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## California Supreme Court Shuts the Dore on Ambiguity In "At-Will" Employment Agreements—Less Might Be More

By Gregory M. Bergman

Imagine that you're a new director of human resources. After dusting off the bookshelves and figuring out which coffee machine yields the strongest java, you decide to fill your first vacancy. While finding the best candidate takes time and effort, it's worth it. Your boss wants the most talented, eager, self-starting people out there. And, voila! You find that ideal person!

But when you read your predecessor's standard boilerplate acceptance letter, it's just a litany of legal jargon about "at-will" employment. When it comes to parsing out the meaning of "at-will" in California, is more explication really more? Or would less be more?

On August 3, 2006, the California Supreme Court decided what promises to be a watershed case about the interpreta-

tion of "at-will" employment agreements. The case, *Dore v. Arnold Worldwide*, will almost certainly change how employment agreements are written in California. Perhaps most importantly, the decision allows employers to treat new employees as new opportunities, instead of potential liabilities. As with all legal precedent, this case begins with a story.

In early 1999, while working for an ad agency in Colorado, Brook Dore decided to relocate to Los Angeles. Dore approached Arnold Worldwide ("AWI") about a management supervisor position in AWI's Los Angeles office, and subsequently interviewed for the position. In April of the same year, he received a formal telephone offer from an AWI senior executive. Dore requested and received a

letter agreement from AWI outlining the specifics of his new position, including his salary, benefits, and other miscellaneous occupational details. The relevant portions of this letter, including AWI's at-will policy, state:

"Dear Brook:

On behalf of [AWI], it is with great pleasure that I confirm our offer to join us as Management Supervisor in our Los Angeles office. The terms of this offer are as follows:

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You will have a 90-day assessment with your supervisor at which time you will receive initial performance feedback.

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continued on page 22

### — Inside the Review —

- 1 California Supreme Court Shuts the *Dore* on Ambiguity in "At-Will" Employment Agreements—Less Might Be More  
3 MCLE Self-Study: "When Johnny (and Jenny) Come Marching Home Again, Hurrah! Hurrah!...They'll be Protected by USERRA, Hurrah! Hurrah!" | 4 Department of Labor Seeks Public Comment on Family Medical Leave Regulations in Connection With Possible Rule Revision | 5 Don't Fall Into An Employment Tax Liability Trap: A Survey of California Law | 6 Sometimes, More is Just More—Make Your Next Labor Arbitration More Efficient With These Insider Insights | 7 New Year, New Laws: Changes to the California Employment Landscape for 2007 | 8 Employment Law Case Notes | 10 NLRB Update  
12 Public Sector Case Notes | 14 Cases Pending Before the California Supreme Court | 39 Message from the Chair

*Brook, please know that as with all of our company employees, your employment with [AWI] is at-will. This simply means that [AWI] has the right to terminate your employment at any time just as you have the right to terminate your employment with [AWI] at any time.*

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Please sign this letter signifying your acceptance of these employment terms and return this to me at your earliest convenience.”

Dore signed this letter agreement and headed to Los Angeles.

In late 2000, Dore received a substandard performance evaluation. Eight months later, he was terminated by AWI. Shortly thereafter, Dore brought suit against his former employer for, among other things, breach of contract and fraud in connection with his termination.

For the literalists out there, the factual basis of Dore's complaint might come as a surprise. The crux of Dore's argument revolved around his interpretation of “at-will” in the letter agreement. To Dore, the inclusion of “at any time” as a modifier of “at-will” translated into “at any time, for cause.” How so? Dore alleged the “at-will” phrase was ambiguous.

He claimed that certain statements made and facts gathered during the pre-hiring process at AWI rose to an “implied-in-fact” agreement that he could only be fired for cause. The communications he cited giving him this impression would give you, revolving in your human resources chair, a sudden case of acid reflux. For instance, Dore was offered a “welcome to the family” greeting from AWI's senior vice president. In addition, AWI had recently landed a new account and mentioned they needed someone to handle it on a long-term basis.

While interviewing, AWI employees shared with Dore that they'd been successfully employed by AWI for years.

Finally, the two people that had previously filled Dore's new role had been terminated for cause. In addition to these comments was the 90-day assessment mentioned in the letter agreement. To Dore, such phraseology worked against a literal interpretation of “at any time” because he'd need to be in the position for at least 90 days before these provisions could take effect.

Despite Dore's interpretations, these are sentiments and procedures hiring executives often utter and follow with virtually every new hire. A judgment in Dore's favor would have manifest implications on labor law in California. But on a more personal level, AWI felt that Dore was trying to turn what had once been their good faith overture for a promising start into grounds for a potential suit by inventing subjective interpretations long after the fact.

To make matters worse, AWI could not imagine how anyone could misconstrue the “at-will” provision as anything else. AWI used no language at any time limiting termination to circumstances involving good cause, nor did any AWI employee intimate as much. In fact, Dore never alleged any such representations were made. And finally even after reading the letter agreement, Dore did not discuss any concerns about the language with anyone at AWI. So what exactly was there to be interpreted?

Labor Code § 2922<sup>1</sup> codifies the presumption of at-will employment in California, and is rebuttable only by an express or implied agreement to the contrary. When litigation reached the trial court, AWI was awarded summary judgment because Dore failed to prove the existence of either an express or implied-in-fact agreement that his employment was terminable only for cause. The trial court looked at the letter agreement, noted that AWI made no other promises to Dore, and went with a straightforward, literal interpretation of AWI's unambiguous language. “At-will” shadowed the Labor Code language, and thus the presumption stuck; AWI was within its rights to terminate Dore at any time, with or without cause.

On appeal, however, the court of appeal reversed, sharing Dore's interpretation of the “at any time” modifier in the letter agreement. In the court's reasoning, AWI defined “at-will” in a manner that

referred expressly only to the duration of the contract. By not explicitly stating whether cause was required, the court ruled that AWI's agreement was ambiguous and as such looked to extrinsic evidence, including Dore's pre-hiring interactions with AWI, to determine that triable issues of fact did indeed exist and a trial on the merits was warranted. Collectively, employers state-wide felt the ground shake. Did this decision mean they had to jettison “welcome to the family” policies for fear of breeding litigious new-hires?

Enter Associate Justice Kathryn Mickle Werdegar and the righting of the employer ship. The Supreme Court first clarified that “a clear and unambiguous at-will provision in a written employment agreement cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination.”<sup>2</sup>

However, the Supreme Court noted that the courts of appeal in California were in conflict over whether a provision like the one in AWI's letter agreement, using the modifier “at any time,” was, without more, susceptible to an interpretation allowing for the existence of an implied-in-fact agreement that termination will occur only for cause.<sup>3</sup> After reviewing, but declining to analogize to the four relevant court of appeal cases in this area,<sup>4</sup> Justice Werdegar succinctly and summarily held that “the verbal formulation ‘at any time’ is [not] per se ambiguous merely because it does not expressly speak to whether cause is required.”<sup>5</sup> As she wrote, “[a]s a matter of simple logic such a formulation ordinarily entails the notion of ‘with or without cause.’”<sup>6</sup>

The Supreme Court did not stop here, however. Justice Werdegar also considered the fact that even if the phrase “at any time” in the letter agreement was not itself ambiguous, that it would still be possible that the letter, “when considered as a whole,” might contain an ambiguity on the topic when applied to material facts.<sup>7</sup> The Supreme Court recognized that a latent ambiguity might be exposed by extrinsic evidence that could reveal more than one possible meaning to which the language of the contract was reasonably susceptible.<sup>10</sup>

The Court stated, regarding the test of admissibility of extrinsic evidence to explain the meaning of a written instru-

ment, that: "[It] is not whether it appears to the court plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."<sup>11</sup>

Applying these legal principles to the facts at hand, the Supreme Court first, in considering the language of the letter agreement itself, held that "the language of the parties' written agreement was unambiguous" and that the 90-day assessment and annual review provisions in the letter agreement "neither expressly nor impliedly conferred on Dore the right to be terminated only for cause."<sup>12</sup>

Justice Werdegar opined that the "at any time" modifier in the letter did not introduce ambiguity such that Dore was justified in believing his employment could be terminated only for cause. The court based this finding on the fact that Labor Code section 2922 used similar language in that its implications applied to employment "having no specified term."<sup>13</sup>

Finally, in rejecting any ambiguity on the face of the letter agreement, the Supreme Court plainly observed that:

For the parties to specify—indeed to emphasize—that Dore's employment was at will (explaining that it could be terminated at any time) would make no sense if their true meaning was that his employment could be terminated only for cause. Thus even though AWI's letter defined "at will" as meaning "at any time," without specifying it also meant without cause or for any or no reason, the letter's meaning was clear.<sup>14</sup>

The Supreme Court next considered whether a latent ambiguity existed wherein extrinsic evidence might change the meaning of the otherwise unambiguous letter. The Court accepted as true the fact that Dore had been told AWI had a family atmosphere, that AWI wanted to build a relationship with a new client, that certain employees had been employed at AWI for years, and so forth. However, Justice Werdegar summarily rejected the notion that these statements and sentiments supported an inference that Dore reasonably understood AWI's letter as a promise not to terminate him without cause.<sup>15</sup> In the words of the Court: "[w]hen a dispute arises over the mean-

ing of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over."<sup>16</sup>

Finally, as to Dore's fraud claim, the Supreme Court quickly disposed of it based on Dore's inability to prove up the reliance element. The Court noted that AWI did not promise Dore, either orally or in writing, that he would be employed long term or that he would be terminated only for cause. For Justice Werdegar, the point was that Dore admitted he signed the letter agreement, which unambiguously and expressly stated that his employment would be "at will," such an action "defeats any contention that [Dore] reasonably understood AWI to have promised him long-term employment," and thus any notion of reliance was destroyed.<sup>17</sup>

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*Dore ensured that welcoming a new employee or allowing other current employees to describe their work experiences with a new hire remains a process that is encouraged.*

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Because no triable issues of fact remained, the Supreme Court reversed the Court of Appeals and reinstated summary judgment in favor of AWI. Collectively, employers state-wide breathed a sigh of relief. Had the Supreme Court affirmed, it would have rendered any employee's never-communicated subjective belief a triable issue. By deciding the matter as it did, the Supreme Court resolved a conflict in the Courts of Appeal regarding whether a provision in an employment contract providing for termination "at any time" is, without more, reasonably susceptible to an interpretation allowing for the existence of an implied-in-fact agreement that termination will occur only for cause. The

Supreme Court, citing the court of appeal decision in *Bionghi v. Metropolitan Water District of Southern California* with approval, said the phrase "at any time" is not susceptible to such an interpretation.<sup>18</sup>

Perhaps most critical to human resource directors, *Dore* ensured that welcoming a new employee or allowing other current employees to describe their work experiences with a new hire remains a process that is encouraged. *Dore* effectively recognized that public policy is fostered if employers remain free to create a positive work environment, to praise their employees, or to engage in pleasantries and courtesies without infringing upon their legal right to terminate employees at will.

Despite the resolution of the case in AWI's favor, employers should take a number of lessons from this litigation, which they should consider when drafting new-hire agreement letters. For instance, the inclusion of a 90-day assessment provision in the letter agreement could be construed as being in conflict with an "at any time" modifier of "at will." When drafting a contract, it's always a good idea to be wary of provisions that are potentially inconsistent with each other. If necessary, the purpose of each provision should be explained to eliminate any doubt over each provision's purpose and to eliminate a party's ability to later argue a contrary interpretation. If the employer uses technical terms in any operative language, where possible, this verbiage should track the technical definition established by law.

For instance, "at will" provisions should closely track the language of Labor Code section 2922. Otherwise, any deviation could open the door to a dispute about consistency and interpretation.

So as you sip from your mug, consider that, at least in regard to "at will" provisions in letter agreements, sometimes, refraining from elaborating on the meaning of a legal term of art is the safer option. AWI, in an attempt to be clear and open with its employees included language that, at least according to Dore and the appeals court, actually changed the meaning and scope of what might otherwise be a legally unambiguous expression. To avoid spending an enormous amount of time and effort on a dispute similar to the *Dore* case, this area

*continued on page 38*

of employment law might safely be the one that actually does prefer less to more—proactive language selection versus reactive litigation. So take that sip, and find a bottle of white out. Brevity is back in style. ☞

## ENDNOTES

1. 39 Cal.4th 384 (2006).
2. Emphasis added.
3. California Labor Code § 2922 reads, in full: “[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.”
4. *Dore*, 39 Cal.4th at 389.
5. *Id.*
6. Cases where existence of an implied-in-fact agreement were found and subsequently disapproved by *Dore* include *Seubert v. McKesson Corp.*, 223 Cal.App.3d 1514 (1990); *Wallis v. Farmers Group*, 220 Cal.App.3d 718 (1990); *Bert G. Gianelli Distributing Co. v. Beck & Co.*, 172 Cal.App.3d 1020 (1985). The single case which rejected an implied-in-fact agreement was *Bionghi v. Metropolitan Water Dist. Of So. California*, 70 Cal.App.4th 1358 (1999).
7. *Dore*, 39 Cal.4th at 391.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*, citing *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33 (1968).
12. *Id.* at 392.
13. *Id.*
14. *Id.*
15. *Id.* at 393.
16. *Id.*
17. *Id.* at 393–394.
18. *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358. The Supreme Court disapproved *Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514; *Wallis v. Farmers Group* (1990) 220 Cal.App.3d 718 and *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, to the extent those cases are inconsistent with the opinion in *Dore*.