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### Employers' Duties of Honesty and Accuracy

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# EMPLOYERS' DUTIES OF HONESTY AND ACCURACY

BY  
HELEN NORTON\*

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## I. INTRODUCTION

Employers speak to workers about a wide range of job-related topics that include the terms and conditions of employment, business projections, and applicable workplace legal protections. Employers' communications on these subjects can, and often do, valuably inform workers' decisions about jobs and other weighty issues. But employers' speech – in particular their lies and misrepresentations – about these matters can also inflict substantial harm by distorting workers' decisions of great life importance.<sup>1</sup> That employers enjoy advantages of information and power further enhances their ability to manipulate or coerce workers' choices through lies and misrepresentations. Efforts to articulate employers' legal duties of honesty and accuracy should thus be informed by a functional, rather than formalist, understanding of the information and power dynamics within this relationship.

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\* Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law. Thanks to Rachel Arnow-Richman, Roberto Corrada, Matt Finkin, Beto Juarez, Scott Moss, Nantiya Ruan, and participants at the Labor Law Group Conference on the Restatement of Employment Law for thoughtful comments, and to Benjamin Hand-Bender for excellent research assistance.

1. I have addressed these issues at length elsewhere. See Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

Chapter 6 of the *Restatement of Employment Law* explores whether and when employers' dishonest or inaccurate speech is, or should be, actionable. Sections 6.01 and 6.02 address the defamatory harms of employers' knowingly or recklessly false statements about employees to third parties, while sections 6.03 and 6.04 address employers' wrongful interference with workers' employment opportunities – which sometimes takes the form of lies and misrepresentations to third parties. Other causes of action, such as the covenant of good faith and fair dealing, may also impose duties of honesty or accuracy with respect to employers' speech to or about workers.<sup>2</sup>

This Essay focuses specifically on sections 6.05 and 6.06 of the *Restatement of Employment Law*, which address employers' duties of honesty and accuracy in their communications to workers themselves as articulated by the torts of fraudulent and negligent misrepresentation. The Essay starts by explaining how and why law imposes duties of honesty and accuracy on speakers (including but not limited to employers) who experience information or power advantages over their listeners. It then draws upon this background to evaluate the *Restatement's* attention to these information and power asymmetries in its discussion of employers' fraudulent and negligent misrepresentations to workers. It concludes that the *Restatement* and its commentary do not consistently attend to these dynamics – in particular, by failing to recognize the breadth of situations in which employers enjoy structurally unequal and thus special access to key information, and by discounting the ways in which these asymmetries can lead workers to rely to their detriment on employers' misrepresentations. Despite the *Restatement's* limitations in this regard, judges can and should keep these dynamics in mind when considering claims of fraudulent or negligent misrepresentation in the employment context – as should legislators and other policymakers considering workplace policy to inform and empower workers.<sup>3</sup>

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2. See James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 *COMP. LAB. L. & POL'Y J.* 773, 782-85, 795-98 (2011) (discussing cases alleging employers' lies and misrepresentations).

3. As I have explored elsewhere, the information and power asymmetries within the employment relationship justify certain affirmative disclosure requirements in addition to duties of honesty and accuracy. Such requirements, however, have generally been imposed by statute rather than through the common law. See Norton, *supra* note 1, at 32-33.

## II. KNOWLEDGEABLE AND POWERFUL SPEAKERS' DUTIES OF HONESTY AND ACCURACY

Law often, and appropriately, imposes duties of honesty and accuracy upon speakers in communicative relationships where listeners have less access to key information than speakers.<sup>4</sup> As just one illustration, law frequently addresses the informational disadvantage experienced by consumers as listeners in prohibiting misrepresentations by, and requiring certain disclosures of, commercial speakers.<sup>5</sup> Other examples include speech by professionals and other fiduciaries to their clients and beneficiaries who rely on them for important advice and guidance: law often prohibits these professionals' lies and misrepresentations and requires them to make truthful disclosures of their listeners' options and risks because their dishonesty or inaccuracy threaten especially grave harms.<sup>6</sup>

Relatedly, law often imposes duties of honesty and accuracy upon speakers in relationships in which listeners are dependent on or vulnerable to comparatively powerful speakers in various ways. These include relationships in which speakers have the ability to coerce or otherwise control their listeners. As an illustration, consider situations in which speakers hold their listeners "captive" in some respects, as the Court "permits the government to prohibit offensive speech when the 'captive' audience cannot avoid the objectionable speech."<sup>7</sup>

The workplace relationship similarly involves information imbalances that justify enforceable expectations of employers' honesty or accuracy in their speech to workers about jobs and related matters of great life importance. Indeed, the employment relationship is riddled with information differentials: employers know considerably more than workers about the terms and conditions of

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4. *See id.* at 52-60.

5. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (rejecting First Amendment challenge to governmental requirement that commercial speakers disclose certain factual information about their products and services); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-64 (1980) (stating that false commercial speech frustrates listeners' informational interests and thus receives no First Amendment protection from government regulation).

6. *See* PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 248-50 (2013).

7. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) ("[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological but the physical well-being of the patient held 'captive' by medical circumstance.").

employment, about economic projections and business prospects, and often (as repeat players with comparatively greater resources) about workplace legal protections. Employers thus enjoy what Kim Lane Scheppele calls “structurally unequal access to information,” which “occurs when one actor can obtain information more easily than another actor can – and can do so because she holds some special position that provides a shortcut, as it were, to find out the information.”<sup>8</sup>

Workers also experience economic and expressive inequalities that limit listeners’ traditional remedies of exit and counterspeech, as employers exert power over workers’ livelihoods and sometimes even over their physical liberty (e.g., by compelling workers’ attendance at “captive audience” meetings<sup>9</sup>). As Cynthia Estlund observes, “[P]articularly in the private sector, employers enjoy nearly untrammled power to censor and punish the speech of their employees, subject only to a variety of limited statutory and common law restrictions.”<sup>10</sup> Employers’ speech to workers thus differs from that in many other communicative relationships in its significant potential for manipulation and coercion.<sup>11</sup>

The Supreme Court recognized the ways in which employer speech can threaten harms of this sort in *National Labor Relations Board v. Gissel Packing Co., Inc.*, where it held that the National

8. KIM LANE SCHEPPELE, LEGAL SECRETS 120-21 (1988); *see also id.* (“The main systematic reason why people may not have equal probabilities [of learning certain information] is that they may be differently situated with respect to the social distribution of knowledge. They may have structurally unequal access to knowledge. . . . In addition, the two actors may not be equally capable of making the effort required to find the information. This unequal capacity can occur because one actor (1) does not even know that the knowledge exists to be sought out while the other does (the problem of deep secrets), (2) has fewer resources – and so cannot invest what it takes to acquire the information while the other can (the problem of economic inequality), or (3) has less intellectual ability or social experience to begin with and so is unequally matched with more savvy partners (the problem of unequal facility).”).

9. *See* Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17, 19-22 (2010), available at <<http://www.yalelawjournal.org/forum/addressing-political-captive-audience-workplace-meetings-in-the-post-citizens-united-environment>> (explaining how employers may compel worker attendance at such “captive audience” meetings through threats of job loss or disciplinary action).

10. Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689 (1997); *see also* Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1093 (2011) (discussing various “restrictions on employee discourse, particularly the restrictions on employees’ ability to access and discuss relevant information”).

11. The employment relationship thus involves both the moral and epistemic features that Seana Shiffrin identifies as triggering heightened expectations for comparatively knowledgeable or powerful speakers’ honesty and accuracy. *See* SEANA SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 132 (2014).

Labor Relations Act prohibited an employer's false threats that employees would lose their jobs if they voted to unionize.<sup>12</sup> The Court emphasized workers' economic dependence on their employers in explaining why the employer's speech constituted an actionable "threat of retaliation based on misrepresentation and coercion": "[A]ny balancing of [workplace] rights must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."<sup>13</sup> Moreover, as Kent Greenfield explains, the harms threatened by employer misrepresentations are unusually high: "[W]hen a company defrauds an investor about an investment, the damage is to savings. When a company defrauds a worker about her work, the damage is to subsistence."<sup>14</sup>

### III. THE *RESTATEMENT*'S APPROACH TO EMPLOYERS' HONESTY AND ACCURACY

The reality that employers enjoy significant informational and power advantages over their workers should inform any articulation of their legal duties of honesty and accuracy when speaking to workers. As discussed in more detail below, the *Restatement* and its commentary are inconsistently attentive to these functional realities by failing to recognize the breadth of situations in which employers enjoy structurally unequal and thus special knowledge of key information and by discounting the ways in which these asymmetries can lead workers to rely to their detriment on employers' misrepresentations.

#### A. Section 6.05 on Fraudulent Misrepresentations: Articulating Employers' Duty of Honesty

Section 6.05 provides for employer liability for certain knowingly

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12. 395 U.S. 575, 618-19 (1969). In certain contexts, an employer's promise of benefits can sometimes operate as coercively as its threats of reprisal. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.")

13. *Gissel*, 395 U.S. at 618.

14. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protections in the Labor Market*, 107 *YALE L.J.* 715, 760 (1997).

false statements (those of “fact, current intent, opinion, or law”) accompanied by a certain motivation (“intentionally inducing a current or prospective employee”) that is successful in achieving certain results (“to enter, maintain, or leave an employment relationship” or “to refrain from entering into or maintaining an employment relationship with another employer”).

Here section 6.05 draws from the *Restatement (Second) of Torts* in taking an appropriately broad view of the scope of employers’ misrepresentations that would breach this duty of honesty to include those of “fact, current intent, opinion, or law.”<sup>15</sup> More specifically:

**Knowingly False Statements of Fact:** Employer misrepresentations about a wide range of factual matters related to the terms and conditions of employment – such as pay, benefits, hours, hazards, job security and opportunities for advancement – can and do inflict substantial harm.<sup>16</sup> Indeed, employers’ lies and misrepresentations about the factual terms and conditions of employment can distort and sometimes even coerce workers’ important life decisions – for example, decisions about whether to take, decline, keep, or leave a job.<sup>17</sup>

**Knowingly False Statements of Current Intent:** As the commentary to the *Restatement (Second) of Torts* (from which section 6.05 often draws) observes, “[t]he state of a man’s mind is as much a fact as the state of his digestion.”<sup>18</sup> Examples of fraudulent misrepresentations of intent include an employer’s knowingly false claims to workers that it had no plans to move or shut down, or its false claims that it planned to expand a position’s job responsibilities

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15. See RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (“One who fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”).

16. See Greenfield, *supra* note 14, at 719-21 (“[T]here are abundant examples of companies that mislead their employees. These companies may cause their employees to believe, for instance, that their jobs are more secure than they in fact are, that their jobs will be better than they actually turn out to be, or that their health benefits are assured after retirement when in fact they can be revoked at the will of the company.”); Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L REV. 233, 234-38 (2005) (describing examples of workers’ detrimental “reliance on false statements or promises the employer made during pre-hiring negotiations”).

17. See RESTATEMENT OF EMP’T LAW § 6.05, illus. 1 (AM. LAW INST. 2015); see also Cruz v. Maypa, 773 F.3d 138, 141-43 (4th Cir. 2014) (describing an employer’s lies to her prospective employee about the job’s pay, hours, benefits, and other working conditions that induced the applicant to take a job to her great detriment).

18. RESTATEMENT (SECOND) OF TORTS § 530 cmt. a.



and pay.<sup>19</sup>

**Knowingly False Statements of Opinion:** As comment b to section 6.05 explains, “[a]n employer’s intentional misrepresentation of opinion about the future of its business may be intended to induce acceptance of employment,” observing that “[t]his is true particularly when the maker is understood to have special knowledge of facts unknown to the recipient.”<sup>20</sup> The commentary does not offer an illustration of an employer’s misrepresentation of opinion, but examples include knowingly false statements of opinion that the employer is complying with employment law protections, or opinions about the safety or other quality of working conditions.<sup>21</sup>

**Knowingly False Statements of Law:** Finally, employers’ lies or misrepresentations about workers’ legal rights can frustrate key workplace protections by skewing workers’ decisions about whether to engage in a wider range of protected activity – such as decisions about whether to unionize, report illegal workplace conditions, take family or medical leave, or advocate for different terms and conditions of employment.<sup>22</sup> Here too the commentary does not offer an illustration of an employer’s misrepresentation of law, but examples abound. Consider one recent instance, where an employer’s employee handbook denied the existence of federal and state laws that require overtime pay: “There is no overtime pay as there is no shortage for qualified labor. Any hours worked beyond 40 are paid straight-time and it is understood by the employee that the extra hours are a privilege.”<sup>23</sup> Other examples might include an employer’s knowingly false assertions to its workers that its compulsory noncompetition agreements complied with applicable law.<sup>24</sup>

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19. See RESTATEMENT OF EMP’T LAW § 6.05, illus. 2.

20. *Id.* at cmt. b.

21. For a related example, see *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327-28 (2015) (indicating that a CEO’s statement of belief that the company’s contracts complied with applicable law could be actionable under section 11 of the Securities Act either if the speaker did not actually hold that belief or if the statement conveyed untrue facts about the basis for the speaker’s belief).

22. See Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 455 (1995) (describing employers’ misrepresentations of law in union organizing campaigns).

23. *Reyes v. Snowcap Creamery, Inc.*, No. 11-cv-02755-JLK-KMT, 2014 WL 2459740, at \*6 n.3 (D. Colo. June 2, 2014). Note too that employers’ misrepresentations of law may sometimes constitute unfair labor practices in violation of the National Labor Relations Act (which would then, however, pre-empt statute tort claims). See Norton, *supra* note 1, at 40-42 (discussing cases in which employers’ misrepresentations of law have been found to violate the NLRA).

24. See Complaint at 12-13, *Illinois v. Jimmy John’s LLC*, No. 2016-CH-07746 (Ill. Cir. Ct. filed June 8, 2016), available at <<https://will.illinois.edu/nfs/JimmyJohnsComplaintFILED.pdf>>

The commentary to (but, surprisingly, not the text of)<sup>25</sup> section 6.05 requires an employee's objective as well as subjective reliance on an employer's misrepresentation before it becomes an actionable breach of the employer's duty of honesty. Although the commentary appropriately acknowledges that employers can and do have "special knowledge" that may induce workers to rely on their misrepresentations, it fails to recognize the breadth of situations in which workers may justifiably rely on employers' misrepresentations about other workers' earnings and related prospects:

If the misrepresentations did not in fact cause the employment decisions that allegedly harmed the employee, the employer is not liable under this Section. If the misrepresentations were too ambiguous for the employee's reliance to be justifiable, the employer is not liable under this Section, even if the employer intended to induce reliance. Employees generally cannot justifiably rely on an employer's general or vague statements predicting future business success or good employment relations.<sup>26</sup>

The illustrations to section 6.05 take a similarly myopic approach. For example, illustration 6 maintains that an employer is not liable for intentionally misrepresenting the incomes earned by other employees in hopes of motivating the plaintiff to sell more when the plaintiff continued to work for that employer for two years after discovering them to be misrepresentations. Illustration 7 maintains that an employer is not liable for intentionally misrepresenting his opinion about a broker's future sales and earnings prospects, characterizing the broker's reliance on such statements in accepting the position as unjustifiable. The reporters' notes describe these as "involv[ing] opinions that do not imply a basis in facts specially known by the one expressing the opinion" and thus upon which a worker would not reasonably rely. In so doing, however, the illustrations and notes fail to recognize that employers have structurally unequal access to – and thus "special knowledge" of

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(alleging that the employer fraudulently required its employees, as a condition of employment, to sign noncompetition agreements that were illegal and thus unenforceable under state law).

25. Without explanation, the text of section 6.05 fails to identify an express reliance element, unlike section 525 of the *Restatement (Second) of Torts* (from which it otherwise often draws heavily). See RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (including justifiable reliance as an element of the tort of fraudulent misrepresentation more broadly); see also RESTATEMENT OF EMP'T LAW § 6.06(a) (expressly including a reasonable reliance element in describing the tort of negligent misrepresentation in the employment context).

26. RESTATEMENT OF EMP'T LAW § 6.05 cmt. e; see also *id.* ("An employee, however, may justifiably rely on an employer's statement of an opinion the employer knew to be false when made, if the employee justifiably considered the opinion to be based on special information the employer – and not the employee – knows about the company.").

– information regarding the sales and earnings of their other employees as well as of the business's likely future prospects, and that workers may thus justifiably rely on employers' misrepresentations regarding such matters.

The *Restatement's* commentary also fails to recognize the functional realities of the employment relationship by maintaining the availability only of reliance – and not expectation – damages for fraudulent inducement of a worker's employment decisions. More specifically, the commentary to section 6.05 provides that

[a]n employer who is liable to an employee for an inducement through fraudulent misrepresentation may be liable for the pecuniary losses an employee incurs through reasonably relying on the misrepresentation, but not for losses resulting from the employer's failure to provide specific promised benefits or take other promised actions.<sup>27</sup>

Although the reporters' notes to section 6.05 acknowledge that the *Restatement (Second) of Torts* (from which the *Restatement of Employment Law* often draws) expressly provides for expectation damages for fraudulent misrepresentations in certain business transactions,<sup>28</sup> the notes reject without explanation the extension of that approach to employment law, stating conclusorily that such a remedy "has not been adopted in the employment context if the existence of a contractual bargain is at issue."

In contrast, a functional (rather than formalist) approach to employers' duty of honesty would support the possibility of expectation damages when an employer fraudulently induces a worker's decisions on matters of great life importance. Consider, for example, an employee who foregoes another attractive – but rare and time-limited – job opportunity in reliance on her employer's fraudulent misrepresentation that it planned to promote her. In cases like this where a comparatively knowledgeable and powerful speaker engages in intentional misrepresentation, justice and policy considerations can sometimes require the speaker to provide the listener the benefit of the bargain as a consequence of its deceit. Indeed, such an approach would be consistent with section 549(2) of the *Restatement (Second) of Torts*, as its commentary explains:

When the plaintiff has made a bargain with the defendant,

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27. *Id.* cmt. g.

28. RESTATEMENT (SECOND) OF TORTS § 549(2) ("The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.").

however, situations arise in which [reliance damages] do not afford compensation that is just and satisfactory. If the value of what the plaintiff has received from the defendant is fully equal to the price he has paid for it or other value he has parted with and he has suffered no consequential damages, he may be unable to recover at all under the rules stated in Subsection (1). He may nevertheless . . . have lost the opportunity of acquiring a substitute at the same price and because of his commitment made or expenses incurred or for a variety of other reasons he may find rescission of the transaction and recovery of the price paid an unsatisfactory and insufficient remedy.<sup>29</sup>

*B. Section 6.06 on Negligent Misrepresentations: Employers' Duty of Care and Accuracy*

While section 6.05 articulates an employer's duty not to engage in knowing misrepresentations to its workers – i.e., a duty of honesty – section 6.06 articulates a duty to take care to avoid certain inaccurate representations to its workers. More specifically, section 6.06(a) identifies employers' duty to exercise reasonable care not to provide false information to current or prospective employees on a topic about which the employer has "special knowledge" and upon which the employee may reasonably rely in deciding whether to enter into or maintain a relationship with that employer. Section 6.06(b) provides for liability when a breach of this duty intentionally induces an employee to enter into or maintain an employment relationship with an employer.

As an initial matter, section 6.06 inexplicably departs from 6.05 in providing for liability only with respect to misrepresentations that induce an employee to enter into or maintain an employment relationship, while failing to address those that induce employees to leave an employment relationship or those that affect a prospective employee's decision about whether to take or leave a relationship with another employer.<sup>30</sup> But negligent as well as fraudulent misrepresentations can cause substantial harm to workers by skewing such decisions.

Here too, the commentary to section 6.06 fails to recognize the breadth of situations in which employers enjoy structurally unequal

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29. RESTATEMENT OF EMP'T LAW § 6.05 cmt. g. Note that neither the *Restatement (Second) of Torts* nor section 6.06 of the *Restatement of Employment Law* provides for expectation damages as a remedy for *negligent* (as opposed to fraudulent) misrepresentations where the defendant's mental state is less culpable.

30. See *supra* note 15 and accompanying text (describing scope of section 6.05).

and thus special access to key information, and discounts the ways in which these asymmetries can lead workers to rely to their detriment on employers' misrepresentations. More specifically, the commentary explains that section 6.06 does not impose a duty of care on employers to be accurate on matters "about which [the employer] has no special knowledge" – i.e. "when information about the same topic is otherwise readily available to the employee" – but goes on to define special knowledge quite narrowly as

information about the state of the employer's business or the work opportunity for the current or prospective employee or . . . about who is authorized to offer, terminate or otherwise affect the employee's employment. Such special knowledge generally does not apply to representations about the business generally or about employment at other employers.<sup>31</sup>

Without explanation, the commentary further distinguishes negligent from fraudulent misrepresentations in maintaining that "negligent misrepresentation does not reach the misrepresentation of opinion or current intention, only the misrepresentation of information."<sup>32</sup> But again, a thoughtful conception of "special knowledge" would consider the breadth of situations in which employers enjoy structurally unequal and thus special access to key information. Contrast section 552 of the *Restatement (Second) of Torts* (from which section 6.06 draws in other respects), which takes an appropriately broad approach to the types of decisions that may be harmed by comparatively knowledgeable speakers' negligent misrepresentations.<sup>33</sup> More specifically, section 552 articulates a duty of care to be accurate upon a speaker who "in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions."<sup>34</sup> Attention to information asymmetries in the workplace relationship should similarly inform our understanding of when and how employers' misrepresentations – both negligent and fraudulent – of current intent, opinion, and law as well as fact can manipulate workers' choices about matters of great life importance.

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31. RESTATEMENT OF EMP'T LAW § 6.06 cmt. d.

32. *Id.* cmt. c; see also *id.* ("An employer, however, may be liable for negligent misrepresentation by stating an opinion that conveys false information. . . . An employer or its agent may also negligently misstate information about the opinion or current intent of another.").

33. RESTATEMENT (SECOND) OF TORTS § 552(1).

34. *Id.*

As another example of the *Restatement's* failure to attend to the functional realities of workplace communication, illustration 2 misguidedly focuses on the motivation underlying an employer's negligent misrepresentation – rather than the employer's privileged access to the relevant information – as key to liability.<sup>35</sup> More specifically, it claims a meaningful distinction between an employer's negligent misrepresentation about employees' future prospects with the firm that sought to boost their morale as opposed to one that sought to shape their life decisions.<sup>36</sup> Whether the two motivations can be so easily parsed is not at all clear, but in any event, in both cases the employer enjoys structurally unequal access to the relevant information, thus inviting justifiable employee reliance. For this reason, the employer should be understood as breaching its duty to take care to be accurate.

Illustration 3 similarly fails to recognize the dynamics of workplace communication as a functional matter, maintaining that an employer is not liable for negligent misrepresentation when it carelessly and inaccurately told an employee that her work “was good enough to warrant a contract for the following year” in response to the worker's query as to whether she should look for work elsewhere.<sup>37</sup> The commentary asserts that

[s]uch special knowledge generally does not apply to representations about the business generally or about employment at other employers. Individuals making such decisions as whether to enter or maintain an employment relationship generally do not reasonably rely on information from an interested party who lacks special knowledge.<sup>38</sup>

But an employer *does* have structurally unequal – i.e., special – knowledge of a wide range of matters relevant to the question whether a worker should seek other employment opportunities, and an employee's reliance on such statements in making life-shaping decisions is thus justifiable. To be sure, the law imposes no duty upon employers to answer employees' questions about their future prospects – but when employers choose to do so, they should take care to be accurate.

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35. RESTATEMENT OF EMP'T LAW § 6.06 cmt. b, illus. 2.

36. *Id.*

37. *Id.* cmt. c, illus. 3.

38. *Id.*

## V. CONCLUSION

Efforts to articulate employers' legal duties of honesty and accuracy should be informed by a functional understanding of the information and power dynamics within the employment relationship. The *Restatement's* discussion of fraudulent and negligent misrepresentation claims, however, missed a number of opportunities to emphasize and learn from the ways in which employers' informational and power advantages enable and exacerbate the harms threatened by their dishonest or inaccurate speech to workers. Despite the *Restatement's* limitations in this regard, judges can and should keep these dynamics in mind when considering claims of fraudulent or negligent misrepresentation in the employment context – as should legislators and other policymakers considering workplace policy to inform and empower workers.

