasonable expectation of privacy based upon the circumstances of the workplace. Because the claim is fact-dependant, an implied-in-fact contract theory offers an employee more flexible protection than other causes of action. In light of the trend toward greater government regulation over the employment relationship, it is probable that further federal and state legislation will be passed in an effort to provide employees with heightened privacy protection. Inevitably, there will be gaps in protection afforded by these statutes. Like the off-duty conduct statutes, new legislation may only protect employees from termination.¹⁹³ Where a statutory scheme does not adequately protect an employee's reasonable expectation of privacy, the implied-in-fact contract argument is available.

Some jurisdictions may methodically require that the facts meet the

192. See *supra* Part IV (discussing how Quon's expectation of privacy was created by his supervisor's repeated deviations from the employer's actual policies).

193. E.g., COLO. REV. STAT. § 24-34-402.5(1)(a) (2010) (applying only to wrongful terminations).

elements of contract formation including an offer, an acceptance, and consideration. Even in these jurisdictions, the employee's reasonable expectation of privacy will be essential in determining whether the parties reached an enforceable agreement regarding employee privacy. The reasonableness of an employee's expectation of privacy is determined by the circumstances and the realities of the workplace. In *Quon*, the Supreme Court opined as to circumstances creating reasonable privacy expectations.¹⁹⁴ The Court's dicta may prove persuasive to future implied-in-fact contract causes of action. In the evolving legal climate with the trend toward increasing employee protection and recognizing greater privacy protection for all citizens, some courts will likely be more accepting of implied-in-fact contracts for employee privacy. When an employer fails to manage employee privacy expectations, the implied-in-fact contract may be the only cause of action available to protect an employee's reasonable expectation of privacy.

194. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (noting that a court must decide if oral assurances contrary to an established employer policy do, in fact, override the established policy).