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## Employee Handbooks and the Legal Effect of Disclaimers

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# Employee Handbooks and the Legal Effect of Disclaimers

Stephen F. Befort†

*In his article, Professor Befort discusses the use of employee handbook disclaimers in the workplace. He begins the article with an examination of the employment-at-will rule, its history, and exceptions which recently have been utilized by courts that refuse to apply the rule under certain conditions. He then turns to the use of handbook disclaimers and explores the varying contexts in which courts agree or decline to enforce them. Finally, Professor Befort offers a somewhat different approach which takes into account both the benefits employers derive from the use of handbooks and the reasonable expectations they instill in employees.*

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## INTRODUCTION

The decline in strict enforcement of the employment-at-will rule was widely acclaimed as the most important development in employment law during the 1980's.<sup>1</sup> Courts and legislative bodies alike created exceptions in response to the perceived harshness of a rule that permitted employers to discharge their employees regardless of rationale or length of service.

One of the most commonly accepted limitations on the at-will rule is the implied contract exception; the employee handbook is a notable example. These handbooks, which detail an employer's personnel rules and expectations, are more than mere gratuities. Employers distribute them in order to obtain certain benefits in the context of an ongoing employ-

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1. See, e.g., Kurt H. Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware!*, 5 J.L. & COM. 207, 208 n.3 (1985); Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1, 1 (1984).

ment relationship. The handbooks also may create legitimate expectations among the workforce. Accordingly, courts in the vast majority of jurisdictions now recognize that, in appropriate circumstances, an employer's promise of job security in a handbook is a legally enforceable obligation.<sup>2</sup> A number of the courts, however, also have suggested that employers could avoid unwanted contractual liability by using disclaimers.<sup>3</sup>

Not surprisingly, a virtual industry has arisen devoted to designing enforceable handbook disclaimers. Its goal is to enable employers to retain benefits flowing from the use of employee manuals without incurring attendant legal obligations. If successful, this effort would accomplish a *de facto* elimination of the handbook exception to the at-will rule.

A review of handbook cases over the past decade reveals a significant gap between theory and practice with respect to the legal effect of disclaimers. In theory, the courts suggest, disclaimers can dispel employee expectations and negate the contractual nature of employee handbooks.<sup>4</sup> In practice, however, many courts have gone to great lengths to avoid giving dispositive effect to disclaimers. In at least forty-five reported decisions since 1980, courts have rejected employer attempts to defeat handbook claims by asserting the preclusive effect of disclaimers.<sup>5</sup> The common denominator in these cases is a reluctance to allow a boilerplate disclaimer to shield handbook promises from enforcement without a prior examination of the overall circumstances and equities of the situation.<sup>6</sup>

This article explores this gap between theory and practice with respect to the legal status of disclaimers. Part I discusses the emergence of the handbook exception to the employment-at-will rule.<sup>7</sup> Part II surveys the law of handbook disclaimers in both theory and practice.<sup>8</sup> Part III analyzes the gulf that has emerged between theory and practice.<sup>9</sup> In the concluding portion, I recommend closing the gap by adjusting the theoretical side of the equation to reflect both the benefits an employer derives from a handbook and the legitimate employee expectations that handbook language may create despite the inclusion of a disclaimer.<sup>10</sup> On the practical side, I urge that courts resist construing disclaimers as automatically precluding enforcement of handbook statements. Instead, the disclaimer should be just one of the factors for the trier of fact to

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2. See discussion *infra* part I.B.

3. See *infra* notes 144-48 and accompanying text.

4. See *infra* notes 153-56 and accompanying text.

5. These decisions are listed in the appendix. See *infra* pp. 382-85.

6. *Id.*

7. See discussion *infra* part I.B.

8. See discussion *infra* part II.

9. See discussion *infra* part III.A-B.

10. See discussion *infra* part III.C-D.

consider in determining whether an employee handbook, when viewed in its entirety, conveys a credible promise that the law should enforce.

## I.

### EMPLOYEE HANDBOOKS AND THE RULE OF EMPLOYMENT AT WILL

#### A. *The Rise and Fall of Employment At Will*

The at-will rule has prevailed in employment law for at least the last century.<sup>11</sup> The rule generally is traced to treatise writer Horace Gray Wood, who wrote the following in 1877:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at-will, and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party.<sup>12</sup>

Although the accuracy of Wood's description of the law at that time is questionable,<sup>13</sup> "Wood's rule" quickly became the law throughout the United States.<sup>14</sup> Only a few years later, for example, the Tennessee Supreme Court articulated its classic formulation of the rule: "All may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for a cause morally wrong, without being thereby guilty of legal wrong."<sup>15</sup>

The employment-at-will doctrine is premised on a theoretical equality of rights. Both employer and employee have the right to terminate the employment relationship at any time and for any reason. This theoretical equality is consistent with prevailing late 19th-century notions of freedom of contract and unfettered entrepreneurship.<sup>16</sup> As a doctrine

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11. For a good description of the development and historical antecedents of the employment-at-will rule, see generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

12. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

13. See *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1030 (Ariz. 1985) ("As commentators and courts later would point out, none of the four cases cited by Wood actually supported the rule."); see also *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 886-87 (Mich. 1980) (noting that juries in those cases were permitted to determine questions of fact based on "written or oral communications between the parties"); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 (1974) [hereinafter Note, *Implied Contract Rights*]. Apparently, some American courts continued to follow the one-year presumption as to duration, which had been borrowed from the English common law. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 n.51 (1980) [hereinafter Note, *Protecting At Will Employees*] (citing CHARLES MANLEY SMITH, TREATISE ON THE LAW OF MASTER AND SERVANT 53-57 (1852)).

14. See Feinman, *supra* note 11, at 121.

15. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), overruled on other grounds by *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915).

16. See Note, *Protecting At Will Employees*, *supra* note 13, at 1824-26 ("By increasing the employer's freedom in the employment relationship and restricting her liability, the at-will contract rule was meant to further economic growth and entrepreneurship."); see also Richard J. Pratt, Com-

regulated by market rather than legal forces, the at-will rule has been defended on the basis that it promotes overall economic efficiency with a minimum of administrative cost.<sup>17</sup>

Today, however, the rule's detractors are numerous: many commentators have written about the unfairness of the at-will rule;<sup>18</sup> and its theoretical underlying equality is widely viewed as fictional in reality.<sup>19</sup> The greater concentration of economic resources on the employer's side renders the loss of an individual worker to a typical employer much less severe than the loss of a sustaining income to a typical employee. Courts and commentators alike point to a changing economy, characterized by large corporate employers and specialized job functions, as further exacerbating this imbalance.<sup>20</sup>

Two additional factors compound the increasing discomfort with the at-will rule. First, the at-will rule may be out of step with contemporary employee expectations. As Professor Finkin's work illustrates, employers have been successful over the past century in efforts to reduce employee turnover. This phenomenon, in turn, produces heightened em-

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ment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 201 ("[T]he at-will doctrine contributed to the entrepreneurship and economic growth of an era.").

17. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989); see also Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984) (concluding that the adoption of limitations on the at-will rule will impose increased economic costs on employees, particularly those with low skills and few alternative employment opportunities). On the other hand, some commentators claim that the at-will rule is economically inefficient because of the costs associated with employee turnover. See, e.g., Pratt, *supra* note 16, at 202; Note, *Protecting At Will Employees*, *supra* note 13, at 1833-34.

18. See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Joseph DeGiuseppe, Jr., *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 69-70 (1981); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482-84 (1976); Richard A. Winters, Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 198-99.

19. One commentator has noted the following:

[I]n principle there is widespread agreement that the employment-at-will doctrine has no economic or moral justification in a modern industrialized Nation. The idea that there is equity in a rule under which the individual employee and the employer have the same right to terminate an employment relationship at will is obviously fictional in a society in which most workers are dependent upon employers for their livelihood.

Jack Steiber, *Most U.S. Workers Still May be Fired Under the Employment-at-Will Doctrine*, MONTHLY LAB. REV., May 1984, at 34, 36.

20. See, e.g., *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) (citing Blades, *supra* note 18, at 1405: "With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic."); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509-10 (N.J. 1980) (tracing the rule's history from widespread acceptance to disfavor among commentators and courts); Blades, *supra* note 18, at 1404-05; Pratt, *supra* note 16, at 200-01.

ployee expectations in job tenure.<sup>21</sup> Second, the at-will rule is becoming a global anomaly; the United States virtually stands alone among industrialized nations in failing to provide general statutory protection against unjust dismissals.<sup>22</sup>

The continued decline in unionization further exacerbates the harshness of the at-will rule. Passage of the National Labor Relations Act in 1935,<sup>23</sup> itself a response to the recognized inequality of bargaining power between labor and management,<sup>24</sup> marked the first major inroad against the at-will rule. The Act adjusts relative bargaining strength by requiring management to bargain in good faith with its employees' collective representative.<sup>25</sup> Some ninety-four percent of the resulting agreements contain a "just cause" limitation on employee discipline.<sup>26</sup> Unionization, then, offers an alternative to at-will employment that employees may select by majority vote.<sup>27</sup>

However, the American union movement has faltered. The proportion of unionized employees in the non-agricultural work force has declined from over thirty percent in 1960 to about sixteen percent in 1990.<sup>28</sup> As the alternative of collective bargaining becomes less viable, the at-will doctrine becomes more intolerable. Ironically, to the extent that American employers' opposition to unionization reflected their in-

21. Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 751-52 (1986). Much of Professor Finkin's analysis builds on the conclusions reached in SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945* (1985).

22. See Samuel Estreicher, *Unjust Dismissals in Other Countries: Some Cautionary Notes*, 10 EMPLOYMENT REL. L.J. 286, 287 (1984); Summers, *supra* note 18, at 508-09.

23. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-169 (1988) [hereinafter the NLRA or the Act]. The original version, 49 Stat. 449 (1935), is better known as the Wagner Act.

24. The "Findings and Policies" section of the National Labor Relations Act expressly endorses the policy of "restoring equality of bargaining power between employers and employees." Wagner Act § 1, 29 U.S.C. § 151. The Supreme Court, in upholding the Wagner Act against constitutional challenge, similarly explained the guiding congressional purpose:

Long ago we stated the reasons for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer . . . that union was essential to give laborers opportunity to deal on an equality with their employer. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937).

25. National Labor Relations Act, 29 U.S.C. § 158(d).

26. Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 n.1.

27. Representation and voting procedures are governed by § 9 of the NLRA, 29 U.S.C. § 159.

28. See Katherine van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578 (1992); 139 LAB. REL. REP. (BNA) 182 (1992) (U.S. Department of Labor reporting 1991 union membership at 16.1 percent of wage and salary work force).

terest in preserving the at-will prerogative, they unwittingly may have contributed to the demise of the rule itself.

Statutory limitations on the at-will doctrine appeared first. In addition to the NLRA, anti-discrimination statutes were passed at both the federal and state levels beginning with the enactment of Title VII in 1964.<sup>29</sup> These statutes ban employee discharges that discriminate on the basis of specified "protected" criteria, such as race and gender. The list of protected classifications has grown over the years to include age<sup>30</sup> and disability<sup>31</sup> as well.

Judge-made exceptions to the at-will rule are a recent phenomenon. Only a handful of cases predate 1980. With varying degrees of acceptance, three major exceptions have emerged.<sup>32</sup>

The most widely accepted exception is grounded in tort law. Approximately forty jurisdictions<sup>33</sup> now recognize that an at-will agreement, like any other contract, should not be enforced if enforcement would offend public policy.<sup>34</sup> In an early decision, for example, the California Supreme Court held that public policy prohibited an employer from terminating an employee who refused to commit an unlawful act.<sup>35</sup> In addition, the courts frequently have cited public policy reasons to bar discharges of employees who exercise statutory rights<sup>36</sup> or who report an

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). For an example of a state anti-discrimination statute, see MINN. STAT. §§ 363.01-.15 (1990 and Supp. 1991).

30. See the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989 & Supp. II 1990).

31. See the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (Supp. II 1990).

32. See *infra* notes 33-50 and accompanying text.

33. Recent surveys attempting to ascertain the number of jurisdictions recognizing these exceptions are somewhat inconsistent. Professor Summers, writing in 1988, reported 32 states adopting some form of the public policy exception, 29 states implying contractual obligations from employee handbooks, and 11 states endorsing the covenant of good faith and fair dealing. See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988). A survey published by Michael Chagares the following year found generally higher totals: 43 states recognizing a public policy exception, 41 states recognizing an implied contract exception, but only nine states adopting a good faith and fair dealing covenant. Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400-05 (1989). One explanation for the higher totals in the Chagares survey may be his inclusion of federal cases which construe state law. *Id.* at 400.

34. See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) (discussing the commonly accepted rule denying enforcement to an agreement that is contrary to either law or public policy).

35. The employee in this case refused to participate in an unlawful price-fixing scheme. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980); see also *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987) (refusal to violate antipollution laws by dispensing leaded gas into car designed for unleaded gas); *O'Sullivan v. Mallon*, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (refusal to perform medical procedure without license); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (refusal to violate antipollution laws by pumping boat bilges into water).

36. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (reversing summary judgment for employer on grounds that discharge for refusal to take polygraph test, in contravention of state statute, may give rise to cause of action); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) (affirming award to employee discharged for filing workers' compensation claim).



employer's unlawful conduct.<sup>37</sup> The public policy exception, then, focuses on the employer's reason for terminating an employee and provides the employee a cause of action when that rationale violates recognized public policy mandates.<sup>38</sup>

Most states also recognize a contract-based exception to the at-will employment rule.<sup>39</sup> Following this approach, courts imply contractual obligations, such as some form of job security or disciplinary procedure, from promissory expressions communicated by the employer. These expressions may take the form of oral statements,<sup>40</sup> pre-employment letters,<sup>41</sup> employee handbooks,<sup>42</sup> or a combination of circumstances including past personnel practices and longevity of service.<sup>43</sup> Under this exception, courts generally focus on the legitimacy of employee expectations rather than on the employer's alleged misdeeds.

A few jurisdictions<sup>44</sup> recognize a third exception rooted in both tort and contract law.<sup>45</sup> Borrowing from the field of commercial transac-

37. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (employee discharged for reporting labeling misrepresentations to employer); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (employee discharged for reporting criminal conduct to authorities). A number of jurisdictions have enacted statutes specifically prohibiting employee discharges for such "whistleblowing" activities. See, e.g., The Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.) (federal employees); MICH. COMP. LAWS §§ 15.361 et seq (1992).

38. Courts typically require that the discharge violate a "clear mandate of public policy." See, e.g., *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo. Ct. App. 1985); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509, 512 (N.J. 1980) (stating that "the sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may [also] contain an expression of public policy.").

39. See articles cited *supra* note 33.

40. See, e.g., *Eales v. Tanana Valley Medical-Surgical Group*, 663 P.2d 958 (Alaska 1983) (holding representation that employee would not be discharged without cause may be read into employment contract); *Bullock v. Automobile Club*, 444 N.W.2d 114 (Mich. 1989) (finding revocation of oral promise in policy manual not necessarily binding), *cert. denied*, 493 U.S. 1072, *reh'g denied*, 494 U.S. 1092 (1990).

41. See, e.g., *Integon Life Ins. Co. v. Vandegrift*, 669 S.W.2d 492 (Ark. Ct. App. 1984) (holding employer to pre-employment letter terms, though they contradicted subsequent contract provisions).

42. See discussion *infra* part I.B.

43. See, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981) (granting implied promise of fair treatment as reward for loyalty).

44. See *supra* note 33.

45. This third exception commonly is referred to as 'breach of the implied covenant of good faith and fair dealing.' See, e.g., John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1634-37 (1986). Most jurisdictions that recognize the covenant of good faith and fair dealing authorize only contract damages rather than potentially more lucrative tort damages. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389-401 (Cal. 1988) (finding that contract remedies are the most appropriate means of relief for wrongful termination); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985); *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 748-49 (Idaho 1987) (following the *Foley* and *Wagenseller* approach). But see *K. Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370-73 (Nev. 1987) (extending tort liability for breach of employment contracts by comparing them to insurance contracts).

tions,<sup>46</sup> these states read a covenant of good faith and fair dealing into the employment agreement. This covenant requires that parties to a contract refrain from acting in bad faith to frustrate one another's expectations of receiving the benefits of their bargains.<sup>47</sup> Often cited as an example of this approach is *Fortune v. National Cash Register Co.*,<sup>48</sup> in which the Massachusetts Supreme Court found a breach of the covenant of good faith and fair dealing where an employer terminated a salesman to avoid paying anticipated sales commissions. Most jurisdictions have declined to adopt the covenant limitation on the at-will rule,<sup>49</sup> and at least one state court has rejected the bad faith concept as too "amorphous."<sup>50</sup>

Partly in response to the proliferation of exceptions to the at-will rule, the Uniform Law Commissioners recently approved the Model Employment Termination Act.<sup>51</sup> The Act would require "just cause" in order to discharge virtually all employees unless the statutory protection was waived by an individually executed agreement that provided for fixed minimum amounts of severance pay graduated by length of service.<sup>52</sup> The trade-off that the Act offers employers is the elimination of most common law claims,<sup>53</sup> a ban on punitive damages,<sup>54</sup> and the financial advantages of an extrajudicial forum.<sup>55</sup> While the Model Act may foreshadow the eventual future of employee termination law, to date only one state has enacted legislation even remotely resembling it.<sup>56</sup>

### B. *The Employee Handbook Exception to the At-Will Rule*

Employee handbooks are a common source of an implied contract right to job security.<sup>57</sup> The transformation of employee handbooks from gratuitous expressions of employer policy to enforceable legal obligations

46. See, e.g., U.C.C. § 1-203 ("Every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement.").

47. See, e.g., *Mitford v. De Lasala*, 666 P.2d 1000 (Alaska 1983) (finding against employer who discharged employee in effort to avoid profit sharing liability); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (holding in favor of salesman fired by employer attempting to avoid bonus payments); *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (holding against employer who dismissed employee in effort to avoid retirement benefit payments).

48. 364 N.E.2d 1251, 1254 (Mass. 1977).

49. See articles cited *supra* note 33.

50. See, e.g., *Parner v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Haw. 1982) (rejecting the covenant because it would necessitate "judicial incursions into the amorphous concept of bad faith").

51. MODEL EMPLOYMENT TERMINATION ACT (1991).

52. *Id.* §§ 3, 4.

53. *Id.* § 2(b), (d).

54. *Id.* § 7(d).

55. See *id.* §§ 5-8 (providing for enforcement by means of an arbitral forum); Appendix Alternative A (providing an alternative enforcement system by means of an administrative agency forum).

56. See MONT. CODE ANN. §§ 39-2-901 to -914 (1991). The statute prohibits employers from discharging employees without "good cause," or in violation of either public policy or express provisions of the employer's own written personnel policy.

57. See Chagares, *supra* note 33, at 373 n. 69.

provides a vivid illustration of the declining adherence to the employment-at-will rule.

Employee handbooks, or personnel manuals as they sometimes are called, vary significantly in shape and content. The spectrum extends from short, fluffy welcoming statements to lengthy documents containing far more detail than the average collective bargaining agreement.<sup>58</sup> Their primary function is to convey information concerning the employer's personnel policies.<sup>59</sup> The handbooks typically include rules concerning expected employee behavior, disciplinary procedures, and compensation schedules, as well as information on fringe benefits such as sick leave and vacation.<sup>60</sup>

### 1. Traditional Objections to Handbook Enforcement

Under traditional at-will employment analysis, courts routinely construe employee handbooks as lacking contractual status.<sup>61</sup> In part, this lack of enforceability is the same as for any employment arrangement that lacks a specified duration. Under the at-will rule, the courts presume that a contract of indefinite duration is terminable at the option of either party.<sup>62</sup> The parties are, of course, free to stipulate to a contract for a designated period.<sup>63</sup> But under traditional contract doctrine, a purported limitation on the employer's right to discharge an employee hired without a specified duration, such as an agreement to terminate only for cause or subject to progressive discipline, is enforceable only if the em-

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58. See, e.g., *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989) (employee manual at issue encompassed "85 pages of detailed text."). One commentator has described employee handbooks as the "equivalent of the union contract in the nonunion setting." John D. Coombe, *Employee Handbooks: Asset or Liability*, 12 EMPLOYMENT REL. L.J. 4, 12 (1986).

59. For a discussion of the purposes and functions of employee handbooks, see Coombe, *supra* note 58, at 10-13.

60. See Decker, *supra* note 1, at 211.

61. See, e.g., *Shaw v. S.S. Kresge Co.*, 328 N.E.2d 775 (Ind. Ct. App. 1975) (finding no binding promise of continued employment even if handbook was part of employee's contract); *Johnson v. National Beef Packing Co.*, 551 P.2d 779 (Kan. 1976) (holding company policy manual providing that no employee be fired absent just cause did not express or imply a contract); *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213 (Minn. 1962) (finding absence of consideration rendered manual's just-cause provision unenforceable); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982) (holding unenforceable handbook provision requiring notice of termination, where handbook was distributed two years after employee's hire); *Mau v. Omaha Nat'l Bank*, 299 N.W.2d 147 (Neb. 1980) (citing *Johnson* for proposition that company policy manuals do not constitute contracts without a promise for a definite term of employment); *Edwards v. Citibank, N.A.*, 425 N.Y.S.2d 327 (App. Div.) (declining to find creation of employment obligation where manual relied on could have been unilaterally amended or withdrawn), *appeal dismissed*, 414 N.E.2d 400 (N.Y. 1980).

62. See *Feinman*, *supra* note 11, at 125; Comment, *Employment at Will and the Law of Contracts*, 23 BUFF. L. REV. 211, 215 (1973).

63. See, e.g., *Eales v. Tanana Valley Medical-Surgical Group*, 663 P.2d 958, 959 (Alaska 1983) (holding contract for employment until retirement to be for a definite period and therefore terminable only for good cause).

ployee provides additional consideration.<sup>64</sup> The employee's promise to provide services for the employer is insufficient to support such a limitation because the employee already is obligated to provide these services in exchange for a paycheck.<sup>65</sup> Moreover, enforcing this limitation would offend the requirement of mutuality of obligation, since the employee still would be free to quit at any time.<sup>66</sup> Thus, unless the employee provides some consideration beyond that inherent in the employment relationship, such as the sale of a business<sup>67</sup> or forgoing an injury claim,<sup>68</sup> an employer's promise of job security for an indefinite period is unenforceable.

Moreover, employee handbooks suffer from an even more fundamental impediment under traditional at-will analysis. Until recently, the courts viewed handbook statements not as contractual in nature, but instead as mere unilateral expressions of employer policy.<sup>69</sup> In *Johnson v. National Beef Packing Co.*,<sup>70</sup> for example, an employee attempted to challenge his dismissal by relying on the employer's promise in a company manual that "[n]o employee shall be dismissed without just cause."<sup>71</sup> Refusing to afford any contractual status to this language, the Kansas Supreme Court summarized the usual objection as follows:

It [the employee handbook] was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of pub-

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64. See, e.g., *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 222-23 (Minn. 1962); *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967).

65. See Note, *Implied Contract Rights*, *supra* note 13, at 351-52; see also *Aberman v. Malden Mills Indus.*, 414 N.W.2d 769, 772 (Minn. Ct. App. 1987) (holding that additional consideration sufficient to support agreement must be of type that is "uncharacteristic" of the employment relationship).

66. See, e.g., *Edwards v. Citibank, N.A.*, 425 N.Y.S.2d 327, 328-29 (App. Div.) (holding that the handbook "does not create an obligation on the part of the employer to continue the employment of the employee for life, subject only to the conditions set forth in the manual while leaving the employee free to terminate his employment at any time and for any or no reason" (citation omitted)), *appeal dismissed*, 414 N.E.2d 400 (N.Y. 1980); see also *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1062 (Ind. Ct. App. 1980) (quoting *Shaw v. S.S. Kresge Co.*, 328 N.E.2d 775, 779 (Ind. Ct. App. 1975)); *Hanson v. Central Show Printing Co.*, 130 N.W.2d 654, 658 (Iowa 1964).

67. See, e.g., *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305 (Iowa 1971); *Weidman v. United Cigar Stores Co.*, 72 A. 377 (Pa. 1909).

68. See, e.g., *Rhoades v. Chesapeake & Oil Ry.*, 39 S.E. 209, 211-12 (W. Va. 1901).

69. See, e.g., *Caster v. Hennessey*, 727 F.2d 1075, 1077 (11th Cir. 1984) (finding handbook not to be binding where grievance procedures could be exercised at defendant's discretion); *Lieber v. Union Carbide Corp.*, Nuclear Div., 577 F. Supp. 562 (E.D. Tenn. 1983) (holding employer endorsement of policy statement does not create a contractual right to that policy); *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982) (finding that no binding contract existed where handbook was a unilateral expression of the employer's policies issued for the guidance and benefit of the employees); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982) (declining to hold employer to handbook provision where handbook could be changed unilaterally at any time).

70. 551 P.2d 779 (Kan. 1976).

71. *Id.* at 781.

lishing company policy.<sup>72</sup>

In short, the lack of an express bargain foreclosed the existence of a legal obligation.

## 2. Policy Reasons for Enforcing Handbook Provisions

Like most developments in the law, the transition of employee handbooks from unenforceable statements to binding contracts resulted from practical concerns rather than from the adoption of a revolutionary legal theory. The Michigan Supreme Court, in *Toussaint v. Blue Cross & Blue Shield*,<sup>73</sup> first recognized that employee handbooks are not mere gratuitous expressions. The *Toussaint* court correctly perceived two key attributes common to many employee handbooks. First, employers issue handbooks for the purpose of securing tangible benefits.<sup>74</sup> Second, many of these benefits are secured by encouraging employee reliance on promissory statements contained in the handbooks.<sup>75</sup>

### a. Employer Benefits

The *Toussaint* court recognized that an employer may seek a number of different benefits through the distribution of an employee manual. The court noted, for example, that the adoption of a handbook can enhance the employment relationship:

The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.<sup>76</sup>

The benefits that distribution of an employee handbook can produce for an employer include:

(1) *Promoting employee adherence to a desired code of workplace conduct.* Employee handbooks typically attempt to influence employee behavior by presenting a set of work rules.<sup>77</sup> In addition, the handbooks often foster employee compliance with this code of conduct by including supplementary statements of encouragement (i.e., suggestions of job security, promotion, or compensation increases) or discouragement (i.e., indications of disciplinary consequences for failure to follow the rules).

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72. *Id.* at 782.

73. 292 N.W.2d 880, 895 (Mich. 1980).

74. *Id.* at 892; see also *Jones v. East Ctr. for Community Mental Health, Inc.*, 482 N.E.2d 969, 974 (Ohio Ct. App. 1984) ("Indeed, why would an employer adopt the policies contained in an employment manual if it did not expect to benefit from them?").

75. *Toussaint*, 292 N.W.2d at 892-95. For a discussion of how employers issue handbooks for the purpose of obtaining benefits through the development of employee expectations, see THE EMPLOYEE HANDBOOK: AN A-Z GUIDE TO COMMUNICATING WITH EMPLOYERS 225-26 (Harper Business Series in Human Resources Management 1990); Coombe, *supra* note 58, at 10-13; Finkin, *supra* note 21, at 747.

76. Finkin, *supra* note 21, at 892.

77. See Coombe, *supra* note 58, at 12; Finkin, *supra* note 21, at 747.

Presumably, employee compliance will enhance overall discipline and productivity.<sup>78</sup>

(2) *Implementing a uniform personnel system which is easy to administer.* A uniform set of personnel rules makes both judicial and practical sense.<sup>79</sup> In response to personnel questions, employers can point to the handbook and thus avoid confronting each issue anew. In addition, many handbooks describe dispute resolution procedures that help to channel and defuse potentially troublesome personnel problems.

(3) *Avoiding unionization.* Some employers distribute handbooks containing relatively generous personnel rules in order to diminish their employees' incentives for seeking union representation.<sup>80</sup> This helps employers avoid the limitations on management flexibility which result from collective bargaining.

(4) *Boosting employee morale.* Handbooks may convey to employees the impression of a fair and benevolent employer. By creating "an atmosphere of fair treatment and job security,"<sup>81</sup> employers seek to secure a work force that is both more loyal<sup>82</sup> and less transitory.<sup>83</sup> As one court has stated, employers use handbooks to promote an "environment conducive to collective productivity."<sup>84</sup>

(5) *Creating a favorable image in the community.* A handbook containing "fair" employment policies also may convey a favorable impression to the community at large.<sup>85</sup> Presumably both consumers and government generally prefer employers who are "good citizens" to those who are not.

#### b. *Employee Expectations*

The *Toussaint*<sup>86</sup> court also recognized that employees legitimately may develop expectations based on handbook language. The handbook issued by the employer in *Toussaint*, for example, was 260 pages long and

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78. See THE EMPLOYEE HANDBOOK, *supra* note 75, at 225.

79. See, e.g., *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 120 (Mich. 1989) (recognizing that even revocable employment policies promote stable employment relations by holding employers accountable and by requiring consistent and uniform application); see generally THE EMPLOYEE HANDBOOK, *supra* note 75, at 226.

80. See, e.g., *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 116 (Haw. 1986); *Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12, 14-15 (N.J. Super. Ct. App. Div. 1989); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706-07 (Wyo. 1985).

81. *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984).

82. See, e.g., *Kinoshita*, 724 P.2d at 117; *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980); *Jones v. East Ctr. for Community Mental Health, Inc.*, 482 N.E.2d 969, 974 (Ohio 1984); see also THE EMPLOYEE HANDBOOK, *supra* note 75, at 226.

83. See *Finkin*, *supra* note 21, at 747.

84. *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 119 (Mich. 1989).

85. See *Coombe*, *supra* note 58, at 12.

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

contained "elaborate procedures promising" both "fair, consistent, and reasonable corrective discipline" and discharge "for just cause only."<sup>87</sup> Given the explicit promises, the court concluded that the "employees could justifiably rely on those expressions and conduct themselves accordingly."<sup>88</sup>

Employee handbooks create a direct correlation between employee expectations and employer benefits, enabling the employer to generate the expectations as a means of yielding the benefits. The employer makes promissory statements in a handbook with the purpose of obtaining a benefit. Indeed, the more a handbook fosters employee reliance on promises of job security or specific disciplinary procedures, the more likely that the employer will derive the benefits for which the handbook was issued.

The confluence of these two factors—employer benefits and employee expectations—establishes a firm policy foundation for the enforcement of handbook promises. To the extent that employers secure benefits by encouraging employee reliance on promises expressed in employee handbooks, they should not be able to void these promises as gratuitous and unenforceable. In *Toussaint*, the Michigan Supreme Court summarized these considerations aptly:

Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.<sup>89</sup>

Instead, the employer has "created a situation 'instinct with an obligation.'"<sup>90</sup>

### 3. Doctrinal Bases for Handbook Enforcement

While the policy justifications for enforcing handbook promises are

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87. *Toussaint*, 292 N.W.2d at 893.

88. *Id.*; see also *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984) ("It would appear that employers expect, if not demand, that their employees abide by the policies expressed in such manuals. This may create an atmosphere where employees justifiably rely on the expressed policies and, thus, justifiably expect that the employers will do the same." (emphasis in original)).

89. *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 895 (Mich. 1980); see also *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) ("[I]f an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it."); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1266 (N.J. 1985) ("Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable."); *Thompson*, 685 P.2d at 1088 ("Once an employer announces a specific policy or practice, especially in light of the fact that he expects employees to abide by the same, the employer may not treat its promises as illusory.").

90. *Toussaint*, 292 N.W.2d at 892 (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).

clear, the theoretical underpinnings are less developed. Typical of most early handbook cases, the *Toussaint* opinion focused more on issues of fairness than on theory. In a more recent decision, the Michigan Supreme Court surveyed the case law and reported that "[w]hile a majority of jurisdictions now recognize some type of 'handbook exception' to the employment-at-will doctrine, there is no clear consensus as to . . . the legal theory supporting the handbook exception."<sup>91</sup>

The courts generally rely on either or both of two legal theories to support the handbook exception: unilateral contract and promissory estoppel. The more frequently invoked appears to be the former.<sup>92</sup>

#### a. *Unilateral Contract Theory*

Unilateral contract theory is a convenient analytical tool in the handbook context because it eliminates the need to find an express exchange of promises as a prerequisite to enforceability.<sup>93</sup> As discussed above,<sup>94</sup> the lack of an explicit bargain initially was a major stumbling block to the enforcement of handbook promises. Mutual assent is necessary to the formation of the typical bilateral contract under traditional contract law principles.<sup>95</sup> A unilateral contract, however, does not require a mutual exchange of promises.<sup>96</sup> Instead, such a contract is formed when a party responds to a promissory offer by commencing performance of the desired task, without the necessity of a prior or even an accompanying express reciprocal promise of performance.

The Minnesota Supreme Court's decision in *Pine River State Bank v. Mettille*<sup>97</sup> illustrates the unilateral contract approach. In that case, the bank distributed a handbook describing disciplinary procedures applicable to all its employees.<sup>98</sup> Subsequently, on discovering that one of its loan officers had made a number of deficient loan arrangements, the bank fired the employee without following the handbook procedures.<sup>99</sup> In spite of the absence of any express exchange of promises or specified duration of employment, the court held that the employer was bound to comply with the disciplinary procedures it had established under a unilateral contract.<sup>100</sup>

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91. *In re Certified Question* (Bankey v. Storer Broadcasting Co.), 443 N.W.2d 112, 116-17 (Mich. 1989) (citations omitted).

92. See, e.g., cases cited *infra* note 111.

93. See Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 565 (1983).

94. See *supra* notes 69-72 and accompanying text.

95. See Pettit, *supra* note 93, at 552-53.

96. See *id.* at 552-53, 565-67; see also JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 2-10 (3d ed. 1987).

97. 333 N.W.2d 622 (Minn. 1983).

98. *Id.* at 626 n.3.

99. *Id.* at 624-25.

100. *Id.* at 631.



The Minnesota court identified four requisite elements for the formation of a unilateral contract: offer, communication, acceptance, and consideration.<sup>101</sup> The court held that promissory handbook language, such as the bank's disciplinary procedures, could constitute a sufficient offer.<sup>102</sup> The communication element was satisfied, in turn, by dissemination of the handbook to the employee.<sup>103</sup> The court stated that both of the remaining factors, acceptance and consideration, were satisfied by the employee's "continued performance despite his freedom to leave."<sup>104</sup> In dispensing with the traditional requirement of additional consideration beyond job performance, the *Pine River* court explained:

The requirement of additional consideration, like the at-will rule itself, is more a rule of construction than of substance, and it does not preclude the parties, if they make clear their intent to do so, from agreeing that the employment will not be terminable by the employer except pursuant to their agreement, even though no consideration other than services to be performed is expected by the employer or promised by the employee.<sup>105</sup>

The *Pine River* court also concluded that no technical mutuality of obligation was necessary if the employee fulfilled the consideration element by continuing to stay on the job.<sup>106</sup>

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101. *Id.* at 626-27.

102. *Id.* at 627.

103. *Id.* at 626. In *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987), the Illinois Supreme Court expressed the communication requirement as follows: "[T]he statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer." The most difficult application of this element arises when a handbook is not distributed directly to certain employees, but they nonetheless are aware of its terms. Compare *Ware v. Prudential Ins. Co.*, 531 A.2d 757 (Super. Ct. App. Div. 1987) (finding that limited distribution of handbook to supervisory personnel for internal management purposes does not rise to contractual obligation enforceable by non-supervisory employees), *certification denied*, 550 A.2d 450 (N.J. 1988) with *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 775 (Ohio Ct. App. 1984) (suggesting that handbook policies may constitute an offer even if employee knowledge is derived from casual sources).

104. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 629 (Minn. 1983). Most courts adhering to the unilateral contract approach will simply presume acceptance and consideration from the employee's continued performance of work. *Id.* at 626-29; see also *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267, 1270 (N.J. 1985) (holding that an employment manual constitutes a unilateral contract offer and that the offer becomes binding when employees who may quit at any time nevertheless continue to work).

105. 333 N.W.2d at 629; see also *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982) (holding that despite employee's right to quit at will, employer was not free to terminate employee by claiming that contract lacked mutuality); *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 775 (Ohio Ct. App. 1984) (finding that employees accepted new severance pay policy by continuing to work after learning of it). In support of its position, the *Pine River* court specifically cited RESTATEMENT (SECOND) OF CONTRACTS § 80 cmt. a (1981) for the proposition that a single performance, such as continued work, may furnish consideration for any number of promises. 333 N.W.2d at 629.

106. Most courts reject the need for "mutuality of obligation," arguing that mutuality is archaic and discredited. *Pine River*, 333 N.W.2d at 629; see also *Weiner*, 443 N.E.2d at 445. Others argue that the mutuality concept applies only to bilateral and not to unilateral contracts. See, e.g., *Eales v. Tanana Valley Medical-Surgical Group*, 663 P.2d 958, 959-60 (Alaska 1983); *Helle*, 472 N.E.2d at 776-77.

The *Pine River* court cautioned, however, that not all handbook statements would rise to the level of a contractual obligation. The court explained that handbook language constituted an offer for a unilateral contract only if "definite in form."<sup>107</sup> Thus, the job security language in the bank's handbook did not convey an offer because it contained only "general statements of policy."<sup>108</sup> In contrast, the Minnesota court found an offer in the handbook's section on disciplinary procedures because this portion promised a specific set of procedural steps in definite, nondiscretionary language.<sup>109</sup> As summarized by the Illinois Supreme Court's description of the *Pine River* criterion, a handbook statement, in order to rise to a unilateral contract offer, "must contain a promise clear enough that an employee would reasonably believe that an offer has been made."<sup>110</sup>

Most of the decisions enforcing handbook language appear to apply unilateral contract principles.<sup>111</sup> Yet unilateral contract analysis fits uneasily into the handbook context.<sup>112</sup> Except for the communication pre-

107. 333 N.W.2d at 626.

108. *Id.* at 630. The "job security" section did not contain language promising discharge only for "cause" or limited to any specified set of circumstances. Instead, the section contained only rather generalized and imprecise statements to the effect that employment in the banking industry is "very stable" and that the bank, in turn, expects "diligence, cooperation and dependability" from its employees. *Id.* at 626 n.2.

Other courts similarly refuse to construe handbook statements as offers where handbook language fails to limit the reasons for employee discharge, e.g., *Arnold v. Diet Ctr., Inc.*, 746 P.2d 1040, 1043 (Idaho Ct. App. 1987) (finding specified grounds for termination expressly "illustrative," not "all-inclusive"); where the language is discretionary, e.g., *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1145-46 (Wash. 1988) (en banc) (holding policy statement that management "should" consider performance, experience, and length of service in determining layoffs merely advisory); or where the language lacks specificity, e.g., *Davis v. Connecticut Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1281 (M.D. Tenn. 1990) (holding that insufficiently specific language did not create a binding contractual term).

109. 333 N.W.2d at 626 n.3, 630.

110. *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).

111. See, e.g., *Hoffmann-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 735 (Ala. 1987) (holding that handbook language created offer for binding unilateral contract); *Duldulao*, 505 N.E.2d at 318 (finding enforceable contractual rights created in handbook); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 456 (Iowa 1989) (finding terms of handbook not sufficiently definite to support sanction for breach of unilateral employment contract); *Johnston v. Panhandle Coop. Ass'n*, 408 N.W.2d 261, 266 (Neb. 1987) (holding that only handbook provisions which meet usual requirements for unilateral contracts are sufficient to support enforcement); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J. 1985) (holding that an implied promise in a handbook was enforceable even if employment otherwise would be at-will, absent a clear and prominent disclaimer); *Small v. Springs Indus.*, 357 S.E.2d 452 (S.C. 1987) (holding that question of whether handbook terms constituted an employment contract was for the jury to decide).

112. Commentators are divided on the suitability of analyzing employee handbooks by reference to unilateral contract principles. At least one has suggested that unilateral contract theory is the "most logical and internally consistent methodology." Murray Tabb, *Employee Innocence and the Privileges of Power: Reappraisal of Implied Contract Rights*, 52 MO. L. REV. 803, 820-21 (1987); see also Chagares, *supra* note 33, at 373 n.71 (arguing that courts should apply unilateral contract analysis when enforcing employer promises); Winters, *supra* note 18, at 213. Others maintain that unilateral contract theory is a less than ideal analytical tool in this context. See, e.g., Peter Linzer, *The*

requisite, all of *Pine River's* unilateral contract elements are implied by the court rather than intended by the parties. Like the bank in *Pine River*, most employers have no intention of extending a contractual offer when issuing an employee handbook.<sup>113</sup> Similarly, the court infers the employee's acceptance and consideration from conduct that, in reality, could occur regardless of the handbook's existence.<sup>114</sup>

The notion of a bargained-for exchange in this setting is a fiction,<sup>115</sup> but the fiction is convenient and understandable. These advantages have induced courts to stretch unilateral contract theory in order to achieve a desirable policy result: the enforcement of handbook promises that benefit employers by creating legitimate expectations among the work force.

### b. Promissory Estoppel

Promissory estoppel represents a second theoretical basis for the enforcement of handbook statements. Some courts reject unilateral contract analysis in favor of the promissory estoppel approach,<sup>116</sup> while others recognize promissory estoppel as an alternative, coexisting theoretical justification.<sup>117</sup> Still another group of decisions fails to articulate any particular theoretical framework, but scrutinizes handbook statements in terms of equitable principles that resemble the doctrine of promissory estoppel.<sup>118</sup>

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*Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 345 (1985) ("[S]ome courts [in handbook cases] have found agreements under circumstances that would probably garner a first-year Contracts student an F."). These commentators suggest that the courts are straining unilateral contract concepts to reach the desired result. See *id.* at 345, 356, 379; David A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 920-21 (1985); Note, *The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J. CORP. L. 105, 111 (1986) [hereinafter Note, *Use of Disclaimers*].

113. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 624 (Minn. 1983).

114. Courts following the unilateral contract approach presume acceptance and consideration from an employee's continued performance of work after receiving the handbook. See *supra* notes 101-105 and accompanying text.

115. See Sarah C. Steefel, Case Note, *At Will Employment—Contractual Limitation of an Employer's Right to Terminate*, 7 HAMLINE L. REV. 463, 476-77 (1984) (criticizing the *Pine River* decision for presuming that a contract existed where neither party was aware of it).

116. See, e.g., *Jones v. East Ctr. for Community Mental Health, Inc.*, 482 N.E.2d 969, 973-74 (Ohio Ct. App. 1984).

117. See, e.g., *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711-12 (Colo. 1987); see also *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153-55 (Ohio 1985); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087-88 (Wash. 1984).

118. See, e.g., *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (holding that employer which issues policy statement, and explicitly or implicitly encourages reliance on that policy, cannot selectively adhere to it); *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 119 (Mich. 1989) (finding that the enforceability of written personnel policies arises from the benefit employer obtains by creating a stable and dependable work environment); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 707 (Wyo. 1985) (finding that handbook provisions created an expectation that they would be followed and induced employee to continue employment).

The Restatement (Second) of Contracts describes promissory estoppel as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of a promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.<sup>119</sup>

Thus, promissory estoppel is similar to unilateral contract analysis in providing a basis for enforcing a promissory statement without the requirement of a return promise. Another similarity is that courts tend to find "promises" in circumstances similar to those in which they find "offers" under a unilateral contract theory.<sup>120</sup> The principal difference between the two theories lies in the role of the promisee. Under unilateral contract analysis, an enforceable obligation arises only if the promisee furnishes an acceptance accompanied by consideration. Enforcement is justified by the existence of an implicit, bargained-for exchange.<sup>121</sup> Promissory estoppel, at least as traditionally construed, focuses instead on the reasonableness of the promisee's reliance and requires neither acceptance nor consideration.<sup>122</sup> Enforcement is justified by reasonable expectations and a sense of fairness.<sup>123</sup>

The promissory estoppel analysis offers two advantages in the handbook arena. First, promissory estoppel appropriately focuses on the legitimacy of employee expectations rather than on the somewhat fictionalized search for the contract law technicalities of acceptance and consideration. Second, promissory estoppel theory goes beyond the promise principle to consider explicitly the underlying equities or "injustice" of enforcement or nonenforcement.<sup>124</sup> While the equity factor may well drive many of the handbook cases under either theory, promissory estoppel analysis does so openly and directly instead of covertly through a manipulation of other factors.

On the other hand, the difficulty of satisfying the reliance requirement is a potential drawback of promissory estoppel theory.<sup>125</sup> Some

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119. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

120. Handbook language, if sufficiently definite in form, may qualify as either an "offer" for a unilateral contract or a "promise" enforceable under a theory of promissory estoppel. See generally *Continental Air Lines, Inc. v. Keenan*, 731 P.2d at 711-12; *Mers*, 483 N.E.2d at 153-55.

121. See *supra* notes 98-102 and accompanying text.

122. See Clare Tully, Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J.L. REF. 449, 459 (1983) (noting that under a promissory estoppel approach, "unbargained-for reliance frequently is regarded as the equivalent of consideration").

123. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); see also *De Frank v. County of Greene*, 412 A.2d 663, 667 (Pa. Commw. Ct. 1980) ("To reject an estoppel here would amount to placing our imprimatur upon an inequitable manipulation of employees' legitimate expectations as to the stated terms and conditions of their relationship with their employer.").

124. See Pettit, *supra* note 93, at 591.

125. See *id.* at 592; Pratt, *supra* note 16, at 216. A further potential drawback is that some courts have traditionally limited recovery under the promissory estoppel theory to reliance damages. See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 276-77 (Wis. 1965); *Goodman v.*

courts have refused to enforce handbook promises when the employee seeking relief failed to prove detrimental reliance on specific handbook terms.<sup>126</sup> A strict prerequisite of individual reliance is troublesome both because of practical problems of proof and because the requirement would produce inconsistent levels of job security among employees covered by the same handbook language.<sup>127</sup> As a result, most courts, regardless of the theoretical framework, dispense with the necessity of proving individual, subjectively based reliance in favor of a rule requiring only objectively based group reliance.<sup>128</sup> That is, the reliance element is satisfied if the employer's distribution of a handbook creates reasonable expectations of job security among the employees as a group. If legitimate expectations are created as to a class of employees, individual reliance will be presumed.<sup>129</sup>

### c. *Searching for a New Theory*

Thus far, the vast majority of handbook cases have relied on one or both of these two theoretical bases. This inclination to fit the analysis of employee handbooks within the familiar context of existing legal pigeonholes is not surprising. Each theory is well recognized and lends legitimacy to a new phenomenon in the law. But neither theory provides an ideal framework for handbook analysis. In particular, neither theory has kept pace with newly recognized policy justifications for handbook enforcement. A revised theoretical formula is needed that reflects the underlying policy basis for enforcing handbook promises—employer benefits derived from collective employee expectations.

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Dicker, 169 F.2d 684, 685 (D.C. Cir. 1948). Recent cases, however, suggest that full expectation damages now are recoverable under the promissory estoppel approach, just as under a unilateral contract approach. See Farber & Matheson, *supra* note 112, at 909-10.

126. See, e.g., *Karnes v. Doctors Hosp.*, 555 N.E.2d 280, 283 (Ohio 1990) ("It is incongruous for appellant to suggest that she relied upon representations about which she was unaware."); *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1146 (Wash. 1988) (no evidence was introduced to show that the employee was aware of or relied on the handbook's layoff policies).

127. See Pettit, *supra* note 93, at 593.

128. See, e.g., *Loffa v. Intel Corp.*, 738 P.2d 1146, 1150 (Ariz. 1987) (holding that particular reliance on the manual by the employee is not necessary in order for manual's personnel provisions to be in effect); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980) (holding that a manual may give an employee contractual rights even in the absence of mutual agreement or signing of a policy statement by employer and employee); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 (N.J. 1985) (presuming reliance by employee on promises in manual in order to avoid unequal protection of employees' rights); see also *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 117 (Haw. 1986) ("Inasmuch as CP Air circulated the rules with an intention 'to create expectations and induce reliance by employees as a group, it should not be able to escape liability on the grounds that a particular employee was unaware of the rules and thus did not receive a promise.'" (quoting Pettit, *supra* note 93, at 583)).

129. See *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 (N.J. 1985). The *Woolley* court drew an analogy between the employee handbook and a collective bargaining agreement in explaining that an employee covered by a set of rules applicable to a class need not be cognizant of specific provisions in order to obtain the benefits of the document. *Id.* at 1268 n.10.

Two recent developments may portend movement in this direction. First, a recent study of more than 100 promissory estoppel decisions found that proof of a particularized detrimental reliance is no longer the key prerequisite to enforcement of promises under a promissory estoppel theory.<sup>130</sup> Professors Farber and Matheson conclude that the courts now tend to premise recovery on the presence of a credible promise accompanied by an economic benefit to the promisor in the context of an ongoing economic relationship.<sup>131</sup> Farber and Matheson point to handbook cases such as *Pine River* as examples of this revised promissory estoppel approach,<sup>132</sup> even though many of the decisions, including *Pine River* itself, are couched in the language of unilateral contract analysis.<sup>133</sup> The new formulation has considerable appeal in guiding handbook analysis, not only because the employer-employee arrangement is a prime example of a continuing economic relationship, but also because the focus on the benefits potentially gained by the employer coincides with a major policy rationale for enforcing handbook promises.

A significant contribution of the Farber and Matheson study is its recognition that the essential bargain in many continuing economic relationships, like that of employer and employee, does not involve either a specific transactional exchange (as in the traditional unilateral contract setting) or an instance of individualized detrimental reliance (as in the traditional promissory estoppel setting).<sup>134</sup> Instead, the bargain arises out of a long-term relationship characterized by the need for a high level of confidence and trust.<sup>135</sup> The authors explain that while the role of individual reliance is on the decline, collective reliance, "in the form of trust, is on the rise as the policy behind legal rules of promissory obligation."<sup>136</sup> Thus, the authors conclude, promises made for the purpose of obtaining an economic benefit in the context of an ongoing relationship should be enforced even in the absence of an explicit bargained-for exchange.<sup>137</sup>

A similar approach was adopted in a recent decision that may point the way to a *sui generis* approach to analyzing employee handbooks. In *In re Certified Question: Bankey v. Storer Broadcasting Co.*,<sup>138</sup> the Michi-

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130. Farber & Matheson, *supra* note 112, at 904. The authors state that while "courts still feel constrained to speak the language of reliance, their holdings can best be understood and harmonized on other grounds." *Id.*

131. *Id.* at 914.

132. *Id.* at 920-22.

133. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626-27 (Minn. 1983). The decision is discussed *supra* at notes 97-114 and accompanying text.

134. Farber & Matheson, *supra* note 112, at 925-29.

135. *Id.*

136. *Id.* at 929.

137. *Id.*

138. 443 N.W.2d 112 (Mich. 1989).

gan Supreme Court considered whether an employer could unilaterally alter the employment relationship of existing employees by modifying discharge-for-cause policy statements contained in a previously issued employee handbook. The *Bankey* court noted the lack of consensus about which legal theory appropriately underlies the handbook exception, and reviewed decisions that followed the unilateral contract and promissory estoppel approaches.<sup>139</sup> Finding both theories inadequate, the Michigan Supreme Court returned instead to the policies underlying its landmark *Toussaint*<sup>140</sup> decision some nine years earlier:

Under *Toussaint*, written personnel policies are not enforceable because they have been "offered and accepted" as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.

. . . .

Under the *Toussaint* analysis, an employer who chooses to establish desirable personnel policies, such as a discharge-for-cause employment policy, is not seeking to induce each individual employee to show up for work day after day, but rather is seeking to promote an environment conducive to collective productivity. The benefit to the employer of promoting such an environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, gives rise to a situation "instinct with an obligation."<sup>141</sup>

The *Bankey* court correctly perceived that the real reason for enforcing handbook promises does not rest on implicit notions of either "mutual assent or individual detrimental reliance."<sup>142</sup> Instead, handbook promises should be enforced if they benefit an employer by encouraging employee expectations that lead to an "environment conducive to collective productivity."<sup>143</sup>

In spite of the lack of consensus about which legal theory is best suited for analyzing employee handbooks, the courts, in general, have spent little time agonizing over the appropriate theoretical framework. Regardless of articulated theoretical prerequisites, courts find a way to enforce handbook promises that reflect the combined equities of employer benefit and legitimate employee expectations of some sort of job security. Both the unilateral contract and promissory estoppel doctrines are flexible enough to accomplish this task when equitable circumstances so dictate. However, matters of theory become more significant and more difficult when disclaimers are added to the mix.

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139. *Id.* at 116-19.

140. *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980). The decision is discussed *supra* at notes 73-91 and accompanying text.

141. 443 N.W.2d at 119.

142. *Id.*

143. *Id.*

## II. HANDBOOK DISCLAIMERS

### A. Introduction

The judicial transformation of employee handbooks into enforceable obligations sent shock waves throughout the management sector. The bank president in *Pine River*, for example, had no idea that he had created a contract when he issued an employee handbook upon the advice of a human resources consultant.<sup>144</sup>

The courts were not unaware of the significant change worked by their decisions. A number of the same courts that first announced the enforceability of handbook promises sought to ameliorate the impact of this doctrine by suggesting means by which employers could avoid liability.<sup>145</sup> The advice offered by the Arizona Supreme Court was typical:

We do not mean to imply that all personnel manuals will become part of employment contracts. Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason.<sup>146</sup>

Thus, an employer could protect itself by not issuing a manual at all, by omitting any promissory language from the handbook, or by limiting the legal effect of the handbook through the inclusion of a disclaimer.

Few employers responded by withdrawing handbooks already issued. The more attractive alternative was the disclaimer.<sup>147</sup> This option was particularly enticing to employers since it offered them the possibility of continuing to obtain the benefits of a handbook policy, while avoiding liability that might otherwise arise from promissory language contained in the handbook.

A number of courts, at least in the abstract, joined the Arizona Supreme Court in suggesting that disclaimers could preclude the enforcement of handbook statements.<sup>148</sup> This result finds theoretical support

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144. See *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 624 (Minn. 1983).

145. See, e.g., *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (by "either not issuing a personnel manual or issuing one with clear language of limitation"); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 894-95 (Mich. 1980) (by making known to employees that personnel policies are subject to unilateral change by employer); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985) (by including "very prominent" statement that employer promises nothing and remains free to change all working conditions without consulting anyone); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984) (by specifically stating "in a conspicuous manner" that contents are not intended to be part of the employment relationship, or by specifically asserting employer's right to modify policies).

146. *Leikvold*, 688 P.2d at 174.

147. See generally Chagares, *supra* note 33, at 365; Note, *Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution*, 15 FORDHAM URBAN L.J. 533 (1987).

148. See cases cited *supra* note 145.



under either a unilateral contract or a promissory estoppel approach. Under the former, a disclaimer defeats contract formation by clarifying that the employer does not intend that the handbook statements constitute an offer to enter into a unilateral contract.<sup>149</sup> A disclaimer may also succeed under a promissory estoppel approach if it dispels expectations of job security that might otherwise arise from handbook statements.<sup>150</sup> Nonetheless, a significant disjunction has emerged between theory and practice. In at least forty-five decisions published over the past decade, courts have refused to interpret disclaimers as dispositively negating the legal status of handbook promises.<sup>151</sup> In theory, disclaimers protect employers from liability; in practice, they often do not. Resolving this discordance requires adjustment of either theory or practice or both.

### B. Designing Disclaimers

A "disclaimer," in its most basic sense, is an attempt to repudiate or deny a potential claim.<sup>152</sup> In the context of employee handbooks, the essential purpose of a disclaimer is to claim at-will status for the employment relationship by repudiating or denying liability for statements expressed in the handbook.<sup>153</sup>

Employers use disclaimers of varying format and language to accomplish this objective. Perhaps the most common type of disclaimer is one set out in the handbook itself.<sup>154</sup> The handbook disclaimer typically states that nothing contained in the handbook should be construed as a contract and that the employment relationship may be terminated without cause.<sup>155</sup> Some employers place similar language in a separate docu-

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149. See, e.g., *Anders v. Mobil Chem. Co.*, 559 N.E.2d 1119, 1122 (Ill. App. Ct. 1990) (holding that disclaimer in handbook makes it clear that the employer is promising nothing); *Woolley*, 491 A.2d at 1271 (holding that a manual's provisions are considered binding unless there is proof that the employer intended otherwise).

150. See, e.g., *Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517, 1521-23 (D. Colo. 1987) (holding that employee cannot enforce manual's grievance procedures by promissory estoppel because disclaimers preclude any justifiable reliance on manual's terms); *Leikvold*, 688 P.2d at 174 (holding that if an employer articulates a policy statement in a manual, and encourages reliance on it, he must consistently abide by the policy).

151. These decisions are listed in the appendix, *infra* at 382-85, and are discussed *infra* Part II.C.2.

152. Webster's Third New International Dictionary 645 (unabridged 1981).

153. See generally *Chagares*, *supra* note 33, at 376-78 (summarizing value to employer of "non-promissory" "informational" descriptions of the employment relationship and role of disclaimers in seeking to maintain non-promissory character of such communications).

154. *Chagares*, *supra* note 33, at 386.

155. One court enforced a disclaimer which stated:

The contents of this handbook DO NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT. Nothing contained in this handbook should be construed as a guarantee of continued employment, but rather, employment with the bank is on an "at will" basis. This means that the employment relationship may be terminated at any time by either the employee or the Bank for any reason not expressly prohibited by law. *Chambers v. Valley Nat'l Bank*, 721 F. Supp. 1128, 1131 (D. Ariz. 1988); see also *Arnold v. Diet*

ment, such as an employment application.<sup>156</sup> The "at-will agreement" is yet another variation. These agreements take the form of a written contract, usually executed at the time of initial employment, in which the parties expressly acknowledge their at-will status.<sup>157</sup>

A veritable industry has developed around the design of successful disclaimers. Experts and consultants recommend methods by which an employer can "sanitize"<sup>158</sup> handbooks (as well as other documents) to "avoid unintended legal consequences."<sup>159</sup> For example, the American Society of Personnel Administration Foundation has drafted a model disclaimer containing four recommended features.<sup>160</sup> In addition to the usual denial of contract status and retention of the right to dismiss at will, the Foundation's model disavows the effect of any conflicting representations and reserves the right to modify handbook policies on a unilateral basis.<sup>161</sup> Disclaimer experts also provide advice to employers on how to enhance the clarity and conspicuousness of disclaimers,<sup>162</sup> and

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Ctr., Inc., 746 P.2d 1040, 1041 n.1 (Idaho Ct. App. 1987) (enforcing as a matter of law a disclaimer that stated: "This handbook is not an employment contract, and an employee can be terminated at any time."); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 788 (Md. Ct. Spec. App. 1986) (enforcing on motion for summary judgment a disclaimer which stated: "[T]his handbook does not constitute an express or implied contract. The employee may separate from his/her employment at any time; the Hospital reserves the right to do the same."), *cert. denied*, 523 A.2d 1013 (Md. 1987).

156. *See, e.g.*, *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 456 (6th Cir. 1986) (employment application included statement: "In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or myself."); *see also* *Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1391-92 (9th Cir. 1985) (employment application containing condition: "If given employment I hereby agree that such employment may be terminated without advance notice and without liability to me for wages or salary . . .").

157. For a discussion of at-will agreements, *see* Keenan McClenahan, Note, *At Will Employment Agreements: New Focus for Shielding Employers From Wrongful Termination Suits?*, 17 W. ST. U.L. REV. 131, 133-36 (1989). Though most prevalent in California, the use of at-will agreements is not limited to that state. *See, e.g.*, *Ware v. Prudential Ins. Co.*, 531 A.2d 757, 761 (Super. Ct. App. Div. 1987), *certification denied*, 550 A.2d 450 (N.J. 1988).

158. *See* LOPATKA, *supra* note 1, at 27-30.

159. DECKER, *supra* note 1, at 210.

160. *See* LAURENCE LORBER ET AL., *FEAR OF FIRING* 22 (1984). This model disclaimer provides as follows:

This is not a contract of employment. Any individual may voluntarily leave employment upon proper notice, and may be terminated by the employer at any time and for any reason. Any oral or written statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee. The contents of this handbook are subject to change at any time at the discretion of the employer.

161. *Id.* Model disclaimers abound. For other proposed models, *see* JEROME B. KAUFF & MAUREEN E. MCCLAIN, *UNJUST DISMISSAL 1984—EVALUATING, LITIGATING, SETTLING, AND AVOIDING CLAIMS* 777-78 (1984); Decker, *supra* note 1, at 223-24; *see also* 1 LITTLER, MENDELSON, FASTIFF & TICHY, *THE 1990 EMPLOYER* 0-16 to -17 (on file with the author, a San Francisco, California law firm); Richard G. Moon, *Avoiding Liability for Wrongful Discharge—Management Planning and Litigation Tactics*, 62 MICH. BAR J. 780, 780-81 (1983).

162. *See, e.g.*, Chagares, *supra* note 33, at 381-86; Decker, *supra* note 1, at 220-22; Moon, *supra*

recommend various procedural steps aimed at limiting potential liability.<sup>163</sup>

### C. Limitations on Disclaimer Enforcement

#### 1. In General

Courts generally have been enforcing disclaimers where the employer followed the steps recommended by disclaimer industry experts.<sup>164</sup> Disclaimers are most likely to succeed if no handbook is issued or if the handbook contains nothing that could reasonably be interpreted as promising a limitation on the at-will presumption.<sup>165</sup> The outcome is less predictable, however, if an employer couples a disclaimer with handbook language promising some sort of job security.<sup>166</sup> In this situation, the disclaimer runs counter to policy reasons that favor enforcing promissory handbook language. If the disclaimer is given effect in this context, the employer gains a windfall by obtaining the benefits of a handbook without following through on the expectations that the handbook creates.

In spite of the theoretically preclusive effect of disclaimers, a number of courts have sought ways to avoid the perceived inequities of this windfall result. As discussed below, the reasons courts give for denying enforcement vary. The basic method, however, is nearly universal. Courts deny the dispositive enforcement of disclaimers by treating the disclaimer issue as a question of fact for the jury.

The court and the jury both have responsibilities in handbook cases. In general, the issue of whether handbook language gives rise to an enforceable contract obligation is a question of fact for the jury.<sup>167</sup> On the other hand, the construction of a contract is a matter of law for the court

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note 161, at 781; Richard J. Simmons, *Reviewing the Employee Handbook*, Hum. Resources Mgmt. (CCH) No. 61 (March 23, 1984).

163. For example, a number of sources recommend that employers require employees to expressly acknowledge awareness of the disclaimer and its terms. See Chagares, *supra* note 33, at 387-89; Lopatka, *supra* note 1, at 29. A number of cases have pointed to an employee's express acknowledgment of disclaiming language as a basis for denying enforcement of handbook provisions. See, e.g., Pratt v. Brown Mach. Co., 855 F.2d 1225, 1233 (6th Cir. 1988) (employee requested to sign tear-out page from employee handbook; signed page then placed in the employee's personnel file); Arnold v. Diet Ctr., Inc., 746 P.2d 1040, 1041 (Idaho Ct. App. 1987) (employee requested to sign acknowledgment of disclaimer on cover page of handbook).

164. See, e.g., Pratt v. Brown Mach. Co., 855 F.2d 1225 (6th Cir. 1988) (applying Michigan law); Lee v. Sperry Corp., 678 F. Supp. 1415 (D. Minn. 1987); Castiglione v. Johns Hopkins Hosp., 517 A.2d 786 (Md. Ct. Spec. App. 1986), *cert. denied*, 523 A.2d 1013 (Md. 1987); Ware v. Prudential Ins. Co., 531 A.2d 757 (Super. Ct. App. Div. 1987), *certification denied*, 550 A.2d 450 (N.J. 1988); Eldridge v. Evangelical Lutheran Good Samaritan Soc'y, 417 N.W.2d 797 (N.D. 1987).

165. See Note, *Use of Disclaimers*, *supra* note 112, at 118-19.

166. See *id.* (noting that even the "perfect disclaimer" is unlikely to work if combined with express promises of job security).

167. See, e.g., Leikvold v. Valley View Community Hosp., 688 P.2d 170, 174 (Ariz. 1984); Cronk v. Intermountain Rural Elec. Ass'n, 765 P.2d 619, 623 (Colo. Ct. App. 1988); Small v.

where the terms are clear and unambiguous.<sup>168</sup> Courts that dispositively enforce disclaimers typically do so as a matter of law. These cases never reach the jury because the court construes the disclaimer as unambiguously negating the possibility of an enforceable obligation.<sup>169</sup>

In contrast, cases denying the dispositive enforcement of a disclaimer generally do so by turning the disclaimer issue over to the jury. The courts in these decisions, for various reasons, find that the presence of a disclaimer does not unambiguously determine the broader issue of handbook enforcement.<sup>170</sup> Instead, these decisions authorize the jury to determine whether the handbook, even with a disclaimer, constitutes an enforceable obligation.<sup>171</sup> Given the likelihood that the jury will be more sympathetic to the underdog employee,<sup>172</sup> this procedure significantly undercuts the legal effectiveness of disclaimers.

## 2. *Reasons for Non-Enforcement of Disclaimers*

The courts have been very resourceful in finding reasons not to give dispositive legal effect to disclaimers.<sup>173</sup> These reasons fall into four general categories: procedural defects, timing flaws, restrictions arising from extraneous evidence, and substantive limitations.

### a. *Procedural Defects*

A disclaimer will be given effect as a matter of law only if expressed clearly and conspicuously.<sup>174</sup> If the employer fails to fulfill this threshold

Springs Indus., Inc., 357 S.E.2d 452, 454 (S.C. 1987). Of course, the judge will decide this issue if she is playing the role of fact finder.

168. *Leikvold*, 688 P.2d at 174; see also *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706 (Wyo. 1985); E. ALLAN FARNSWORTH, *CONTRACTS* § 7.14 (2d ed. 1990).

169. See, e.g., *Dell v. Montgomery Ward & Co.*, 811 F.2d 970, 973-74 (6th Cir. 1987); *Eldridge v. Evangelical Lutheran Good Samaritan Soc'y*, 417 N.W.2d 797, 799-800 (N.D. 1987).

170. See, e.g., *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1037-38 (Ariz. 1985); *Morriss v. Coleman Co.*, 738 P.2d 841 (Kan. 1987).

171. See, e.g., *Dalton v. Herbruck Egg Sales Corp.*, 417 N.W.2d 496, 498 (Mich. Ct. App. 1987); *Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629, 630 (Nev. 1983); *Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12, 15 (N.J. Super. Ct. App. Div. 1989).

172. See Julius M. Steiner & Allan M. Dabrow, *The Questionable Value of the Inclusion of Language Confirming Employment at-Will Status in Company Personnel Documents*, 37 LAB. L.J. 639, 644 (1986) ("Almost every jury member is, or once was, someone's employee. Consequently, a jury's sympathies are with the discharged employee. A typical citizen believes that it is simply wrong for employers, as important members of the American society, to discharge employees for reasons that are perceived to be unfair.").

173. Many courts cite multiple reasons for not enforcing a disclaimer as a matter of law. See, e.g., *Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12, 14 (N.J. Super. Ct. App. Div. 1989) (refusing to enforce disclaimer due to inadequate notice and lack of clarity); *McGinnis v. Honeywell, Inc.*, 791 P.2d 452, 456-57 (N.M. 1990) (declining to enforce disclaimer because of both ambiguous application to separate document and necessity of considering norms of conduct).

174. See, e.g., *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 787-88 (Alaska 1989); *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1037-38 (Ariz. 1985); *Jimenez v. Colo-*

prerequisite, the impact of the disclaimer on the enforceability of the handbook language properly becomes a matter for the jury to determine.<sup>175</sup>

(1) *Lack of Clarity*

In *Wagenseller v. Scottsdale Memorial Hospital*,<sup>176</sup> the Arizona Supreme Court overturned a lower court's grant of summary judgment because of a disclaimer's lack of clarity. The hospital had distributed a handbook providing for a four-step disciplinary procedure applicable prior to termination. The handbook also listed thirty-two instances in which the procedure was not to apply and concluded with a statement that these exceptions "are not inclusive and are only guidelines."<sup>177</sup> The lower court treated the quoted language as a disclaimer that effectively negated any rights that might otherwise have arisen from the handbook.<sup>178</sup> The Arizona Supreme Court disagreed, finding that the concluding provision did not clearly disavow the applicability of the four-step procedure.<sup>179</sup> Since reasonable persons could draw different inferences from the meaning of the handbook language, the disclaimer could not be enforced as a matter of law and its effect was appropriately an issue for the jury to resolve.<sup>180</sup>

The disclaimer at issue in *Wagenseller* fell far short of the ideal recommended by disclaimer industry experts. These experts recommend that a disclaimer, at a minimum, inform employees that the handbook does not constitute a contract and that the employment relationship may be terminated at the will of either party.<sup>181</sup> If this information is stated unambiguously and with a minimum of legalese, the disclaimer is unlikely to fail on clarity grounds.<sup>182</sup>

The status of disclaimers falling between the poles of the experts' ideal and the disclaimer in *Wagenseller* are less certain. A number of courts have declined to enforce disclaimers that, though stated more clearly than in *Wagenseller*, failed to comport fully with the experts' recommendations. For example, three courts have refused to enforce as a matter of law disclaimers that denied contractual status but did not ex-

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rado Interstate Gas Co., 690 F. Supp. 977, 980 (D. Wyo. 1988); see also cases cited *infra* notes 176-205.

175. See, e.g., *Jones*, 779 P.2d at 787-88; *Wagenseller*, 710 P.2d at 1037-38.

176. 710 P.2d 1025 (Ariz. 1985).

177. *Id.* at 1037.

178. *Id.*

179. *Id.* at 1037-38.

180. *Id.* at 1038; see also *Harvet v. Unity Medical Ctr., Inc.*, 428 N.W.2d 574, 577 (Minn. Ct. App. 1988); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct. App. 1986).

181. See *supra* notes 158-63 and accompanying text.

182. See generally *Chagares*, *supra* note 33, at 380-86.

pressly notify employees that they could be terminated at will.<sup>183</sup> As one of these courts noted, such a disclaimer is unclear because it speaks in terms of the technicalities of contract status without plainly stating the practical impact of the disclaimer on apparent promises of job security contained elsewhere in the handbook.<sup>184</sup> Similarly, a recent federal court decision found unclear a disclaimer that merely defined the employment relationship as "at-will."<sup>185</sup> The court explained that this language did not clearly disavow the enforceability of "other manual provisions imposing conditions unrelated to the duration of the [employment] contract."<sup>186</sup>

The extent to which courts will search for ambiguities in disclaimers in order to avoid an inequitable result is illustrated in *Morris v. Chem-Lawn Corp.*<sup>187</sup> In that case, an employee claimed an implied contract right to her position for as long as she performed her duties satisfactorily. The employer moved for summary judgment, relying on the terms of an at-will agreement that stated that "[t]he Employee's employment with the Company may be terminated by either party at any time."<sup>188</sup> In spite of this seemingly clear language, the court found the disclaimer ambiguous because it did not expressly state whether the right to terminate could be exercised for any reason or only upon a showing of good cause.<sup>189</sup>

## (2) Ambiguity of Coverage

Disclaimers frequently fail when their application to separate documents or statements is ambiguous.<sup>190</sup> This situation occurs most frequently when the disclaimer is contained in a document other than the handbook itself. Thus, in at least seven cases, courts have found a disclaimer in one document insufficient to dispel as a matter of law expectations created by statements in other sources.<sup>191</sup>

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183. *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989); *Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12, 15 (N.J. Super. Ct. App. Div. 1989); *Johnson v. Nasca*, 802 P.2d 1294, 1295-97 (Okla. Ct. App. 1990).

184. See *Preston*, 555 A.2d at 15.

185. *Wojcik v. Commonwealth Mortgage Corp.*, 732 F. Supp. 940 (N.D. Ill. 1990); see also *Haselrig v. Public Storage Inc.*, 585 A.2d 294 (Md. Ct. Spec. App. 1991) (finding unclear a statement that the employment relationship is "predicated on an at will basis").

186. *Wojcik*, 732 F. Supp. at 942.

187. 541 F. Supp. 479 (E.D. Mich. 1982).

188. *Id.* at 481.

189. *Id.* The court nevertheless went on to grant the employer's summary judgment motion on the grounds that the employee's claim was preempted by the National Labor Relations Act. *Id.* at 484.

190. A disclaimer also may be ineffective if the definition of those employees covered by the disclaimer is ambiguous. See, e.g., *Haselrig v. Public Storage Inc.*, 585 A.2d 294 (Md. Ct. Spec. App. 1991); *Sadler v. Basin Elec. Power Coop.*, 409 N.W.2d 87, 89 (N.D. 1987).

191. See *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 809-10 (D. Colo. 1983) (holding that policy manual disclaimer did not necessarily dispel expectations); *Loffa v. Intel Corp.*, 738

A common scenario involves two separate documents: an employment application that sets forth a disclaimer and an employee handbook that contains promises of job security. In this setting, courts often find a question of fact concerning whether the disclaimer negates the statements expressed in the separate handbook.<sup>192</sup> In *McLain v. Great American Insurance Companies*,<sup>193</sup> for example, a California court of appeals held that an at-will agreement included in an employment application did not preclude the jury from considering the terms of a separately issued employee handbook. The court explained that the application did not contain an integration clause establishing the at-will agreement as an integrated contract governing the employment relationship.<sup>194</sup> Since the disclaimer language did not unambiguously disavow other possible sources of contract rights, the court upheld the jury's conclusion that the handbook created an implied contract obligation to terminate only for just cause.<sup>195</sup>

The *McLain* opinion also revealed the court's underlying dislike for disclaimers. The court noted that the at-will agreement was set out on a standardized form that did not lend itself to any genuine individualized bargaining.<sup>196</sup> The court suggested that such disclaimers, even if in the form of an integrated agreement, should not bar consideration of extraneous evidence to establish the parties' actual intentions.<sup>197</sup>

### (3) Lack of Conspicuousness

A disclaimer will be effective only if communicated in a manner that alerts employees to its existence.<sup>198</sup> Since a disclaimer attempts to negate rights that might otherwise flow from handbook promises, courts scruti-

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P.2d 1146, 1151 (Ariz. 1987) (refusing to find disclaimer in "employee agreement" controlling); *Seubert v. McKesson Corp.*, 273 Cal. Rptr. 296 (Ct. App. 1990) (holding that employment application disclaimer was not dispositive); *McLain v. Great Am. Ins. Cos.*, 256 Cal. Rptr. 863, 867-69 (Ct. App. 1989) (same); *Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629, 630 (Nev. 1983) (finding that small print on employment application did not foreclose contrary expectations); *McGinnis v. Honeywell, Inc.*, 791 P.2d 452, 456-57 (N.M. 1990) (holding disclaimer in employee manual not dispositive); *Ferraro v. Koelsch*, 368 N.W.2d 666, 667-74 (Wis. 1985) (finding employment application disclaimer not dispositive).

192. See, e.g., *McLain*, 256 Cal. Rptr. at 867-69; *Ferraro*, 368 N.W.2d at 667-74. Other courts, however, have enforced disclaimers in employment applications so as to negate the contractual nature of statements contained in an employee handbook. See, e.g., *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 461-62 (6th Cir. 1986).

193. 256 Cal. Rptr. 863 (Ct. App. 1989).

194. *Id.* at 1485. The Court of Appeals distinguished a prior case, *Gerdlund v. Electronic Dispensers Int'l*, 235 Cal. Rptr. 279 (Ct. App. 1987), in which an at-will agreement in a comprehensive contract containing an explicit integration clause was held to bar the introduction of extrinsic evidence to support the employee's implied contract claim.

195. *McLain v. Great Am. Ins. Cos.*, 256 Cal. Rptr. 863, 868-70 (Ct. App. 1989).

196. *Id.* at 868.

197. *Id.* at 868-69.

198. See *Montgomery v. Association of Am. R.R.s.*, 5 Indiv. Empl. Rts. Cas. (BNA) 1118, 1120 (N.D. Ill. 1990) ("An uncommunicated disclaimer is no disclaimer at all."). Many consultants rec-

nize disclaimers to make sure that they are displayed conspicuously.<sup>199</sup>

Courts generally find disclaimers insufficiently conspicuous in two situations. First, courts deny dispositive effect to disclaimers that are not set off in a manner that draws attention to their terms. The court in *Jimenez v. Colorado Interstate Gas Co.*,<sup>200</sup> refusing to give effect as a matter of law to a disclaimer, observed:

The disclaimer in question is not set off in any way that would attract attention. It falls under the heading "GENERAL INSTRUCTIONS" and the subheading "CONTENTS." Nothing is capitalized that would give notice of a disclaimer. The type size equals that of other provisions on the same page. No border sets the disclaimer apart from any other paragraph on the page.

Other courts have criticized disclaimers under similar circumstances.<sup>201</sup>

Courts also reject disclaimers that are buried in lengthy handbooks. For example, courts have refused to enforce dispositively a one-sentence disclaimer followed by eighty-five pages of detailed text,<sup>202</sup> as well as a disclaimer placed on the last page of a fifty-two page handbook.<sup>203</sup> Similarly, an employer risks nonenforcement unless the disclaimer is displayed on a page that is prominent within the communication as a whole.<sup>204</sup>

These procedural objections to the enforcement of handbook disclaimers are hardly revolutionary. They represent traditional standards by which all contractual obligations are tested. Even the anti-disclaimer slant of many of the decisions can be explained, in part, by the widely

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commend that employers preempt the issue of conspicuousness by requiring employees to acknowledge awareness of the disclaimer. See *supra* note 163 and accompanying text.

199. See, e.g., *Small v. Springs Indus.*, 357 S.E.2d 452, 455 (S.C. 1987); *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866, 871 (Wyo. 1990) (Golden, J., concurring), *remanded*, 820 P.2d 986 (Wyo. 1991); *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977, 980 (D. Wyo. 1988).

200. 690 F. Supp. at 980.

201. See, e.g., *Davis v. Connecticut Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1280 (M.D. Tenn. 1990) (disclaimer not highlighted in any way, located on last page, and printed in smaller typeface than most of handbook); *Perman v. Arcventures, Inc.*, 554 N.E.2d 982, 987 (Ill. App. Ct. 1990) (disclaimer "was not set off from the rest of the text, printed in capital letters or titled"); *Belfatto v. Robert Bosch Corp.*, No. 86-C-6632, 1987 WL 9569, at \*2 (N.D. Ill. April 15, 1987) (disclaimer not set off in different typeface); *McDonald*, 789 P.2d at 870 (Golden, J., concurring) (disclaimer was one sentence, unlabeled, and no different in appearance from any other sentence). But cf. *Audette v. Northeast State Bank*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989) (suggesting that it would be preferable to set out disclaimer in boldface type, but still enforcing disclaimer printed in regular typeface).

202. *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989).

203. *Davis*, 743 F. Supp. at 1280; see also *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1037 (Ariz. 1985) (disclaimer expressed as the last of 32 exceptions to a four-step disciplinary procedure).

204. *Chagares*, *supra* note 33, at 385-86. Placement on the front page generally is considered conspicuous. See, e.g., *Arnold v. Diet Ctr., Inc.*, 746 P.2d 1040, 1043 (Idaho Ct. App. 1987). But cf. *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866, 870 (Wyo. 1990) (Golden, J., concurring) ("The fact that the disclaimer appears on the front page does not by itself make it conspicuous."), *remanded*, 820 P.2d 986 (Wyo. 1991).



recognized rule<sup>205</sup> of construing ambiguous language against the drafting party.

But more is at work here. Courts enforce these standards with exceptional vigor in cases involving handbook disclaimers, raising the procedural hurdles beyond mere neutral norms of construction. Rather, the courts appear to resort to these objections as welcome escape routes that enable them to avoid an uncomfortable and undesirable result.

*b. Timing Flaws—The Problem of Unilateral Modification*

Not all employers are in a position to consider from an unencumbered vantage point the options suggested by the Arizona Supreme Court:<sup>206</sup> either not issuing a handbook at all or issuing one that includes a clear disclaimer. Many employers have already distributed handbooks that contain descriptions of job security policies but lack disclaiming language. These employers confront two less attractive options in seeking to avoid potential liability for their handbook statements. They can either attempt to withdraw the handbook statements or reissue the handbook with the inclusion of a disclaimer.

Both options raise potential problems. The previously issued handbook may have created enforceable expectations with respect to job security. If so, it is not clear that the employer can simply extinguish these obligations on a unilateral basis.

Two points seem clear. First, an employer may not extinguish rights already vested or accrued under an existing handbook policy.<sup>207</sup> On the other hand, the courts will permit employers to modify existing policies if this right was expressly reserved in the original handbook.<sup>208</sup> Employer modifications taken pursuant to express reservation clauses are treated not as unilateral, but rather as within the contemplation of the original agreement.<sup>209</sup>

In the absence of a reservation clause, the courts are split about whether the employer has a right to modify existing handbook promises.<sup>210</sup> Some courts have used a "reverse" unilateral contract anal-

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205. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

206. See *supra* notes 145-46 and accompanying text.

207. See, e.g., *Helle v. Landmark, Inc.*, 472 N.E.2d 765 (Ohio Ct. App. 1984); see also *Langdon v. Saga Corp.*, 569 P.2d 524, 527 (Okla. Ct. App. 1976).

208. See, e.g., *Lee v. Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987); *Shaver v. F.W. Woolworth Co.*, 669 F. Supp. 243, 247 (E.D. Wis. 1986), *aff'd*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

209. See *Lee*, 678 F. Supp. at 1418; *Shaver*, 669 F. Supp. at 247.

210. A number of courts have stated in dicta that an employer may unilaterally modify handbook statements. See, e.g., *Hoffmann-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 734-35 (Ala. 1987); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct. App. 1986). Some commentators describe this position as the majority view. See, e.g., *Pratt, supra* note 16, at 219-20. Only a handful of courts, however, have reached this conclusion when actually confronted with an employer's unilat-

ysis to uphold an employer's right to modify handbook language through the addition of a disclaimer.<sup>211</sup> In *Chambers v. Valley National Bank*,<sup>212</sup> for example, the plaintiff claimed that the employer had wrongfully terminated her employment without following the disciplinary procedures described in the employee handbook. The employer moved for summary judgment based on the terms of a handbook disclaimer. This disclaimer had been added to a previously issued handbook shortly after the Arizona Supreme Court had determined that handbook promises may be legally enforceable.<sup>213</sup> The plaintiff argued that the employer could not negate preexisting, enforceable handbook promises simply by issuing a new handbook that contained a disclaimer.<sup>214</sup> The *Chambers* court relied on unilateral contract notions in rejecting this argument. The court stated that "the inclusion of the disclaimer in the [later] publications may best be considered an offer of a modification to a unilateral contract of employment, which plaintiff accepted by continuing her employment with defendant."<sup>215</sup> In essence, the *Chambers* court found that a modification may occur in the same manner that gave rise to a unilateral contract in the first place.

Courts adhering to the *Chambers* approach find the principles underlying unilateral contract formation "equally applicable to the opposite transformation."<sup>216</sup> Since the handbook obligation arose without express mutual assent, these courts find no need to require mutual assent to effect a modification of that obligation.<sup>217</sup> Thus, the employee's continued work after notice of the change provides the necessary acceptance and consideration.<sup>218</sup> Any other result, these courts conclude, would unduly restrict management flexibility in that policies once stated "could never be changed short of successful negotiation with each employee who

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eral withdrawal of handbook rights. See *infra* notes 211-32 and accompanying text. If only those courts that have directly faced the modification issue are counted, the pro-modification and anti-modification positions appear to be balanced at three decisions each. Compare note 211 and accompanying text with note 225 and accompanying text.

211. See *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1547-48 (E.D. Va. 1990), *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Chambers v. Valley Nat'l Bank*, 721 F. Supp. 1128, 1131-32 (D. Ariz. 1988); *Allen v. Sunbelt Coca-Cola Bottling Co.*, 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1457 (S.C. Ct. App. 1989).

212. 721 F. Supp. 1128 (D. Ariz. 1988).

213. *Id.* at 1131.

214. *Id.*

215. *Id.* at 1131-32.

216. *Lee v. Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987) (upholding unilateral modification based on unilateral contract principles, but also based, at least in part, on presence of explicit reservation clause).

217. See *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 116 (Mich. 1989) (permitting unilateral modification, but not premised on unilateral contract principles); see also *Allen v. Sunbelt Coca-Cola Bottling Co.*, 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1457 (S.C. Ct. App. 1989).

218. See *Lee*, 678 F. Supp. at 1418; *Allen v. Sunbelt Coca-Cola Bottling Co.*, 4 Indiv. Empl. Rts. Cas. (BNA) 1453, 1457 (S.C. Ct. App. 1989).

worked while the policy was in effect.”<sup>219</sup>

Other courts are less receptive to the unilateral change prerogative. Two courts have invalidated employer attempts to modify handbook terms unilaterally on grounds of inadequate notice to the affected employees.<sup>220</sup> In *Preston v. Claridge Hotel & Casino, Ltd.*,<sup>221</sup> the employer issued a handbook detailing job expectations and disciplinary procedures. The handbook was distributed at a general orientation meeting prior to the opening of a new casino. Employer representatives explained the provisions of the handbook, and all employees were required to sign a form indicating that they understood its terms.<sup>222</sup> A year later, the employer issued a revised handbook which was identical except for the addition of a disclaimer. This time, the employer simply asked employees to pick up a copy of the new handbook and did not reorient employees regarding the significance of the disclaimer.<sup>223</sup> The court held that the attempted modification failed to extinguish rights created by the first handbook, explaining that the attenuated communication accompanying the revision was inconsistent with notions of “basic honesty.”<sup>224</sup>

Three other courts have gone further, holding that an employer may unilaterally withdraw enforceable handbook promises only upon mutual consent and the provision of adequate additional consideration.<sup>225</sup> The three cases decided by these courts are very similar. In each instance, the employer initially distributed a handbook that contained statements describing job security policies. The employer then attempted to limit its exposure by issuing a revised handbook or waiver disclaiming contractual liability. All three courts, when faced with wrongful discharge suits premised on the handbook statements, refused to construe the newly added disclaimers or employment provisions as a basis for granting employer motions for summary judgment.<sup>226</sup>

The reasoning of these courts is that an employee's acceptance of the

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219. *Bankey*, 443 N.W.2d at 120.

220. *Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12 (N.J. Super. Ct. App. Div. 1989); *Helle v. Landmark, Inc.*, 472 N.E.2d 765 (Ohio Ct. App. 1984).

221. 555 A.2d 12 (N.J. Super. Ct. App. Div. 1989).

222. *Id.* at 13.

223. *Id.* at 13-14, 16.

224. *Id.* at 16; see also *Helle*, 472 N.E.2d at 777 (finding that contemplated modification of unilateral contract failed due to lack of “legally adequate notice”); *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 120 (Mich. 1989):

Fairness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight. We hold that for the revocation of a discharge-for-cause policy to become legally effective, reasonable notice of the change must be uniformly given to affected employees.

225. *Toth v. Square D Co.*, 712 F. Supp. 1231, 1235 (D.S.C. 1989); *Thompson v. Kings Entertainment Co.*, 674 F. Supp. 1194, 1198 (E.D. Va. 1987); *Towns v. Emery Air Freight, Inc.*, 3 Indiv. Empl. Rts. Cas. (BNA) 911, 913-14 n.3 (S.D. Ohio 1988).

226. *Toth*, 712 F. Supp. at 1235-36; *Thompson*, 674 F. Supp. at 1198-99; *Towns*, 3 Indiv. Empl. Rts. Cas. (BNA) at 914.

revised handbook terms cannot be inferred merely from the employee's continuing to work.<sup>227</sup> Because the employee already possesses contractual rights flowing from the initial handbook,<sup>228</sup> the employer cannot unilaterally extinguish these rights simply by issuing a new handbook.<sup>229</sup> Instead, the modification is effective only if it satisfies the elements for a new bilateral contract, including mutual assent and sufficient consideration.<sup>230</sup> While the determination as to assent is a question of fact for the jury,<sup>231</sup> all three opinions suggest that satisfying the consideration element requires the employer to provide new or additional benefits in return for the modification.<sup>232</sup>

Once again, a strict contractual approach provides a less than optimal analytical framework. The pro-modification courts pile fiction upon fiction in implying a revised unilateral contract based on the new handbook. These courts' conclusion that an employee's continued work performance provides both acceptance and consideration is counter-intuitive where the employee loses rather than gains rights.<sup>233</sup> Since the employer is the party benefiting from the modification, it is the employer rather than the employee who should provide the necessary consideration. On the other hand, the anti-modification courts fail to explain why a unilateral contract approach is sufficient to establish enforceable handbook rights but a bilateral approach is necessary to effect a revision of these rights.

The Michigan Supreme Court in the *Bankey*<sup>234</sup> decision discussed above expressly rejected unilateral contract analysis in addressing the modification issue.<sup>235</sup> The *Bankey* court explained that handbook provisions are "not enforceable because they have been 'offered and accepted' as a unilateral contract," but because of the benefit the employer derives

227. See, e.g., *Toth*, 712 F. Supp. at 1236; *Thompson*, 674 F. Supp. at 1198-99.

228. See, e.g., *Towns*, 3 Indiv. Empl. Rts. Cas. (BNA) at 914 n.3; Pratt, *supra* note 16, at 221.

229. See, e.g., *Toth*, 712 F. Supp. at 1235 ("If an employer were permitted to extinguish an employee's rights under an existing handbook through the simple expedient of a revised handbook, employees could suffer the very inequities the [courts recognizing the handbook exception to the employment-at-will doctrine] sought to prevent.").

230. *Toth*, 712 F. Supp. at 1235-36; *Thompson*, 674 F. Supp. at 1198; see also Pratt, *supra* note 16, at 219-21, 224 (arguing that decisions permitting modification without mutual assent and adequate consideration are inconsistent with general contract law principles).

231. *Toth*, 712 F. Supp. at 1236; *Thompson*, 674 F. Supp. at 1198. The *Thompson* court explained that "[t]o establish acceptance under the contractual analysis, [the employer] must demonstrate that [the employee] was aware of the new Handbook, that he understood that its terms governed his employment, and that he worked according to those terms." 674 F. Supp. at 1198.

232. *Toth*, 712 F. Supp. at 1236; *Thompson*, 674 F. Supp. at 1198 n.7; *Towns*, 3 Indiv. Empl. Rts. Cas. (BNA) at 914 n.3.

233. See *supra* note 74 and accompanying text.

234. *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112 (Mich. 1989). The *Bankey* decision is discussed *supra* at notes 138-43 and accompanying text.

235. *Id.* at 119.

by establishing such policies.<sup>236</sup> Based on this analysis, the court ruled that an employer may unilaterally withdraw promissory handbook language because "the employer's benefit is correspondingly extinguished."<sup>237</sup> Thus, according to the *Bankey* court, an employer may effect a unilateral modification if it eliminates the source of both the employer's benefit and the employee's expectations.

However, the *Bankey* court did not address the situation in which the employer unilaterally modifies the handbook by adding a disclaimer yet retains the promissory statements. Here, the Michigan court would presumably find a question of fact concerning the disclaimer's impact. By retaining the initial handbook language, the employer may not have extinguished either the potential benefit to itself or the reasonable expectations of its work force. The addition of a disclaimer may simply represent an attempt to preserve the benefits without paying the price. Under the *Bankey* court's analysis, this situation would seem to require a factual determination by the jury as to whether the revised handbook, when taken as a whole, continues to provide a benefit to the employer and is, for that reason, enforceable.

The *Bankey* court's approach is better adapted to the problem of handbook modifications. It does not attempt to mold fact situations to mesh with the technicalities of unilateral contract analysis. It does not change the rules of the game depending upon which party is seeking contract enforcement. Instead, the *Bankey* approach tests the modification issue by the same principles that give rise to the handbook obligation in the first place. More significantly, the *Bankey* decision points the way to a revised policy-oriented analysis of the broader issue of handbook disclaimers.

### *c. Restrictions Arising From Extraneous Evidence*

The parol evidence rule generally bars admission of prior or contemporaneous evidence to contradict the terms of an integrated contract.<sup>238</sup> With regard to employee handbooks, courts sometimes invoke the parol evidence rule as a basis for excluding evidence that is inconsistent with the terms of a disclaimer.<sup>239</sup>

In contrast, other courts rely on extraneous evidence to limit the legal effect of disclaimers in handbooks or job applications. Courts frequently take this approach when a case includes evidence arising after the issuance of the disclaimer that may serve as a modification of the at-

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236. *Id.*

237. *Id.*

238. See E. ALLAN FARNSWORTH, *CONTRACTS* § 7.2 (2d ed. 1990).

239. See, e.g., *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 231 Cal. Rptr. 820, 828 (Ct. App. 1986); *Ware v. Prudential Ins. Co.*, 531 A.2d 757, 761 (Super. Ct. App. Div. 1987), *cert. denied*, 550 A.2d 450 (N.J. 1988).

will agreement.<sup>240</sup> When such inconsistent evidence exists, courts often deny dispositive effect to the disclaimer and submit the broader enforcement issue to the jury.

Courts find extraneous evidence in various sources. A written<sup>241</sup> or oral<sup>242</sup> statement promising some sort of job security and made sometime after the disclaimer is a prime example. Thus, in *Helle v. Landmark, Inc.*,<sup>243</sup> the employer issued a personnel manual that contained a detailed severance plan describing benefits payable upon a plant closure or mass layoff. When a closure actually occurred, the employer defended its reduced severance payments based on the terms of two disclaimer provisions that provided for discretionary payments and unilateral amendments, respectively.<sup>244</sup> The employees countered with evidence of oral assurances that the employer would abide by the severance plan for employees who did not quit early, during the swirl of rumors of an imminent plant closure.<sup>245</sup> The trial court granted summary judgment for the employer, but an Ohio court of appeals reversed, stating:

[T]o the extent that the oral assurances of severance pay conflicted with the manual's disclaimers, or induced appellants to disregard their significance, we hold that such representations will negate the effect of disclaimers which are intended to absolve the employer from liability for unilateral alterations of or deviations from policies presented in the written manual or similar writings.<sup>246</sup>

A growing number of courts have now taken the position that the effect of a disclaimer should be evaluated in light of all the circumstances.<sup>247</sup> This is a very significant limitation on the usefulness of dis-

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240. See, e.g., *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 810 (D. Colo. 1983); *Rodie v. Max Factor & Co.*, 256 Cal. Rptr. 1, 4 (Ct. App. 1989). But cf. *Bratton v. Menard, Inc.*, 438 N.W.2d 116, 117-18 (Minn. Ct. App. 1989) (finding offer to modify at-will status in handbook issued prior to execution of agreement containing disclaimer).

241. See *Brooks*, 574 F. Supp. at 806, 810; *Bratton*, 438 N.W.2d at 117-18; *Butzer v. Camelot Hall Convalescent Ctr., Inc.*, 454 N.W.2d 122, 124 (Mich. Ct. App. 1989); *Swanson v. Liquid Air Corp.*, 781 P.2d 900 (Wash. Ct. App. 1989); *Ferraro v. Koelsch*, 368 N.W.2d 666, 673 (Wis. 1985).

242. See *Wilkerson v. Wells Fargo Bank*, 261 Cal. Rptr. 185, 189 n.2 (Ct. App. 1989); *Rodie*, 256 Cal. Rptr. at 4; *Morriss v. Coleman Co.*, 738 P.2d 841, 849 (Kan. 1987); *Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 310-11 (Mich. Ct. App. 1981); *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 775 (Ohio Ct. App. 1984).

243. 472 N.E.2d 765 (Ohio Ct. App. 1984).

244. *Id.* at 774.

245. *Id.* at 769-71, 774.

246. *Id.* at 775. Because of the oral modification possibility, some commentators advise employers to include a clause in the disclaimer which specifically limits the number of persons with authority to alter the terms of the employment agreement. See, e.g., *Chagares*, *supra* note 33, at 393-94. Even this strategy is not always successful, however. See, e.g., *Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910, 912, 914-15 (N.D. Ill. 1989).

247. See, e.g., *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988); *Wilkerson v. Wells Fargo Bank*, 261 Cal. Rptr. 185, 189, 191 (Ct. App. 1989); *Morriss v. Coleman Co.*, 738 P.2d 841, 849 (Kan. 1987); *McGinnis v. Honeywell, Inc.*, 791 P.2d 452, 457 (N.M. 1990); *Tiranno v. Sears, Roebuck & Co.*, 472 N.Y.S.2d 49, 50 (App. Div. 1984); *Johnson v. Nascia*, 802 P.2d 1294, 1297 (Okla. Ct. App. 1990); *Badgett v. Visiting Nurse Ass'n*, 6 Indiv. Empl. Rts. Cas. (BNA) 322,

claimers. Under this standard, handbook enforcement becomes a matter for determination by the jury if the employee submits any evidence inconsistent with the terms of the disclaimer.

For example, the Kansas Supreme Court held in *Morriss v. Coleman Co.*<sup>248</sup> that a handbook disclaimer did not, by itself, warrant a grant of summary judgment for the employer. Instead, according to this court, the handbook enforcement issue should be resolved by the jury based on all the evidence:

The disclaimer in the supervisor's manual quoted above does not as a matter of law determine the issue. It has not been established that the disclaimer was brought to the personal attention of its employees or that it was intended by Coleman to create an unqualified employment-at-will relationship, especially in view of other provisions in the manual and the statements made by Coleman's supervisors to the employees. . . . The ultimate decision of whether there was an implied contract not to terminate the plaintiffs without just cause must be determined from all the evidence presented by the parties on that issue.<sup>249</sup>

Similarly, the New Mexico Supreme Court ruled in *McGinnis v. Honeywell, Inc.* that a disclaimer must be construed with reference to the parties' "norms of conduct and expectations founded upon them."<sup>250</sup> In spite of a clear and unambiguous disclaimer, the New Mexico court in *McGinnis* affirmed a jury award for the discharged employee, citing the employer's "policy to take uniform and consistent actions regarding termination" and the fact that "supervisors were required to follow applicable policies."<sup>251</sup>

#### d. Substantive Limitations

The cases discussed above clearly exhibit a discomfort with disclaimers. But they do so indirectly. The approach taken by these courts stretches the boundaries of conventional contract formation defenses in situations where enforcement of a disclaimer would lead to inequitable results.

A growing number of recent decisions take a more direct approach. The courts in these cases, although relying on different rationales, squarely confront the equities of handbook enforcement and recognize substantive limitations on the legal effect of disclaimers.

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324 (Iowa Ct. App. 1991); see also *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1200 (5th Cir. 1987) (declining to enforce disclaimer where evidence established that supervisors and employees understood that handbook provisions concerning job security were binding and engaged in course of conduct consistent with that understanding).

248. 738 P.2d 841 (Kan. 1987).

249. *Id.* at 849.

250. 791 P.2d 452, 457 (N.M. 1990) (quoting *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988) and *Greene v. Howard Univ.*, 412 F.2d 1128, 1134-35 (D.C. Cir. 1969)).

251. 791 P.2d at 457.

These decisions represent a significant and positive development in the law of employee handbooks. The courts in these cases recognize that the proper legal impact of a disclaimer can be ascertained only by reference to the language of a handbook read as a whole. Thus, a conspicuous disclaimer in the context of indefinite language may simply underscore the handbook's non-promissory nature. On the other hand, a handbook that contains both a clear promise and a disclaimer is inherently ambiguous. The cases discussed below appropriately recognize that it is the role of the jury, rather than that of the court, to resolve this ambiguity. In doing so, these decisions pave the way for a revised, policy-oriented framework for the analysis of handbook disclaimers.

### (1) *Inherent Fact Question*

At least two cases have taken the position that an inherent question of fact exists if a handbook contains both promissory language and a disclaimer.<sup>252</sup> Under this approach, the court does not enforce the disclaimer as a matter of law, but instead asks the jury to resolve the ambiguity that results from the inconsistent representations.

A 1989 federal court decision illustrates the approach. In *Seehawer v. Magnecraft Electric Co.*,<sup>253</sup> the employer issued an employee handbook that explicitly stated that "[e]mployees shall be discharged or disciplined only for just cause."<sup>254</sup> The handbook also established a grievance procedure for resolving employee-management disputes.<sup>255</sup> At the same time that the handbook was issued, the employer required employees to sign statements acknowledging the at-will nature of the employment relationship.<sup>256</sup> An employee subsequently sought to enforce the handbook statements in a suit challenging her dismissal after nineteen years with the company. The employer moved for summary judgment and relied on the disclaimer, but the federal court declined to grant the motion, explaining:

We are faced with two simultaneously and seemingly conflicting "offers" to Seehawer. The Manual, upon which Seehawer primarily relies in opposition to summary judgment, promises termination only for just cause.

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252. See *Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910 (N.D. Ill. 1989); *Dalton v. Herbruck Egg Sales Corp.*, 417 N.W.2d 496 (Mich. Ct. App. 1987). Two other decisions have adopted similar positions: see also *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988) (holding a handbook disclaimer insufficient to justify summary judgment; it must be read in reference to the parties' norms of conduct and expectations founded upon them); *Wilkerson v. Wells Fargo Bank*, 261 Cal. Rptr. 185, 191 (Ct. App. 1989) (finding that disclaimer in handbook which is not reduced to integrated at-will agreement will not support summary judgment for employer on implied contract claim, but is one of the factors for the jury to consider in determining the existence and content of the employment agreement).

253. 714 F. Supp. 910 (N.D. Ill. 1989).

254. *Id.* at 912.

255. *Id.*

256. *Id.*



The Statement, upon which defendants rely in support of summary judgment, appears to disclaim any such promise. . . . [T]his apparent inconsistency precludes summary judgment. . . . [T]o the extent that the provisions are irreconcilable on their face, the clarification of ambiguities in contractual provision is a matter best left to the trier of fact.<sup>257</sup>

The *Seehawer* approach represents a significant restriction on the efficacy of handbook disclaimers. In this group of cases, the courts refuse to enforce disclaimers as a matter of law even if the disclaiming language is clear and no extraneous evidence is offered to contradict the disclaimer. As these courts analyze the situation, the ambiguity that inhibits disclaimer enforcement arises from the handbook itself. The *Seehawer* approach recognizes that a handbook that contains both promises of job security and a disclaimer that attempts to negate involuntary enforcement of these promises is inherently ambiguous. As with any contractual ambiguity, resolution is assigned to the jury. The jury's task is to weigh the "conflicting offers" and determine whether the terms of the entire handbook establish a binding contractual obligation.<sup>258</sup>

## (2) Promissory Estoppel

Three other courts have reached the same result by relying on notions of promissory estoppel.<sup>259</sup> These courts conclude that the presence of a disclaimer, although possibly sufficient to defeat formation of a unilateral contract, does not foreclose the possibility of handbook enforcement on the basis of promissory estoppel. Under this approach, a disclaimer does not warrant a grant of summary judgment for the employer, but is merely one piece of evidence for a jury to consider in determining whether the handbook, taken as a whole, reasonably induced the work force to rely on its terms.<sup>260</sup>

The Wyoming Supreme Court provided the best articulation of this theory in its 1990 decision, *McDonald v. Mobil Coal Producing, Inc.*<sup>261</sup> In this case, the employer distributed an employee handbook containing a "fair treatment" procedure which guaranteed employees the opportu-

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257. *Id.* at 914-15.

258. *See* Dalton v. Herbruck Egg Sales Corp., 417 N.W.2d 496, 498 (Mich. Ct. App. 1987):

The tenor of the entire handbook is that all employees will be fairly and justly treated in accordance with the procedures set forth in the handbook. Where a policy manual provides both a "for cause" termination policy and a terminable at will policy, the question whether an employment contract with a just cause termination policy has been formed is a question of fact to be resolved by the jury.

259. *See, e.g.,* Allabashi v. Lincoln Nat'l Sales Corp., 824 P.2d 1 (Colo. Ct. App. 1991); Cronk v. Intermountain Rural Elec. Ass'n, 765 P.2d 619 (Colo. Ct. App. 1988); Haselrig v. Public Storage Inc., 585 A.2d 294 (Md. Ct. Spec. App. 1991); McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991).

260. *See, e.g.,* Allabashi, 824 P.2d at 2; Cronk, 765 P.2d at 623-24; Haselrig, 585 A.2d at 300; McDonald, 789 P.2d at 869-70.

261. 789 P.2d 866 (Wyo. 1990).

nity to be heard on any problem without fear of reprisal.<sup>262</sup> The handbook also set out a list of inappropriate behaviors and a five-step disciplinary process.<sup>263</sup> The trial court, although noting that the tenor of the handbook was that of an employment contract, held that the employer's inclusion of a disclaimer in the handbook defeated the discharged employee's contract claim.<sup>264</sup> The state Supreme Court reversed, with the five justices authoring four opinions. The plurality agreed that the disclaimer precluded the employee's claim of a unilateral contract.<sup>265</sup> This conclusion did not end the analysis, however. The opinion went on to explain that the handbook language "could be understood to connote promises" that might be enforceable even in the absence of a contractual obligation.<sup>266</sup> The plurality found that, even with the disclaimer, the handbook promises could be enforced under a theory of promissory estoppel.<sup>267</sup> According to the plurality, an employee is entitled to enforce a handbook promise, notwithstanding an accompanying disclaimer, if it can be shown that:

- (1) The employer should have reasonably expected the employee to consider the representation as a commitment from the employer; (2) the employee reasonably relied upon the representation to his detriment; and (3) injustice can be avoided only by enforcement of representation.<sup>268</sup>

These issues, the plurality concluded, were a matter for the jury to determine and warranted reversal of the trial court's summary judgment order.<sup>269</sup>

Like the "conflicting offer" logic of *Seehawer*,<sup>270</sup> the *McDonald* approach transforms the disclaimer issue from one of law to one of fact.

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262. *Id.* at 868.

263. *Id.*

264. *Id.* The employer added the disclaimer following a 1985 decision that held that the Mobil Coal Producing handbook constituted an employment contract. *See Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706-07 (Wyo. 1985). The two dissenting opinions in *McDonald* chided the majority for changing the rules of the game after Mobil followed the Supreme Court's advice and added the disclaimer. 789 P.2d at 871 (Cardine, C.J., dissenting), 872 (Thomas, J., dissenting), *remanded*, 820 P.2d 986 (Wyo. 1991).

265. *Id.* at 869.

266. *Id.*

267. *Id.* at 869-70.

268. *Id.* at 870.

269. *Id.* at 870. The third and deciding vote for the majority result in *McDonald* was premised on a different theory. Justice Golden, in a concurring opinion, applied unilateral contract rather than promissory estoppel principles in finding that the disclaimer was not sufficiently conspicuous to justify summary judgment. 789 P.2d at 870-71 (Golden, J., concurring). Based on reasoning similar to *Seehawer* (*see supra* notes 252-58 and accompanying text), Justice Golden found that the inconsistent representations contained in the handbook provisions describing job security on the one hand, and those asserted in the disclaimer on the other, created an ambiguity requiring submission to the jury. 789 P.2d at 871. Two dissenting justices would have enforced the disclaimer and affirmed the grant of summary judgment for the employer. 789 P.2d at 871 (Cardine, C.J., dissenting), 789 P.2d at 872 (Thomas, J., dissenting).

270. The *Seehawer* case is discussed *supra* at notes 252-58 and accompanying text.

What differentiates the two cases is their underlying theories. *Seehawer* is grounded in unilateral contract principles, while the *McDonald* plurality relies on promissory estoppel.<sup>271</sup> The *Seehawer* approach asks the jury to resolve the ambiguity resulting from inconsistent handbook representations, while the promissory estoppel approach frames the question in terms of the employees' reasonable expectations. But the result is essentially the same. The disclaimer is reduced in significance from the determinative factor that automatically precludes handbook enforcement to just one of the factors for the jury to consider in resolving the question of handbook enforcement.

### (3) Detailed or Unequivocal Handbook Language

Finally, two other cases have denied enforcement to disclaimers because of explicit and detailed promissory language contained elsewhere in the handbook.<sup>272</sup> The courts in these cases found that the promissory language simply overrode the disclaimer. These cases go beyond the two preceding groups of cases in that, in this category, each court ruled as a matter of law that the handbook created enforceable job security rights regardless of the disclaimer.

In *Jones v. Central Peninsula General Hospital*,<sup>273</sup> the hospital provided its employees with a detailed, eighty-five page personnel manual. The manual described a policy of termination for cause coupled with a detailed grievance procedure. Marge Jones, a registered nurse at the hospital, invoked the handbook provisions in challenging her dismissal. The hospital argued that the handbook did not modify the at-will presumption because it contained a disclaimer of contract status. The Alaska Supreme Court rejected this argument, noting that the one-sentence disclaimer was followed by eighty-five pages of detailed text.<sup>274</sup> The court explained that:

[t]he manual therefore creates the impression, contrary to the "disclaimer," that employees are to be provided with certain job protections. Employers should not be allowed to "instill . . . reasonable expectations of job security" in employees, and then withdraw the basis for those expectations when the employee's performance is no longer desired. We therefore conclude that the disclaimer contained in the 1978 manual does not prevent the provisions of the manual from becoming part of, and thus

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271. Compare *Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910, 914-15 (N.D. Ill. 1989) with *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866, 869-70 (Wyo. 1990).

272. A third case adopted a very similar position. See *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1200 (5th Cir. 1987) (declining to enforce disclaimer because of detailed handbook provisions establishing a policy of termination only for good cause and a grievance procedure; plus evidence that supervisors and employees understood that such policies were binding on all concerned).

273. 779 P.2d 783 (Alaska 1989).

274. *Id.* at 787-88.

modifying, Jones' at-will employment agreement. . . .<sup>275</sup>

Rather than simply reversing the lower court's grant of summary judgment to the employer and remanding the handbook enforcement issue to the jury, the Alaska Supreme Court ruled as a matter of law that the personnel manual created a binding policy of termination for cause. The only issue remaining for the jury on remand, then, was whether the discharge of Marge Jones had actually complied with this policy.<sup>276</sup>

An Illinois appellate court followed a similar approach in *Perman v. ArcVentures, Inc.*<sup>277</sup> In this case, an employee was given a detailed handbook that contained a code of conduct, disciplinary rules, and a grievance procedure.<sup>278</sup> The handbook also contained a disclaimer that reserved the right to modify policies and to terminate or discipline employees.<sup>279</sup> Despite this disclaimer, the court found as a matter of law that the discharged employee possessed enforceable rights in the handbook procedures:

[W]e find that the language in Rush's manual of personnel policies and procedures created enforceable contractual rights despite its disclaimer.

. . . Given the unequivocal language [of the handbook], we reverse the trial court's summary judgment ruling and find as a matter of law that Perman's employment could not be terminated at-will insofar as the manual provided for an established grievance procedure for an unfavorable decision affecting employment.<sup>280</sup>

Thus, the conclusion reached by the *Jones* and *Perman* courts is that detailed or unequivocal handbook promises will prevail over disclaimers. The essential methodology of these decisions involves comparing the impact of the promissory statements and that of the countervailing disclaiming language. If the promissory statements are so explicit as to create legitimate expectations among the work force, despite the presence of a disclaimer, the court will enforce the handbook statements. The key difference from the cases discussed in the two preceding sections is that, in *Jones* and *Perman*, the court itself undertakes this comparison. Instead of simply finding an evidentiary conflict between the promissory statements and the disclaimer, which would require submitting the issue to a jury, these decisions find the balance tilted so heavily as to permit the court to nullify the disclaimer as a matter of law.

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275. *Id.* (citations omitted).

276. *Id.* at 788-89.

277. 554 N.E.2d 982 (Ill. App. Ct. 1990).

278. *Id.* at 985.

279. *Id.*

280. *Id.* at 987. The *Perman* court went on to conclude, however, that the employer had complied with the handbook grievance procedures and that the termination was supported by just cause. *Id.* at 987-88.

## III.

## THE GAP BETWEEN THEORY AND PRACTICE

A. *Explaining the Gap*

The cases discussed above reveal a significant gap between theory and practice. Many of the leading handbook decisions suggest that, in theory, disclaimers can defeat enforcement of handbook statements.<sup>281</sup> But, in practice, courts frequently search for reasons to reach just the opposite result. As this article illustrates, no fewer than forty-five reported decisions over the past decade have declined to give effect to handbook disclaimers.<sup>282</sup>

The gap has its origins on both sides of the theory/practice equation, though the factors leading to divergence are probably more obvious on the side of practice. Courts often refuse to give effect to disclaimers, regardless of theory, when doing so would lead to inequitable results. Indeed, considerations of fairness, although typically unstated, explain the outcome of most handbook cases. Where handbooks make no promises of job security or contain only vague statements of policy, courts have little difficulty adhering to theory and enforcing the terms of disclaimers.<sup>283</sup> But where handbooks make explicit promises or otherwise foster reasonable employee expectations, courts tend to downplay theory and find reasons to require jury consideration of the handbook provisions as a whole.<sup>284</sup>

The criterion of fairness flows from the same policy considerations as those underlying handbook enforcement itself.<sup>285</sup> To the extent that a handbook describes personnel policies that facilitate greater productivity, the employer benefits from the distribution of the handbook even if it contains a statement disclaiming contractual liability. Similarly, a disclaimer may not eliminate legitimate employee expectations of job security when the tenor of the entire handbook is taken into account. It is one thing for courts to deny handbook claims where a disclaimer underscores that non-promissory statements do not give rise to contractual rights. It is quite another to permit an employer to reap the benefits of a handbook by making explicit representations of job security, while also allowing the employer to avoid complying with these representations merely by in-

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281. See *supra* notes 153-57 and accompanying text.

282. These cases are listed in the Appendix *infra* at 000-00.

283. See, e.g., *Arnold v. Diet Ctr., Inc.*, 746 P.2d 1040 (Idaho 1987) (enforcing disclaimer where employer read it to employee at time of hiring and had employee sign cover page including disclaimer); *Allan v. Sunbelt Coca-Cola Bottling Co.*, 4 Indiv. Empl. Rts. Cas. (BNA) 1453 (S.C. Ct. App. 1989) (holding that handbook reciting company policy of trying to provide permanent work insufficient to alter employees' at-will status).

284. See *supra* notes 252-58 and accompanying text.

285. The policy considerations underlying handbook enforcement are discussed *supra* notes 76-90 and accompanying text.

cluding a disclaimer. As observed in a number of recent opinions, the latter situation is the quintessence of having one's cake and eating it too.<sup>286</sup>

The theoretical component also contributes to the existence of the gap between theory and practice in the disclaimer cases. Here, the problem lies with the prevailing mode of analysis, grounded in the doctrine of unilateral contract. As discussed above,<sup>287</sup> unilateral contract theory offers a convenient fiction for the enforcement of handbook statements. The unilateral contract approach is convenient because it offers an acceptable vehicle for reaching the desirable policy end of enforcing promissory handbook terms. It accomplishes this by providing the theoretical framework for finding a binding contract in the absence of an express agreement. According to unilateral contract analysis, the handbook constitutes an implied offer which is accepted and rendered enforceable by an employee's continued performance of work.<sup>288</sup>

No matter how convenient, unilateral contract analysis in the handbook setting still relies heavily on fiction. It is a fiction to conclude that an employer intends to make a contractual offer by issuing an employee handbook. It is also a fiction to conclude that employees intend to accept revised employment terms by showing up for work as usual the day after the handbook is distributed. The result accomplished by applying unilateral contract principles to handbook statements may be just, but the analysis is inescapably entangled with fiction.

When unilateral contract analysis is extended to the disclaimer context, the fiction is compounded. Under unilateral contract theory, a disclaimer is effective because it dispels the existence of an offer.<sup>289</sup> When an employer prints a statement disclaiming that a handbook constitutes a contractual offer, the implied offer essential to unilateral contract forma-

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286. See, e.g., *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989):

The manual therefore creates the impression, contrary to the 'disclaimer,' that employees are to be provided with certain job protections. Employers should not be allowed to 'instill . . . reasonable expectations of job security' in employees, and then withdraw the basis for those expectations when the employee's performance is no longer desired.

See also *Thompson v. King's Entertainment Co.*, 674 F. Supp. 1194, 1198 (E.D. Va. 1987) ("Employers should be bound by their expressed policies to preclude their offering with one hand what [they] take away with the other."); *Eldridge v. Evangelical Lutheran Good Samaritan Soc'y*, 417 N.W.2d 797, 801 (N.D. 1987) (Meschke, J., dissenting) ("There are evident issues of fact about the 'ambiguity and reliance created by an employer's disclaimer in an employee handbook that purports to 'taketh' what the remainder of the handbook appears to 'giveth.'") (quoting *Bailey v. Perkins Restaurants, Inc.*, 398 N.W.2d 120, 123 (Levine, J., concurring) (N.D. 1986))).

287. See *supra* notes 93-115 and accompanying text.

288. The requisite elements of unilateral contract formation with respect to employee handbooks are discussed *supra* notes 101-06 and accompanying text.

289. See *Anders v. Mobil Chem. Co.*, 559 N.E.2d 1119, 1122 (Ill. App. Ct.) (holding that explicit disclaimer precluded employee from reasonably believing an offer had been made), *appeal denied*, 564 N.E.2d 834 (Ill. 1990); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985) (holding that with a disclaimer, employer promises nothing).

tion disappears. A simple formalistic statement defeats enforcement of the entire handbook. One fiction defeats another. Meanwhile, however, the underlying policy concerns are left unaddressed. In reality, the policy considerations that support handbook enforcement remain relevant even if the handbook includes a disclaimer. The handbook, taken as a whole, may still convey representations that yield benefits for the employer and instill expectations among the work force. But there is no room for these crucial policy concerns to come into play under the traditional unilateral contract approach. As a result, the fiction involved in applying unilateral contract analysis loses its convenience when a court's focus shifts to the effect of disclaimers.

Much like the application of unilateral contract analysis, the traditional promissory estoppel basis for handbook enforcement depends on a fiction to the extent that the doctrine requires proof of individualized reliance. The courts have indulged in a fiction in finding that an employee's continued performance of work satisfies this reliance element.<sup>290</sup> And as in the unilateral contract approach, resorting to the fiction undercuts consideration of relevant policy concerns when a disclaimer is construed as automatically negating the appropriateness of the reliance that the doctrine requires of the affected employee.

The poor fit between existing theoretical models and the issue of handbook disclaimers produces discordance between theory and practice.<sup>291</sup> Under the prevailing theories, disclaimers are effective to defeat handbook enforcement without regard to underlying policy considerations. In practice, however, courts frequently refuse to enforce disclaimers because of the very policy considerations that the theoretical framework ignores. Except for a few pioneering courts that are now invoking substantive objections to the automatic enforcement of disclaimers,<sup>292</sup> courts generally rely on a certain amount of disingenuousness to reach their practical results. Instead of directly discussing the equities of disclaimer enforcement, most decisions in this area have stretched conventional contract analysis to find ambiguities or extraneous evidence sufficient to warrant jury consideration of the issue. In short, most courts continue to give lip service to the theory, but refuse to be constrained by its limitations when necessary to prevent fundamental unfairness.

### *B. Bridging the Gap*

The gap between theory and practice should be closed. The fiction

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290. The promissory estoppel basis for handbook enforcement is discussed *supra* at notes 116-29 and accompanying text.

291. See *supra* notes 281-90 and accompanying text.

292. See *supra* notes 252-80 and accompanying text.

of the unilateral contract approach compels courts to resort to covert devices to avoid unfair results. Unfortunately, this situation confirms the observations of Karl Llewellyn, principal architect of the Uniform Commercial Code: "[C]overt tools are never reliable tools."<sup>293</sup> While manipulation of conventional doctrines may produce justice in individual cases, the overall result is unpredictability and confusion.

The appropriate response of the legal system to the gap between theory and practice is to revise current theory to incorporate the policy considerations that have played such a significant, though often covert, role in many recent handbook decisions.<sup>294</sup> Bringing the underlying principles into the open can reduce the obscurity of much existing disclaimer analysis, thus leading to better-grounded, more consistent case law.

Some commentators suggest that handbook disclaimers are inherently unfair and should be found unenforceable as a matter of law.<sup>295</sup> These critics contend that disclaimers are typically boilerplate clauses that employers impose without bargaining and that employees do not understand.<sup>296</sup> While this is often the case, the argument misses the

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293. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 365 (1960) (quoting Karl N. Llewellyn, Book Review, *HARV. L. REV.* 700, 703 (1939)).

294. An adjustment of this nature was undertaken in the adoption of the Uniform Commercial Code. The Code's drafters recognized that a similar gap between theory and practice existed with respect to the enforcement of oppressive or unfair contract provisions. Because freedom of contract notions prevailed during the first half of this century, the courts resorted to indirect flanking techniques to negate the offending clauses. The U.C.C. drafters responded by modifying the theoretical perspective so as to recognize "unconscionability" as a legitimate defense to contract enforcement. The official comment to the resulting § 2-302 explained the purpose of this provision as follows:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract . . . .

*U.C.C. § 2-302 cmt. 1* (1990); see also Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 *U. PA. L. REV.* 485, 525-27 (1967) (criticizing § 2-302 and cmt. 1 for empowering courts to give "no reason at all" for voiding contracts as unconscionable); Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 *IOWA L. REV.* 843, 844-46 (1960) (stating that § 2-302 will allow courts to mount a "long-overdue assault on the citadel of freedom of contract.").

295. See, e.g., Steiner & Dabrow, *supra* note 172, at 642 (arguing that disclaimers may be unconscionable if construed as adhesion contracts); Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1106-07 (1984) (arguing that courts should not hesitate in holding contract provisions unenforceable as a matter of public policy; disclaimers should be subject to close scrutiny). See also Note, *Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution?*, 15 *FORDHAM URB. L.J.* 533, 564 (1987) (arguing that judicial support for handbook disclaimers discourages an employment relationship based on principles of fairness and equal treatment).

296. See generally Finkin, *supra* note 21, at 750 (stating that judicial enforcement of a boilerplate disclaimer "comes close to deference to a fraud"); Summers, *supra* note 295, at 1106-07 (noting that the potential for overreaching is pervasive in standardized employment contracts, particularly since employees may not recognize the full import of disclaimer clauses incorporated by reference).



mark for two reasons.<sup>297</sup> First, disclaimers are not always unfair. In some instances, a disclaimer represents part of a conscious bargain between employer and employee. More frequently, the disclaimer simply underscores that the particular handbook makes no promises of job security. This leads to the second point: the fairness of a handbook disclaimer cannot be ascertained without reference to the rest of the handbook. That is, the question of whether a disclaimer fairly dispels expectations created by handbook statements can be answered only by an evaluation of the entire handbook. Ultimately, then, the appropriateness of giving effect to disclaimers depends on whether the handbook as a whole warrants legal enforcement.

The most appropriate way to bridge the gap between theory and practice, accordingly, is to adopt a revised theoretical framework that reflects the policy considerations underlying the enforcement of handbook statements. More specifically, handbook language, including disclaimers, should be evaluated with reference to the ultimate policy reason for enforcing handbook promises: the benefits that an employer derives by creating employee expectations of job security.

A number of recent developments appear to signal the emergence of such an approach. As discussed above, both the Farber and Matheson study<sup>298</sup> and the Michigan Supreme Court's *Bankey* decision<sup>299</sup> urge adoption of a modified promissory estoppel standard grounded in the relevant policy considerations. In addition, this article describes a significant and growing number of decisions that have recognized substantive limitations on the enforcement of disclaimers.<sup>300</sup> The Wyoming Supreme Court's *McDonald* decision, in particular, has stated these limitations in terms of a policy-oriented, promissory estoppel rationale.<sup>301</sup>

Taken together, these sources suggest the appropriate formula for both handbook and disclaimer analysis. The Farber and Matheson arti-

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297. Thus far, the "adhesion contract" argument has been roundly rejected by the courts. See, e.g., *Batchelor v. Sears, Roebuck & Co.*, 574 F. Supp. 1480, 1488 (E.D. Mich. 1983); *Anders v. Mobil Chem. Co.*, 559 N.E.2d 1119, 1123-25 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 834 (Ill. 1990); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 794 (Md. Ct. Spec. App. 1986), *cert. denied*, 523 A.2d 1013 (Md. 1987). One of the principal rejoinders to this argument is that disclaimers cannot be viewed as inherently unfair since they serve only to leave employees in the same at-will position as the law presumes in the first place. See *Anders*, 559 N.E.2d at 1124; Chagares, *supra* note 33, at 379-80. While I agree that handbook disclaimers should not be rejected automatically, this response seems to miss the point of the anti-disclaimer argument. To the extent that a disclaimer coexists in a handbook with promissory language, the disclaimer does not just preserve the status quo of the at-will presumption. Instead, it *secures* this status by negating contractual rights to job security that, but for the disclaimer, would exist by virtue of the handbook promises.

298. The Farber & Matheson study is discussed *supra* at notes 130-37 and accompanying text.

299. *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112 (Mich. 1989). The *Bankey* decision is discussed *supra* at notes 138-43 and accompanying text.

300. See *supra* notes 252-80 and accompanying text.

301. See *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991). The decision is discussed *supra* at notes 261-71 and accompanying text.

cle clarifies that the exchange initiated by the distribution of an employee handbook occurs, not as the specific transaction envisioned by unilateral contract analysis, but in the context of an ongoing economic relationship characterized by a need for confidence and trust.<sup>302</sup> The quasi-fiduciary nature of the employment relationship creates a context in which handbook promises may become "instinct with an obligation."<sup>303</sup> A handbook that contains promises that are credible and specific instills reasonable expectations of fair treatment among the work force.<sup>304</sup> These expectations, in turn, promote what the *Bankey* court described as "an environment conducive to collective productivity."<sup>305</sup> Finally, as the *McDonald* court recognized, the entire handbook should be consulted in determining the enforceability of handbook promises. Thus, even if the handbook contains a disclaimer, its promissory statements should be enforced if the policy reasons that favor handbook enforcement still predominate.<sup>306</sup>

### C. *The Proposed Test*

The terms of an employee handbook, with or without a disclaimer, should be enforced if the following three elements are present:

#### 1. *A Specific Promise*

Handbook statements should be binding on the employer only if stated in a manner that may readily be understood as the expression of a credible promise. Not every handbook term rises to this level. A muddled or vague statement of general policy does not. Neither does language that describes predominantly subjective or discretionary policies. To be enforceable a handbook promise must be stated in language sufficiently objective and specific to lead employees reasonably to believe that the employer will abide by the expressed representation.<sup>307</sup>

#### 2. *Reasonable Employee Expectations*

The promise, to be enforceable, must be conveyed in a context that creates reasonable employee expectations concerning the employer's policies. To a certain extent, this is the traditional promissory estoppel re-

302. See Farber & Matheson, *supra* note 112, at 925-29.

303. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980).

304. See Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 787-88 (Alaska 1989); see also Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087-88 (Wash. 1984).

305. *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 119 (Mich. 1989).

306. McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866, 869-70 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991).

307. Decisions following a unilateral contract approach similarly require that handbook language be "definite in form" to constitute an offer for a unilateral contract. See *supra* notes 107-09 and accompanying text.

quirement of reasonable reliance. But in this analytic framework, reliance relates to objectively based group expectations, rather than individual expectations.<sup>308</sup> The enforcement of handbook promises should not depend on proof that a particular employee actually read and relied on a particular handbook provision. Instead, handbook promises, should be enforced if they create an atmosphere in which the collective work force legitimately expects that the employer will comply with its stated policies.

### 3. *Substantial Benefit to the Employer*

The employee expectations or behavior induced by the handbook promises should be capable of providing a potential benefit to the employer. This benefit need not be tangible or objectively demonstrable, such as the hiring or retention of a particular, desirable employee. It is enough, in the words of the *Bankey* court, if the handbook statements facilitate "an environment conducive to collective productivity."<sup>309</sup>

To a great extent, these three factors describe a single phenomenon. The promise is enforceable because of the resulting benefit to the employer. The element of reasonable expectation acts as the conduit from promise to benefit. That is, the benefit occurs by virtue of the favorable expectations created by the promise.

Nonetheless, the three-factor formula is desirable because a delineation of the three elements both helps to clarify which handbook statements should be enforceable and highlights the reasons for their enforcement. For example, handbook statements that contain only "feel good" language may be marginally beneficial to an employer but fail to instill a reasonable expectation of specific treatment. Such statements would not pass muster under the proposed standard. Only those statements that are sufficiently promissory in nature to create a legitimate expectation of specific employer conduct should give rise to a binding obligation.

So, how does the disclaimer fit into this analytical framework? Under the proposed test, the disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys credible promises that should be enforced. Unlike the role assigned it under traditional unilateral contract analysis, the disclaimer is not automatically determinative of the enforcement issue. But neither is it to be disregarded. The disclaimer, which necessarily militates against enforcement, should be weighed in the balance along with other handbook provisions.

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308. The concept of collective rather than individual reliance is discussed *supra* at notes 127-29 and accompanying text.

309. *Bankey*, 443 N.W.2d at 119.

As in the *Seehawer*<sup>310</sup> and *McDonald*<sup>311</sup> cases discussed above, however, a handbook that contains both promissory language and a disclaimer should be viewed as inherently ambiguous. Thus, under the proposed test, the entire handbook, including any disclaimer, should be considered in determining whether the handbook gives rise to a promise, an expectation, and a benefit.

As with any question of fact, this is primarily a matter for the jury to decide. The court should intervene to resolve the handbook issue as a matter of law only if the handbook statements and the disclaimer, taken together, establish beyond any doubt that an enforceable promise either does or does not exist. The coexistence of specific promissory statements with a disclaimer, however, necessarily precludes a grant of summary judgment for the employer.

#### *D. Application of the Proposed Test*

The following examples illustrate the application of the proposed test in three paradigm handbook settings.

##### *1. Handbook Without a Disclaimer*

When an employer distributes a handbook without a disclaimer, the enforceability issue should be determined by the jury in terms of the proposed three-factor test. The jury's task is to determine whether the handbook contains promises of specific treatment that give rise to reasonable expectations among the work force and that facilitate a beneficial work environment for the employer. Evidence beyond the handbook terms is also relevant to establish the overall tenor of the employment relationship. The court should remove the enforceability issue from the jury only if no possible doubt exists as to the construction of the handbook terms.

##### *2. Handbook With a Disclaimer*

The same general approach should be taken even if the handbook contains a disclaimer.<sup>312</sup> The relevant issue is still whether the handbook, even with a disclaimer, gives rise to a promise, an expectation, and a benefit. If so, the handbook representations should be enforced despite the disclaimer.<sup>313</sup> The disclaimer, of course, weighs against enforcement

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310. *Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910 (N.D. Ill. 1989), is discussed *supra* at notes 253-58 and accompanying text.

311. *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991), is discussed *supra* at notes 261-71 and accompanying text.

312. The reference to disclaimers is meant to include disclaiming language contained in documents other than a handbook, such as a separate at-will agreement.

313. *See, e.g., McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991).

and necessitates a greater amount of countervailing evidence than in the preceding illustration.

The court should remove the enforcement issue from the jury's consideration and decide it as a matter of law in only two situations. First, the court should rule for the employer as a matter of law if the handbook statements, when read with the disclaimer, could not possibly be interpreted in a promissory manner.<sup>314</sup> Conversely, the court should rule for the employee as a matter of law if, as in the *Jones* and *Perman* cases discussed above,<sup>315</sup> the handbook statements are so detailed or unequivocal that, even with a disclaimer, they could not plausibly be interpreted in a non-promissory manner.

### 3. Handbook Modification

A somewhat different question is posed when an employer attempts to withdraw previously issued handbook statements promising job security. The appropriate test, however, remains the same. The pertinent inquiry here concerns whether the reasons initially justifying handbook enforcement still predominate. Thus, when an employer modifies its handbook by eliminating promissory statements, the reasons for future handbook enforcement also are eliminated. The withdrawal of the promise extinguishes both the employees' expectations and the employer's benefit. Accordingly, handbook modification should be permissible, even on a unilateral basis, if the employer also rescinds the source of its potential benefit.<sup>316</sup>

On the other hand, an employer's attempt to avoid liability merely by adding a disclaimer may not be successful. If the handbook still contains representations of job security, the addition of a disclaimer serves only to raise a fact question concerning the promissory nature of the revised handbook. The handbook will remain enforceable, even with the newly added disclaimer, if the jury concludes that on balance, the entire handbook continues to offer a credible promise of job security. The key to the enforcement issue, then, is not the disclaimer, but the document's overall tenor.

Of course, even if a revised handbook successfully limits future obligations, an employer still may face liability for pre-existing obligations that arose from the prior handbook language. In other words, while an employer should be able to limit future liability by eliminating future promises along with the benefits derived from those promises, it should not be able to limit liability for past promises in the same manner. For

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314. See, e.g., *Arnold v. Diet Ctr., Inc.*, 756 P.2d 1040 (Idaho 1987); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786 (Md. Ct. Spec. App. 1986).

315. See *supra* notes 272-80 and accompanying text.

316. See *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 119 (Mich. 1989).

example, it seems clear that an employer cannot extinguish an employee's entitlement to benefits or compensation earned or accrued under an explicit handbook policy merely by altering the policy terms on a retroactive basis.<sup>317</sup> Similarly, an employee who works for a considerable period of time under an explicit job security policy may have some claim to relief upon discharge without cause after a policy change in order to avoid unjust enrichment.<sup>318</sup> As a separate opinion in the *Bankey* case noted, the resolution of such issues necessarily depends on the facts and circumstances of each case.<sup>319</sup>

### *E. Foreseeable Objections to the Proposed Test*

Not everyone will approve of this proposed test. Employers particularly will resist the suggested transfer of decision-making authority from judges to juries. Three principal objections are likely.

First, critics undoubtedly will contend that jury trials are a slow and costly mechanism for resolving disputes. While this contention has some validity, it is hardly an objection unique to employment law. Trial by jury necessarily is more burdensome than trial by summary judgment. Yet our system of jurisprudence has long recognized the jury's paramount authority in resolving factual disputes.<sup>320</sup> It surely would offend our notions of fundamental fairness, not to mention the Seventh Amendment<sup>321</sup> and its counterparts in the various state constitutions, to adopt a blanket policy of awarding summary judgment to all defendants simply because of the higher cost of jury trials.

What is unique to employment law, at least under traditional unilateral contract analysis, is that the factual dispute posed by many employee handbooks typically is withheld from jury deliberation.<sup>322</sup> As discussed

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317. See, e.g., *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 777 (Ohio 1984); *Langdon v. Saga Corp.*, 569 P.2d 524, 527 (Okla. Ct. App. 1976).

318. In his separate opinion in *Bankey*, Justice Levin agreed with the majority opinion in recognizing an employer's ability to withdraw handbook promises, but he cautioned that some remedy may nonetheless be appropriate with respect to legitimate expectations of job security that arose before the policy change:

An employee who worked for a significant period of time under a discharge-for-cause policy before the change in policy to one of employment-at-will and is terminated without cause after the change might be entitled to some relief or remedy in respect to legitimate expectations of job security that arose during his employment under the discharge-for-cause policy.

*In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112, 122 (Mich. 1989) (Levin, J., concurring).

319. *Id.*

320. See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 7.3 (3d ed. 1985).

321. U.S. CONST. amend. VII. The Seventh Amendment provides that "[i]n suits at common law, where the value in the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

322. See *supra* notes 167-69 and accompanying text.

above,<sup>323</sup> a handbook that contains both a promise and a disclaimer is inherently ambiguous. By determining such cases through summary judgment, the court is invading the appropriate province of the jury. Perhaps more important, the summary judgment approach abridges fundamental fairness by automatically resolving this ambiguity in the employer's favor.

It is also important to recognize that even under the proposed test, employers retain ultimate control over whether the handbook raises an issue for the jury to resolve. A factual issue arises for the jury only if the employer chooses to include in a handbook language promising job security. Thus, the proposed test required additional jury trials beyond those previously necessary only where an employer attempts to have the best of both worlds by disseminating contradictory statements that promise job security but attempt to disclaim enforcement of that promise.

In addition, an employer can preempt the jury's role by providing for arbitration as the means of resolving disputes arising from the handbook. Since handbook enforcement flows from the terms expressed in the handbook itself, an employer's selection of the specific forum for enforcement is likely to be sustained so long as the procedures described in the handbook are fair and comport with general notions of due process.<sup>324</sup>

A second likely objection to delegating disclaimer questions to the jury concerns the possibility of inconsistent interpretations of the same employee handbook. This problem could arise if juries in separate lawsuits examined identical handbook language but reached different results. One possible means of avoiding this problem is to afford collateral estoppel effect to the determination that is first in time. This "offensive" use of collateral estoppel, as the Supreme Court has indicated, should include broad discretion in the trial court to avoid unfair results in individual cases.<sup>325</sup>

Finally, critics may argue that the proposed test will dissuade employers from issuing any handbooks whatsoever because of the increased likelihood that the handbook terms will be found legally binding. This result is undesirable, the critics will contend, because of the social utility of expressing workplace policies in an employee handbook format.<sup>326</sup>

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323. See *supra* notes 310-11 and accompanying text.

324. See Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 770-71 (1990); Alfred G. Feliu, *Legal Consequences of Nonunion Dispute-Resolution Systems*, 13 EMPLOYEE REL. L.J. 83, 93 (1987).

325. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

326. Many courts have expressed the view that handbooks are desirable, not just for employers, but for employees and society as a whole. See, e.g., *Fink v. Revco Discount Drug Ctrs., Inc.*, 666 F. Supp. 1325, 1328 (W.D. Mo. 1987) ("[T]he attempt to regularize personnel practices through the use of such handbooks is commendable"); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271

A similar objection was raised a decade ago in reaction to those court decisions that first held handbook statements to be enforceable.<sup>327</sup> Yet employee handbooks have not disappeared. The explanation is that employers issue handbooks, not because of notions of social utility or employee-directed benevolence, but because of the benefits they hope to derive for themselves.<sup>328</sup> Therefore, the proposed test likely will not dissuade employers from distributing handbooks. Instead, it will simply provide employers, as well as the courts, with a more realistic cost-benefit framework for assessing the future impact of employee handbook statements.

### CONCLUSION

The employee handbook exception is a reaction to one of the contextual inequities of the rule of employment-at-will. The exception grew out of a recognition that employers should be bound by handbook statements that seek to improve workplace productivity by instilling expectations of job security and fair treatment. On a theoretical level, most courts rely on unilateral contract principles to enforce handbook premises. These courts invoke unilateral contract concepts to craft a convenient fiction in which employee handbooks constitute offers that are accepted by an employee's continued performance of work.

Unilateral contract theory, however, also construes the disclaimer as a complete defense to contract formation. Thus, an employer may circumvent the handbook exception merely by stating its intent not to be bound by handbook representations. Coupled with the proselytizing efforts of disclaimer industry experts, the disclaimer, at least in theory, threatens to swallow the entire handbook exception.

But the theoretical primacy of the disclaimer has stumbled in workplace realities. Many courts remain uncomfortable with the idea that a simple boilerplate disclaimer automatically negates the binding nature of handbook promises, no matter how detailed or how credible. These courts, not surprisingly, search for ways to avoid disclaimer enforcement where the outcome would be unfair. As this article describes, the courts in at least forty-five decisions over the past decade have declined to dispositive enforce disclaimers.<sup>329</sup> Some do so by finding substantive limi-

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(N.J. 1985) ("Such manuals can be very helpful tools in labor relations, helpful to both employer and employees.").

327. See, e.g., Steefel, *supra* note 115, at 481.

328. See *supra* notes 76-85 and accompanying text; see also THE EMPLOYEE HANDBOOK, *supra* note 75, at 225 (the potential benefits to an employer utilizing a handbook outweigh the resulting risk of contractual liability); Coombe, *supra* note 58, at 10-13 (maintaining that employers should continue to use employee handbooks, despite increased enforceability, because of the benefits they derive from handbook distribution).

329. See Appendix *infra* at 382-85.



tations on the effect of disclaimers. Many other courts, however, do so more covertly by stretching the boundaries of conventional contract defenses. This practice creates a significant gap between theory and practice in the law of handbook disclaimers.

This article proposes to bridge this gap by revising the theoretical standard for handbook analysis. The essential point is this: a disclaimer should not automatically defeat handbook enforcement without regard for the overall tenor of the document. Instead, a disclaimer, along with other handbook statements, should be tested with reference to the policy concerns underlying handbook enforcement. Thus, with or without a disclaimer, a handbook should be enforced if it conveys a credible promise of job security that the employees reasonably expect the employer to honor, thereby fostering a favorable work environment that benefits the employer.

## APPENDIX

*Reported Decisions Declining to Recognize Handbook or Job Application Disclaimers as Dispositive in Wrongful Discharge Cases (1980-1991)*

Aiello v. United Air Lines, Inc., 818 F.2d 1196, 1198, 1201-02 (5th Cir.) (finding that employer's regulations and practices obviated application of at-will doctrine despite disclaimer), *reh'g denied*, 826 F.2d 12 (5th Cir. 1987).

Allabashi v. Lincoln Nat'l Sales Corp., 824 P.2d 1, 2-3 (Colo. Ct. App. 1991) (reserving for trier of fact question of whether documents specifying termination procedures affected at-will relationship notwithstanding disclaimer in employment manual).

Badgett v. Visiting Nurse Ass'n, 6 Indiv. Empl. Rts. Cas. 322, 324 (Iowa Ct. App. 1991) (holding that annual employment agreements and provisions of personnel manual supported finding of one-year contract providing for termination for just cause only, despite disclaimer stating that the annual agreements were no "guarantees of employment").

Bratton v. Menard, Inc., 438 N.W.2d 116, 118 (Minn. Ct. App. 1989) (finding question of whether employment handbook modified at-will employment relationship despite disclaimer was an issue of fact).

Brooks v. Trans World Airlines, Inc., 574 F. Supp. 805, 809-10 (D. Colo. 1983) (holding that employer's manual granting displacement rights to employees applied despite employment application clause stating that employment was at will).

Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33, 36 (Minn. Ct. App. 1986) (stating that the trier of fact must determine whether employment manual modified at-will status of employee despite provision stating that policies in the manual were to be applied solely at the discretion of management).

Butzer v. Camelot Hall Convalescent Ctr., Inc., 454 N.W.2d 122, 124 (Mich. Ct. App. 1989) (finding that issue of whether employee justifiably expected that she would be terminated only for just cause, notwithstanding provision in job application stating employment was at will, was a question of fact).

Cronk v. Intermountain Rural Elec. Ass'n, 765 P.2d 619, 623 (Colo. Ct. App. 1988) (finding question of whether employment contract included just-cause provisions of employment manual despite inclusion of disclaimer was a factual one).

Dalton v. Herbruck Egg Sales Corp., 417 N.W.2d 496, 498 (Mich. Ct. App. 1987) (issue of fact whether, despite disclaimer, provisions in handbook modified at-will relationship).

Davis v. Connecticut Gen. Life Ins. Co., 743 F. Supp. 1273, 1278-80 (M.D. Tenn. 1990) (trier of fact must determine whether employment handbook affected at-will relationship notwithstanding disclaimer).

Ferraro v. Koelsch, 368 N.W.2d 666, 668-69 (Wis. 1985) (just-cause provisions of handbook could be found to have been part of employment contract despite provision in job application stating that employment was at will).

Harvet v. Unity Medical Ctr., Inc., 428 N.W.2d 574, 577 (Minn. Ct. App. 1988) (reservation clause in employment handbook not sufficiently clear in its intent to preclude finding that the handbook's procedural protections became part of the employment contract).

Haselrig v. Public Storage, Inc., 585 A.2d 294, 300-01 (Md. Ct. Spec. App. 1991) (issue of fact whether procedural protections found in the employment handbook modified at-will relationship despite disclaimer).

Helle v. Landmark, Inc., 472 N.E.2d 765, 775 (Ohio Ct. App. 1984) (assurances of severance pay negated effect of reservation clause found in the employment handbook).

Jimenez v. Colorado Interstate Gas Co., 690 F. Supp. 977, 979-80 (D. Wyo. 1988) (disclaimer not clear and conspicuous enough to prevent finding as matter of law that employer's manual of standard operating procedures became part of the employment contract).

Johnson v. Nasca, 802 P.2d 1294, 1297 (Okla. Ct. App. 1990) (issue of fact whether disciplinary procedures included in handbook could be found to be part of the employment contract despite disclaimer).

Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 787-88 (Alaska 1989) (one sentence disclaimer insufficient in 85 page handbook).

Loffa v. Intel Corp., 738 P.2d 1146, 1151-52 (Ariz. Ct. App. 1987) (disclaimer not sufficiently clear and conspicuous to justify construing the employment contract as a matter of law).

McLain v. Great Am. Ins. Cos., 256 Cal. Rptr. 863, 867-69 (Ct. App. 1989) (parol evidence of employment agreement could be considered where written disclaimer was standardized, incomplete, and not integrated).

McDonald v. Mobil Coal Producing Inc., 789 P.2d 866, 870 (Wyo. 1990), *remanded*, 820 P.2d 986 (Wyo. 1991) (trial court must resolve whether handbook affected at-will relationship notwithstanding disclaimer).

McGinnis v. Honeywell, Inc., 791 P.2d 452, 456-57 (N.M. 1990) (disclaimer does not automatically negate document's contractual status in

light of uniform and consistent actions reflecting adherence to written policies).

*Montgomery v. Association of Am. R.Rs.*, 741 F. Supp. 1313, 1315-17 (N.D. Ill. 1990) (uncommunicated disclaimer is no disclaimer at all).

*Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479, 481 (E.D. Mich. 1982) (disclaimer silent on whether employer needs good cause for termination).

*Morriss v. Coleman Co.*, 738 P.2d 841, 849 (Kan. 1987) (disclaimer not determinative as a matter of law in absence of showing that it was brought to employee's attention or that it created an unqualified at-will relationship).

*Perman v. Arcventures, Inc.*, 554 N.E.2d 982 (Ill. App. Ct. 1990) (unequivocal manual language created enforceable contractual rights).

*Preston v. Claridge Hotel & Casino, Ltd.*, 555 A.2d 12, 14 (N.J. Super. Ct. App. Div. 1989) (disclaimer ineffective where employment-at-will policy not stated in straightforward terms).

*Rodie v. Max Factor & Co.*, 256 Cal. Rptr. 1, 5 (Ct. App. 1989) (denial of modification of at-will contract can constitute bad faith).

*Sadler v. Basin Elec. Power Coop.*, 409 N.W.2d 87, 89 (N.D. 1987) (where parties' intent unclear in handbook alone, triable issue of material fact exists).

*Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 310-11 (Mich. Ct. App. 1981) (oral promises may not negate effect of disclaimers).

*Seehawer v. Magnecraft Elec. Co.*, 714 F. Supp. 910, 914-15 (N.D. Ill. 1989) (clarification of ambiguous contract provisions best left to trier of fact).

*Seubert v. McKesson Corp.*, 273 Cal. Rptr. 296, 299-300 (Ct. App. 1990) (evidence supported existence of implied contract requiring cause for termination).

*Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629, 630 (Nev. 1983) (evidence did not show as matter of law that at-will clause in job application was intended to be a contract).

*Swanson v. Liquid Air Corp.*, 781 P.2d 900, 903 (Wash. Ct. App. 1989) (issue of fact exists concerning whether employee justifiably relied on promises of specific treatment in specific situations).

*Thompson v. King's Entertainment Co.*, 674 F. Supp. 1194, 1198 (E.D. Va. 1987) (amended handbook disclaimer does not automatically become effective upon issuance of the handbook).

*Tiranno v. Sears, Roebuck & Co.*, 472 N.Y.S.2d 49 (App. Div. 1984)

(interpreting handbook's disclaimer as requiring just cause prior to termination).

*Toth v. Square D Co.*, 712 F. Supp. 1231 (D.S.C. 1989) (mere revision of handbook by adding a disclaimer could not terminate rights created by prior handbook language).

*Towns v. Emery Air Freight, Inc.*, 3 Indiv. Empl. Rts. Cas. (BNA) 911, 914 (S.D. Ohio 1988) (denying summary judgment on grounds that implied contract may exist despite employer's disclaimer).

*Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1038 (Ariz. 1985) (employer's announced policy is only one of several factors relevant in determining whether a particular policy was intended by the parties to modify an at-will agreement).

*Wilkerson v. Wells Fargo Bank*, 261 Cal. Rptr. 185, 191 (Ct. App. 1989) (employee handbook disclaimer only a factor to be considered by the jury in determining existence and content of the employment contract), *modified*, 4 Indiv. Empl. Rts. Cas. 1217 (Cal. Ct. App. 1989).

*Wojcik v. Commonwealth Mortgage Corp.*, 732 F. Supp. 940, 942 (N.D. Ill. 1990) (handbook provisions promising employee appropriate notice before termination of his job preclude granting of summary judgment motion based on inclusion of disclaimer in handbook).

*Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476 (10th Cir. 1988) (contractual disclaimer not sufficient to justify summary judgment on a breach of contract claim).