OPINION OF ACOBA, J.
CONCURRING IN PART AND DISSENTING IN PART

In the main,[1] I respectfully disagree with the majority's promissory estoppel analysis for the reasons following. First, I believe the "manifestation of [Defendants'] intent" in the promises made by them to Gonsalves must be viewed using an objective standard. Hence, the statements only, rather than an interpretation of the subjective intent of Wayne Suehisa, the Vice President and Treasurer of Nissan and the Treasurer of Infiniti, in making the statements, are controlling. Ordinarily, the nature of the promises, and whether those statements were sufficient to create an enforceable promise, are questions for the jury.

I believe that the jury could have determined that one of the statements made by Suehisa was sufficiently definite so as to justify Gonsalves in understanding that a binding promise had been made. However, inasmuch as only one of the several "promises" submitted by the court to the jury would support a promissory estoppel claim, I would remand the case for the jury to consider whether that promise supported Defendants' liability and if the jury affirmatively decided it did, then for the jury

---

[1] I also believe the court abused its discretion in failing to sanction Defendants-Appellants/Cross-Appellees Nissan Motor Corporation in Hawai‘i, Ltd. and Infiniti Motor Sales, Inc. (collectively, Defendants) for violation of a pretrial order and "false claims of privilege and relevance." Majority opinion at 43 (emphasis added). I believe these violations were more egregious than the unauthorized setting of a deposition for which the Plaintiff-Appellee/Cross-Appellant Leland Gonsalves was sanctioned by the court and which the majority upholds. I agree with the majority's resolution of Gonsalves's sex discrimination and implied contract claims.

to apply a "reliance" measure of damages rather than "expectation" damages as it had been instructed. Second, in my view, public policy, which the majority relies on, does not mandate that we refuse to enforce Suehisa's promises to Gonsalves, inasmuch as other methods of progressive discipline were available to the employer to meet public policy concerns.

I.

According to the promissory estoppel instruction given by the court, Suehisa made four representations to Gonsalves: (1) that Gonsalves did not need an attorney; (2) that Gonsalves would not be fired; (3) that the investigation would be "thorough and fair"; and (4) that Gonsalves would be provided with progressive discipline in a "fair and consistent" manner.[2]

Defendants contend that Gonsalves's promissory estoppel claim "fails as a matter of law" because the statements made by Suehisa "do not express a clear and definite commitment or intention to act or refrain from acting in any specified way." (Quoting In re Herrick, 82 Hawai'i 329, 338, 922 P.2d 942, 951 (1996).) Defendants maintain that (1) the first statement reflects an opinion or an assurance, rather than a promise, (2) the second statement was a warning made to Neldine Torres and was not a commitment to Gonsalves, and (3) the third statement is vague and, therefore, fails to provide a clear and definite

[2] Neither party mentions the fourth alleged promise in their briefs.

promise. In my view, Defendants are arguably correct regarding the first and third promises, but not the second.

II.

The question of whether an enforceable promise has been made is determined on a case-by-case basis. As one court has observed, "as to establishing the requisite promise, the totality of the circumstances determines the nature of the contract. Agreement may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances." Price v. Public Serv. Co., 1 F. Supp. 2d 1216, 1226 (D. Colo. 1998) (quoting Soderlun v. Public Serv. Co., 944 P.2d 616, 621 (Colo. Ct. App. 1997)).

Not all statements are enforceable "promises." A promise to act is distinguishable from an opinion or a prediction.

> A promise must be distinguished from a statement of opinion or a mere prediction of future events. The distinction is not usually difficult in the case of an informal gratuitous opinion, since there is often no manifestation of intention to act or refrain from action or to bring about a result, no expectation of performance and no consideration.

Restatement (Second) of Contracts § 2 cmt. f (1979). Moreover, a promise must be somewhat definite in order to allow the court to evaluate the promise and its attendant obligations. See Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1465 (10th Cir. 1994) (assurances of fair treatment were mere "vague assurances" and unenforceable under Colorado law); Grossman v. Computer Curriculum Corp., 131 F. Supp. 2d 299, 306 n.4 (D. Conn. 2000)

(assurances of continued employment, allegedly given to employee educational consultant by officer of employer in successful effort to dissuade him from resigning, were insufficiently detailed to constitute promise); Irwin v. Marquette Med. Sys., Inc., 107 F. Supp. 2d 974, 990-91 (S.D. Ohio 2000) (e-mail message from executive to sales persons, informing them that strategic alliance with another company did not place anyone's job in jeopardy, did not constitute promise of continued employment); Wilder v. Butler Mfg. Co., 533 N.E.2d 1129, 1130-31 (Ill. Ct. App. 1989) (concluding that statements by personnel manager to employee that "[you're] the first woman here[;] [t]here's no problem[;] [y]ou have a permanent job," did not state clear and definite terms of an enforceable contract); Titchener v. Avery Coonley Sch., 350 N.E.2d 502, 506-07 (Ill. Ct. App. 1976) (holding that statement by employer that "[y]our future is here at [the school,] and I hope it will be for many years to come" did not state clear and definite terms of an enforceable contract).

III.

A.

Suehisa's first statement to Gonsalves, that Gonsalves did not need an attorney, was seemingly an opinion or an assurance, rather than "a manifestation of intention to act or refrain from acting in a specified way[.]" Herrick, 82 Hawai‘i at 338, 922 P.2d at 951 (quoting Restatement (Second) of

Contracts, supra, § 2(1)). Accordingly, it was not an enforceable promise.

Suehisa's third statement to Gonsalves, that the investigation would be "thorough and fair," does indicate an "intention to act . . . in a specified way[.]" Id. This statement was, however, insufficiently definite to enable this court to evaluate the promise and its attendant obligations. Similarly, the fourth alleged promise that Gonsalves would be provided with progressive discipline in a "fair and consistent" manner is also insufficiently definite to constitute terms of an enforceable contract.

The statement that Gonsalves testified Suehisa made to him, that Gonsalves "didn't have to worry about losing [his] job[,]" must be viewed objectively. It cannot be construed in terms of any hypothetical or unvoiced intentions Suehisa may have harbored when making the remark. Suehisa promised Gonsalves that he would not lose his job. Although the promise was made to Gonsalves before the completion of the investigation, there is no indication that it was contingent upon the results of that investigation. By contracting the meaning behind the statement that "Gonsalves didn't have to worry about losing [his] job" to Gonsalves could be discharged pending the outcome of the investigation, Defendants substitute their view of Suehisa's supposed subjective intent as to what Suehisa was trying to convey. Defendants err in doing so, inasmuch as a promise must be viewed objectively, rather than as incorporating limitations

based upon the secret intentions of the promisor. In effect, Defendants redefine the word "promise."

B.

In Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983), this court adopted the revised Restatement (Second) of Contracts § 90 (1979), which sets out the requirements of promissory estoppel. See Ravelo, 66 Haw. at 201, 658 P.2d at 887-88. "[T]he essence of [promissory estoppel] is detrimental reliance on a promise." Id. at 199, 658 P.2d at 887 (citations omitted). The elements of promissory estoppel pursuant to § 90 are:

> (1) There must be a promise;
> (2) The promisor must, at the time he or she made the promise, foresee that the promisee would rely upon the promise (forseeability);
> (3) The promisee does in fact rely upon the promisor's promise; and
> (4) Enforcement of the promise is necessary to avoid injustice.

Herrick, 82 Hawai'i at 337-38, 922 P.2d at 950-51 (citation omitted) (emphases in original). In Herrick, this court further defined a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Id. at 338, 922 P.2d at 951 (quoting Restatement (Second) of Contracts, supra, § 2(1)). "In elaborating on this term, the commentators have said that '[a] promisor manifests an intention if he [or she] believes or has reason to believe that the promisee will infer that intention from his [or her] words or

conduct." Id. (quoting Restatement (Second) of Contracts, supra, § 2(1) cmt. b).

The promisor's manifestation, and, therefore, the promisor's promise, is judged using an objective standard, rather than relying upon only what the promisor intended to convey. Restatement (Second) of Contracts § 2 comment b explains that "[t]he phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention." (Emphasis added.)

Viewed objectively, Suehisa's statement that Gonsalves "didn't have to worry about losing his job" is unconditional. The plain meaning of Suehisa's statement was that Gonsalves did not have to worry about termination, not that Gonsalves's job was safe only for the time being, or that Suehisa would not fire Gonsalves at that point in time, based solely on Torres's uninvestigated allegations. There is nothing within the promise itself that conditions Gonsalves's job. Accordingly, the promise must be judged on the "external expression of intention[.]" Restatement (Second) of Contracts, supra, § 2 cmt. b (emphasis added).

IV.

In the present case, the jury determined that, through their agent Suehisa, that Defendants had made enforceable representations to Gonsalves. It is well established in this

jurisdiction that, in contract, "[w]hether or not the parties entered into an agreement is essentially a question of fact." Island Directory Co. v. Iva's Kinimaka Enters., Inc., 10 Haw. App. 15, 23, 859 P.2d 935, 940 (1993) (citations omitted). As such, the existence of a contractual relationship is a question for the jury "for its determination of the facts concerning the issue of the contractual relation between the parties." Ferreira v. Honolulu Star-Bulletin, 44 Haw. 567, 571, 356 P.2d 651, 654, reh'g denied, 44 Haw. 581, 357 P.2d 112 (1960). Similarly, "[i]f the evidence as to whether an enforceable promise was made is 'conflicting or will admit of more than one inference[,] . . . the issue is one for the jury. If, on the other hand, the evidence discloses only a "vague assurance," rather than a legally enforceable promise, then the court must determine the issue as a matter of law.'" Price, 1 F. Supp. 2d at 1226 (quoting Soderlun, 944 P.2d at 621).

Because all of the "promises" were presented as a package in one instruction[3] to the jury for its consideration, the jury could have relied on one of the statements that did not amount to an enforceable promise.[4] The instruction therefore was

---

[3] The record indicates that an objection was made to the jury instruction, however, the nature of the objection is unclear.

[4] The subject instruction stated that

> [t]o prevail under this theory, Plaintiff must prove each of the following elements by a preponderance of the evidence:
> First, that Defendants made the following promises to Plaintiff concerning his employment with Defendants:
> a) that he would be provided a thorough and fair investigation of the claims against him by Neldine Torres;
> (continued...)

erroneous, and I would vacate the judgment and remand for the jury's consideration of Defendants' statement that Gonsalves would not lose his job.

V.

Defendants argue that Gonsalves also may not maintain his promissory estoppel claim because Gonsalves cannot prove damages. They urge that the jury instructions regarding damages on Gonsalves's promissory estoppel claim allowed the jury to award "improper contract damages" contrary to Hawai'i case law. In opposition, Gonsalves maintains that the amount of damages for all claims was "conservative." As to the jury instructions, Gonsalves argues that these were proper and not in any way misleading.

A.

The doctrine of promissory estoppel may modify an employment relationship that is otherwise terminable at will. See, e.g., Lord v. Souder, 748 A.2d 393, 399 (Del. 2000); Foote v. Simmonds Precision Prods. Co., 613 A.2d 1277, 1278 (Vt. 1992). A promise can be made during the course of employment that does not specifically change the at-will relationship and does not remove the employment relationship from the at-will realm. See

[4](...continued)
b) that he would not lose his position; c) that he did not need to obtain a lawyer and; and [sic] d) that he would be provided with progressive discipline in a fair and consistent manner.

id. at 1280. Thus, a promise may modify the terms of the relationship, so as to prevent an employer from terminating an employee for a specific reason, while otherwise generally retaining the at-will character of the relationship, allowing the employer to discharge the employee for any or no reason, except for the specific situation that is the subject of the modification. See id.

> Nothing about the at-will doctrine suggests that it does not coexist with numerous modifications and exceptions imposed by law, including the law of promissory estoppel, depending on the facts of a particular case. . . . Even with modifications, employees for an indefinite term are still considered at-will employees, who may be discharged for any number of reasons not prohibited by the modifications.

Id.

B.

Calculating damages in cases such as these, however, is a different matter than determining damages in an ordinary contract situation. Damages cannot be predicated on future earnings, because the employee generally can still be terminated for any or no reason at all. See Treadwell v. John Hancock Mut. Life Ins. Co., 666 F. Supp. 278, 287 (D. Mass. 1987) (stating that, because "[t]he promise of secure and continued employment is simply too vague to be enforceable under the doctrine of promissory estoppel and thereby transform the nature of plaintiff's employment from at-will to employment for a definite period[,]" "plaintiff cannot recover as damages wages or benefits related to future services beyond that which would accrue during

the period covered by" the retraining program promised to the plaintiff). Damages may still be established by the employee, in the form of financial detriment incurred as a result of the termination, however. See Lord, 748 A.2d at 400 ("Although quantifying damages in cases involving the wrongful discharge of an at-will employee is problematic, . . . [i]t is sufficient to claim that the discharge would not have otherwise occurred when it did and that the plaintiff incurred financial detriment as a result.").

VI.

The foregoing is consistent with our case law. Such a limitation on recovery is envisioned by the revised Restatement (Second) of Contracts, supra, § 90, which was adopted by this court in Ravelo, see 66 Haw. at 201, 658 P.2d at 887-88. Prior to Ravelo, this jurisdiction had viewed promissory estoppel under Restatement of Contracts § 90 (1932), which had required "action or forbearance of a definite and substantial character." Id. at 200, 658 P.2d at 887 (quoting Restatement of Contracts § 90 (1932)). As noted by the Ravelo court, "[c]hanges from the former § 90 are reflected in the deletion of the requirement that the action or forbearance induced be of 'a definite and substantial character,' . . . and a recognition of the possibility of partial enforcement." Id.

In Ravelo, this court additionally declared that partial enforcement was "particularly apt in this situation." Id. at 201 n.4, 658 P.2d at 888 n.4. This court explained that "relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise. Unless there is unjust enrichment of the promisor, damages should not put the promisee in a better position than performance of the promise would have put him[or her]." Id. (citations omitted).

As noted supra, because Gonsalves could generally be fired for any or no reason at all, any recovery for future earnings or benefits would "put [Gonsalves] in a better position than performance of the promise would have put him." Id. (citations omitted). Thus, as in Ravelo, Gonsalves was limited to partial performance of Suehisa's promise. Accordingly, damages in the present case should have been limited to those damages "measured by the extent of [Gonsalves's] reliance[,]" id., i.e., reliance damages, "rather than by the terms of the promise[,]" id., i.e., expectation damages. Accordingly, Gonsalves could not recover damages in excess of the earnings he would have realized had Defendants kept their promise and not terminated him based upon the allegations of harassment.

VII.

Defendants rely upon the "after-acquired evidence" rule set forth in McKennon v. Nashville Banner Publ'g Co., 513 U.S.

352, 359 (1995). They contend that Gonsalves's damages "would end (under the 'after-acquired evidence doctrine') when Defendants decided to terminate [Gonsalves] as a result of [their independent investigator, Linda] Kreis's report[,]" because, even if the original termination of Gonsalves was discriminatory, Kreis's report was sufficient to allow Defendants to terminate Gonsalves anyway. Gonsalves, on the other hand, argues that the "after-acquired evidence" rule has never been adopted in Hawai'i and is based upon a federal law, the Age Discrimination in Employment Act, § 2 et seq., 4(a)(1), as amended, 29 U.S.C.A. § 621 et seq., 623(a)(1) (1967). Further, Gonsalves argues that, even under McKennon, Defendants must establish that "the wrongdoing [constituting the reason for the second discharge] was of such severity that the employee would, in fact, have been terminated on those grounds alone had the employer known of it at the time of the discharge."

As observed by the majority, Gonsalves has no sex discrimination claim as a matter of law, and there was no implied contract that would alter the at-will nature of his employment. Thus, Defendants did not require a reason to terminate Gonsalves. Accordingly, the after-acquired doctrine is, in the present case, irrelevant to the question of damages.

VIII.

The jury instruction in the present case, however, did not address reliance damages but, instead, suggested expectation

damages, in contravention of Ravelo. It stated as follows:

> If you find for the Plaintiff under his theory of promissory estoppel, you may award such damages, if any, as would put the Plaintiff in the same position he would have been in if the promises allegedly made to him by Defendants had been kept.

(Emphasis added.) The wording of the instruction did not limit Gonsalves's award under his promissory estoppel claim to any detriment he suffered in reliance on the promises, nor indicate that Gonsalves could not recover more than he would be entitled to had the Defendants' promises been kept.

Instead, the instruction appears to rely upon the results of the other claims, inasmuch as the amount awarded "as would put [Gonsalves] in the same position he would have been in if the promises allegedly made to him by Defendants had been kept" rests upon a determination of future damages: if the jury determined that there was an implied contract and that Gonsalves was not an at-will employee, a promise not to fire Gonsalves could include future earnings. Thus, Gonsalves could receive expectation damages, rather than reliance damages.

This is demonstrated by the jury's verdict. The special verdict form with respect to promissory estoppel indicated that the jury found that "[Defendants] breach[ed] a promise to Mr. Gonsalves, upon which Mr. Gonsalves relied[.]" The jury indicated that special damages regarding this claim were $1,090,597, and general damages were $140,000.[5] The jury,

[5] The jury separately awarded the amount of $1,090,597 as special damages for Gonsalves's discrimination claim, promissory estoppel claim, and implied contract claim. Prior to reaching a verdict, the jury had sent a (continued...)

however, returned verdicts for the same amount of special damages for the discrimination and implied contract claims.

Additionally, the instruction did not limit any damages awarded to not more than what Gonsalves would have received, had Defendants kept their promises. Because the instruction did not differentiate between results, if the jury determined that Gonsalves was an at-will employee and if he was not, Gonsalves could receive an award in excess of what he could have received as future earnings and benefits had he remained in the employment of Defendants.

It is well established that erroneous jury instructions are presumptively harmful:

> "When jury instructions, or the omission thereof, are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Hirahara v. Tanaka, 87 Hawai'i 460, 462, 959 P.2d 830, 832, reconsideration denied, 87 Hawai'i 460, 959 P.2d 830 (1998) (citing Craft v. Peebles, 78 Hawai'i 287, 302, 893 P.2d 138, 153 (1995)). "Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." Id. at 463, 959 P.2d at 833 (citing Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 350, 944 P.2d 1279, 1293 (1997)).

Nelson v. University of Hawai'i, 97 Hawai'i 376, 386, 38 P.3d 95, 105 (2001). The jury instruction regarding damages, here, was also erroneous, because the limitations established by Ravelo were not included therein. Therefore, I would remand this case on the issue of damages also.

---

[5](...continued)
communication, asking if the damages for each cause were cumulative. The court had answered that "[t]he damages calculated under each count should be made separately. The [c]ourt will ensure that Mr. Gonsalves does not receive a double recovery."

IX.

The majority further objects to the enforcement of Suehisa's promises because it maintains that "this court [should not] enforce promises . . . against public policy." Majority opinion at 25. Contrary to the majority's assertion, however, there is no public policy that mandates that an employer terminate an employee who is accused of sexual harassment, and, accordingly, public policy does not require that this court invalidate any promises not to terminate such an employee, inasmuch as other forms of discipline are available to cure any violations.[6]

In its amicus curiae brief, the HCRC argues that the promises made by Suehisa should not be enforceable as a matter of public policy. As explained by the HCRC, within the context of supervisor harassment, absolute liability on the employer is imposed, but "immediate and appropriate action is still required . . . to 'take any other steps necessary to prevent sexual harassment.'" (Quoting Hawai'i Administrative Rules (HAR) Rule § 12-46-109(d).) Therefore, according to the HCRC, "[t]o the extent that these promises constitute a disavowal of an employer's legal obligation to take immediate and appropriate corrective action to prevent sexual harassment, they must be

[6] While the fourth alleged promise was not an enforceable promise, the option was open for the employer to impose progressive discipline, as it had seemingly indicated and as had been recommended by Kreis.

treated as unenforceable as a matter of public policy." (Citing In re Doe, 90 Hawai'i 200, 978 P.2d 166 (App. 1999).)

As observed by the HCRC, however, "the rule on supervisor harassment . . . does not specify what an employer must do after notice" of supervisor harassment. In the present case, Suehisa promised Gonsalves that he would not be fired. Suehisa did not make any representations as to other disciplinary actions that may have been "immediate and appropriate[ly] corrective[.]" HAR Rule § 12-46-109(d). Other disciplinary methods were available and were, in fact, recommended by Kreis in her interim report. In that report, she recommended that Gonsalves "be counseled about his unacceptable behavior and disciplined in a manner to assure that there's no reoccurence." Thus, under the circumstances of this case, enforcement of the promises made to Gonsalves would not "constitute a disavowal of [Defendant's] legal obligations" or a violation of public policy.

X.

Accordingly, based upon the analysis supra, I would remand this case to the court on Gonsalves's promissory estoppel claim.