POLICIES, DISCLAIMERS, AND UNINTEGRATED CONTRACTS AFTER *MCALLEN HOSPITALS V. LOPEZ*

Richard R. Carlson[*]

I. INTRODUCTION

Contracting parties "integrate" a transaction by mutually adopting a written statement of terms,[1] but employers often do the opposite in making contracts with employees. Employers declare that documents they present to employees are not memoranda of "a contract" even when there is no other mutually adopted written statement of the contract.[2] Such a declaration is widely known as a "disclaimer" but could more appropriately be called an "anti-integration" declaration.[3] Anti-integration leaves parties without a mutually adopted record of terms and increases the risks of an argument about what one party promised, the details of a promise, or the exact words of a promise.[4] In contrast with integrated contracts, unintegrated contracts

* Professor of Law, South Texas College of Law Houston.

1. RESTATEMENT (SECOND) OF CONTS. §§ 209, 213–16 (AM. L. INST. 1981).
2. *See, e.g.*, Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam).
3. *See id.*
4. *See id.*

can be proven or disputed by any evidence admissible under the usual rules of evidence.[5]

The Texas Supreme Court dramatically changed these rules in *McAllen Hospitals v. Lopez*.[6] In *McAllen Hospitals*, the Texas Court gave unprecedented effect to an employer's disclaimer or anti-integration declaration.[7] In the Texas Court's view, one party's anti-integration declaration for a document makes that document inadmissible as evidence of unintegrated terms.[8] The Texas Court's interpretation of an anti-integration clause empowers employers, and other parties who control the documentation of unintegrated transactions, to make significant details of their promises unenforceable as a practical matter.[9]

Anti-integration was a peculiar, but usually harmless, contracting practice before *McAllen Hospitals*.[10] The worst possibility was that anti-integration was one party's strategy to make proof of that party's promises an expensive and impractical swearing-match for the other party.[11] In the employment context anti-integration is mainly an innocent artifact from a certain phase of employment law history, lingering as an overused habit.[12] Anti-integration's legitimate function in employment is to warn employees that some institutional memoranda are commands or "policies," not promises.[13] A policy that resembles a promise is a common problem for the resolution of contract disputes in employment.[14] For example, a command that supervisors must not discharge employees without "just cause" can resemble a promise to subordinate employees that the employer will not discharge them without just cause.[15] An anti-integration clause warns that the policy standing alone is the former, not the latter.[16]

An anti-integration clause can cause headaches for both parties when they dispute real, but unintegrated, promises.[17] Practical circumstances limit the severity of this problem, especially from the point of view of employers.[18] So employers likely see no need to quit the anti-integration habit or to use

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5. CONTS. § 209.
6. *See, e.g.*, McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389 (Tex. 2019).
7. *See id.* at 397.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* at 396–97.
13. *See* Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993).
14. *See id.*
15. *See id.*
16. *See supra* notes 13–15 and accompanying text (explaining that anti-integration clauses warn that the policy standing alone is, for example, a command that supervisors must not discharge employees without just cause).
17. *See infra* Part 2.B.4 and accompanying text (noting the difficulties courts have had with unintegrated contracts).
18. *See infra* pp. 17–23 (discussing the effect of the parol evidence rule and anti-integration in employment).

alternatives to distinguish policies from promises.[19] But *McAllen Hospitals* endorses a new function for an anti-integration clause, permitting an employer to declare its documents inadmissible as "evidence" of contract terms even when the parties indisputably have a contract but have not integrated their contract.[20] If widely adopted, this view of unilateral anti-integration declarations is so favorable to parties who control the documentation of transactions that anti-integration declarations will spread beyond employment to other settings, such as merchant-consumer transactions or transactions between merchants.[21]

This Article is a critique of *McAllen Hospitals* and a warning of the implications of that decision. Part II summarizes the unusual facts in *McAllen Hospitals* and the Court's unorthodox resolution of the case. Part III places *McAllen Hospitals* in its larger legal context, particularly in the context of the parol evidence rule and the practice of anti-integration in the employment setting. Part IV explores the potentially disruptive impact of *McAllen Hospitals* on future contract disputes—especially, but not only in employment—with adverse consequences for both declaring parties and recipient parties.

II. *MCALLEN HOSPITALS V. LOPEZ*

A. From the Trial Court to the Supreme Court of Texas

A summary of the facts and proceedings in *McAllen Hospitals* is especially important to appreciate that the Texas Court's new rule for contracts and employment law may have been inadvertent. There is no indication in the Court's opinion that it understood it was changing the law.[22] Nothing in the Court's opinion shows any anticipation or consideration of some very important implications of its holding.[23] Thus, it is entirely possible that the Court's opinion was a mistake resulting from the Court's effort to correct an unjust verdict by invoking a rule of Texas appellate procedure known as "legal sufficiency" review.

McAllen Hospitals was a lawsuit by four nurses against their employer-hospital, alleging that the hospital made implied promises to convert their hourly-rated pay to fixed salaries, and that the hospital breached its promises by continuing to pay an hourly rate, resulting in significantly less pay than what the nurses expected.[24] "Salary" is an ambiguous term often but

19. *See infra* notes 219–20 and accompanying text (noting that an employer may believe that they have more to lose by integrating their employment contracts).

20. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 391 (Tex. 2019).

21. *See infra* notes 221–23 and accompanying text (explaining why unilateral anti-integration contracts are effective).

22. *McAllen Hosps.*, 576 S.W.3d at 392–97.

23. *Id.*

24. *Id.* at 391–92.

not always understood to be a fixed rate of pay that does not fluctuate by hours of actual work.[25] The fact that salary is ambiguous might have been the real cause of the dispute and might have called for application of the law of interpretation, but neither side expressly invoked the law of interpretation as a framework for resolving the dispute.[26] Under federal wage and hour law, a salary is a weekly rate that does not change regardless of whether an employee worked less than, greater than, or exactly equal to forty hours in a week.[27] In *McAllen Hospitals*, it appears that there were many weeks when the nurses worked fewer than forty hours.[28] The hospital reduced the compensation it paid for those short weeks as if the nurses were hourly-rated rather than salaried.[29] The nurses alleged that the hospital breached its salary promises by reducing pay for short weeks.[30] The jury agreed and awarded nearly $400,000 for nearly four years of alleged underpayments, approximately $25,000 per nurse per year.[31]

The hospital appealed on two grounds.[32] First, it argued that the evidence of implied promises to pay salaries was legally insufficient.[33] In other words, there was "no evidence" of such promises.[34] Given the testimonial and documentary evidence of the promises,[35] a no evidence challenge must have seemed like a stretch at this stage of the proceeding.[36] However, for reasons explained below, a no evidence challenge was the only way for the hospital to preserve the possibility of a further appeal to the Texas Supreme Court.[37] The hospital's second and more likely ground for appeal was that the evidence of an implied promise was factually insufficient.[38] In other words, there was some evidence of an implied promise to pay a salary, but the jury's verdict was "so against the great weight of the evidence" (both for and against the alleged promises) that the verdict was "clearly wrong and unjust."[39]

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25. *See* Davis v. Hubbard, 44 Ohio C.C. 684 (1899); Russell v. Luzerne Cnty., 3 Pa. D. 493 (Ct. of Common Pleas, Pa. 1894); Lemoine v. City of St. Louis, 25 S.W. 537 (Mo. 1894). *See also infra* note 62 (offering more examples of the definition of salary, and its relevance to contract disputes).

26. *See McAllen Hosps.*, 576 S.W.3d at 392–97.

27. *See infra* note 63 and accompanying text (noting that the nurses only used an implied contract theory).

28. *McAllen Hosps.*, 576 S.W.3d at 391.

29. *Id.*

30. *Id.* at 391–92.

31. *Id*. at 391.

32. *Id.*

33. *Id.* at 390.

34. McAllen Hosps., L.P. v. Lopez, 567 S.W.3d 748, 750 (Tex. App.—Corpus Christi-Edinburgh 2017), *rev'd*, 576 S.W.3d 389 (Tex. 2019).

35. *See infra* pp. 7–10 and accompanying text (discussing the Texas Supreme Court's evaluation of the evidence in the *McAllen Hospitals* case).

36. *See infra* pp. 7–10 and accompanying text (same).

37. *McAllen Hosps.*, 576 S.W.3d at 395.

38. *McAllen Hosps.*, 567 S.W.3d at 750.

39. *Id.*

The court of appeals rejected both legal and factual sufficiency challenges.[40] There was some evidence of the alleged promises to pay salaries.[41] While the nurses' recollections of oral promises were vague,[42] the hospital's own documents corroborated its decision to classify the nurses as salaried employees, and those documents included notes showing salary rates for at least part of the backpay time in question.[43] The evidence was factually sufficient even in the face of the hospital's rebuttal evidence, which consisted mainly of the hospital's practice of calculating pay based on hourly rates.[44] Evidently, the hospital had not disclosed its method of calculation in its pay advices to employees.[45] Texas law does not require an employer to disclose pay rates or other methods of calculating.[46] In the court of appeal's view, the hospital's practice over three years of paying compensation based on hourly rates, standing alone, did not necessarily rebut the evidence that the hospital promised the nurses it would pay salaries.[47] The hospital's pay practices were nothing more than a breach of its promises.[48]

The court of appeal's judgment was the end of the road with respect to the hospital's factual sufficiency challenge.[49] The Texas Supreme Court lacks constitutional authority to review a court of appeals' factual sufficiency decision.[50] Under the Texas Constitution, a decision of a court of appeals "shall be conclusive on all questions of fact brought before them on appeal."[51] This constitutional barrier against the Texas Supreme Court's factual sufficiency review left one narrow road for the hospital's further appeal: legal sufficiency.[52] In other words, the hospital could not prevail on appeal before the Texas Supreme Court unless it could show that the jury's verdict was based on no evidence.[53]

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40. *Id.* at 751.

41. *McAllen Hosps.*, 576 S.W.3d at 394. The nurses testified that the hospital had an "oral discussion[]" with them about the conversion of their compensation to a salary basis, and they recalled these discussions as including the hospital's "promise" to pay salaries. Respondents' Brief on the Merits at 7–8, 14, *McAllen Hosps*., 576 S.W.3d at 391 (No. 17-0733), 2018 WL 1858738.

42. *See infra* pp. 7–9 (noting the Texas Supreme Court's analysis in the *McAllen Hospitals* case).

43. *McAllen Hosps.*, 567 S.W.3d at 751.

44. *Id.*

45. *See infra* pp. 6–9 (noting key important facts in the *McAllen Hospitals* case).

46. *See supra* note 40 and accompanying text (noting the court of appeals rejected both the legal and sufficiency challenges).

47. *See McAllen Hosps.*, 567 S.W.3d at 751.

48. *Id.*

49. TEX. CONST. art. V, § 6.

50. *Id.*

51. *Id.*; *see generally* W.W. Hall & R.G. Anderson, *Standards of Review in Texas*, 50 ST. MARY'S L.J. 1099, 1136–42 (2019); Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 368 (1960).

52. *See* Calvert, *supra* note 51, at 372; *see generally* Hall & Anderson, *supra* note 51.

53. *See* Calvert, *supra* note 51, at 362.

B. The Supreme Court's Legal Sufficiency Review

1. The Limited Basis for the Appeal

The hospital had some reason to hope that the Texas Supreme Court would reverse the jury and lower courts if only there was a constitutional way to do so.[54] After all, the nurses alleged that the hospital promised fixed salaries, but the nurses' first objection or complaint after nearly four years of alleged underpayments, averaging $25,000 per nurse per year, was to file a lawsuit.[55] The hospital appealed on the ground that there was legally insufficient evidence that the hospital promised to pay the nurses fixed salaries rather than hourly wages.[56]

To prevail on grounds of legal insufficiency, the hospital was required to demonstrate that there was no evidence to support the alleged promises of fixed salaries.[57] The legal sufficiency test is not as absolute as it sounds. Evidence supporting a verdict is not supportive simply because an advocate for the verdict declares certain evidence to be supportive.[58] Evidence is supportive only if reasonable jurors could find it to be supportive.[59] There are a number of methods by which a reviewing court can reach a conclusion that no reasonable juror could treat certain evidence as supportive.[60] One of these methods was particularly important in this case: the evidence in question was "incompetent" or inadmissible and barred from a jury's or court's consideration.[61] In finding that a jury or judge was barred from considering the principle evidence for the nurses' claims, the hospital persuaded the Texas Supreme Court to adopt an unprecedented rule of contracts law.[62]

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54. *See supra* note 51 and accompanying text (discussing the limited review of legal insufficiency and its procedural implications); *see also* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389 (Tex. 2019).

55. *McAllen Hosps.*, 576 S.W.3d at 393.

56. McAllen Hosps., L.P. v. Lopez, 567 S.W.3d 748, 752 (Tex. App—Corpus Christi-Edinburg 2017), *rev'd*, 576 S.W.3d 389 (Tex. 2019). The hospital also appealed on the ground that evidence of its classification of the nurses as exempt salaried professional employees was irrelevant to whether it promised to pay salaries. *Id.* at 752. This ground of appeal was rejected by the court of appeals, and the Texas Supreme Court disregarded it. *Id.* at 752; *McAllen Hosps.*, 576 S.W.3d at 397. A relevance objection to evidence of the hospital's decision to classify the nurses as exempt salaried workers appears to have been without merit and was properly disregarded by the courts. *See supra* note 50–52 and accompanying text (explaining the Texas Supreme Court's limitation on factual sufficiency review).

57. City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005) (quoting Calvert, *supra* note 51, at 362–63).

58. *Id.* at 827.

59. *Id.*

60. *Id.* at 813–14. Other than showing a complete absence of evidence, other ways to establish legal insufficiency are to show that (1) the verdict was supported by nothing more than a "scintilla" (circumstantial evidence so meager as to leave jurors to guess about some essential but missing fact not included in the evidence); or (2) there was evidence to support the claim, but there was also evidence that conclusively established the opposite of some fact essential to the claim. *Id.* at 813–15.

61. *McAllen Hosps*., 576 S.W.3d at 397.

62. *Id.*

2. The Texas Supreme Court's Summary and Analysis of the Evidence

The nurses had advanced only an implied contract theory, tacitly conceding that the hospital officials' oral statements were not sufficiently clear to be express promises of the hospital.[63] Moreover, there were no mutually agreed memoranda of the rules of pay or integrations of the terms of their contracts.[64] All the evidence presented by either side involved "circumstances,"[65] which is typical when parties have failed to integrate the terms in dispute.

The Court's summary of the circumstances began with evidence *against* the verdict for the nurses, an odd beginning because the issue on appeal was whether there was any evidence supporting the verdict.[66] In a legal sufficiency review, a court normally confines its review to supporting evidence and ignores contrary evidence.[67] Starting with evidence against the verdict was a spoiler. The Court would reverse the verdict.[68]

The Court began with the nurses' initial hiring for hourly rates and the hospital's consistent practice of paying hourly rates.[69] Every one of the nurses began employment at agreed hourly rates on initial hiring dates ranging from 1975 to 2000.[70] The hospital continued to compensate the nurses based on hourly rates even after the alleged promises to pay salaries.[71] This evidence, the Court believed, "show[ed] that the Hospital intended to pay the Nurses based on the hours they worked," and "there are no indications from the course of dealing between the parties that the Hospital ever intended to do otherwise."[72]

The hospital's practice might have proven the hospital's intent, but the hospital's practice was only half the evidence required to prove a mutual "course of dealing."[73] The missing half was the *nurses'* knowledge and conduct assenting to the hospital's practice of paying less than the amount

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63. Respondents' Brief, *supra* note 41, at 7–8; Brief for Appellee at 2, McAllen Hosps., L.P. v. Lopez, 567 S.W.3d 748 (Tex. App.—Corpus Christi-Edinburg 2017), *rev'd* 576 S.W.3d 389 (Tex. 2019) (No. 13-16-00138-CV), 2016 WL 4705001.

64. Brief for Appellee, *supra* note 63, at 14.

65. *McAllen Hosps.*, 576 S.W.3d at 391.

66. *Id.* at 392–93.

67. *See id.* Ordinarily legal sufficiency review focuses on evidence supporting a factfinder's conclusions. *See* City of Keller v. Wilson, 168 S.W.3d 802, 809 (Tex. 2005). There are exceptions to this rule. *See id.* Sometimes the meaning or effect of supporting evidence depends on opposing evidence. *Id.* at 810–17. For example, it is not unusual for the Court to examine "all" the evidence en route to holding that there is no competent or admissible evidence for at least one essential fact for a factfinder's conclusions. *Id.* at 827–28. In this instance, the Court did not offer a reason for its initial focus on adverse evidence. *See id.* Probably, beginning with adverse evidence was a rhetorical strategy.

68. *McAllen Hosps.*, 576 S.W.3d at 391.

69. *Id.* at 393.

70. *Id.*

71. *Id.* at 391, 393.

72. *Id.* at 393.

73. *Id.*

allegedly promised.[74] As the same Court had previously recognized in many cases before *McAllen Hospitals*, conduct of one party does not establish a course of dealing without evidence of mutual knowledge and assent, which might include one party's manner of performance knowingly accepted or tacitly approved by the other.[75]

The Court did not describe what evidence showed the nurses' knowledge of the hospital's method of calculating pay.[76] The Court did not even acknowledge the need for such evidence to establish a course of dealing.[77] Perhaps the Court assumed the answer was plain to see: the difference between the amounts the hospital allegedly promised and the amounts the hospital actually paid averaged $25,000 per nurse per year,[78] a seemingly obvious shortfall. But, the issue as to when the nurses learned of the alleged underpayments was contested even in oral argument before the Texas Supreme Court.[79] The nurses protested that they did not know the hospital was calculating pay based on hourly rates in breach of its alleged promises.[80] Their explanation was not impossible to believe.[81] The hospital

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74. Patrick v. Smith, 90 Tex. 267, 271 (1896); Furmanite Worldwide, Inc. v. NextCorp, Ltd., 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.); RESTATEMENT (SECOND) OF CONTS. § 202(4) (AM. L. INST. 1981) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.").

75. *See Patrick*, 90 Tex. at 271; *Furmanite Worldwide*, 339 S.W.3d at 336; *see also* Tubelite, Div. of Indal, Inc. v. Risica & Sons, Inc., 819 S.W.2d 801, 804 (Tex. 1991) (describing that course of dealing requires circumstances showing the "common understanding" of the parties); Hous. Med. Testing Servs., Inc. v. Mintzer, 417 S.W.3d 691, 698 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (detailing how implied contract is based on circumstances showing a mutual intent); Victoria Air Conditioning, Inc. v. Sw. Tex. Mech. Insulation Co., 850 S.W.2d 720, 724–25 (Tex. App.—Corpus Christi-Edinburg 1993) (explaining that course of dealing arises from one party's knowledge of the other party's conduct); CONTS. § 19.

The single case cited by the court in *McAllen Hospital* in support of its application of course of dealing appears to hold that one party's words or conduct cannot create a course of dealing without the knowledge of the second party. Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co., 480 S.W.2d 607, 609 (Tex. 1972), cited in *McAllen Hosps.*, 576 S.W.3d at 392.

76. *McAllen Hosps.*, 576 S.W.3d at 392–93.

77. *Id.* at 397.

78. *Id.* at 391.

79. *See* Oral Argument, McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389 (Tex. 2019) (No.17-0733), 2019 WL 1227945.

80. Respondents' Brief, *supra* note 41, at 45 n.21; Oral Argument, *supra* note 79. The nurses "testified they trusted the Hospital and they didn't know the Hospital wasn't paying them what they were entitled to." Oral Argument, *supra* note 79. Justice Green asked whether the nurses had ever checked to see the amounts of their pay, and counsel for the nurses replied:

> Based on the record, no, your Honor. They said that they just trust it and we have to remember that these nurses, this wasn't their only source of employment, they, they were employed by other employers, so they had numerous salaries going into their direct deposit, they said they trusted the Hospital and they never really checked to, to see [inaudible].

Id.

81. Oral Argument, *supra* note 79. The nurses received their pay by direct deposit into their bank accounts rather than by receiving pay envelopes or cash in hand. *See id.*; Petitioners' Opening Brief at 27,

evidently had not disclosed the methods of its calculation of net earned compensation.[82] Moreover, if there was evidence of the nurses' knowledge, the hospital might have asserted a defense of estoppel,[83] but an estoppel argument was nowhere to be seen in the appellate proceedings.[84] The jury apparently credited the nurses' version of events and the trial court and court of appeals affirmed the jury's findings.[85] If the court of appeals upheld this credibility determination, the Court lacked constitutional authority to overrule it unless there were grounds why no reasonable juror could credit the nurses' testimony.[86] The Court offered no grounds.[87] It simply ignored this defect in the hospital's course of dealing theory.[88]

The hospital's practice of calculating pay based on hourly rates could not, standing alone, avoid the real issue on appeal: was there any evidence to support the jury's finding that the hospital's words or conduct toward the nurses implied promises to pay salaries?[89] If so, the jury might reasonably have regarded the hospital's "practice" as the breach of its promises rather than the defining circumstance of its promises.[90] The evidence in support of the jury's verdict was as follows.[91]

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n.18, *McAllen Hosps*., 576 S.W.3d 389 (No. 17-0733), 2018 WL 1229973. The hospital did not send a notice or pay statement directly to the nurses. *Id*. Instead, it posted whatever information it allowed on a website for the nurses if they sought such information. *Id*.; Appellants' Amended Brief at 7, McAllen Hosps., L.P. v. Lopez, 567 S.W.3d 748 (Tex. App.—Corpus Christi-Edinburg 2017), *rev'd*, 576 S.W.3d 389 (Tex. 2019) (No. 13-16-00138-CV), 2016 WL 3197509. It is not clear whether either party offered an example of the hospital's pay notices or a description of the information the hospital provided. Since the hospital asserted its pay practices as a binding course of dealing, it would have been incumbent on the hospital to produce proof of sufficient notice.

82. *See McAllen Hosps.*, 576 S.W.3d at 389–97. Unlike many other states, Texas does not require an employer to provide an employee with a pay statement at the time of payment, leaving it to the employer to decide whether to inform its employees when payment issues or whether to provide any employees with any information at all. *Texas Guidebook for Employers,* TEXAS WORKFORCE COMM'N 147, https://www.twc.state.tx.us/news/efte/efte.pdf (last visited June 5, 2021). The facts in *McAllen Hospitals* illustrate a very real problem for the integrity of employment compensation systems in a state like Texas. Many employees receive payment by direct deposit and assume their pay arrives in their accounts in the correct amount. Even salaried employees do not expect the fixed gross amounts quoted in their contracts because an employer must withhold money for income taxes, Social Security taxes, and Medicare taxes. The employer might deduct additional amounts for benefits, professional memberships, uniforms or uniform maintenance, food allowances, or other facilities of work. If the employer is not required to explain the amounts paid, the pay rate, the reasons for variations, or the nature of deductions, the employee can hardly be faulted for failing to notice an error of less than a very substantial part of the amount due.

83. *See generally McAllen Hosps.*, 576 S.W.3d at 389.

84. *See id.*

85. *See id.* at 391–92.

86. *See id.*

87. *See id.* (noting the Court did not discuss this issue).

88. *Id.*

89. *Id.* at 391.

90. *See generally id.* Whether the hospital made a promise to the nurses depended on its objective manifestations to the nurses, not on what the hospital "intended." RESTATEMENT (SECOND) OF CONTS. §§ 2, 3 (AM. L. INST. 1981).

91. *See McAllen Hosps.*, 576 S.W.3d at 389–97.

The nurses testified that starting in 2007 performance reviews, hospital officials told them that the hospital would pay them salaries.[92] The nurses did not seem to recall much about these conversations.[93] Their recollection of these conversations may have been so vague that, standing alone, their testimony was less than a scintilla of evidence that the hospital really promised to change their compensation from hourly rates to something else at any particular time.[94] But, whatever the content of the oral discussions, there was substantial documentary evidence and the hospital's judicial admission of facts supporting the proof of an understanding that the hospital would pay a salary as that term is used in federal wage and hour law.[95]

The documentary evidence included performance reviews the hospital presented to the nurses showing their "annual" rates of pay for at least some of the years in question.[96] Standing alone, an annual rate of pay might be an estimate of projected earnings for one year of full time work at an hourly rate.[97] However, the performance reviews showed that the hospital classified the nurses as "exempt" employees,[98] meaning that federal law did not require the hospital to pay for overtime hours because, among other things, the hospital paid the nurses a salary.[99]

A *separate* document, the hospital's own employee handbook, stated that "[a] performance review is not a contract or a commitment to provide a

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92. *Id.* at 391–94.

93. *See id.*

94. *See id.* Did hospital officials promise to pay salaries starting immediately for the next pay period, or did they promise to begin paying salaries in the indefinite future subject to contingencies such as upper management approval? Did the parties orally discuss salaries in the sense of fixed rates of pay that would be constant without regard to actual hours of work, or did they simply annualize an hourly rate of pay? People often state their earnings on an annualized basis even if they are hourly-rated because, among other things, an annualized statement presents a more complete picture of earnings over time, and income taxes and some benefits are based on annual compensation.

95. *Id*. at 391–92.

96. *See id.* at 391–93. The evaluations showed an annual rate for each nurse starting in 2009, in contrast with earlier evaluations showing pay "per hour." *See id.* at 393–94. In fact, the 2010 evaluations included handwritten marks to cross out "hourly" and insert "annual," as if to prevent any misunderstanding that the pay rate was hourly. *Id.* at 394 n.3.

97. *See* Rebecca Lake, *Annual Compensation vs. Annual Salary: What's the Difference?*, INVESTOPEDIA (Nov. 9, 2019), https://www.investopedia.com/articles/personal-finance/120616/difference-between-annual-compensation-and-annual-salary.asp.al.

98. *McAllen Hosps.*, 576 S.W.3d at 393–94.

99. *See id.* at 391. A description of employees as exempt or "nonexempt" is the standard way of distinguishing between employees who are entitled to overtime pay (nonexempt) under § 7 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, and those who are not (exempt). *See* 29 U.S.C. § 213. The nurses would have been exempt only if they were salaried professional employees. *See* 29 C.F.R. §§ 541.300, 541.602 (2020). *See generally* R. CARLSON & S. MOSS, EMPLOYMENT LAW 266–71 (4th ed. 2019). Of course, an employer might classify an employee as exempt from some other type of rule, but the hospital identified no rule, other than the FLSA, as to which it had regarded the nurses as exempt. *See McAllen Hosps.*, 576 S.W.3d at 391. Moreover, other documents authored by the hospital showed that it intended its use of the word exempt to mean exempt from FLSA timekeeping and overtime regulations. *Id.* at 395–97. These documents stated hospital policies that non-exempt employees must be paid for overtime work, and that exempt employees such as the nurses were not entitled to pay for overtime. *Id.*

salary increase."[100] In other words, a performance review did not guarantee a proposed raise, but this case did not involve a raise.[101] The handbook provision also stated the obvious: a performance review form is just a performance review, not an integration of a contract.[102] It was not the parties' mutually adopted memorandum of the terms of pay.[103] But neither the hospital nor the nurses asserted any document as the integration of terms of pay.[104] In the absence of a mutually adopted controlling document, the performance reviews were some evidence of an agreement for salary-based compensation, provided the reviews were admissible under the rules of evidence.[105]

Beyond the performance reviews, there was other compelling documentary evidence that the hospital shared the nurses' understanding that they were exempt "salaried" employees.[106] The hospital's employee handbook,[107] personnel policies,[108] and payroll change documents[109] confirmed that when the hospital used the word "exempt" to describe a class of employees, it meant that the employees were exempt under federal wage and hour law because they were salaried.[110] The Court gave no weight to any of this evidence.[111] It rejected the performance reviews and handbook because disclaimers explained that these documents were not integrations of the parties' terms of pay.[112] The Court also gave no weight to separately issued personnel polices because they were mere clarifications of the same subjects covered in the handbook, and therefore, the Court presumed, must have been subject to the handbook's disclaimer.[113] Finally, the Court denied any relevance to payroll change documents showing the nurses' exempt classification for at least part of the time in question because the hospital had not presented these documents to the nurses and the nurses could not have "accepted" these forms.[114] In dismissing all of this documentary evidence,

100. *Id*.
101. *Id.*
102. *Id.*
103. *Id.* at 396.
104. *See generally id.*
105. RESTATEMENT (SECOND) OF CONTS. §§ 202(1), (2) (AM. L. INST. 1981).
106. *McAllen Hosps.*, 576 S.W.3d at 395–96.
107. *Id.*
108. *Id.* at 396.
109. *Id.* at 394–95.
110. *See id.* at 396–97.
111. *Id.* at 397.
112. *Id.* at 396.
113. *Id.* at 396–97. The Court also rejected the separately published personnel policies because "[t]he record contain[ed] no evidence that any of the policies were in force when the alleged agreement was formed in 2007." *Id.* at 397. However, like the other documentary evidence dismissed by the Court, the policies corroborated the hospital's understanding of exempt during the time it classified them as exempt. *See id.* at 396–97.
114. *Id.* at 395. The nurses do not appear to have argued that the payroll change forms were "offers" for their acceptance. As noted earlier, all the parties agreed there was no integration of their terms of pay,

the Court avoided the real function of the evidence: to prove that the hospital understood and intended that when it told the nurses they were exempt, it meant they were salaried.[115]

The evidence that the hospital regarded the nurses as exempt was so overwhelming that the hospital admitted before the Court that it had classified the nurses as exempt.[116] Still, the hospital argued, classifying the nurses as exempt did not imply an agreement to pay a salary.[117] The Court ultimately agreed with this argument,[118] but its explanation of the argument was vague and based in part on a misinterpretation of a federal regulation.[119] This lack of clarity by the hospital or the Court does not necessarily mean the hospital's position was without merit.[120] The hospital might have been evasive about the meaning of its classification of the nurses as exempt because its classification of the nurses was embarrassing.[121] The hospital had evidently misunderstood federal law when it classified the nurses as exempt.[122] It believed, wrongly, that it could cut an exempt salaried nurse's pay to account for short weeks when the nurse worked fewer than forty

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and no mutually adopted or accepted memorandum of terms. *See generally id.* The payroll change forms were evidence that the hospital regarded the nurses as exempt. *See id.* at 394–95.

115. Consol. Eng'g Co. v. S. Steel Co., 699 S.W.2d 188, 192–93 (Tex. 1985); Connelly v. Paul, 731 S.W.2d 657, 660–61 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) ("The conduct of the parties, which indicates a construction that the parties have themselves placed on the contract, may be considered in determining the parties' true intent."). The Court applied the rule stated in these cases when it gave significance to the hospital's calculation of pay based on hourly rates. *See McAllen Hosps*., 576 S.W.3d at 391. The Court failed to apply the same rule when it denied significance to the hospital's internal actions and documents showing its understanding that the nurses were salaried. *See id.* at 396–97.

116. *McAllen Hosps.*, 576 S.W.3d at 395. The hospital's position in this regard appears to have qualified as a judicial admission, and thus a conclusive fact as to the hospital's intent to treat the nurses as salaried within the meaning of the FLSA. *See* Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 905 (Tex. 2000).

117. *McAllen Hosps.*, 576 S.W.3d at 396.

118. *Id.* at 397.

119. The Court believed that 29 C.F.R. § 541.602 "permits deductions from exempt employees' salaries." *Id*. Section 541.602 actually states in relevant part that "an exempt employee must receive the full salary for any week in which the employee performs any work *without regard to the number of days or hours worked*." 29 C.F.R § 541.602(a)(1) (emphasis added). The employer may dock such an employee's pay when the employee "is absent from work for one or more full days for personal reasons, other than sickness or disability." *Id.* § 541.602(b)(1). However, this rule does not authorize an employer to dock pay on an hourly basis, and the employer may not dock pay at all for whole or part day absence "occasioned by the employer or by the operating requirements of the business." *Id*. § 541.602(a)(2). Further, "[i]f the employee is ready, willing and able to work, *deductions may not be made* for time when work is not available." *Id.* (emphasis added). Unfortunately, the reasons for and durations of the nurses' missed work time was not explained in the Court's summary of the facts or the parties' briefs before the Court. *See generally McAllen Hosps.*, 576 S.W.3d at 391–92.

A few other exceptions to the no-docking rule, such as the imposition of fines for employee violations of major safety rules, do not support the Court's suggestion that an exempt employee's salary may be reduced for missed hours or paid as if it is an hourly rate. 29 C.F.R. § 541.602(b)(4).

120. *See McAllen Hosps.*, 576 S.W.3d at 397.

121. *Id.* at 395–96.

122. *Id.*

hours.[123] In other words, the hospital's documented decision to classify the nurses as exempt salaried employees did not reflect the hospital's real, subjective intention to pay an hourly rate.[124] The hospital's mistake could have exposed it to significant liability under the Fair Labor Standards Act (FLSA).[125] If the hospital routinely failed to pay fixed weekly salaries regardless of hours worked, its FLSA liability would have included up to three years of back pay for all overtime hours at premium overtime rates plus additional "liquidated" damages equal to back pay.[126] Circumstances evidently saved the hospital from this liability.[127] If the nurses never worked overtime in any week within the statute of limitations, the loss of the exemption was without consequence under the FLSA.[128] Still, the hospital might have hesitated to publicly declare its non-compliance with the federal exemption.[129]

3. The Missing Estoppel Defense

Dismissing the nurses' evidence as no evidence was questionable on many counts, and yet the Court's sense of injustice in the verdict was not surprising. The nurses failed to object to the hospital's alleged underpayments until the passage of four years and an accumulation of hundreds of thousands of dollars of back pay liability.[130] Had the nurses brought the hospital's payroll errors to light at an earlier stage, the hospital could have renegotiated the terms of its at will employment contracts with the nurses.[131] Because the underpayments were seemingly avoidable, it is no wonder the jury verdict repelled the Court.[132] A legal doctrine exists for such injustice: estoppel.

In analogous situations, the same Court has sometimes taken a hard line against obligors like the hospital, who claimed unfair surprise when an obligee sued for a series of past underpayments, without having promptly complained when the underpayments began.[133] An obligor's payment of less than the amount due is a breach of contract, not a definition or modification of the contract's terms as the Court seemed to suppose in *McAllen*

123. *See supra* note 119 and accompanying text (noting that docking pay for short weeks is generally inconsistent with a salary required for an exemption).

124. *McAllen Hosps.*, 576 S.W.3d at 395–96.

125. 29 U.S.C. §§ 201–19.

126. *See* R. CARLSON & S. MOSS, *supra* note 99, at 269–71, 302–03 (giving a description of liability arising out of the failure to pay a true salary to an exempt white collar employee, and providing a summary of remedies under the FLSA).

127. *Id.*; *McAllen Hosps.*, 576 S.W.3d at 395–96.

128. *See McAllen Hosps*., 576 S.W.3d at 397.

129. *See generally id.*

130. *See id.* at 391.

131. *Id.* at 393.

132. *Id.* at 397.

133. *See, e.g.*, Barfield v. Howard M. Smith Co. of Amarillo, 426 S.W.2d 834, 838–39 (Tex. 1968).

Hospitals.[134] Moreover, standing alone, an obligee's silence is not assent to the obligor's continuing breach.[135] However, if an obligee gains knowledge of a breach, but delays objecting or calling attention to the breach, an obligor's detrimental reliance can form the basis for an affirmative defense of estoppel.[136] An obligee's constructive knowledge can suffice for purposes of estoppel,[137] and a very significant discrepancy between what is owed and what is paid might constitute constructive notice.[138]

If the nurses had actual or constructive notice that the hospital was breaching its promise to pay salaries, and the hospital relied to its detriment on the nurses' failure to object, estoppel may have barred the nurses from suing for the shortages.[139] The annual discrepancies were significant,[140] and the annual W-2 forms would have reflected the discrepancies—assuming the nurses prepared their own tax returns and paid attention to the forms.[141] Moreover, the hospital might well have relied to its detriment.[142] If the hospital had understood that classifying the nurses as exempt salaried employees would entitle them to full salaries for short weeks, it might have reclassified the nurses as nonexempt and changed the basis of their pay.[143] The hospital could have easily reclassified the nurses and revised the terms of their pay if it was made aware of the need to do so.[144] The nurses were evidently employed at will.[145] At any time during the employment, the hospital could have offered new terms of pay as a condition of continued employment.[146]

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134. *McAllen Hosps.*, 576 S.W.3d at 396.

135. *Barfield*, 426 S.W.2d at 839; Weinstein v. Nat'l Bank of Jefferson, 6 S.W. 171, 174 (Tex. 1887). *Cf.* Champlin Oil & Refin. Co. v. Chastain, 403 S.W.2d 376, 404 (Tex. 1965) (holding silence is not a basis for estoppel unless the obligee has a duty to speak).

136. *Champlin Oil & Refin. Co.*, 403 S.W.2d at 403–04; E.P. Clegg & Co. v. Gee, 2 Willson 487, 487–88 (Tex. App. 1885, no writ). *See also* Levi v. Reid, 91 Ill. App. 430, 432 (1899) (holding an employee who continued performing overtime without protesting receipt of fixed weekly compensation waived any claim for additional compensation); Teal Trading Dev., L.P. v. Champee Springs Ranches Prop. Owners Ass'n, 593 S.W.3d 324, 337 (Tex. 2020) (describing the related doctrine of quasi-estoppel). *Cf.* Hous. Endowment Inc. v. Atl. Richfield Co., 972 S.W.2d 156, 160 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (noting the statute of limitations did not begin to run against obligee's claim for underpayments until obligee discovered the underpayments).

137. *See Champlin Oil & Refin. Co.*, 403 S.W.2d at 403–04.

138. Shell Oil Co. v. Ross, 356 S.W.3d 924, 928 (Tex. 2011) (holding a significant discrepancy might put a party on notice for purposes of triggering the running of the statute of limitations under the discovery rule).

139. *See Champlin Oil & Refin. Co.*, 403 S.W.2d at 385–86.

140. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 391 (Tex. 2019).

141. *See generally id.*

142. *See generally id.*

143. *See generally id.*

144. *See generally id.*

145. *See* 24R, Inc. v. Boot Jack, 324 S.W.3d 564, 567 (Tex. 2010).

146. *See id*. at 566–67; Hathaway v. Gen. Mills, Inc., 711 S.W.2d 227, 228–29 (Tex. 1986). The Court did not address whether the hospital employed the nurses "at will," but the Court's treatment of the hospital's disclaimers and its reference to precedents describing at will employment indicate that the Court assumed the nurses were at will and that there was no argument in this regard. *McAllen Hosps.*, 576

However appealing the estoppel solution might have been, it was not available to the Court.[147] Estoppel is an affirmative defense, and the hospital did not assert the defense in its appeal.[148] In any event, there were reasons why estoppel might have failed and why the hospital might have chosen not to assert that defense.[149] The hospital had not disclosed the methods of its pay calculations to the nurses other than in documents that, after a certain point in time, showed salaries and annual rates.[150] The pay advices accompanying paychecks apparently added no information other than the net pay after deductions for each pay period.[151] However, if an employer classifies employees as "salaried," tells them they are salaried, but fails to inform the employees that it is actually using an hourly rate to calculate pay, it is in a poor position to question the knowledge of the employees.[152]

4. The Court's Adoption of a New Rule for Unintegrated Contracts

In the end, the Court declared the evidence "insufficient to allow reasonable, fair-minded people to conclude there was a meeting of the minds between the Hospital and the Nurses as to the issue of fixed pay."[153] To reach a conclusion that the jury had acted beyond the bounds of reason, the Court misinterpreted a federal regulation,[154] summarily denied the relevance of evidence that the hospital's understanding of the terms was contrary to what it professed in Court,[155] and gave retroactive effect to a significant new rule for unintegrated contracts.[156] The new rule is that one party's declaration that a document is not a "contract" is more than an anti-integration declaration.[157] That declaration is a rule of evidence adopted by one private party but binding against the other party and the judiciary, and preventing a court from treating the disclaimed document as circumstantial or corroborating evidence of the terms of an unintegrated contract.[158]

S.W.3d at 395–96. The at will cases the Court cited included Montgomery County Hospital District v. Brown and *24R, Inc.*. *See id* (citing Montgomery Cnty. Hosp. Dist. v. Brown, 965 S.W.2d 501 (Tex. 1998), and *24R, Inc.*, 324 S.W.3d at 567).

147. *See Affirmative Defenses*, SIMAS & ASSOC. LTD., https://simasgovlaw.com/legal-tools/affirmative-defenses/ (last visited June 5, 2021).

148. *Affirmative Defenses: Information and Examples*, TEX. L. HELP, https://texaslawhelp.org/Article/affirmative-defenses-information-and-examples# (last visited June 5, 2021).

149. *See McAllen Hosps.*, 576 S.W.3d at 391–94.

150. *Id.* at 391.

151. *See supra* notes 44–46 and accompanying text (noting how little information the hospital gave to as to how they calculated their pay advices).

152. *See* McAllen Hosps., L.P. v. Lopez, 567 S.W.3d 748, 751–52 (Tex. App.—Corpus Christi–Edinburg 2017), *rev'd* 576 S.W.3d 389 (Tex. 2019).

153. *McAllen Hosps.*, 576 S.W.3d at 397.

154. *See generally id.*

155. *See generally id.*

156. *See generally id.*

157. *See id.*

158. *See id.*

It is far from clear whether the Court appreciated that it was adopting an entirely new rule of law for unintegrated contracts.[159] The Court assumed the rule was well established, but it cited only *Fed. Express Corp. v. Dutschmann*[160] as precedent, describing that case as "recognizing use of handbook disclaimer to prevent contract formation"[161]— an overstatement to be sure.[162] *Dutschmann* held that an employer can use a disclaimer to clarify that disciplinary instructions are only operational policies (commands) for the workforce and not the integration of promises to individual employees.[163] As explained in Part II, cases like *Dutschmann* do not support a rule that a private party can declare its own documents out-of-bounds for a court to consider in a legitimate dispute over unintegrated contract terms.[164] Courts of other states that have considered such a rule have completely rejected it.[165] Perhaps, the Texas Court was tempted to endorse the hospital's unusual contract theory because the Court was determined to reverse an unjust verdict but prohibited by the Texas Constitution from engaging in factual sufficiency review.[166] The hospital's theory of anti-integration declarations provided the court with a basis for legal sufficiency or no evidence reversal by converting relevant evidence into no evidence, but only by a significant if inadvertent change in substantive law.[167]

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159. *See id.* at 394–97.

160. Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283–84 (Tex. 1993) (per curiam).

161. *McAllen Hosps*., 576 S.W.3d at 394 (citing *Fed. Express Corp*., 846 S.W.2d at 283–84).

162. *See generally McAllen Hosps.*, 576 S.W.3d at 394–95. Presumably, the Court did not mean that a disclaimer can "prevent contract formation" between an employer and employee. *Id*. at 394. Employment is a contract involving an exchange of service for pay. *See* Adam Hayes, *Bilateral Contract*, INVESTOPEDIA, investopedia.com/terms/b/bilateral-contract.asp (last updated Jan. 29, 2021). If a disclaimer prevented contract formation between the employer and its employees, the "employees" would be volunteers donating their work with no right to pay. *See infra* pp. 16–17 (discussing unintegrated contracts between employers and employees).

163. *See generally Dutschmann*, 846 S.W.2d at 282–84. For the distinction between policy commands and promises, see *infra* pp. 18–20 (discussing the value of integration in employee contracts for parol evidence rule). Nothing in the Court's opinion in *Dutschmann* suggested that the handbook in that case was inadmissible as evidence to corroborate disputed terms of an unintegrated contract. *See generally Dutschmann*, 846 S.W.2d at 282–84. That case involved an employer's alleged promise not to discharge except for just cause. *See id.* There was no evidence, aside from the employer's procedural and command policy, to corroborate the alleged promise. *See id*. In the absence of evidence of an employer's promise to employees to discipline them only for cause, the default rule is that the employer may discharge even without cause. *See infra* pp. 20–21 (explaining the benefits and flexibilities of unilateral contracts in employment). In contrast, *McAllen Hospitals* involved a legitimate dispute over the rules of an undisputed employer promise: to pay for work. *See McAllen Hosps.*, 576 S.W.3d at 391. There is no default rule for pay. The terms rules and details of the promise, such as the unit of time measurement, must be determined, and if the contract is unintegrated all relevant evidence should be admissible for that purpose. *See infra* pp. 19–20 (describing how in *McAllen Hospitals* relevant evidence was admissible to prove the details of the promise).

164. *See Dutschmann*, 846 S.W.2d at 282–84.

165. *See, e.g.*, Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1103 (Cal. 2000); Russell v. Bd. of Cnty. Comm'r, 952 P.2d 492, 502–02 (Okla. 1997).

166. *See McAllen Hosps*., 576 S.W.3d at 391–97.

167. *Id.*

A full appreciation of the extent to which the *McAllen Hospitals* Court departed from prior law requires a comparison of integrated and unintegrated contracts, a summary of the parol evidence rule, and an explanation of unusual features of employment as a contractual relation.[168] These topics are the subject of the next section of this Article.

III. THE PAROL EVIDENCE RULE, INTEGRATION, AND NON-INTEGRATION IN EMPLOYMENT CONTRACTS

A. The Parol Evidence Rule

Contract law does not require contracting parties to put their agreement in writing.[169] Even the Statute of Frauds, when it applies,[170] requires only that the parties put enough of their agreement in writing to corroborate the making of an agreement.[171] A writing is sufficient for that purpose even if it omits some of the terms of the agreement.[172] In many transactions, including the one in *McAllen Hospitals*, the Statute of Frauds does not apply at all.[173] Thus, a contract that is partly oral, completely oral, or arising by tacit or implied agreement, like the one in *McAllen Hospitals*, can still be an enforceable contract.[174] Enforceability is mainly a practical problem.[175] Without a mutually adopted writing, the parties are more likely to have different recollections or understandings of the terms and exact words of their agreement.[176]

In most settings, it is a good practice for parties to record all the terms of their agreement in one complete and final written version.[177] Such a writing not only confirms what terms comprise the agreement, it also records the exact words of the agreement.[178] The parties can integrate their agreement

168. *See infra* Part III (explaining how the parole evidence rule, integration, and non-integration in employment contracts can help understand the gravity of the *McAllen Hospitals* decision).

169. RESTATEMENT (SECOND) OF CONTS. § 110 (AM. L. INST. 1981).

170. *Id.*

171. *Id.* § 131.

172. *Id.* cmt. g ("The 'essential' terms of unperformed promises must be stated; 'details or particulars' need not. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought.").

173. *See generally* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 389–91 (Tex. 2019). An employment contract would likely fall within one of the categories covered by the Statute of Frauds only if the employment was for a fixed term of at least one year. RESTATEMENT (SECOND) OF CONTS. § 110(1)(e). Since the nurses in *McAllen Hospitals* were employees at will, as most private sector employees are, their contracts with the hospital were enforceable even if oral or implied by circumstances. *See McAllen Hosps*., 576 S.W.3d at 389–91.

174. *See id*. at 391; RESTATEMENT (SECOND) OF CONTS. § 110(1).

175. RESTATEMENT (SECOND) OF CONTS. § 209 cmt. 9.

176. *See id.*

177. *Id.* § 209.

178. *See* Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd., 352 S.W.3d 462, 469 (Tex. 2011); *see* RESTATEMENT (SECOND) OF CONTS. § 209.

in this manner from the outset by the process of offer and acceptance.[179] If the offer takes the form of a complete written statement of the terms, the acceptance of that document provides the parties with a mutually adopted writing of the contract.[180] If parties reach an agreement without a complete writing, they can still prepare and adopt a subsequent written version of the agreement.[181] A contract arises upon offer and acceptance even if the parties contemplate a later integration.[182] If the parties do subsequently integrate their contract, that writing becomes their contract and supersedes the prior contract to the extent there is any difference between the initial unintegrated and subsequent integrated versions of the contract.[183] Parties can confirm their intention that a particular document is the entire and exclusive version of their contract by including an integration clause.[184]

In *McAllen Hospitals*, if the parties had adopted a writing integrating an agreement with a term that an "employee's pay shall be $25 per hour," it would be irrelevant that the parties previously agreed to "salaried pay of $52,000 per year."[185] To the extent the parties might once have intended or reasonably expected a salary, the subsequent integration would have superseded that understanding, as if the parties had amended the rate of pay.[186]

Integration gains substantial legal effect by operation of the parol evidence rule, which bars either party from asserting rights or duties different from the words or terms of the integration.[187] The parol evidence rule is not really a rule of evidence in the usual sense.[188] It is a function of the parties' contractual agreement that a certain document is "the contract."[189] Even if the parties do not dispute that they previously agreed to a term omitted from the

179. *See* RESTATMENT (SECOND) OF CONTS. §§ 209, 22.

180. *Id.* §§ 50, 209.

181. *Id.* § 27.

182. *Id.*

183. West v. Quintanilla, 573 S.W.3d 237, 243–44 (Tex. 2019); Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 334 n.6 (Tex. 2011) (citing 11 S. WILLISTON & R. A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.21 (4th ed.1999)); *see* RESTATEMENT (SECOND) OF CONTS. §§ 213–16.

184. *Quintanilla*, 573 S.W.3d at 244; *Prudential Ins. Co. of Am.*, 341 S.W.3d at 334 n.6 (citing 11 WILLISTON & LORD, *supra* note 183, § 33.21).

185. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 391 (Tex. 2019); *Quintanilla*, 573 S.W.3d at 244 (discussing integrated agreements power to supersede prior agreements).

186. *See McAllen Hosps.*, 576 S.W.3d at 391; *Quintanilla*, 573 S.W.3d at 244 (discussing integrated agreements ability to supersede prior agreements).

187. *See Quintanilla*, 573 S.W.3d at 243; Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd., 352 S.W.3d 462, 469 (Tex. 2011); Hubacek v. Ennis State Bank, 317 S.W.2d 30, 31 (1958) (discussing that the parol evidence rule is a rule of substance about the nature of the parties' contract, and not just a rule of evidence). *See supra* note 6–7 and accompanying text (noting how the *McAllen Hospitals* Court handled integration).

188. *See Hubacek*, 317 S.W.2d at 31.

189. *See id.*

integration, the integration overrides the prior version of their bargain.[190] In effect, the mutual adoption of an integration implicitly rejects any earlier or contemporaneous agreements to different or additional terms.[191]

If contracting parties lack the time or ability to draft and adopt a complete integration, a partial integration is an alternative.[192] A partial integration is the adoption of a written version of one term, or a limited set of terms, of a contract.[193] A partial integration only limits disputes over the terms it recites.[194] A partial integration constitutes the parties' mutual adoption of the words of a particular term and precludes the parties from asserting that the term was something different.[195] A partial integration does not implicitly reject omitted terms outside the scope of the partial integration because a partial integration is not the complete or exclusive statement of terms of the entire transaction.[196]

If the hospital in *McAllen Hospitals* was anxious to avoid a future dispute about the rules of pay, it could have drafted and presented a memorandum stating the final and exclusive version of the rules of pay.[197] That memorandum, if accepted by the nurses, would have been the partial integration of the terms of pay.[198] In fact, the hospital did present written statements of the rules of pay, but for reasons peculiar to the employment setting,[199] the hospital purposely avoided integration of the terms of pay by attaching anti-integration clauses to its documents.[200] There was plenty of documentation in *McAllen Hospitals* but no integration.[201] The hospital disclaimed integration.[202] The Court's opinion rescued the hospital from the complications of that dangerous course of action.[203]

There is a significant difference between integrated and unintegrated contracts with respect to proof of terms or the interpretation of vague or ambiguous terms.[204] If the agreement or a term of the agreement is integrated, a dispute within the scope of the integration is confined to the parties' choice

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190. *Id.* (noting that the parol evidence rule is a rule of substance about the nature of the parties' contract and not just a rule of evidence); Chaplin v. Milne, 555 S.W.2d 161 (Tex. Civ. App.—El Paso 1977, no writ).

191. *See Hubacek*, 317 S.W.2d at 31.

192. RESTATEMENT (SECOND) OF CONTS. § 210 (AM. L. INST. 1981).

193. *Id.* § 210 cmt. C.

194. West v. Quintanilla, 573 S.W.3d 237, 243 (Tex. 2019); RESTATEMENT (SECOND) OFCONTS. § 216.

195. *See Quintanilla*, 573 S.W.3d at 243.

196. *Id.* at 244.

197. *See* RESTATEMENT (SECOND) OF CONTS. § 209.

198. *See id.*

199. *See infra* pp. 24–25 (discussing employers' use rules of pay).

200. *See supra* pp. 2–3 (noting that the anti-integration clauses allowed in *McAllen Hospitals* to declare that some of its documents were inadmissible).

201. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 397 (Tex. 2019).

202. *See id.* at 394.

203. *See id.*

204. *See* RESTATEMENT (SECOND) OF CONTS. § 216 (AM. L. INST. 1981).

of words in the integration.[205] When parties lack an integration, there is no definitive document to which they can refer for a mutual statement of their contract.[206] Such was the case in *McAllen Hospitals*.[207] The rate of compensation is an essential term of an employment contract, but the hospital purposely avoided the creation of a mutually agreed statement of that term.[208] The parties' oral discussions about the rate of pay were certainly relevant to establish the terms of pay, but the parties could not sufficiently remember the words of their discussions.[209] No wonder both sides were left to rely on incidental documents, conduct, and other circumstances.[210] If, as the Court suggested in *McAllen Hospitals*, a party can unilaterally declare its own incidental documents to be inadmissible, the problem of non-integration becomes much more dangerous in entirely new ways.[211]

Why would an employer or any other contracting party purposely avoid the precaution of integrating terms of a contract even when that party would likely control the drafting of an integration? The practice of integration avoidance is common in the employment setting because of some unusual features of employment contracts and the echoes of a surge in wrongful discharge cases in the 1980s.[212] The phenomenon of anti-integration in employment, and the confusion anti-integration has caused in the resolution of employment contract disputes in Texas and elsewhere, is the subject of the next section of this Article.[213]

B. Contracting and Anti-Integration in Employment

Employment is a contractual relationship—an exchange of work for compensation.[214] Employment "at will"[215] can be described as a unilateral contract: the employer promises to pay a certain rate of compensation in exchange for the employee's work.[216] The employer's promise to pay a

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205. *See id.*

206. *See id.*

207. *See McAllen Hosps.*, 576 S.W.3d at 390–97.

208. *See id.* at 396–97.

209. *See generally id.* at 391–92.

210. *See id.* at 393–95.

211. *See id.* at 392.

212. *See, e.g.*, S. Schuab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

213. *See infra* Part III.B (noting the difficulties anti-integration clauses have caused employment contracts).

214. *See generally* CARLSON & MOSS, *supra* note 99.

215. *See id.* at 17–22 (describing employment at will).

216. Denton v. Rushing, 570 S.W.3d 708 (Tex. 2019); Hous. v. Williams, 353 S.W.3d 128, 135–38 (Tex. 2011); Vanegas v. Am. Energy Serv., 302 S.W.3d 299 (Tex. 2009). Relations in an employment contract at will can be much more complex than a simple unilateral contract. *See infra* note 222 and accompanying text (noting difficulties with relations in employment contracts). Employers and employees frequently adopt incidental or collateral agreements regarding dispute resolution, protection of trade secrets or other confidential information, and benefit plans. *See infra* notes 259–61 and accompanying

specified rate of compensation is the employer's principle consideration in the bargain.[217] In the unilateral employment at will model, the employee promises nothing in return.[218] If this model was sufficient to explain employment, there would be little for the parties to integrate except for the employer's promise to pay for the work.[219] In fact, the unilateral model offers one possible explanation why employers might choose not to integrate a simple employment transaction: the only term for the employer to integrate is the employer's promise—which is the basis for its potential liability.[220] An employer might believe it has more to lose than to gain by putting its promise in a final and exclusive statement of the promise.[221]

The unilateral employment contract may appear to be simple, but it is a fluid and particularly effective basis for legal relations in an activity as complex and valuable as the design and construction of a rocket ship or the administration of a hospital.[222] The key advantage of employment is the preservation of employer fiat over the management of the work, and the elimination of any need for a comprehensive contract to govern the details of the work.[223]

To appreciate the employment model's combination of contractual simplicity and fluidity, compare the usual alternative for contracting for work—the hiring of independent contractors.[224] If an employer contracts with an independent contractor, the employer purchases a "result" but leaves the details of the work to the independent contractor.[225] This lack of control is often impractical for the employer's regular work production or any activity requiring a high degree of management, oversight, and coordination of many individuals.[226] To the extent the employer needs to control any aspect of the work, such as the timing, order, or place of work for multiple service providers, it must negotiate and draft the details in advance.[227] As the complexity of an employer's management of the work increases, the need to integrate increases, and the integration is likely to require a substantial

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text (noting when incidentals may be used). Some of these agreements include promises by the employee, such as a promise to submit disputes to arbitration in exchange for the employer's reciprocal promise forming a bilateral contract. *See, e.g.*, *In re Halliburton*, 80 S.W.3d 566 (Tex. 2002). Some employee rights to employment benefits, such as medical insurance or pensions, are governed by the federal law of "plans" rather than contract law. CARLSON & MOSS, *supra* note 99, at 323–30.

217. *See generally* Anthony v. Jersey Cent. Power & Light Co., 143 A.2d 762 (N.J. Super 1958).

218. CARLSON & MOSS, *supra* note 99, at 17–22.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. R. Carlson, *Employment by Design: Employees, Independent Contractors and the Theory of the Firm*, 71 ARK. L. REV. 127, 174–202 (2018).

225. *Id.* at 194.

226. *Id.* at 199–202.

227. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–25 (1992); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 391 (5th ed. 1998); Carlson, *supra* note 224, at 178.

document.[228] Moreover, once an employer has negotiated the details with an independent contractor, it can neither change the terms of the contract nor abandon the contract without the independent contractor's assent.[229] An independent contractor arrangement restricts the employer from modifying its management of the work on a day-to-day basis and inhibits managerial adaptation to experience and changing environment.[230]

In contrast, there are comparatively few terms to negotiate or integrate in employment other than the terms of compensation.[231] An employer hiring employees retains an implied right to control the details of the work.[232] The employer's right to manage the details of the work is the most important feature distinguishing an employee from an independent contractor.[233] Especially in an employment at will, the parties are relieved of the need to negotiate the details of the work in advance.[234] The employer manages the work by "fiat" rather than negotiation.[235]

Even though an employment contract can be comparatively simple, employment generates a substantial amount of documentation necessary to the management of the work.[236] The incidental documentation is necessary because of the limits of an employer's ability to manage work by direct and individualized observation and oral instruction.[237] An employer relies, to a large extent, on standardized written policies to manage and coordinate the work.[238] Large-scale productive activity would probably be impossible without written policies, and the fact that most modern production can be reduced to standardized rules or instructions makes the use of written policies particularly useful.[239] Although written, most employer policies are clearly not contracts because they promise nothing.[240] They are the blueprints, commands, instructions, and procedures by which an organization of employees operates.[241] Organizing policies in an "employee handbook" makes the policies easily accessible to managers and employees as needed.[242]

Employer policies can be divided into three types: (1) pure policies that serve as the employer's commands; (2) rules of pay and benefits in

228. RESTATEMENT (SECOND) OF CONTS. §§ 209, 213–16 (AM. L. INST. 1981); Carlson, *supra* note 224, at 148–58.
229. Carlson, *supra* note 224, at 148–58.
230. *Id.* at 178–79, 189–91.
231. *Id.* at 183–85.
232. *Id.* at 178, 183–85.
233. *Id.* at 159–64.
234. *Id.* at 184–86.
235. *Id.* at 148, 176–77, 187–88.
236. *Id.* at 179, 181–83.
237. *Id.*
238. *Id.* at 184.
239. *Id.* at 182, 184.
240. RESTATEMENT (SECOND) OF CONTS. §§ 1(c), 2 (AM. L. INST. 1981).
241. Carlson, *supra* note 224, at 184.
242. *Id.*

standardized form for all employees; and (3) policies that ambiguously exhibit characteristics of both the first and second category.[243] Most policies fall within the first category—commands and procedures that could not reasonably be confused with promises.[244] A policy that employees must be at work by 8 A.M. is a command, not a promise.[245] It does not state what the employer will do (except as a threat of discipline), only what the employee must do.[246] Such a policy is not an offer of benefit to induce a bargain for an employee's work.[247] Command polices include procedural policies for the organization's administrative activity such as the completion of reports, communication within the organization, and hierarchies of decision-making.[248] An employee could not reasonably believe that such procedures are promises enforceable by the employee.[249] An employer's compliance with its own commands or administrative procedures is not the inducement or any part of a bargain for the employee's work.[250]

In the second category, there are policies that articulate the employer's promises of compensation and benefits, including rules for accrual and calculation of the amount due.[251] To the extent these rules affect the amount of pay and the value of benefits—the consideration for the employee's work—these rules are integral and part of the employer's promises to the employee.[252] It should not be surprising that the details of the employer's promise to pay are presented in the form of uniform policies issued to the entire workforce.[253] Modern employment is highly standardized, even with respect to an employer's terms of compensation for each employee.[254] While the base amount of pay might vary from individual to individual, the rules for calculating pay, accrual of pay and benefits, counting working time, paying for non-productive time such as travel or training time, the right to premium or "extra" pay, the timing of payment, and deductions or docking from pay are easily standardized for all employees or for classes of employees.[255] Standardizing the incidental rules obviates detailed negotiation at the individual level.[256]

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243. *See generally id.* at 161 (noting that policies provided by employers are part of the ways an employer can fragment their control).

244. *See id.* (explaining that commands and procedures are a direct representation of an employer's control).

245. *See id.*

246. *See id.* (reiterating again, the control an employer has over an employee).

247. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 397 (Tex. 2019).

248. *See* Carlson, *supra* note 224, at 161.

249. *See McAllen Hosps.*, 576 S.W.3d at 397.

250. *See id.* at 396–97.

251. *See generally id.* (noting that the hospital had such policies).

252. *See contra id.* at 397 (explaining that the policies from the hospital were all elective and not a specification of rates).

253. *See* Carlson, *supra* note 224, at 184.

254. *See id.*

255. *See id.*

256. *Id.*

Employers often include rules of pay and benefits in their handbooks because the same rules apply to all employees or all members of a class. The rules are information administrators need to manage payroll and benefits; and further, the rules are information employees need to make decisions about their schedules, work-life management, budgeting and the need to shop for their own insurance.[257] Placing the rules of compensation in the handbook does not mean the rules are commands, except perhaps to the employer's officials and departments responsible for keeping the employer's promises.[258]

Placing the incidental rules of the employer's promises to pay in a handbook cannot be a complete integration because a handbook does not include the most important term of all: the actual rate of pay for any individual employee.[259] Nevertheless, the handbook's incidental rules of pay and benefits would likely still serve as a partial integration of the rules it describes if the employer did not take steps to prevent the integration of the terms.[260] Purposely preventing integration of the incidental rules of pay might seem to be a peculiar choice of action.[261] Still, as *McAllen Hospitals* illustrates, an employer might actually choose this contracting strategy for reasons explained below.[262]

There should be no doubt that incidental rules of pay are part of the employment contract whether they are recorded in written policies or evidenced by unwritten customs and circumstances.[263] Rules of pay determine the value of the employer's inducement for the employee's work, which is the employer's primary consideration and the very core of the employment contract.[264] An employee who decides from one day to the next whether to renew the at will contract might well consider the rules of pay as a basis for his or her decision.[265] An employee's right to pay described in published, standardized rules should be no less than the right of a bank, credit card company, or utility when collecting the principal, interest and other fees

257. *See generally McAllen Hosps.*, 576 S.W.3d at 395–97 (providing examples of pay and benefit descriptors in handbooks).

258. *See supra* notes 239–42 and accompanying text (explaining the limits of employee handbooks).

259. *See* Edwards v. Citibank, N.A., 418 N.Y.S.2d 269, 279 (1979).

260. *See* Parriz-Khyari v. Alcon Lab'ys, Inc., 395 S.W.3d 376 (Tex. App.—Dallas 2013, pet. denied) (finding no integration when employer took steps to prevent the integration of terms in the handbook).

261. *See id.*

262. *See generally* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 396 (Tex. 2019).

263. *See generally id.* Until recent decisions in Texas such as *McAllen Hospitals* and *Parviz-Khyavi*, courts had no difficulty recognizing pay "policies" as enforceable parts of the bargained for exchange of compensation for work. *See, e.g.*, Anthony v. Jersey Cent. Power & Light Co., 143 A.2d 762 (N.J. Super. 1958); Cowles v. Morris & Co., 161 N.E. 150 (Ill. 1928).

264. *See Jersey Cent. Power & Light Co.*, 143 A.2d at 765 (illustrating this point using bonus structures as an example).

265. *See Parviz-Khyavi*, 395 S.W.3d at 382 (discussing issues facing at-will employees and compensation).

owed by a consumer according to the published, standardized rules.[266] However, even before *McAllen Hospitals*, some lower Texas courts seemed confused by the proposition that an employer's published description of its rules of pay and benefits is important evidence of what it promised, or that that incidental rules of pay are part of the employer's promise that formed the unilateral contract of employment.[267] *McAllen Hospitals* will add to the confusion.

The third category of policies is the problem that gave rise to employer use of disclaimers and anti-integration declarations.[268] This category consists of ambiguous statements that are commands to some of the employees but might also be promises to all the employees.[269] Disciplinary policies are a prime example.[270] A policy that supervisors should not discharge employees "without just cause" is a command to supervisors that also resembles a promise to employees.[271] An employer commands its supervisory employees to be fair to subordinates in order to protect the employer's valuable investment in human resources, to prevent potentially unlawful discrimination, and to deter a supervisor's arbitrary use of authority for personal gain or gratification.[272] The employer guards against a supervisor's violation of a disciplinary policy by adopting a procedural policy requiring upper management review of disciplinary action, possibly with the receipt of the employee's version of the facts.[273]

An employer might intend its disciplinary procedures to be a command designed to protect its own interests, but an employee might read such a policy differently—as a promise and an inducement for the employee's continued service and loyalty.[274] Until half a century ago, courts widely rejected an employee's interpretation of a disciplinary procedure as a promise.[275] An employer policy to discipline only for "fair" or "just" cause

266. Richard Harrison Winters, *Employee Handbooks and Employment-At-Will Contracts*, 34 DUKE L.J. 196, 213 (1985) (advancing the idea that all employee handbooks should bind employers as unilateral contracts).

267. *See, e.g.*, *Parviz-Khyavi*, 395 S.W.3d 376 (noting that employers are not bound by their description of their disability benefits plan because of their anti-integration declaration). The *Parviz-Khyavi* case is particularly shocking because it involved what appears to have been an employee benefits plan subject to federal employee benefits law, not Texas contracts law. *See* CARLSON & MOSS, *supra* note 99, at 321–30. The unfortunate and sometimes unconscionable habit of state courts denying the enforceability of pension and other employee benefits was one of the reasons Congress superseded state law for most private-sector benefit plans by the enactment of the Employee Retirement Income Security Act.

268. *See* Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1264 (D. Kan. 1984).

269. *See supra* notes 13–14 and accompanying text (noting the different meanings policies can take).

270. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 893 (1980).

271. *Id.* at 903.

272. *See id.* at 893.

273. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 917 (Cal. 1981).

274. *See* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1268 n.10 (N.J. 1985); *see generally* S. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

275. *See, e.g.*, Schwab, *supra* note 274, at 9 n.8.

seemed too vague and subjective to be enforced, and courts were skeptical that an employer would genuinely promise to continue the employment indefinitely while leaving the employee free to resign.[276]

The courts' attitude changed dramatically in the 1970s and 1980s with high profile wrongful discharge cases in Michigan and California and a number of widely read law review articles about employment at will.[277] In *Toussaint v. Blue Cross & Blue Shield of Michigan*,[278] the Supreme Court of Michigan held that an employer's fair discipline and discharge policy was not just a command to supervisors, it was a promise to employees, reasonably interpreted as the inducement for employee loyalty and enforceable as a contract term.[279] In *Pugh v. See's Candies, Inc.*,[280] the Supreme Court of California held that employer disciplinary and discharge policies, in combination with other circumstances, established an employer's implied and enforceable promise not to discharge without just cause.[281] Even some Texas courts embraced the possibility that an employer's disciplinary policies or oral assurances of fairness might be enforceable promises to employees.[282]

To fend off contract-based wrongful discharge lawsuits, employers added "disclaimers" to their policy documents.[283] Disclaimers typically carry two different messages.[284] First, to prevent wrongful discharge lawsuits, a disclaimer declares that nothing in the employer's disciplinary policies modifies the "at will" character of the employment, and that the employer retains the right to discharge at will, with or without just cause.[285] This message alone fulfills an employer's need for protection against an argument

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276. CARLSON & MOSS, *supra* note 99, at 663–65.

277. *See, e.g.*, Schwab, *supra* note 274, at 48; *see generally* Stark v. Kent Prod., Inc., 62 Mich. App. 546 (1975).

278. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 880 (Mich. 1980).

279. *See also* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1268 n.10 (N.J. 1985); Cont'l Air Lines v. Keenan, 731 P.2d 708 (Colo. 1987).

280. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 917 (Cal. 1981).

281. *Id.*

282. *See* Kelley v. Apache Prod., Inc., 709 S.W.2d 772 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.); United Transp. Union v. Brown, 694 S.W.2d 630 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); Johnson v. Ford Motor Co., 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). *But see* Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410 (Tex. App.—Corpus Christi–Edinburg 1988, no writ) (noting that disciplinary policies and procedures, standing alone, are not contractual promises to employees); Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).

283. *See* Favre v. Wal-Mart Stores, Inc., 820 So.2d 771, 774 (Miss. Ct. App. 2002).

284. *See, e.g.*, Murphy v. Gulf States Toyota, Inc., No. 01-00-00740-CV, 2001 WL 619557 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet.) (not for publication); Hicks v. Baylor Univ. Med. Ctr., 789 S.W.2d 299 (Tex. App.—Dallas 1990, writ denied); Figueroa v. West, 902 S.W.2d 701 (Tex. App.—El Paso 1995, no writ); Berry v. Dr.'s Health Facilities, 715 S.W.2d 60, 61–62 (Tex. App.—Dallas 1986, no writ); *In re* 24R, Inc., 324 S.W.3d 564, 567 (Tex. 2010) (per curiam); *see also* Fed. Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1983); Brown v. Sabre, Inc., 173 S.W.3d 581, 589 (Tex. App.—Fort Worth 2005, no pet.) (concluding a disclaimer demonstrated the employer's "clear intent not to create any binding contractual rights through its employee handbook").

285. *See, e.g.*, *Hicks*, 789 S.W.2d at 299; *Figueroa*, 902 S.W.2d at 701; *Berry*, 715 S.W.2d at 61–62.

that a disciplinary policy is an enforceable promise to be fair.[286] If an employer explains clearly enough that its disciplinary policy is a command to managers, not a promise to be fair, there is no genuine need to say more.[287] However, disclaimers often go farther. It is often tempting to be overly emphatic or to overstate a message for fear of having failed to anticipate all of the contrary interpretations.[288] Thus, employer disclaimers often thoughtlessly declare that an entire handbook "is not a contract," as if to prevent contractual liability for whatever else the employer might have said about anything.[289] A declaration of this sort is as strange as it is common for several reasons.[290]

First, even without a disclaimer or anti-integration declaration, a handbook is obviously not a "contract."[291] A handbook cannot be a complete integration of terms for any particular individual, even with respect to compensation, because it states only the incidental rules, not the employee's individual basic rate of compensation.[292] Moreover, a large part of the handbook is probably devoted to commands and instructions rather than promises.[293] If the handbook were an integration, it would suggest that all the employer's written commands are also promises and terms of a contract, which is contrary to common sense and would needlessly discourage an employer from managing by written commands.[294]

Employers sometimes maintain that a disclaimer or anti-integration declaration is still important to reserve management's right to modify policies, but this argument is contrary to basic contract law.[295] If the employment is at will, the contract terms are subject to prospective modification on any given day by the employer's announcement of the change (or new terms of its offer), combined with the employee's acceptance

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286. *Berry*, 715 S.W.2d at 62.

287. *See supra* notes 12–14 and accompanying text (noting how an employee may misinterpret a policy). Such a disclaimer is certainly sufficient and possibly unnecessary in a state like Texas, where employment at will is not merely presumed, but very strongly presumed and rebuttable only by very clear, definitive, and unequivocal evidence of an employer promise to the contrary. *See* Montgomery Cnty. Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998). *Montgomery Hospital District* was an ineffective response to the uncertainty generated by *Toussaint* and *Pugh*. *See generally Brown*, 965 S.W.2d at 502.

In fact, it is very hard, if not impossible, to find reported successful wrongful discharge cases in Texas based on disciplinary policies with or without disclaimers after *Montgomery Hospital District*. *See generally Brown*, 965 S.W.2d at 502.

288. *See supra* notes 160–63 and accompanying text (noting the difficulty with interpreting disclaimers).

289. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 394 (Tex. 2019).

290. *See id.*

291. *See supra* notes 182–84 and accompanying text (noting how a contract arises).

292. *See McAllen Hosps.*, 576 S.W.3d at 396; *see supra* notes 182–84 and accompanying text (explaining how a contract is formed).

293. *See McAllen Hosps.*, 576 S.W.3d at 396.

294. *See* RESTATEMENT (SECOND) OF CONTS. § 27 (AM. L. INST. 1981).

295. *See id.*

by performance (continued work).[296] A disclaimer or anti-integration declaration adds nothing.[297] There is no merit to an argument that a "no contract" or anti-integration clause is necessary to achieve the inherent flexibility of at will employment.[298]

Second, a declaration that a handbook is not a contract can backfire on the employer when a contract dispute involves something other than a disciplinary policy.[299] Many employees work pursuant to layers of contracts.[300] The basic unilateral contract is a foundation, and that contract is topped with incidental, bilateral, and reverse unilateral contracts, such as a bilateral dispute resolution contract or a unilateral noncompetition contract (with the employee promising not to compete, solicit customers, or divulge confidential information).[301] If the employment is not an exclusively unilateral contract, and if the employer obtains employee promises as part of the terms of employment, the employer might regret having placed employee promises in the very document it declared "not a contract."[302] When an employer inserts disclaimers in its handbook, but later seeks to enforce an employee's promise, the employer is subject to the same arguments the hospital asserted in *McAllen Hospitals* against enforcement of a policy.[303]

A disclaimer might also backfire by violating federal law or eliminating certain defenses the employer would have had under federal law.[304] Handbooks often include the rules of employee benefits, some of which might constitute "employee benefit plans."[305] A plan might be subject to the Employee Retirement Income Security Act (ERISA),[306] and subject to the law of plans rather than the law of contracts.[307] If so, implying that a plan is

296. *See supra* note 222 and accompanying text (noting how unilateral employment contracts are fluid).

297. *See supra* Part III.B (describing disclaimers and anti-integration declarations).

298. *See supra* pp. 17–18 (highlighting that mutual assent to the intended terms of an agreement is sufficient to bind the parties).

299. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 396 (Tex. 2019).

300. *See supra* notes 17–19 and accompanying text (noting how employers continue to use anti-integration).

301. *See McAllen Hosps.*, 576 S.W.3d at 396.

302. *See supra* notes 17–19 and accompanying text (noting problems anti-integration can cause employers).

303. *See McAllen Hosps.*, 576 S.W.3d at 392; *see, e.g.*, Sun Fab Indus. Contracting, Inc. v. Lujan, 361 S.W.3d 147, 150–51 (Tex. App.—El Paso 2011, no pet.). *See also In re* 24R, Inc., 324 S.W.3d 564, 567–68 (Tex. 2010). Where the Texas Supreme Court held that an arbitration agreement was binding only because it was sufficiently separate and distinct from the handbook that included the anti-integration clause. *Id.*

304. *See McAllen Hosps.*, 576 S.W.3d at 396.

305. *See, e.g.*, Parviz-Khyavi v. Alcon Lab'ys, Inc., 395 S.W.3d 376, 379 (Tex. App.—Dallas 2013, pet. denied). The parties and court in *Parviz-Khyavi* erroneously litigated disability claim as a contract claim, but facts suggest the benefits in question were governed by the Employee Retirement Income Security Act. *See id.*

306. *See generally* 29 U.S.C. §§ 1001–461.

307. *Id.* § 1144(a); *see, e.g.*, Moeller v. Bertrang, 801 F. Supp. 291, 298 (D.S.D. 1992).

not binding would likely violate federal law.[308] Even more importantly, as the Court interpreted in *McAllen Hospitals*, an employer's disclaimer might deprive the employer of important defenses against significant liability for unlawful retaliation, discriminatory harassment, or misclassification of employees under the FLSA.[309]

Nevertheless, such backfires have not persuaded all employers or their counselors to reconsider the merits of no-contract clauses.[310] Human resources professionals have recommended disclaimers so emphatically for so long that client employers have learned to expect such provisions and remain suspicious of contrary advice.[311] Instead of deleting or clarifying no-contract clauses, drafters of employment documentation have addressed the backfire risk by making their documentation more confusing, complex, and one-sided by attempting to distinguish, policy-by-policy, employee promises (binding terms of contract) from employer promises (not binding terms of contract) and by segregating handbook policies from stand-alone policies, with separate processes for acknowledgement and acceptance.[312]

McAllen Hospitals adds a disturbing new effect to a conventional disclaimer.[313] A disclaimer is not just a clarification of policy or anti-integration declaration.[314] The disclaimer creates a rule binding on the non-declaring party and the judiciary to prohibit consideration of disclaimed documents in a dispute over what the disclaiming party wrote, intended, or understood about the essential terms in an unintegrated contract.[315] Part IV, which follows, addresses the disruptive impacts of the *McAllen Hospitals* doctrine and the reasons why courts elsewhere should reject the doctrine.

IV. THE IMPLICATIONS OF THE *MCALLEN HOSPITALS* DOCTRINE IN UNINTEGRATED TRANSACTIONS

McAllen Hospitals changed Texas contracts and employment law by creating a new rule of disclaimers.[316] Before *McAllen Hospitals*, a conventional employer disclaimer simply clarified that a command policy was neither a promise nor the integration of a contract.[317] A disclaimer functioning as an anti-integration declaration left the parties with no integration at all in most instances and subject to the usual rules of proof for

308. *See Moeller*, 801 F. Supp. at 298; CARLSON & MOSS, *supra* note 99, at 322–30.
309. *See infra* Part IV (discussing the implications of the *McAllen Hospitals* doctrine).
310. *See* CARLSON & MOSS, *supra* note 99, at 716–18.
311. *See id.*
312. *See, e.g.*, *In re* 24R, Inc., 324 S.W.3d 564, 567–68 (Tex. 2010).
313. *See* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 396 (Tex. 2019).
314. *See id.*
315. *See id.*
316. *See id.*
317. *See supra* pp. 21–22 (explaining employment contracting options and their consequences).

unintegrated transactions.[318] However, under *McAllen Hospitals*, a standard disclaimer binds the other party and the judiciary to a rule that disclaimed documents are no evidence and are beyond a court's consideration for purposes of determining unintegrated terms even when those terms involve pay or other essential elements for a contract.[319]

There was nothing peculiar about the language of the hospital's disclaimers in *McAllen Hospitals* to account for the expansive effect the Court granted.[320] The disclaimers resembled the same disclaimers employers have used for decades since *Toussaint* and *Pugh*.[321] The disclaimers did not expressly bar the admissibility of the documents in evidence or prohibit the judiciary from considering them.[322] Thus, *McAllen Hospitals* appears to hold that any standard disclaimer clause will bear the same meaning the Court found implied by the *McAllen Hospitals* disclaimers.[323] While *McAllen Hospitals* was an employment case, the Court gave no reason to believe its holding was limited to employment.[324] Disclaimers might have the same effect in other contexts as well.[325]

The most immediate casualty of *McAllen Hospitals* is the certainty and enforceability of employee compensation and benefits.[326] While the base rate of current pay for any individual worker might vary, an employer of any large workforce must standardize the incidental rules.[327] Incidental rules include the unit of time or task on which pay is based (as in *McAllen Hospitals*), rules for measuring time or the completion of a task, accrual of rights to pay (especially for commissions), and the treatment of holidays or vacations and other non-productive time.[328] The standardization of "benefits," including deferred and contingent pay, is equally important.[329] Employers regularly express pay and benefit rules as policies even if the rules are fundamental to the promise to pay and even if employees naturally and reasonably appraise the value of the employer's promise of pay in light of the rules.[330] However,

318. *See supra* notes 204–06 and accompanying text (discussing the difference in proof between integrated and unintegrated contracts).

319. *McAllen Hosps.*, 576 S.W.3d at 394 ("[T]he question is whether those [disclaimed documents] can provide evidence of a commitment by the Hospital to pay a fixed salary. The handbook expressly barred the jury from giving weight to the reviews for that purpose."); *see also id.* at 396–97 ("To the extent the policies are additions to the handbook, which the Hospital reserved the right to make, the handbook's disclaimer prevents them from serving as evidence of the Hospital's intent to contract with the Nurses.").

320. *See id.* at 396.

321. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980); *see also* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. 1981).

322. *See McAllen Hosps.*, 576 S.W.3d at 396.

323. *See id.* at 397.

324. *Id.*

325. *See* CARLSON & MOSS, *supra* note 99, at 246–56.

326. *See id.*

327. *See id.*

328. *Id.*

329. *See id.* at 184–85.

330. *Id.*

disclaimers are ubiquitous in employment, and after *McAllen Hospitals*, these disclaimers will make incidental rules of pay—the price term of the contract—unenforceable unless an employee can find evidence of the rules other than the employer's own written description of the rules.[331] Even if the employee can find other evidence of the unintegrated terms, the employer's disclaimed documents are inadmissible to corroborate that evidence.[332] As a practical matter, the incidental rules are unenforceable.[333]

An employer is not entirely free to abuse this new power. In most states an employer must pay current compensation bi-weekly or semi-monthly.[334] If an employer violates its own description of current pay rates or incidental rules, employees usually have a reasonable chance of discovering the violations and protesting "shaving" or other improper reductions in current pay before their continued employment can be regarded as "acceptance" of the employer's modified terms or before the employees are "estopped."[335] However, employees are frequently in a poor position to oppose an employer's manipulation of current pay.[336] In states like Texas that do not require an employer to explain the basis for a pay calculation in a pay advice issued with wages,[337] an employee might not discover the employer's manipulation of pay for a long time.[338]

Non-wage benefits are better protected from the *McAllen Hospitals* rule.[339] In 1974, Congress adopted a federal law of employee benefits in part, because state courts had sometimes treated pensions and other important welfare benefits as nonbinding.[340] *McAllen Hospitals* is a contemporary illustration of the risks of a misapplication of contract law to the unusual circumstances of employment.[341] Fortunately, to the extent benefits described in an employer's policies qualify as an employee benefit plan subject to federal law, those benefits are no longer subject to state law, and an employee may sue to recover benefits in a federal court.[342] In fact, an employer must not fail to integrate a benefit plan. Attaching a disclaimer to a document describing an employee benefit plan would likely violate federal law; unless

331. McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 397 (Tex. 2019).

332. *Id.*

333. *Id.*

334. CARLSON & MOSS, *supra* note 99, at 316–17.

335. *See supra* pp. 11–12 (explaining the *McAllen Hospitals* handbook policy evidence discussed in court).

336. *See supra* notes 150–52 and accompanying text (noting that the hospital in *McAllen Hospitals* did not explain their methods of pay calculation).

337. *See supra* note 151 and accompanying text (noting that pay advices to the nurses in *McAllen Hospitals* did not provide information as to any pay fluctuation).

338. *McAllen Hosps.*, 576 S.W.3d at 397.

339. *Id.*

340. *See* 29 U.S.C. § 1001.

341. *See also* Parviz-Khyavi v. Alcon Lab'ys, Inc., 395 S.W.3d 376 (Tex. App.—Dallas 2013, no pet.) (noting that an employer not bound by its description of its disability benefits because of its anti-integration declaration).

342. *See id.*

the employer has provided a complete integration of the plan in some other document.[343]

McAllen Hospitals presents the greatest danger for deferred compensation in the form of bonuses, profit-sharing, and certain "payroll practices" that are not protected by employee benefits law[344] and do not qualify as current compensation protected by state wage payment laws.[345] Deferred income includes any form of compensation that is earned by current service and effort but does not accrue, or is not paid, until the passage of a significant amount of time.[346] An employer might induce an employee's lengthy, continued service and effort by a promise of deferred compensation only to assert much later that the stated rules were not really binding.[347]

Texas courts in particular have struggled with the issue of whether a promise of deferred pay is binding. In some cases, the Texas courts have denied enforcement of an employer's promise to pay deferred compensation simply because the promise was included in a handbook with a general disclaimer.[348] The Texas courts' frequent difficulty with the enforceability of terms of pay stems in large part from their confusion over the function of employer policies, the effect of an anti-integration declaration, and the differences between integration and non-integration.[349] *McAllen Hospitals* makes the confusion worse and leaves the Texas courts with a new rule that will make employee enforcement of the terms of pay more difficult than ever.[350]

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343. CARLSON & MOSS, *supra* note 99, at 328.

344. *See generally McAllen Hosps.*, 576 S.W.3d at 389–97. A plan is not covered by ERISA unless it has a "pension" function or a "welfare" function. 29 U.S.C. §§ 1002(1), 1002(2).

345. CARLSON & MOSS, *supra* note 99, at 317.

346. *Id.*

347. *See id.*

348. Parviz-Khyavi v. Alcon Lab'ys, Inc., 395 S.W.3d 376, 381–82 (Tex. App.—Dallas 2013, no pet.). *See also* City of Denton v. Rushing, 570 S.W.3d 708 (Tex. 2019) (noting that a handbook subject to an anti-integration clause could not satisfy the requirement of a properly executed written contract for purposes of waiving sovereign immunity from contract liability); Vanegas v. Am. Energy Servs., 224 S.W.3d 544 (Tex. App.—Eastland 2007), *rev'd*, 302 S.W.3d 299 (Tex. 2009).

In *Vanegas*, an employer promised employees a specific percentage of the sale price of the business if they remained in employment through the sale. *Vanegas*, 224 S.W.3d at 546. After the employer completed the sale and the employees' completed their performance, the employer refused to pay the promised compensation, and the employees sued. *Id.* The court of appeals upheld summary judgment for the employer, finding the employer's promise "illusory because it depended on [the employees'] continued employment. [But,] [a]fter making the promise, AES could have terminated appellants in lieu of performance." *Id.* at 549. On this occasion, the Texas Supreme Court vindicated the employees' contractual rights to pay. Vanegas v. Am. Energy Servs., 302 S.W.3d 299, 304 (Tex. 2009). It found that the court of appeals had misapplied the law of unilateral contracts. *Id.* The condition of the employer's promise was the employees continued service through the sale of the business. *Id.* at 300–03. Once the employees fulfilled that condition, it was no longer relevant whether the employment was "at-will." *Id.* at 303. The Supreme Court's decision in *Vanegas* was a step in the right direction, but *McAllen Hospitals* gives employers new grounds for asserting that the rules of pay are discretionary for employers. *See generally* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 396–97 (Tex. 2019).

349. *See* cases cited in *supra* note 348 (discussing the evolution of the case law).

350. *See generally McAllen Hosps.*, 576 S.W.3d at 396–97.

A second way *McAllen Hospitals* changed contract and employment law was by implying that a party can gain important contract-like rights in a transaction without the usual requirements of mutual assent or exchange of consideration.[351] *McAllen Hospitals* created a right of one party to preclude the other from introducing a document in evidence, and this right arose without a contract.[352] To appreciate the contract-like power of this non-contract right, consider the functional similarities between the parol evidence rule, which arises from a contract, and the *McAllen Hospitals* rule based on one party's unilateral declaration.[353] Under the parol evidence rule, two parties mutually adopt a writing to serve as the final and exclusive statement of their contract.[354] From this mutual act arises an important contract-based rule.[355] Either party can bar the other from asserting rights or defenses based on prior agreements different from or omitted from the integration.[356] If one party seeks to introduce evidence to prove an omitted term, the other party can object based on the parol evidence rule.[357] The linchpin of this rule is a contract integration. A single party acting alone cannot declare a document to be the final and exclusive version of the parties' contract. Integration is a mutual act.[358]

Under *McAllen Hospitals*, a party can gain evidentiary preclusion rights analogous to the parol evidence rule, but without the mutual adoption of an integrated contract.[359] By a simple disclaimer as interpreted by the Court, the hospital exacted the nurses' duty not to introduce otherwise relevant evidence of the terms of an unintegrated contract,[360] and yet the disclaimer was certainly not a contract in itself or part of a contract. It could not be a contract because it said on its face, "[this] is not a contract."[361]

McAllen Hospitals is a paradox. According to the Court, the hospital's disclaimer prevented proof of a contract by creating a contract not to prove a contract, all within the space of a single sentence.[362] Like Schrödinger's cat, the contract was both dead and alive at the same time.[363] This idea is probably

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351. *Id.*
352. *Id.*
353. *See generally id.*
354. *See* RESTATEMENT (SECOND) OF CONTS. §§ 209, 213–16 (AM. L. INST. 1981).
355. Hubacek v. Ennis State Bank, 317 S.W.2d 30, 31 (Tex. 1958).
356. *Id.*
357. *See id.*
358. *See* RESTATEMENT (SECOND) OF CONTS. §§ 209, 213–16.
359. McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 396–97 (Tex. 2019).
360. *Id.*
361. *Id.* at 396. Was the declaration applicable to all of the handbook except to the declaration itself? This seems unlikely. The Texas Supreme Court had previously confirmed that a handbook's general anti-integration declaration has the same effect as to all the handbook's provisions, even those that are plausibly "promises" by employees. *In re* 24R, Inc., 324 S.W.3d 564, 567 (Tex. 2010) (explaining that if an arbitration provision is part of handbook with general anti-integration declaration, it cannot not constitute an employee's binding promise).
362. *McAllen Hosps.*, 576 S.W.3d at 396.
363. *See id.*; *see generally Schrodinger's Cat*, WIKIPEDIA, en.wikipedia.org/wiki/Schrödinger%27s_

impossible as a legal concept.[364] If it is possible, the resulting anti-contract contract is necessarily unenforceable on other grounds.[365] According to the Court, the disclaimed document bound the nurses to a promise not to use the hospital's documents as evidence and simultaneously deprived the nurses of any consideration because the disclaimed document also declared that the hospital was not bound.[366] The lack of consideration and mutual assent is especially striking with respect to the Court's application of the disclaimer to the hospital's subsequently issued documents.[367] Nothing in the facts stated by the Court supported its assumption that the nurses accepted an agreement that the disclaimer applied to these later documents or that the hospital gave consideration for a promise not to introduce these subsequent documents as evidence of unintegrated terms.[368] In extending the reach of the hospital's disclaimer, the Court reasoned that the subsequent documents addressed a common subject matter: the incidental rules or policies of the employer's promise to pay.[369] In the Court's view, a common subject matter was sufficient to make one set of documents subject to a party's disclaimer in a separate, prior document.[370] A comparison to the parol evidence rule is instructive, again.[371] Mutual adoption of an integration of a contract does not preclude the possibility that the parties will modify their contract by a subsequent agreement.[372] In contrast, a disclaimer, as interpreted by *McAllen Hospitals*, has prospective and not just retroactive preclusive effect.[373] The disclaimer precludes a party from introducing a document the disclaiming party might subsequently issue with respect to the same subject matter.[374]

Whether contract or something else, a disclaimer, as interpreted by *McAllen Hospitals*, has another important feature that distinguishes it from a traditional contract.[375] It is binding on the judiciary.[376] In the words of the Court, "[t]he handbook expressly barred the jury from giving weight to" the performance review or handbook "[to] provide evidence of a commitment by

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cat (last visited June 5, 2021).

364. *See generally McAllen Hosps.*, 576 S.W.3d at 389–97. In a related vein, the usual rule of contract law is that the parties' recitation of a fact or a conclusion of law in a contract does not preclude either party from rebutting that fact or conclusion. *See supra* notes 169–72 and accompanying text (noting that generally, contracts do not have to be in writing). A recitation that "we have no contract" or that "this document is not a contract" would appear to fit within this rule. *See supra* note 176 and accompanying text (noting the dangers associated with not having a fully written out contract).

365. *See McAllen Hosps.*, 576 S.W.3d at 397.

366. *Id.*

367. *Id.* at 392–97.

368. *Id.*

369. *Id.*

370. *Id.*

371. *See* RESTATEMENT (SECOND) OF CONTS. § 110 (AM. L. INST. 1981).

372. Lakeway Co. v. Leon Howard, Inc., 585 S.W.2d 660, 662 (Tex. 1979).

373. *McAllen Hosps.*, 576 S.W.3d at 397.

374. *Id.* at 396–97.

375. *Id.* at 395.

376. *Id.*

the Hospital to pay a fixed salary."[377] If the hospital's disclaimer barred the jury from considering the hospital's documents, it had the same effect on the trial court and court of appeals when those courts reviewed the legal and factual sufficiency of the jury's verdict, and it required, or at least allowed, the Supreme Court of Texas to declare the documents "no evidence" for purposes of legal sufficiency review.[378]

Granting a disclaimer or anti-integration declaration such preclusive effect is contrary to the usual rule of contract law that a recital of a fact or conclusion law is not binding on the parties or a court.[379] If a party signs a recital that "a cat is a dog," that party is still entitled to argue and prove, and a court is entitled to hear, that a cat is not a dog.[380] The preclusive effect *McAllen Hospitals* grants a disclaimer also lacks any basis in the rules of evidence.[381] The Court cited no rule of evidence, and the hospital did not object to the admission of the documents in evidence.[382] The documents were certainly relevant to show the hospital's manifestations, understanding, and intention with respect to disputed, unintegrated terms of pay,[383] and they were the hospital's own documents and admissions of its understanding.[384]

McAllen Hospitals is troubling for employees of all kinds and ranks.[385] Upper level management, professionals, and executive employees have the most to lose because they are more likely to work in exchange for employer promises that include deferred compensation, which can accumulate in very significant amounts over a long period of time.[386] For simple hourly wage employees, *McAllen Hospitals* is troubling mainly because it gives dishonest employers a new way to "shave" pay: stating the incidental rules of pay in writing presented to workers, but declaring in fine print that the rules of pay are not binding on the employer and that employees cannot present the rules as evidence of the rules of the employer's unintegrated promise to pay.[387]

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377. *Id.* at 394.

378. *Id.* at 395.

379. *See, e.g.*, Newspapers, Inc. v. Love, 380 S.W.2d 582, 584 (Tex. 1964) (reciting that worker was an "independent contractor" and not an employee did not preclude argument or evidence to show that worker was an employee); Carr v. Christie, 970 S.W.2d 620, 625 (Tex. App.—Austin 1998, pet. denied); RESTATEMENT (SECOND) OF CONTS. § 218 (AM. L. INST. 1981) (preserving a party's right to disprove, and a court's authority to reject, an untrue recital).

380. *See Newspapers, Inc.*, 380 S.W.2d at 584.

381. *See generally McAllen Hosps.*, 576 S.W.3d at 389–97.

382. *See id.* There is no indication of such an objection or assertion of a rule of evidence in the Court's opinion or in the Hospital's Response to Petition for Review, McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389, 391 (Tex. 2019) (No. 17-0733), 2017 WL 5517018.

383. TEX. R. EVID. 402.

384. *See id.*

385. *See McAllen Hosps.*, 576 S.W.3d at 389.

386. *See also* TEX. LAB. CODE § 61.015, which provides that "commission[s] and bonuses are due according to the terms of . . . an agreement between an employee and employer." *Id.* Commissions and bonuses are frequently subject to complex rules that an employer might issue as policies. *See id.* If so, *McAllen Hospitals* might render bonuses and commissions unenforceable. *See McAllen Hosps.*, 576 S.W.3d at 389.

387. *Compare* LAB. § 61.015, *with McAllen Hosps.*, 576 S.W.3d at 389.

If employers succeed in invoking *McAllen Hospitals* in future employment cases, it may encourage other types of parties who control the documentation of standardized transactions to use the same strategy.[388] In any setting in which an obligor's own documents state or imply a promise to calculate an amount due according to certain rules, the obligor can present fine print disclaimers or declarations that the rules are inadmissible as evidence.[389] If the obligor then pays less than what is due under its own rules, and an uninformed obligee does not notice the shortage in time to prevent the obligor's unilateral "course of dealing," the obligee is bound by the obligor's departure from the rules.[390] This tactic might also work in reverse. An obligee in control of the documentation of a transaction can issue disclaimed documents describing the rules by which it will calculate an amount due, charge the obligor a higher amount according to a different method, and then deny the admissibility of its own rules by invoking a simple disclaimer in the fine print of at least one of its documents. If the obligor has not discovered the overcharges soon enough, it is bound by the obligee's unilateral "course of dealing."

On the other hand, after *McAllen Hospitals*, an employer's use of a disclaimer is also more dangerous to the employer than before.[391] As interpreted by *McAllen Hospitals*, a disclaimer can undermine a disclaiming party's defenses to a variety of substantial liabilities.[392] Even before *McAllen Hospitals*, a disclaimer acting as no more than an anti-integration declaration had some potential backfire effects, such as voiding an included arbitration policy.[393] This problem can be contained by making the documentation more complicated, but *McAllen Hospitals* creates new risks for an employer in part because it can affect a much greater range of policies.[394] An incautious employer might find that *McAllen Hospitals* impedes the employer's defense against a variety of employee claims.[395]

Employers depend on their ability to introduce their policies as evidence to limit liability for many types of employment law liabilities.[396] Policies can be useful to prove that a discharge was because of an employee's violation of a command policy and not because of illegal bias.[397] Policies can insulate an employer from liability for certain actions by individual managers by

388. *See McAllen Hosps.*, 576 S.W.3d at 389.
389. *Id.* at 395.
390. *Id.* at 393.
391. *See id.*
392. *Id.*
393. *See supra* pp. 22–23 (discussing the types of policies that employers can have in place).
394. *See McAllen Hosps.*, 576 S.W.3d at 396–97.
395. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Tex. Div.-Tranter, Inc. v. Carrozza, 876 S.W.2d 312, 313–14 (Tex. 1994) (demonstrating that employers rely on evidence of their polices to defend against employment-related claims).
396. *See, e.g.*, *Burlington*, 524 U.S. at 765; *Tex. Div.-Tranter*, 876 S.W.2d at 313–14.
397. *See Tex. Div.-Tranter*, 876 S.W.2d at 313–14.

prohibiting those actions in advance.[398] If you are an employer, "good faith" matters, as it does whenever punitive damages are in question. Preventive policies are part of an employer's defense.[399]

Consider just a few examples. Employers frequently use uniform absence control policies to gain summary dismissal of retaliatory discharge actions under workers' compensation law.[400] If an injured employee cannot return to work within a certain time, employment terminates automatically by virtue of the policy and not because of an employer's retaliatory intent.[401] The policy makes the termination indisputably lawful; unless the employee can prove the employer discriminated in its application of the policy or that the policy is a fiction.[402] However, if the absence control policy is inadmissible because it is contained in a handbook with a disclaimer, summary judgment might be impossible for the employer.[403]

Employer policies also limit potentially massive overtime liability for misclassification of an entire category of employees under the FLSA, as happened in *McAllen Hospitals*.[404] Under the FLSA, an employer, like the hospital in *McAllen Hospitals*, might claim an exemption from overtime rules with respect to allegedly salaried administrative, professional, or executive employees.[405] To guard against classification-wide liability for isolated or inadvertent violations of the salary rule (such as by docking an employee's pay for hours not worked), the employer can adopt a written rule of pay that payroll actions inconsistent with a salary are against the employer's policy, and that inadvertent violations of the rule can be remedied by a grievance procedure and rapid compensation.[406] If the policy is not admissible evidence for the employer, or not enforceable by an employee, the employer might not be entitled to this defense, making it liable for unpaid overtime for every employee within the same classification—if the employer docks salary of a single individual in the classification.[407]

One more example of the new risk for employers is the loss of an affirmative defense against imputed liability for a supervisor's unlawful harassment of an employee.[408] If a supervisor harasses an employee because of sex or another protected characteristic, the extent of the employer's liability depends in part on the employer's proof of "reasonable care" to

398. *See Burlington*, 524 U.S. at 765.
399. *See* Degrace v. Rumsfeld, 614 F.2d 797, 805 (1st Cir. 1980).
400. *See Tex. Div.-Tranter*, 876 S.W.2d at 313–14.
401. *See id.*
402. *See id.*
403. *See generally* McAllen Hosps., L.P. v. Lopez, 576 S.W.3d 389 (Tex. 2019).
404. *See generally id.*
405. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.
406. RICHARD CARLSON, EMPLOYMENT LAW 279 (2d ed. 1987).
407. *See generally McAllen Hosps.*, 576 S.W.3d at 389.
408. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

prevent and remedy such harassment.[409] The existence and effectiveness of the employer's policy prohibiting illegal harassment and establishing a procedure for redress is essential for the affirmative defense in most situations.[410] The lack of a legitimate and reasonably effective policy for dealing with harassment complaints can cause the loss of the defense.[411]

The Court in *McAllen Hospitals* appeared to imply that an employer might be able to assert a policy as evidence for its own benefit even when it has precluded the policy as evidence for employees.[412] However, it is not unusual for litigation between employees and employers to involve a multiplicity of contract, tort, and statutory claims, more than one of which might involve an employer policy as evidence.[413] It may be difficult to disentangle employee contract claims (policy is no evidence for the employee) from employee statutory claims (policy is "some evidence" for the employer) in certain settings.[414] If an employer presents a handbook to prove a salary to support its claim for an FLSA exemption,[415] will the employer still be allowed to object to an employee's use of the same handbook as evidence of other terms of pay that are the basis for a separate contract claim?

Even when there is no mixture of contract and other issues in one employment dispute, the employer's assertion of *McAllen Hospitals* to bar the admission of its policies as evidence in one proceeding might haunt it in other proceedings.[416] An employer's successful invocation of *McAllen Hospitals* to preclude the introduction of its policies in one dispute might preclude the employer's reliance on its policies as part of a defense in another dispute by virtue of "judicial estoppel."[417] Will the hospital in *McAllen Hospitals* now be barred from using its handbook, or other disclaimed policy memoranda, to prove its commitment to paying a true salary in defense of alleged violations of the FLSA, or to prove that an attendance policy was absolutely mandatory and required the termination of an injured employee who could not return to work within the deadline?

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409. *See id.*

410. *Id.*

411. *See id.*

412. *McAllen Hosps.*, 576 S.W.3d at 394 ("[T]he question before us is not whether the handbook disclaimer prevents the performance reviews from being admitted into evidence for *any* purpose. Instead, the question is whether those reviews can provide evidence of a commitment by the Hospital to pay a *fixed salary*.") (emphasis added).

413. *See id.* at 396–97.

414. *Id.*

415. *See id.*; *see also* 29 C.F.R. § 778.114 (implying the handbook might be essential to the employer's case in a number of ways. For example, if an employer alleges it complies with the FLSA salary requirement by paying a fixed salary for a fluctuating workweek, the employer must prove the parties agreed to such a pay practice).

416. *See McAllen Hosps.*, 576 S.W.3d at 397.

417. *See* Perryman v. Spartan Tex. Six Cap. Partners, Ltd., 546 S.W.3d 110, 117 (Tex. 2018).

More generally, *McAllen Hospitals* degrades the value of policies whenever employer good faith is a specific legal issue or simply a matter of appearances before a fact finder.[418] Some judges and factfinders might be troubled that an employer can create a document to use in evidence when it suits the employer, but object to introduction of the document as evidence for employees when it does not suit the employer.[419] Even if the law permits the employer a right to this self-serving inconsistency, exercising the right might lose the employer's goodwill with the factfinder and the employer's workforce.[420]

V. CONCLUSION

Had the Texas Supreme Court reversed the lower courts and set aside the jury verdict on grounds of factual insufficiency, the outcome would have been unremarkable. Under the totality of the circumstances, the verdict for the nurses was arguably "clearly wrong and unjust."[421] However, the Texas Constitution prohibits the Texas Supreme Court from conducting a factual sufficiency review.[422] The Court was limited to a legal sufficiency review and could reverse the verdict only by finding an error of substantive law or by declaring the evidence no evidence at all.[423] Had the Court reversed the jury verdict and the lower courts based on the law of estoppel, its decision would have added little or nothing to existing law.[424] However, the estoppel defense was not presented.[425]

Thus to reverse the jury verdict, the Court declared a new rule of law that made the nurses' evidence no evidence.[426] The Court rewrote the law of unintegrated contracts by treating a standard disclaimer as the creation of the disclaiming party's right to bar a court's consideration of a document as any evidence of disputed, unintegrated terms.[427] By the Court's reasoning, a disclaimer has this effect as to subsequent documents even without the other party's assent.[428] The disclaiming party can assert this right to preclude its documents as evidence not only against the other party but also the judiciary.[429]

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418. *McAllen Hosps.*, 576 S.W.3d at 397.
419. *Id.*
420. *Id.*
421. Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam).
422. TEX. CONST. art. V, § 6.
423. *McAllen Hosps.*, 576 S.W.3d at 389.
424. *See id.*
425. *See id.*
426. *See id.* at 395.
427. *See id.* at 396.
428. *See id.*
429. *See id.*

The Court's adoption of this new rule avoided the constitutional limits of the court's authority to review the evidence and achieved an equitable outcome for one very peculiar case.[430] However, by making significant new law, *McAllen Hospitals* became a precedent that may lead to inequitable and even shocking outcomes in other more typical disputes over unintegrated contract terms.[431] As the old adage goes, "hard cases make bad law."

430. *See id.* at 396–97.
431. *See id.*