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THE EMPLOYMENT HANDBOOK AS A CONTRACTUAL LIMITATION ON THE EMPLOYMENT AT WILL DOCTRINE

I. INTRODUCTION

The employment at will doctrine, developed in the late nineteenth century, holds that under a general agreement of employment for an indefinite length of time, the hiring of an employee is at will and the employer is free to terminate an employee at any time for any reason. While it is still followed by many jurisdictions today, the employment at will doctrine has been subject to several restrictions because of its harsh effect upon the employee. These restrictions have come about through

1. See Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884). The court in Payne stated, "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong." Id. at 519-21. For a discussion of the history of the employment at will doctrine, see infra notes 10-15 and accompanying text.

A distinction is made by courts between contracts of employment for a definite duration and contracts of employment for an indefinite duration. At common law, when a contract fixed a definite period of employment, just cause had to be shown by an employer in order to terminate an employee prior to the conclusion of the employment term. 53 AM. JUR. 2D Master and Servant §§ 34, 43 (1970). Under the common law doctrine of employment at will, however, the employer was not always required to provide a justification for the termination of the employee because the employment relationship was terminable at will. Comment, Employment At Will and the Law of Contracts, 33 BUFFALO L. REV. 211, 215 (1974). This note is primarily concerned with the indefinite term of employment and the effect of the employment at will doctrine on this relationship.

2. See, e.g., Broussard v. CACI, Inc., 780 F.2d 162 (1st Cir. 1986) (contract of employment for indefinite length of time is terminable at will by either party unless intention is stated clearly in express terms that discharge must be for good cause); Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985) (court applied employment at will doctrine in its refusal to adopt either implied covenant of good faith or contractual obligations based on employment handbook).

3. The harshness of the employment at will doctrine can be seen in a number of ways. First, the employment at will rule fails to take into account the lack of equal bargaining strength between employer and employee. Comment, Employment at Will: When Must an Employer Have Good Cause for Discharging an Employee?, 48 Mo. L. REV. 113, 116 (1983). Second, the employee's interest in job security is subordinated to the employer's interest in running his business affairs. Id. Third, the rule allows employers to fire employees for reasons that offend public policy. Id. See also Note, Employment At Will: An Analysis and Critique of the Judicial Role, 68 IOWA L. REV. 787, 793 (1983) (since employer's right to discharge is unrestricted under employment at will doctrine, employers have fired employees to avoid paying workman's compensation and earned pension benefits).

The harshness of the employment at will doctrine is significant because of the great percentage of American workers it effects. Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93
various means such as collective bargaining,^{4} statutory limitations,^{5} tort theories,^{6} and contract theories.^{7}

Several recent cases have reflected this trend toward limiting the employment at will doctrine and have held that where an employer supplies an employee at will with a company handbook that sets forth policies regarding termination of employees, these policies become terms of the employment contract.\(^8\) Courts are split, however, on whether the policies found in an employment handbook constitute terms of the employment contract.\(^9\) This note will provide an overview of the employ-
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ment at will doctrine and its various limitations. Further, this note will examine the development of the employment handbook as a limitation on the employment at will doctrine. Finally, this note will detail recent decisions in this area, and conclude that under a strict unilateral contract analysis, the employment handbook provides a basis for establishing terms of an employment contract regarding job security, and in the process, provides more certainty in the employment relationship.

II. BACKGROUND

A. The Employment At Will Doctrine and Its Subsequent Restriction Through Modern Legal Developments

The employment at will doctrine had its origin in America in 1872, when Horace Wood articulated the doctrine in his treatise on master-servant relationships, stating:

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 it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for


whatever time the party may serve. 10

Wood's formulation created a rebuttable presumption that an indefinite hiring is a hiring at will. 11 Though subject to some criticism, 12 the employment at will doctrine pronounced by Wood was followed by many jurisdictions, with the leading case being Martin v. New York Life Insurance Co. 13 In the cases following Martin, the doctrine evolved into

10. H. Wood, Master and Servant § 134, at 272 (1887) (emphasis added). Prior to Wood's statement, American courts had not yet recognized the employment at will doctrine. Accordingly, various jurisdictions adopted a number of approaches to the employment relationship, including the English common law presumption of employment for a period of one year. See, e.g., Davis v. Gorton, 16 N.Y. 255, 257 (1857) ("to give each party the benefit of all the seasons during the year, an indefinite hiring is taken to be a hiring for a year"). See also Isbell-Sirotkin, Defending the Abusively Discharged Employee: In Search of a Judicial Solution, 12 N.M.L. Rev. 711, 713 (1982) (most jurisdictions in early nineteenth century adopted British common law rule of presumption of employment for one year).

A number of courts at one time followed the rule that a hiring would be presumed to continue for a period of time equivalent to the employee's pay period. See, e.g., Morris Shoe Co. v. Coleman, 187 Ky. 837, 221 S.W. 242 (1920) (plaintiff's agreement to work for defendant for $1,800 per year, payable monthly, held to be contract of employment for one year); Kelley v. Carthage Wheel Co., 62 Ohio St. 597, 57 N.E. 984 (1900) (factory worker's agreement with employer to work for one year at salary of $3,000 held to be binding contract not terminable at will); Pinckney v. Talmage, 32 S.C. 364, 10 S.E. 1083 (1890) (contract indicating plaintiff's salary would be paid monthly at rate of $5.00 per year held employment by month). See also Note, Employment Contract—Indefinite Length—Hiring Terminable by Employer For Cause Only Without Mutuality of Obligations—For Cause Requirement Implied Where Reasonable Expectations Created by Employee Policy Manual, 28 Wayne L. Rev. 373, 375 (1981) (majority American rule in nineteenth century at one time involved presumption that hiring continued for period of time identical to period fixed for employment).

Other jurisdictions refused to apply any presumptions regarding the length of employment. Id. In these jurisdictions, the question of duration of employment presented a question of fact for the jury. See, e.g., Graves v. Lyon Bros. & Co., 110 Mich. 620, 68 N.W. 985 (1896) (upholding finding by jury, based on all facts presented, that plaintiff entered contract of employment for one year); Chamberlain v. Detroit Stove Works, 103 Mich. 124, 61 N.W. 532 (1894) (jury properly found plaintiff entitled to payment for period of one year).

11. Peirce, Mann & Roberts, Employee Termination At Will: A Principled Approach, 28 Vill. L. Rev. 1, 5 (1982) [hereinafter cited as Peirce]. Without a clearly expressed intent of the parties to bind an employee, an employee was free to sell his services to another while the employer was entitled to terminate the employment relationship at any time. Id.

12. Several commentators have indicated that Wood offered little or no analysis to justify the adoption of the employment at will rule. Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 341 (1974). Wood cited only four American cases as authority for his proposition, none of which offered much support. Id. (citing Wilder v. United States, 5 Ct. Cl. 462 (1869), rev'd on other grounds, 80 U.S. 254 (1871); De Briar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871)).

13. 148 N.Y. 117, 42 N.E. 416 (1895). In Martin, the plaintiff agreed to a yearly salary of $10,000 beginning in January 1892, but was terminated four months later in April 1892. Id. at 119, 42 N.E. at 416-17. Plaintiff brought suit
an absolute presumption in many jurisdictions, despite the fact that the 
doctrine as stated by Wood created only a rebuttable presumption of a 
hiring at will. The courts eagerly adopted the employment at will 
doctrine, largely because of the influence of laissez-faire economics and 
governmental policies favoring self-reliance and economic 
individualism.

14. Note, supra note 10, at 377 ("Courts finding a contract did not express 
duration typically held that the hiring was at will, without considering whether 
the facts and circumstances of the hiring might rebut the presumption.") (foot-
note omitted).

15. Note, Wrongful Discharge, supra note 3, at 1826. Prior to the employment 
at will doctrine, American courts relied heavily on English common law. Isbell-
Sirotkin, supra note 10, at 713. English common law developed during the four-
teenth through nineteenth centuries, when the master-servant relationship 
predominated. Id. This setting engendered a sense of commitment and respon-
sibility on the part of both the employer and the employee. Id. As a result, the 
presumption of employment for a year’s duration existed prior to the formula-
tion of the employment at will doctrine. Id. However, the industrial growth in 
the United States in the nineteenth century transformed the master-servant rela-
tionship, as one commentator explains:

The status of the workers changed from that of quasi-family member to 
a much more distant and purely economic relationship. Similarly, the 
duration of employment became dependent upon the demand for the 
product. Accordingly, it made little sense for public policy to impose 
an obligation on the employer to continue employment through all 
four seasons.


Industrial growth in America, therefore, brought a shift in political and so-
cial attitudes toward laissez-faire principles calling for “freedom of bargaining as 
a fundamental and indispensable requisite of progress.” Peirce, supra note 11, at 
4 (citing Williston, Freedom of Contract, 6 CORNELL L.Q. 365, 366 (1921)). Applying 
the laissez-faire theory to employment contracts resulted in the rejection of the 
presumption that indefinite hirings lasted for a specific duration. Note, 
Wrongful Discharge, supra note 3, at 1826. The rationale was that if the parties had 
intended the employment to last for a specific duration they would have made 
that an express term of the contract. Id. at 1825. See also Murg & Scharman, 
Employment at Will: Do the Exceptions Overwhelm the Rule?, 23 B.C.L. REV. 329, 334 
(1982); Note, supra note 12, at 340-41.

Two Supreme Court cases reflect the influence of laissez-faire economics. In 
Adair v. United States, the Supreme Court addressed the constitutionality of a 
federal statute that barred common carriers from dismissing employees for 
union membership. 208 U.S. 161 (1908). In finding the statute unconstitutional, 
the Supreme Court stated that regulation of the employment relationship 
violated the parties' freedom to contract. Id. at 175. The Court also pointed out 
that because the employee's right to quit was equivalent to the employer's right 
to fire an employee, compelling one person to retain the personal services of 
another is an invasion of personal liberty and the right of property guaranteed 
by the fifth amendment. Id. at 174-76. Seven years later, in Coppage v. Kansas, 
the Supreme Court invalidated legislation similar to Adair under the due process 
clause of the fourteenth amendment. 236 U.S. 1 (1915). In Coppage, the Court
Despite its general acceptance in the late nineteenth century, the number of courts willing to strictly apply the employment at will doctrine has greatly declined in recent years. Indeed, one writer has concluded that more than two-thirds of American jurisdictions have now abandoned a strict formulation of the rule. Moreover, it is significant that, of the jurisdictions still strictly following the employment at will doctrine, many either have not considered the issue recently or have shown a willingness to recognize exceptions to the rule should the appropriate case arise. This trend in limiting the employment at will recognized the possibility of a disparity in bargaining power between the employer and employee under the employment at will doctrine, but insisted on its use because of the important function it serves in promoting laissez-faire economics and freedom of contract.

17. Id. at 18. Perritt indicates that, as of 1985, some means of recovery in tort for wrongful discharge has been recognized in 41 states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin. Id. (footnotes omitted).
18. Id. at 20-21 (footnotes omitted). There are many different explanations why the employment at will doctrine has become so restricted. The reasons for the erosion are rooted in technological, economic, and sociological changes in the employment relationship. See Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1405 (1967) (employee lack of mobility has increased concern over job security); Heshizer, The New Common Law of Employment: Changes in the Concept of Employment at Will, 36 LAB. L.J. 95, 97-98 (1985) (heightened dependency on job security in modern society has led to decline of employment at will doctrine); Marrinan, Employment at-Will: Pandora's Box May Have an Attractive Cover, 7 Hamline L. Rev. 155, 158 (1983) (“The at-will rule therefore may have made social and economic sense when it was first enunciated; nevertheless, the rationale for its existence is lacking today.”).

Technological changes affecting bargaining power in the employer-employee relationship include the shift from self-employment to concentrated industrial job markets and the increasing demand for specialization. Note, supra note 12, at 337-38. The lack of opportunity for self-employment in today’s industrial system is evidenced by the fact that 90% of the present labor force can be classified as wage or salary earners. Id. (citing REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA 20-23 (1972)). Thus, as the workforce becomes concentrated under the employment of fewer corporate employers, the bargaining power of nonunion employees diminishes, while employer bargaining power rapidly expands. Id.

Economically, the employee often finds himself bound to his job because of work benefits such as pension, severence, and seniority rights. Note, supra note 3, at 792. Also, from an economic point of view, the mere cost of finding a new job will prevent many employees from attempting to do so. Id.

Sociological changes affecting bargaining power includes the fear of being unemployed that results from the possibility of losing one’s earnings while searching for a new job. Blades, supra, at 1413.

Thus, it appears that only the unusually valuable employee has sufficient
doctrine is the product of modern legal developments in four major areas.

1. Collective Bargaining as a Restriction on Employment at Will

One primary limitation on the employment at will doctrine is the use of collective bargaining. As a great number of industrial workers grew insecure over their lack of bargaining power in the face of an industrial revolution, union activities greatly increased.19 In 1935, the passage of the National Labor Relations Act (NLRA) gave express recognition to the power of organized labor.20 While the NLRA did not directly abrogate the employment at will doctrine, it firmly established the employee's right to collective bargaining.21 In utilization of this right, a large majority of the employment agreements made through collective bargaining have included a requirement of just cause in order to terminate an employee.22

A just cause provision protects union members from the harshness of the employment at will doctrine by contractually binding the employer to his agreement with the union to terminate only for just cause.23 However, the effect of collective bargaining on the ability to bargain power to justify imposition of the employment at will doctrine. Id. As Blades stated, "While a few employees might possess talents so unusual and important that the employer would not risk losing them, most employees are not irreplaceable. The great majority of employees realize that they are expendable, and this realization renders them easy prey to the employer's overreaching demands." Id.


20. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-168 (1982)). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In Jones & Laughlin, the Supreme Court upheld the constitutionality of the NLRA. Id. at 30. In deciding the case, the Court evinced a deep concern with the employee's lack of equal bargaining power when contracting the terms of employment with his or her employer. Id. at 33.

21. Section 8(1) of the NLRA (later amended to be § 8(a)(1)) declared it illegal for an employer "to interfere with, restrain, or coerce employees" in their exercise of the right to organize and bargain collectively to engage in peaceful activities. R. GORMAN, BASIC TEXT ON LABOR LAW 132 (1976). In addition, § 8(3) of the NLRA (later amended to be § 8(a)(3)) made illegal any employer discrimination in hiring, firing, or working conditions to encourage or discourage union membership. Id.

22. It has been estimated that as many as 82% of all collective bargaining agreements contain some general restriction, such as just cause, on an employer's power to dismiss. Note, Common Law Action for the Abusively Discharged Employee, 26 HASTINGS L.J. 1435, 1448 (1975).

23. Note, supra note 22, at 1448. In addition, many collective bargaining agreements contain provisions requiring the use of binding arbitration to solve grievances disputes. Id. The significance or importance of arbitration is that even if a collective bargaining agreement fails to include requirements of just cause, many arbitrators will imply it. H. PERRITT, supra note 15, § 3.5, at 87. See also Atwater Mfg. Co., 13 Lab. Arb. (BNA) 747, 749-50 (1949) (if specific language of collective bargaining agreement does not confer on management right
limit the employment at will doctrine, while significant, does not provide a comprehensive solution to the harshness of the employment at will doctrine due to the limited number of unionized workers in the United States.24

2. Statutory Restrictions on the Employment at Will Doctrine

A second limitation on the employment at will doctrine arises through state and federal statutory protections of employees' rights. Legislative activity limiting the employer's right to discharge was first evidenced by the Railway Labor Act of 1926 (RLA),25 which gave both railroad employers and employees the right to bargain without interference by one side against the other.26 Similarly, as discussed above, the subsequent enactment of the NLRA in 1935 gave protection to employees by prohibiting dismissal for union activities.27 In addition, since the enactment of the NLRA, other laws have been enacted, significantly limiting an employer's power to discharge.28

The protection afforded by the RLA, NLRA, and related statutes, however, like the protection afforded by collective bargaining, has been far from comprehensive. Legislative activity, for the most part, has resulted in the protection of only certain classes of people.29 For exam-

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24. Blades, supra note 18, at 1410-11. Less than 25% of the American working population is covered by collective bargaining agreements. Id. at 1410. Many professional employees or white-collar employees have no desire to be represented by labor unions. Id. at 1410-11. Thus, as Blades comments, "[A] generally satisfactory solution to the problem of the abusive exercise of employer power does not lie in recourse to labor unionism." Id. at 1411. See also Minda, The Common Law of Employment at-Will in New York: The Paralysis of Nineteenth Century Doctrine, 36 SYRACUSE L. REV. 939, 948 (1985) (collective bargaining is relevant to only one-third of work force).


26. See Peirce, supra note 11, at 8. The Supreme Court upheld the constitutionality of the statute in Texas & New Orleans R.R. v. Brotherhood Ry. & S.S. Clerks, 281 U.S. 548 (1930). In Texas & New Orleans, the Court stated that Congress' concern in enacting the legislation was to prohibit interference in either party's selection of a bargaining representative. Id. at 570-71. The court stated that the purpose of the RLA is distinguishable from the regulation in Adair and Coppage, which was held to interfere with the employer's right to select or discharge his employees. Id. at 571. For a discussion of the holdings of Adair and Coppage, see supra note 15 and accompanying text.

27. For a discussion of the enactment of the NLRA, see supra notes 20-21 and accompanying text.

28. For a discussion of such legislative activity, see infra notes 29-36 and accompanying text.

29. Statutory protections in the United States against wrongful dismissal have not been embodied in any general statutory form. H. Perritt, supra note 15, § 2.1, at 26. Regulation of the employment relationship has developed through individual statutory laws extending protection to employees based on their class characteristics or their conduct. Id. One writer suggests that such a statutory scheme represents a desire to restrict the power of the employer to
pie, title VII of the Civil Rights Act of 1964 protects against employment discrimination on the basis of sex, color, religion, or national origin. By the same token, classes of employees such as veterans, the handicapped, public employees, the aged, and debtors are statutorily protected against wrongful discharge. Legislative activity in other areas has afforded the employee protection against discharge based on employee conduct, but again is limited to certain types of conduct.

Unfortunately, the aforementioned legislation, though widely litigated, does not encompass the average employee at will, leaving him without a statutory remedy if he is terminated by his employer in a capricious manner.

terminate, not because of a direct concern with the dismissal power of an employer, but as a means to effectuate or implement other policies. Note, supra note 22, at 1447.


31. See, e.g., Veterans Reemployment Act, 38 U.S.C. § 2021(c)(1) (1982) (military personnel are guaranteed right to employment upon completion of service); CAL. MIL. & VET. CODE § 394 (West 1955) (no employer may discharge any person from employment because of military duty).


35. See, e.g., Consumer Credit Protection Act, 15 U.S.C. § 1647(a) (1982) (no employer may discharge employee by reason of fact that employee's earnings are subject to garnishment); D.C. CODE ANN. § 16-584 (1984) (employer cannot terminate employee because of garnishment of employee's earnings by creditor).

36. See H. PERRIT, supra note 15, § 2.1, at 26; Note, supra note 22, at 1447. For example, employers cannot discharge employees because they file complaints against their employers under certain statutes or because they engage in union activities. See, e.g., Occupational Safety & Health Act of 1970, 29 U.S.C. § 660(c) (1982) (preventing retaliatory discharge of employee for filing complaint against employer). For a discussion of the NLRA prohibition against employer discharges of employees for union activities, see supra notes 20-21 and accompanying text.

37. See Note, supra note 19, at 707 (statutory protection is only for select groups of workers).

One possible exception to the legislative scheme described above is found in Pennsylvania, where the state legislature is currently considering a bill that would provide all employees with a process to seek redress when they have been dismissed without just cause. Unjust Dismissal Act, H.B. 1020, 169th Gen. Ass., 1985 Sess. (Pa.). The proposed bill, currently before the committee on labor relations, would require an employer who dismisses an employee to give notice to that employee of the reasons for dismissal and of the opportunity to exercise
3. Tort Restrictions on the Employment at Will Doctrine

A third restriction on the employment at will doctrine is found in the employee's ability to prevent discharge at the will of the employer through causes of action in tort. There are several methods of limiting the doctrine in this fashion. Courts have attempted to remedy the harshness of the employment at will doctrine by recognizing causes of action based on tortious interference with employment relations, defamation, privacy, fraudulent misrepresentation, and traditional procedural rights under the act. Id. The grievance may then be settled through an arbitration proceeding that would be binding and enforceable on both the employer and employee. Id. See Decker, At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation, 87 DICK. L. REV. 477, 489-92 (1983) (general discussion of Unjust Dismissal Act, which was introduced as Pennsylvania House Bill 1742 in the 1981 legislative session); Comment, Employment-At-Will in Pennsylvania: Employee Manuals Provide Contract Remedies For Discharged Employees, 58 TEMP. L.Q. 243, 249-50 (1985) (discussion of House Bill 1742 and problems dealing with large volume of arbitration required by just cause requirement).

38. Not only have traditional torts such as negligence, invasion of privacy, and defamation gained renewed significance in the context of the employment relationship because of the focus on the employment at will doctrine, many courts have given attention to new tort theories such as breach of public policy. See Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege, 21 IDAHO L. REV. 201, 225-54 (1985).

39. See, e.g., Campbell v. Ford Indus., 274 Or. 243, 252 n.8, 546 P.2d 141, 147 n.8 (1976) (while employment relation for indefinite term is generally terminable at will, interference by third party with that relation is nonetheless actionable). See also RESTATEMENT (SECOND) OF TORTS § 766 (1979) (statement of general rule regarding intentional interference with contractual relations by third persons).

40. See, e.g., Poledna v. Bendix Aviation Corp., 360 Mich. 129, 134-36, 103 N.W.2d 789, 790-792 (1960) (employee suit against employer for defamation where employer's statement that he would fire plaintiff for theft was overheard by other employees); Banas v. Matthews Int'l Corp., 502 A.2d 637, 638-44 (Pa. Super. 1985) (employee brought suit against employer for defamation where employer made statements to management and plaintiff's fellow workers that plaintiff was thief and committed unlawful acts). Contra Biggins v. Hanson, 252 Cal. App. 2d 16, 20-21, 59 Cal. Rptr. 897, 899 (1967) (employer granted new trial where employee brought libel action based on inter-office memorandum discharging employee for disloyalty, insubordination, and for threatening to sabotage company equipment). For a discussion of the use of defamation principles in the context of employment at will, see H. PERRITT, supra note 15, § 5.22, at 207-09.


42. See, e.g., Hall v. Integon Life Ins. Co., 454 So. 2d 1338 (Ala. 1984) (no wrongful dismissal cause of action; however, employee was entitled to trial on fraudulent misrepresentation claim based on oral statements that employee would not be terminated except for gross misconduct, even though written provisions reserved right to terminate at will). For a discussion of the use of fraudu-
negligence principles. One of the more extreme examples of a restriction on the employment at will doctrine based on a tort cause of action is found in *Agis v. Howard Johnson Co.*, where the Massachusetts Supreme Court applied the theory of intentional infliction of emotional distress. In *Agis*, the court held liable a restaurant manager who threatened a number of employees with discharge in order to find out who was stealing from the restaurant.

While these theories have been relied on by some abusively discharged employees, in recent years the prevailing tort theory applied in wrongful discharge cases has been the "public policy tort." In such cases, an employer's tort liability is predicated on a finding that the employer's actions toward the employee threaten some important public policy. In general, three types of situations are embraced by the public representation in the context of employment at will, see H. PERRITR, supra note 15, § 5.21, at 205-07.


45. Intentional infliction of emotional distress is classically defined as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

46. 371 Mass. at 145, 355 N.E.2d at 319. The manager discharged waitresses in alphabetical order until he could discover who was stealing from the company. *Id.* at 141, 355 N.E.2d at 317. See also Moffett v. Gene B. Glick Co., 604 F. Supp. 229, 237 (N.D. Ind. 1984) (where plaintiff was harassed concerning interracial relationship prior to termination, claim for intentional infliction of emotional distress survived motion to dismiss); Alcorn v. Anbro Eng'g Corp., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (en banc) (employer who maligned plaintiff's race when firing him was liable for intentional infliction of emotional distress); Murray v. Bridgeport Hosp., 40 Conn. Supp. 56, 480 A.2d 610 (1984) (where employer failed to conduct job performance evaluation, plaintiff's claim for intentional infliction of emotional distress survived motion to strike).

47. Mauk, supra note 38, at 226. The term "public policy" embodies both statutory and common law. *Id.* at 228. Courts hearing employment personnel actions in recent years have indicated that they are prepared to recognize tort claims based upon the discharge of an at will employee for reasons that contravene statutory or other established public policy. *Id.* While the contours of the public policy exception to the at will doctrine are not clearly defined, the new tort promises to significantly change the legal rights of employees. *Id.* at 228-29. See also H. PERRITR, supra note 15, §§ 5.7-17, at 175-98; Heshizer, supra note 18, at 101-03; Murg & Scharman, supra note 15, at 943-355; Note, *Wrongful Discharge*, supra note 3, at 1822-24; Note, supra note 19, at 708-11.

48. H. PERRITR, supra note 15, at 175. In deciding whether the discharge of an employee is actionable, a court must weigh the clarity of the threatened public policy against the value of maintaining the employment at will doctrine. Heshizer, supra note 18, at 101. The many courts that recognize the public policy tort vary greatly in their application of this balancing analysis. *Id.*
lic policy tort: first, where an employee is discharged for exercising a right under a constitution or statute; second, where an employee is discharged for refusing to disobey a law at the request of the employer; and third, where the employee is discharged for protesting actions by the employer that violate the law. The availability of public variations exist because states will differ as to the exact formulation of public policy, and therefore they will differ on how substantial or clear a public policy consideration must be before the employment at will doctrine may be abandoned. Id.

49. The leading case involving the exercise of a statutory right by an employee is Frampton v. Central Ind. Gas Co., 206 Ind. 249, 297 N.E.2d 425 (1973). In Frampton, the company terminated the plaintiff after she filed and received a settlement on her workman’s compensation claim. Id. at 250, 297 N.E.2d at 426. The court held that if employers are permitted to fire employees for filing such claims, then the ability to rely on the Workman’s Compensation Act would be lost. Id. at 251, 297 N.E.2d at 428.


The Third Circuit, applying Pennsylvania law, recently concluded in Novosel v. Nationwide Ins. Co. that despite the absence of a statutory declaration, an employee may have a cause of action in tort under an expression of public policy derived from a state or federal constitution. 721 F.2d 894 (3d Cir. 1983). In Novosel, the plaintiff was discharged after several years of service for his refusal to participate in a lobbying effort to enact state legislation favorable to the employer. Id. at 896. The court held that although no statutory law protected the right of political expression, both the Pennsylvania Constitution and the federal Constitution, in their protection of free speech, provided the plaintiff with a cause of action based on a violation of public policy. Id. at 898-901.

50. The California Supreme Court has relied on this public policy limitation on the at will doctrine. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1390, 164 Cal. Rptr. 839 (1980). In Tameny, an employee refused to participate in his employer’s price fixing scheme and was terminated as a result. Id. at 169, 610 P.2d at 1391, 164 Cal. Rptr. at 840. The court found that the objectives underlying state penal statutes regarding price fixing require recognition of a rule preventing an employer from terminating an employee for simply doing what was legal. Id. at 176, 610 P.2d at 1393-34, 164 Cal. Rptr. at 844. See also Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985) (at will employee may sue employer when employer requires employee to violate law by refusing to obey subpoena issued by South Carolina Employment Security Commission); Harless v. First Natl Bank, 246 S.E.2d 270 (W. Va. 1978) (termination of employee for refusing to make illegal loan charges violates public policy). Contra Hinrichs v. Tranquaire Hosp., 352 So. 2d 1130 (Ala. 1977) (plaintiff fired for refusing to falsify patient’s medical records; court held that concept of imposing liability for violation of public policy is too vague).

51. In these cases, known as “whistle blower” cases, courts must balance
policy tort theory, however, like the use of collective bargaining and other statutory remedies, falls short of total protection for the capriciously or abusively discharged employee.\textsuperscript{52}

4. \textit{Contractual Restrictions on the Employment At Will Doctrine}

A fourth limitation placed on the employment at will doctrine involves the imposition of liability on the employer for breach of contract.\textsuperscript{53} Prior to the 1950's, a breach of contract theory could not be used to overcome application of the doctrine when the term of employment was indefinite unless the employee benefited from a collective bargaining agreement.\textsuperscript{54} The primary reason courts refused to overcome the employment at will doctrine based on principles of breach of contract was that employers and employees failed to bargain for or negotiate about job security.\textsuperscript{55} Many courts, however, believing that the failure to bargain for job security is the product of the employees' lack of bargaining power, have taken a more active role in limiting the employer's expectations of loyalty against the employee's concern that company policy is improper. Heshizer, \textit{supra} note 18, at 102.

In one New Jersey Supreme Court case, an employee conducted research for a new drug that she believed might be carcinogenic. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). Her employer wished to test the drug on human subjects. \textit{Id.} at 60, 417 A.2d at 507. The employer discharged the employee when she expressed her concerns that the testing was unwise. \textit{Id.} The court held that such a dismissal is contrary to the clear mandate of public policy emanating from state legislation, administrative rules, and judicial decisions. \textit{Id.} at 72, 417 A.2d at 512. See also Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (discharge of employee after he informed authorities about co-employee who was selling stolen goods violated public policy). \textit{Contra} Hostettler v. Pioneer Hi-Bred Int'l, Inc., 624 F. Supp. 169 (S.D. Ind. 1985) (at will employee cannot maintain action against employer for "whistle-blowing"; only public policy tort based on exercise of statutory right is recognized); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (discharge of employees after they notified employer that unsafe product was being marketed does not violate public policy).

52. Murg & Scharman, \textit{supra} note 15, at 355. For example, many courts limit the recovery based on public policy tort theory to cases in which the plaintiff's claim is based on an explicit statement by the legislature regarding the employee's acts. \textit{Id.}

53. For additional discussion of the contractual aspects of the employment at will doctrine, see Mauk, \textit{supra} note 38; Note, \textit{Employee Handbooks and Employment-At-Will Contracts}, 1985 \textit{Duquesne L.J.} 196.

54. While the use of collective bargaining to circumvent the employment at will doctrine involves contract theory, the impact of collective bargaining on the employment at will rule has been discussed above. \textit{See supra} notes 19-24 and accompanying text. This discussion concerns the contract rights of non-union employees who typically do not enjoy the benefits of a collectively bargained agreement.

55. Note, \textit{Wrongful Discharge}, \textit{supra} note 3, at 1828-36. Adherence to the employment at will rule reflects the court's general reluctance to interfere with the determination of the substantive terms that result from contractual bargaining. \textit{Id.} at 1828.
ployment at will doctrine under a contract analysis.56 This analysis begins by treating the doctrine as a rule of construction rather than as a substantive limitation on contract formation.57 From there, courts have developed several different contract theories that enable the employee to limit the harshness of the employment at will doctrine.58

a. Employer's Promise of Continued Employment as a Contractual Limitation

The use of contract law has been successfully relied on by discharged employees where the court finds some type of promise, express or implied, made by the employer, that prevents the application of the employment at will doctrine. For example, some courts have relied on an implied in law covenant of good faith and fair dealing.59 In Fortune v. National Cash Register Co.,60 the court awarded the plaintiff commissions from sales he made during his employment based on a general requirement of good faith and fair dealing between parties to all contracts.61

56. Id. at 1816-17. The justification for judicial intervention in the contractual process is that the employer's superior bargaining power allows him to offer a job on a "take it or leave it" basis, with no opportunity for negotiation. Id. at 1828. One commentator, however, has suggested that the need for judicial intervention is based on inefficiency rather than unfairness. Id. at 1830. High transaction costs associated with the employer having to bargain individually with his employees discourage complete negotiation in the employment context. Id.

57. Many courts relying on the employment handbook as a limitation on the employment at will doctrine have provided a thorough analysis of the treatment of the employment at will doctrine as a rule of construction. For a discussion of recent case law involving employment handbooks, where the court has treated the doctrine as a rule of construction, see infra notes 174-76 and accompanying text.

58. Case law suggests that contract principles have limited the employment at will doctrine in two ways. First, courts have developed a number of contract theories in order to find a promise by the employer to provide employment tenure. H. PERRITT, supra note 15, § 4.6, at 128. For a discussion of contract theories dealing with the employer's promise, see infra notes 59-71 and accompanying text. Second, courts have applied principles of bargained for consideration and promissory estoppel in order to find an agreement limiting the employer's ability to discharge arbitrarily. See H. PERRITT, supra note 15, §§ 4.11-14. For a discussion of theories dealing with bargained for consideration and promissory estoppel, see infra notes 72-86 and accompanying text.

59. Comment, supra note 3, at 127-28. The covenant is essentially a "court-imposed obligation to refrain from interfering arbitrarily with the employee's enjoyment of the benefits of his employment." Id. at 127.

60. 373 Mass. 96, 364 N.E.2d 1251 (1977). The employer promised plaintiff, a machine salesman, a commission or cash bonuses for all machines sold as a result of his efforts. Id. at 97-98, 364 N.E.2d at 1253. Plaintiff only received 75% of the bonuses he was entitled to when the employer discharged him without further payment. Id. at 99, 364 N.E.2d at 1254.

61. Id. at 102, 364 N.E.2d at 1256. The Fortune court, relying on the Uniform Commercial Code, set the stage for other courts to apply covenants of good faith and fair dealing. Id. (citing U.C.C. § 1-203 (1977) (every contract within U.C.C. carries obligation of good faith in its performance or enforce-
An implied in law covenant has also been relied on in cases involving a violation of public policy. In *Brockmeyer v. Dun & Bradstreet*, the Wisconsin Supreme Court upheld a cause of action for breach of an implied covenant where plaintiff refused to submit a report concerning the termination of his secretary that would cover up discriminatory actions taken by the company against the secretary.

A second example of an employer's promise limiting the employment at will doctrine is a promise implied from the employee's length of service. In *Pugh v. See's Candies, Inc.*, the California Court of Appeals stated that, in determining whether an implied in fact promise of continued employment exists, the employee's longevity of service can be considered.

A third situation where courts have found an enforceable promise is where the employer's representations indicate either an express or an implied in fact promise regarding job security. These representations may be communicated in a variety of ways. Specifically, the employer may state company policy through employment manuals, memoranda.

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63. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

64. *Id.* at 565, 335 N.W.2d at 836. See also *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee refusal to follow instructions of employer to commit perjury); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (both contract and tort cause of action existed where employee was terminated for expressing opinion of carcinogenic nature of drug being tested on human subjects). For a discussion of the "public policy tort," see supra notes 47-52 and accompanying text.

65. See H. PERRITT, supra note 15, § 4.8; Note, supra note 12, at 361-66.

66. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). The plaintiff in *Pugh* had been employed by the defendant for 32 years when he was discharged without explanation. *Id.* at 315, 171 Cal. Rptr. at 919.

67. *Id.* at 327, 171 Cal. Rptr. at 925. *Pugh* suggests that length of service may be a factor. *Id.* However, length of service alone may not be enough to find an enforceable promise by the employer. See, e.g., *Sprott v. Avon Prods., Inc.*, 596 F. Supp. 178, 183 (S.D.N.Y. 1984) (length of services does not overcome employment at will rule).


69. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employer's policy statements, either oral or written in handbook,
to employees,70 or oral statements.71

b. Validation of Employer's Promise of Continued Employment: Bargained For Consideration and Promissory Estoppel

Modern courts have played an active role in limiting the employment at will doctrine not only in recognizing an employer's promise regarding job security, but also by developing several theories regarding the validation of that promise.72 The validation devices that have played a significant role in the employment relationship—consideration73 and

may form basis of employment contract requiring termination only upon just cause); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (restraints on termination of employees found in employee handbook are contractually binding on employer); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (implied promise in employment manual that employee will be fired only for cause is enforceable against employer), modified, 101 N.J. 10, 499 A.2d 515 (1985). For a discussion of the use of employment manuals or handbooks to create an express or implied in fact term in an employment contract, see infra notes 87-111 and accompanying text.

70. See Brawthen v. H & R. Block, Inc., 28 Cal. App. 3d 131, 104 Cal. Rptr. 486 (1972) (plaintiff claimed that he was wrongfully terminated where defendant circulated printed sheet indicating that no manager need worry about employment if he or she is doing good job); Staggs v. Blue Cross, Inc., 61 Md. App. 381, 486 A.2d 798 (personnel policy memorandum setting forth procedures involving employee counseling sessions, which were to be followed prior to termination, may give rise to employer's contractual obligation), cert. denied, 303 Md. 295, 493 A.2d 349 (1985).

71. See Ohanian v. Avis Rent A Car Sys., 779 F.2d 101 (2d Cir. 1985) (court held enforceable employer's oral statement that employee would be terminated only for just cause if employee transferred from San Francisco to New York); Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983) (court recognized plaintiff's contract rights against employer where plaintiff was terminated after being told by employer that he would not be discharged as long as he performed his duties); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (statement to plaintiffs that they would be with company as long as they satisfactorily performed their jobs was contractually enforceable promise). But see Cedersand v. Lutheran Bhd., 263 Minn. 520, 117 N.W.2d 219 (1962) (employer, in formulating company retirement plan, stated that no one would be dismissed as long as they showed willingness to work and learn; court held that statement evinced no intent to contract and therefore was not binding on employer).

72. A validation device is defined as any device that makes a promise enforceable. J. Murray, Murray on Contracts § 58 (2d ed. 1974). There are essentially four validation devices involved in contract law: 1) consideration; 2) promissory estoppel or detrimental reliance; 3) the seal; and 4) moral obligation. Id.

73. Consideration is composed of two elements: sufficient legal value and bargained for exchange. J. Murray, supra note 72, § 73. The legal value necessary for the formation of the contract involves either a benefit to the promisor or detriment to the promisee. Id. This benefit or detriment must then be dealt with by the parties to the agreement as the agreed price or exchange for the promise. Id. See also J. Calamari & J. Perillo, Contracts § 4-1, at 134-35 (2d ed. 1977) (essence of consideration is legal detriment that has been bargained for and exchanged for promise).
promissory estoppel— are discussed below.

The contract principles of additional consideration and mutuality of obligation have fostered the historic development of the employment at will rule. Under principles of consideration adhered to in nineteenth and early twentieth century contract law, employees provided labor and services to an employer in exchange for the salary received. If an employee wished to make his employment arrangement binding for a fixed period of time, he was required to provide the employer with additional consideration.

74. The doctrine of promissory estoppel allows a promisee to enforce a gratuitous promise made by the promisor that a promisee relies on. J. MURRAY, supra note 72, § 93, at 203. Promissory estoppel is defined by the Second Restatement of Contracts in this manner:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the 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.


75. For a discussion of the meaning of the term "additional consideration," see infra notes 77-78 and accompanying text.

76. The principle of mutuality of obligation requires that in order for a bilateral agreement to be enforceable, both promises must be binding or neither is binding. J. MURRAY, supra note 72, § 90, at 191. See also J. CALAMARI & J. PERILLO, supra note 73, § 4-14 (doctrine of mutuality expressed in phrase that "both parties must be bound or neither is bound").

77. Note, supra note 12, at 351-52.

78. Id. at 352. The rationale for the requirement of added consideration is that by providing additional consideration the employee has purchased the right to employment of a definite term by conferring a benefit upon his employer greater than the value of his services. Note, supra note 19, at 704. Moreover, by providing additional consideration, the employee has suffered a detriment sufficient to establish an independent contract of a fixed duration. Id. Several cases have held that the presence of additional consideration is sufficient to form a binding term employment agreement. See, e.g., Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939) (plaintiff's resignation from present employment to take new employment, where new employer has knowledge of resignation, held sufficient consideration); Stauter v. Walnut Grove Prods., 188 N.W.2d 305 (Iowa 1971) (plaintiff's sale of business to defendant in exchange for employment held sufficient additional consideration).

In many cases, however, the courts have not found sufficient additional consideration to allow the employee to recover. See, e.g., Lord v. Goldberg, 81 Cal. 569, 22 P. 1126 (1889) (employee's promise to provide certain amount of sales was not sufficient additional consideration to vacate contractual right to continued employment where employee failed to produce requisite amount of sales); Rasnick v. W.M. Ritter Lumber Co., 187 Ky. 523, 219 S.W. 801 (1920) (agreement of employee to drop law suit against company was not sufficient consideration to support contract of employment). Also, in several cases where an employee has provided additional consideration, courts have refused to grant relief because the employer received no benefit despite the employee's detriment. See, e.g., Rape v. Mobile & Ohio R.R., 136 Miss. 58, 100 So. 585 (1924) (substantial moving expenses incurred by employee's change of employment not sufficient additional consideration); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967) (sale of farm in order to return to work for previous employer was not sufficient additional consideration).
The principle of mutuality of obligation, applied in the employment context, results in the conclusion that if an employee is not obligated to continue providing services to an employer, the employer should not be obligated to continue providing employment. This reasoning led many courts to conclude that where an employee may leave his job at any time, any agreement imposing a duty on the employer as to the employee's term of employment lacks mutuality of obligation, and hence, the employment is for an indefinite period and is terminable at will.

In recent years, many courts and commentators have criticized the doctrines of additional consideration and mutuality of obligation and raised doubts about their applicability to the employment relationship. This mounting criticism has played a significant role in enabling an employee to validate an employer's promise of continuing employment through bargained for consideration in order to overcome the employment at will doctrine.

79. For a definition of mutuality of obligation, see supra note 76.
80. See Blades, supra note 18, at 1419-24; Murg & Scharman, supra note 15, at 337; Comment, supra note 1, at 220; Note, supra note 19, at 702; Note, Wrongful Discharge, supra note 3, at 1819.
82. One commentator points out that the doctrine of mutuality of obligation has been variously interpreted and applied by the courts with results that have been inconsistent with other well settled principles of the law of consideration. J. Murray, supra note 72, § 90, at 191. In certain cases the doctrine has been held to require that the undertaking of the promise relied upon as consideration must be equivalent to the undertaking of the promise that it supports before it can constitute consideration. Id. Requiring mutuality in this sense is not necessary because of the accepted doctrine that the law will not inquire into the adequacy of consideration. Id. at 195. Thus, the doctrine of mutuality of obligation is not supported by most of the actual decisions in contract law and the concept should be disavowed. Id. See Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) ("demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration").
83. H. Perritt, supra note 15, § 4.11, at 138-42. Under a unilateral contract analysis, the employer's promise of continued employment may be expressed through, for instance, some representation made by the employer. Id.
Where an employee cannot establish bargained for consideration in order to validate an employer's promise, the courts have also recognized the doctrine of promissory estoppel.\textsuperscript{84} In 1981, for example, the Minnesota Supreme Court in \textit{Grouse v. Group Health Plan, Inc.},\textsuperscript{85} allowed an employee to recover damages for lost income based on the doctrine of promissory estoppel when he resigned from his job in reliance on a job offer from the defendant.\textsuperscript{86} Thus, the modern courts' treatment of contract law in the employment context has extended to all areas of contract analysis.

\textbf{B. Employment Handbooks and the Employment at Will Doctrine}

The harshness of the employment at will doctrine has led to several limitations being placed upon the doctrine, a primary illustration of which is an express or implied in fact term of a contract that restricts employee dismissals.\textsuperscript{87} While promises of job security may be derived from oral representations made by the employer, in many situations the employer's policies regarding termination are stated in an employment handbook;\textsuperscript{88} and it is the terms of the handbook that create the

\textsuperscript{84} Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 492 (W.D. Ark. 1982). Promissory estoppel has always been recognized as a substitute for consideration. \textit{Id.} It prevents an employer "who has failed to act from claiming a right to the detriment of his [employee] when the latter is entitled to rely on the words or actions of the former and has in fact so relied to his detriment." \textit{Id.} For the definition of promissory estoppel, see supra note 74.

\textsuperscript{85} 306 N.W.2d 114 (Minn. 1981).

\textsuperscript{86} \textit{Id.} at 115. In \textit{Grouse}, the plaintiff worked as a pharmacist before quitting his job to accept a new position with the defendant. \textit{Id.} However, the employer hired another person before the plaintiff could begin working for the defendant. \textit{Id.} As a result, the defendant did not have a position to offer plaintiff. \textit{Id.} Accord Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973) (binding contract exists between employee and employer where employee gave up secure job to take new position); Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (1979) (employee who gives up job sufficiently relies on employer's offer of employment to impose duty on employer to terminate only for just cause). \textit{But see} Milligan v. Union Corp., 87 Mich. App. 179, 274 N.W.2d 10 (1978) (employee's forbearance of opportunity to find employment elsewhere prior to beginning work with defendant was not sufficient reliance to impose duty on new employer); Goldstein v. Kern, 82 Mich. App. 723, 267 N.W.2d 165 (1978) (plaintiff's rejection of other job offers was necessary step in beginning employment with defendant); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (employee's rejection of other job offers was not sufficient reliance to change at will status of employee).

\textsuperscript{87} For a discussion of express or implied in fact contracts based on an employer's representations of company policy, see supra notes 68-71 and accompanying text.

\textsuperscript{88} For a discussion of the use of employment handbooks by employers to
The courts’ willingness to bind the employer to terms found in the handbook has often been expressed in the context of benefits received by the employee such as severance pay, vacation pay, and tenure. Where the terms of the handbook have provided a basis for limiting the employment at will doctrine, however, the contractual agreement between the employer and employee is typically derived from either 1) statements that refer to a “just cause” requirement or 2) statements indicating that administrative procedures must be followed prior to termination.


89. There is a split of authority as to whether employment handbooks can create an implied in fact or express term of a contract that limits the conditions upon which an employer may terminate an employee. For a survey of the cases that are split on the issue, see supra note 9.

90. See Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 142, 143 A.2d 762, 763 (1958). In Anthony, an employer gave his employees a booklet titled “general rules.” Id. at 142, 143 A.2d at 763. In this booklet, the employer stated that severance pay would be issued to members of a certain class of employees, which included the plaintiff, upon termination. Id. The court held that the statement constituted an offer that could be accepted by an employee by continued performance at work. Id. at 143, 143 A.2d at 764. In Anthony, continued performance did in fact bind the employer. Id. See also Dahl v. Brunswick Corp., 277 Md. 471, 356 A.2d 221 (1976) (employer’s written policy statements concerning severance pay constitute unilateral contract that is accepted by employees continuing work); Cain v. Allen Elec. & Equip. Co., 346 Mich. 568, 78 N.W.2d 296 (1956) (personnel policy adopted by board of directors relating to severance pay constituted offer that was accepted by employee by continuing to work); Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494 (Mo. 1971) (employer providing employee with document containing company policy regarding severance is bound to unilateral contract thereby formed); Dangott v. ASG Indus., 558 P.2d 379 (Okla. 1976) (employer providing employee with statement of company policy regarding severance pay forms bilateral contract with employee, even though employee is without actual knowledge of provisions); Demerath v. Nestle Co., 121 Wis. 2d 194, 358 N.W.2d 541 (Ct. App. 1984) (terms regarding severance pay in personnel policy were contractually binding on employer after employer sold company).

91. See Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (provisions in employment handbook regarding vacation time are part of employment contract); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976) (personnel policy extending benefits regarding vacation time may be construed as unilateral offer accepted by employee’s continued performance).

92. See Knowles v. Unity College, 429 A.2d 220 (Me. 1981) (terms of contract involving tenure may be derived from passages in faculty handbook).

93. Decker, Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware! 5 J.L. & COMM. 207, 210-15 (1984). For example, in Toussaint v. Blue Cross & Blue Shield, a discharged employee successfully maintained a breach of contract action based on statements in an employment handbook that it was the “policy” of the company to release employees “for just cause only.” 408 Mich. 579, 598, 292 N.W.2d 880, 884 (1980). In Pine River State Bank v. Mettile, an employee alleged a breach of contract based on his employer’s failure to follow a three-stage termination procedure that included certain requirements in the first two stages followed by termination in the third
Many courts have used a unilateral contract analysis94 to find a contract where an employer supplies an employee with an employment handbook containing either a just cause provision or termination procedures.95 For example, if an employer provides an employee with an employment handbook, the employer has made an offer for a unilateral contract.96 The employee may accept the offer by continuing to work


While just cause provisions and termination procedures have provided the basis for finding an employment contract in most cases, the Superior Court of Pennsylvania, in Banas v. Matthews Int'l Corp., recently addressed the issue of whether a specific provision in a handbook, which does not deal with the duration of employment, may create a limitation on the employment at will doctrine. 502 A.2d 637 (Pa. Super. 1985). In Banas, a company terminated an employee for his use of its equipment. Id. at 638. The employee alleged that a breach of contract resulted from his discharge because a provision in his employment handbook stated that an employee may use company equipment with company approval. Id. For a further discussion of Banas, see infra notes 154-63 and accompanying text.

94. A unilateral contract is formed where there is one promisor and one promisee. J. MURRAY, supra note 72, § 6, at 10 (footnote omitted). The promisor manifests his intention that he does not wish a promise in exchange for his own promise, but rather performance. Id. at 10-11. The contract is formed when the promisee completes performance. Id. at 11. Thus, when the contract is formed, the promisee gains a right and the promisor owes a duty. Id.

The unilateral contract analysis should be distinguished from the bilateral contract analysis, where the parties to a contract exchange promises. Id. at 10. The bilateral contract is formed as soon as the promises are exchanged. Id. Thus, at the point where the contract is formed, there are two outstanding obligations since both promises remain to be performed. Id.


96. See Penn River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (promise of employment under particular terms of unspecified duration found in handbook may constitute offer); Langdon v. Saga Corp., 569 P.2d 524, 527-28 (Okla. Ct. App. 1976) (terms of offer are policies contained in handbook). See also Note, supra note 53, at 212-13 (handbook provisions must be specifically stated to show intent by employer to make offer).
for the employer. The validation device that makes the employer's promise enforceable is either 1) the consideration derived from the exchange of the employer's promise to abide by the terms of the contract with the employee's willingness to begin or continue work, or 2) the reliance that the employee places upon such promises made by the employer (despite the fact that the employer did not bargain for the employee's continued performance).


The term validation device is used by Murray to describe the different ways that promises may be enforced. J. Murray, supra note 72, § 58, at 124. The most common validation device used is consideration. Id. § 73, at 142. Consideration in a contract consists of 1) either a benefit to the promisor or detriment to the promisee, and 2) bargained for exchange between the parties to the contract such that the promisor’s promise induces the promisee’s detriment and that this detriment also induces the promise. Id.

Another validation device is promissory estoppel or detrimental reliance. Id. § 58, at 124. Promissory estoppel involves a promise by a promisor that reasonably induces reliance by a promisee. Id. § 92, at 200. Promissory estoppel may be applied where injustice can only be avoided through enforcement of the contract. Id. For the Restatement formulation of promissory estoppel as a validation device, see supra note 74.

It should be noted that this particular analysis, viewing consideration and promissory estoppel as separate and distinct validation devices, may differ from the terminology used by certain courts where the term “consideration” is used in a broader sense to encompass contracts validated through bargained for exchange or promissory estoppel. See, e.g., Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

It should also be pointed out that regardless of whether the contract is formed through bargained for consideration or promissory estoppel, an important element in the formation of the contract is the employee's awareness of the terms of the handbook that prevent arbitrary discharge. See Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983) (“The offer must be definite in form and must be communicated to the offeree.”). The fact situations in the employment handbook cases vary with respect to the requisite degree of the employee's knowledge of the terms of the handbook. In Brooks v. TWA, an employee attempted to enforce the provisions of an employment handbook to protect his right to work at a certain position in the company. 574 F. Supp. 805, 806-07 (D. Colo. 1983). In finding a contract based on the terms in the company handbook, the court relied on the fact that the plaintiff “had consulted and relied on the [Management Policies and Procedure Manual] in his daily decisions and promotions.” Id. at 809-10. In Langdon v. Saga Corp., however, an employee pointed to provisions of an employment handbook in asserting that the employer was liable for terminating him without just cause. 569 P.2d 524, 526 (Okla. Ct. App. 1976). The Oklahoma Court of Appeals affirmed the lower court decision that the terms of the handbook formed a contract, despite the absence of a finding by the lower court respecting whether the employee had any knowledge of the provisions in the handbook. Id. at 527-28. Perhaps the
Where courts have applied a unilateral contract analysis to find a contract of employment based on employment handbooks, the obstacles presented by traditional contract principles are often overcome by simply rejecting the requirements of mutuality of obligation and additional consideration. The courts' unwillingness to require adherence to these traditional contract principles in the employee handbook context is consistent with the criticism of these principles as applied to the employment relationship generally.

While some jurisdictions have accepted the theory that employment handbooks can create an enforceable contract limiting the employer's right to discharge an employee, many others have refused to find either an express or an implied in fact contract and have retained the employment at will doctrine. A few courts have held that there is no enforce-

most extreme position taken in the analysis of the proper validation device is found in Woolley v. Hoffman-La Roche, Inc., where the New Jersey Supreme Court took the position that reliance by the employee on the terms of the handbook will be presumed. NJ. 284, 307, 491 A.2d 1257, 1270, modified, 101 N.J. 10, 499 A.2d 515 (1985). For further discussion of Woolley, see infra notes 139-53 and accompanying text.


Several courts have discussed a rejection of the doctrine of additional consideration. See, e.g., Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (additional consideration is rule of construction that will not preclude parties' formation of contract where intent to do so is express); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 657, 576 P.2d 356, 359 (1978) (continued employment alone provides sufficient consideration). For a basic discussion of the principle of additional consideration, see supra notes 77-78 and accompanying text.

100. For a discussion of the courts' willingness to adhere to traditional contract principles, see supra notes 82-83 and accompanying text.

101. In Richardson v. Charles Cole Memorial Hosp., the Superior Court of Pennsylvania set forth the typical rationale for the rejection of the use of employment handbooks as a limitation on the employment at will doctrine. 320 Pa. Super. 106, 466 A.2d 1084 (1983). The employment handbook in question contained both a statement regarding termination for just cause and a list of termination procedures to be followed by the employer. Id. at 108, 466 A.2d at 1085. In rejecting the employee's argument that the policies set forth in the handbook constituted part of the contract of employment, the court held that the policies were mere gratuities rather than an enforceable promise and that there was no bargained for consideration validating the contract. Id. at 108-09, 466 A.2d at 1085. The court stressed that under Pennsylvania law, the only right of action
able promise made by the employer in an employment handbook because there is no definite statement concerning term of employment. Similarly, some courts have concluded that a handbook only makes general statements of company policy without evincing an intent to be contractually bound.

Other courts have focused on the validation device necessary to form a contract in order to retain the employment at will doctrine. In this regard, a few courts still adhere to the common law principles of mutuality of obligation and additional consideration. Courts have also based their refusal to limit the employment at will doctrine on the

an employee has against an employer for wrongful discharge is through a violation of public policy. Id. at 107-08, 466 A.2d at 1085 (citing Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974)). For a survey of other cases in which the court has refused to find an express or implied in fact contract regarding job security provisions based on an employment handbook, see supra note 9.

102. See, e.g., White v. Chelsea Indus., 425 So. 2d 1090, 1091 (Ala. 1983) (if no agreement specifying definite duration of employment services, employment is at will); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096 (Del. 1982) (plaintiff has no contract rights where handbook does not specify definite term of employment for company employees); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975) (court will not reach question of whether enforceable unilateral contract exists absent promise of employment for ascertainred period); Johnson v. National Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 782 (1976) (if handbook neither expressly provides for fixed term of employment, nor includes language from which contract of fixed term could be inferred, contract is at will); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 314, 299 N.W.2d 147, 151 (1980) (if books or documents provided to plaintiff do not promise definite term of employment, contract of employment is at will).


104. See, e.g., Degen v. Investors Diversified Serv., 260 Minn. 424, 428, 110 N.W.2d 863, 866 (1961) (absent additional consideration, employment is no more than indefinite general hiring terminable at will of either party); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 183, 638 P.2d 1063, 1066 (1982) (employee handbook cannot become part of plaintiff's employment contract because of lack of new and independent consideration for its terms); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 313, 299 N.W.2d 147, 150 (1980) (contract of employment, in absence of good consideration in addition to services contracted to be rendered, is indefinite hiring terminable at will of either party).
timing of the employee's receipt of a handbook. Some courts have held
that where the employee is given the handbook after beginning employ-
ment, there can be no contract based on the terms of the handbook.\textsuperscript{105}
Principally, these courts reason that the distribution of a handbook to an
employee after the employee begins to work for an employer evidences
a lack of either bargained for exchange or reliance necessary to prove
promissory estoppel.\textsuperscript{106}

Courts and commentators have discussed various methods through
which the employer may avoid litigation over the terms contained in an
employment handbook.\textsuperscript{107} The most obvious method is refraining from
setting forth a company policy regarding the conditions upon which an
employee may be terminated.\textsuperscript{108} Alternatively, the employer may be
able to retain the benefits of an employment handbook, yet minimize its
liability through the use of disclaimers.\textsuperscript{109} Disclaimers, however, may
not have the intended effect of preventing litigation; rather, disclaimers
may only provide the employer with a defense during litigation.\textsuperscript{110} The
course of action the employer takes will depend upon the needs of the
employer and its philosophy regarding the employment relationship.\textsuperscript{111}

\textsuperscript{105.} See, e.g., Johnson v. National Beef Packing Co., 220 Kan. 52, 55, 551
P.2d 779, 782 (1976) (factor in applying at will doctrine is that manual was not
published until long after plaintiff's hiring); Gates v. Life of Mont. Ins. Co., 196
after employee is hired does not become part of employee's contract); Mau v.
Omaha Nat'l Bank, 207 Neb. 308, 314, 299 N.W.2d 147, 151 (1980) (at will rule
applies if employer furnished materials to plaintiff after employment
commenced).

\textsuperscript{106.} Johnson v. National Beef Packing Co., 220 Kan. 52, 55, 551 P.2d 779,
782 (1976) (employment manual was published after plaintiff's employment
commenced).

\textsuperscript{107.} See Decker, supra note 93, at 218-29; Comment, supra note 37, at 264-
65.

\textsuperscript{108.} See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 619,
292 N.W.2d 880, 894 (1980) ("an employer who establishes no personnel poli-
cies instills no reasonable expectations of performance"); Woolley v. Hoffman-
La Roche, Inc., 99 N.J. 284, 306, 491 A.2d 1257, 1269 ("If, however, the at-will
status of the workforce was so important, the employer should not have circu-
lated a document so likely to lead employees into believing they had job secur-

\textsuperscript{109.} Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230-31, 685
P.2d 1081, 1088 (1984) (en banc). In Thompson, the Supreme Court of Washing-
ton stressed that the employer may specifically state that nothing contained in
the handbook is intended to be part of the employment relationship. Id. In
addition, the employer may include a more limited disclaimer by writing the
policies so that duration of employment remains within the discretion of the
employer. Id. For a description of total and partial disclaimers that employers
could include in a handbook, see Decker, supra note 93, at 223-26.

\textsuperscript{110.} Decker, supra note 93, at 223.

\textsuperscript{111.} Id.
III. Recent Statements on the Use of the Employment Handbook as a Limitation on the Employment at Will Doctrine

Against this background, several recent cases have provided an in-depth contractual analysis regarding the employment handbook as a means of providing job security. These cases are not only representative of the development of the law in this area, but also raise important questions regarding the limits to which courts should extend a contract analysis, through their interpretation of the required promise or their determination of a proper validation device, in the context of representations in employment handbooks.

In Pine River State Bank v. Mettille, the Supreme Court of Minnesota rejected many common arguments against contractual liability of the employer based on a handbook, and allowed the employee to recover under a strict application of unilateral contract principles. In this case, Pine River State Bank hired Richard Mettille as a loan officer. After completing a six-month probationary period, Mettille received from the bank a printed employee handbook containing company policy concerning disciplinary and discharge procedures. Less than one year later, the bank conducted a review of Mettille’s work and found deficiencies in his management of numerous loan portfolios. After firing Mettille, the bank sued him to recover two notes owed the bank that were in default. Mettille counterclaimed, alleging breach of contract due to the bank’s failure to follow the procedures outlined in its handbook. The trial court entered a judgment in favor of Mettille.

On appeal, the Minnesota Supreme Court affirmed, holding that “personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable as part of the original employment contract.” Thus, where the handbook language

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113. 333 N.W.2d 622 (Minn. 1983).
114. Id. at 626.
115. Id. at 624.
116. Id. A section of the handbook entitled “Disciplinary Policy” detailed the procedures to be undertaken before a discharge would occur. Id. at 626 n.3. These procedures included an oral reprimand, followed by written reprimands, ultimately followed by discharge. Id.
117. Id. at 624-25.
118. Id. at 625. The bank claimed that the main reason it fired Mettille was because of the loan errors, although his excessive sick leave was also a factor. Id.
119. Id. Mettille argued that he was not fired for “just cause” because of the fact that his discharge resulted purely from a personality dispute with his superiors. Id.
120. Id.
121. Id. at 627.
constitutes an offer, and it is communicated to the employee through the employee's receipt of the handbook, the employee may accept the offer by continuing in the performance of his job.\textsuperscript{122} In so holding, the court rejected several arguments typically raised by defendants in such breach of contract actions. First, the court addressed the argument that because the original contract of employment failed to specify a duration, the parties did not intend any restrictions contained in the handbook to be binding.\textsuperscript{123} The court rejected this argument, indicating that the employment at will doctrine is a rule of contract construction rather than a rule of substantive limitation.\textsuperscript{124} Second, the court considered the argument that additional consideration is required to render any subsequent modification enforceable.\textsuperscript{125} Again, the court ruled that such a principle was only a rule of construction, and not a binding substantive rule of law.\textsuperscript{126} Finally, the court found no merit in the argument that mutuality of obligation was required, holding that the application of that principle amounts to an inquiry into the adequacy of consideration, which is forbidden in Minnesota and many other states.\textsuperscript{127}

The Michigan Supreme Court, in \textit{Toussaint v. Blue Cross & Blue Shield},\textsuperscript{128} applied a more expansive view of the unilateral contract analysis regarding the proper validation of the employer's promise. In \textit{Toussaint}, Blue Cross & Blue Shield of Michigan (Blue Cross) hired Charles Toussaint for a middle management position.\textsuperscript{129} Upon an inquiry by Toussaint regarding job security, Blue Cross handed him a handbook

\textsuperscript{122.} \textit{Id.} at 626-27. The court noted that not only can a contract be formed in this manner, but also an existing contract may be modified by a subsequent unilateral contract. \textit{Id.} at 627.

\textsuperscript{123.} \textit{Id.} at 628.

\textsuperscript{124.} \textit{Id.} The court stressed that "[i]f the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so." \textit{Id.}

\textsuperscript{125.} \textit{Id.} at 628.

\textsuperscript{126.} \textit{Id.} at 629. For example, the court pointed out that handbook provisions regarding bonuses, severance pay, and commission rates are enforceable without additional consideration. \textit{Id.}

\textsuperscript{127.} \textit{Id.}

\textsuperscript{128.} 408 Mich. 579, 292 N.W.2d 880 (1980). This case is actually a consolidation of two cases. \textit{See Toussaint v. Blue Cross & Blue Shield}, 79 Mich. App. 429, 262 N.W.2d 848 (1977); \textit{Ebbling v. Masco Corp.}, 79 Mich. App. 551, 261 N.W.2d 74 (1977). In \textit{Toussaint}, the plaintiff based his claim for breach of contract on oral and written statements made by the employer as well as company handbook given to the plaintiff. 79 Mich. App. at 431-32, 262 N.W.2d at 849. In \textit{Ebbling}, the plaintiff based his claim solely on oral assurances made by the employer. 79 Mich. App. at 532-33, 261 N.W.2d at 76. This note's analysis of \textit{Toussaint} is concerned with the finding of a contract upon Toussaint's receipt of a company handbook. For a discussion of employer representation in the form of oral assurances, see \textit{supra} note 71 and accompanying text.

\textsuperscript{129.} 408 Mich. at 595, 292 N.W.2d at 883.
that contained an assurance of job security. After being employed with Blue Cross for five years, however, Toussaint was discharged by Blue Cross. He brought an action against his former employer for a violation of an employment agreement that allegedly allowed discharge only for just cause. The trial court rendered a verdict in favor of Toussaint, but the Michigan Court of Appeals reversed, holding that regardless of whether the employee’s manual was part of the employment contract, the employment contract was terminable at will.

The Michigan Supreme Court, in reversing the court of appeals, held that an employer’s statements of policy in an employment handbook can give rise to contractual rights in employees without evidence that the parties agreed the statements would create contractual rights. The Michigan Supreme Court emphasized that an employer did not have an obligation to establish such policies. However, once policies are established, the court observed that the employment relationship is enhanced and the employer has created a situation “instinct with an obligation.” In so holding, the court rejected the defendant’s argument that separate consideration and mutuality of obligation are required to form a contract based on the terms in an employment manual.

130. Id. at 597-98, 292 N.W.2d at 884. The handbook provided that certain disciplinary procedures applied to all Blue Cross employees who completed their probationary period. Id. The handbook also stated that the company had a policy of releasing employees “for just cause only.” Id.

131. Id. at 595, 292 N.W.2d at 883.

132. Id. Toussaint testified that during his hiring interview, an officer of Blue Cross told him that if he came to Blue Cross he would never have to look for a new job because the officer “knew of no one ever being discharged.” Id. at 597 n.5, 292 N.W.2d at 884 n.5. Plaintiff argued that this statement and the representations made in the handbook gave rise to an enforceable employment contract. Id.

133. Id. at 595, 292 N.W.2d at 883.


135. 408 Mich. at 614-15, 292 N.W.2d at 892. The court stated that a contract could exist even though the parties did not sign the policy. Id. Further, the court declared that it did not matter that the policy failed to refer to any specific employee. Id. The court also noted that there was no significance in the fact that the employer did not refer to handbook policies while interviewing the plaintiff. Id. at 615, 292 N.W.2d at 892. Finally, the court found little significance in the fact that the employee did not learn of the policies until after his employment began. Id.

136. Id. at 613, 292 N.W.2d at 892.

137. Id. (citing Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917); McCall Co. v. Wright, 133 A.D. 62, 117 N.Y.S. 775 (1909)).

138. Id. at 599-600, 292 N.W.2d at 885. The Toussaint court dismissed the need to apply the principles of separate consideration and mutuality of obligation by characterizing these traditional contract principles as rules of construction. Id. at 600, 292 N.W.2d at 885. The court held that separate consideration
One of the most recent statements of the law on the issue of contractual liability based on an employment handbook is *Woolley v. Hoffman-La Roche, Inc.* The New Jersey Supreme Court reaffirms if not expands the broad unilateral contract analysis set forth in *Toussaint*. In *Woolley*, Hoffman-La Roche hired the plaintiff, an engineer, in November 1969. One month later, Woolley received and read a personnel manual that contained statements of company policy regarding termination. Woolley continued working for nine years, receiving several promotions. In 1978, however, the company fired Woolley because a general manager lost confidence in Woolley's work. Woolley filed a complaint alleging breach of contract on the theory that the employment handbook created a contract providing that employees could be fired for just cause only, and then only after the procedures outlined in the handbook were followed. At trial, the court granted defendant's motion for summary judgment and the appellate division affirmed.

On appeal, the Supreme Court of New Jersey held that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." The court stressed that changes in the employment relationship justify en-

and mutuality of obligation are not necessary to the formation of a contract. *Id.* Rather, the court ruled that the proper inquiry is whether there is consideration for the original employment contract. *Id.*

Justice Ryan's dissenting opinion in *Toussaint* emphasized the lack of evidence in the record from which a trier of fact could conclude that the mutual assent required to form a contract existed. *Id.* at 647, 292 N.W.2d at 907 (Ryan, J., dissenting). The dissent, however, indicated that the plaintiff could have proceeded upon a theory of promissory estoppel in order to form a contract. *Id.* at 649-50, 292 N.W.2d at 908 (Ryan, J., dissenting). However, the plaintiff did not plead such a case and there was no evidence in the record that the plaintiff actually relied on the policy statements contained in the handbook. *Id.*

140. *Id.* at 286, 491 A.2d at 1258.
141. *Id.* The handbook specifically stated, "It is the policy of Hoffman-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively." *Id.* at 287 n.2, 491 A.2d at 1259 n.2. The handbook also listed the types of termination in the company as "layoff," "discharge due to performance," "discharge, disciplinary," "retirement," and "resignation." *Id.*
142. *Id.* at 286, 491 A.2d at 1258.
143. *Id.* Hoffman-La-Roche asked plaintiff for his resignation on several occasions. *Id.* On each occasion, plaintiff refused. *Id.*
144. *Id.* at 286-87, 491 A.2d at 1258.
145. *Id.* at 287, 491 A.2d at 1258-59. The New Jersey Superior Court, Appellate Division, found that since the handbook did not set forth specific terms of employment, such as hours and duties of the employee, the handbook represented a unilateral expression of company policy for which the plaintiff did not bargain. *Id.* at 289, 491 A.2d at 1259-60.
146. *Id.* at 285-86, 491 A.2d at 1258.
forcing a contract against an employer based on terms contained in an employment handbook,\textsuperscript{147} and that it must balance the interests of the employer with those of the employee.\textsuperscript{148} The Woolley court explained that although the laissez-faire climate that encouraged industrial growth may have warranted the employment at will doctrine in a previous era, the twentieth-century employer is typically a corporation with superior bargaining power over a large number of employees, and accordingly the limitation on the employment at will doctrine is necessary to provide stability in employment relations.\textsuperscript{149}

While in many ways adopting the same unilateral contract analysis applied in Toussaint and Pine River,\textsuperscript{150} the New Jersey Supreme Court in Woolley chose to expand the employer's liability for breach of contract to situations where the employee is not aware of the termination provisions of handbook.\textsuperscript{151} The court simply presumed the reliance of the employee on the terms of the handbook in order to establish a validation device for the formation of the employment contract.\textsuperscript{152} Thus, because of this presumption of reliance, the court held that the handbook becomes binding the moment it is distributed.\textsuperscript{153}

Another recent statement of the law concerning employment handbooks was set forth in Banas v. Matthews International Corp.\textsuperscript{154} The Superior Court of Pennsylvania in Banas centered its analysis on the type of employer promise necessary to create a contractual limitation on the employment at will doctrine. In Banas, the plaintiff worked as a tooler for a company that made bronze grave markers.\textsuperscript{155} The company fired Banas after he admitted that he made and removed a grave marker from the plant, placing it on his nephew's grave.\textsuperscript{156} He brought suit against

\textsuperscript{147} Id. at 290-92, 491 A.2d 1260-62.
\textsuperscript{148} Id. at 291, 491 A.2d at 1261 (citing Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66-67, 417 A.2d 505, 511 (1980)).
\textsuperscript{149} Id. at 292, 491 A.2d at 1261 (citing Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66, 417 A.2d 505, 511 (1980)). The Woolley court asserted that "any application of the employment-at-will rule . . . must be tested by its legitimacy today and not by its acceptance yesterday." Id. at 292, 491 A.2d at 1262.
\textsuperscript{150} The Woolley court, much like the Toussaint and Pine River courts, stated that the handbook is an offer that seeks the formation of a unilateral contract through the employee's acceptance in the form of continued performance at work. Id. at 302, 491 A.2d at 1267.
\textsuperscript{151} Id. at 302-03, 491 A.2d at 1267.
\textsuperscript{152} Id. at 304, 491 A.2d at 1268. The court stated that unless it presumed reliance, a strict contractual analysis might protect the rights of some employees but not others. Id. at 304 n.10, 491 A.2d at 1268 n.10.
\textsuperscript{153} Id. at 305 n.10, 491 A.2d at 1268 n.10.
\textsuperscript{155} Id. at 638.
\textsuperscript{156} Id. The dispute arose because the cemetery where the nephew's grave was located had an agreement with the plaintiff's employer that all grave markers would be purchased through the cemetery. Id. The grave marker taken by the plaintiff was not purchased through the cemetery, which filed a complaint with the company. Id.
Matthews International Corporation for breach of contract, arguing that a handbook he had received gave employees the right to personal use of company time and equipment, provided they obtained permission from a supervisor.

The Superior Court of Pennsylvania, sitting en banc and reversing the trial court’s award for Banas, held that regardless of whether Banas had permission to make the grave marker and was authorized under the employment handbook to engage in this activity, he was still an employee at will subject to a viable employment at will doctrine, namely, dismissal for any or no reason. The court acknowledged that the doctrine has been limited through various statutory laws and public policy torts designed to protect the employee. However, the court stressed that a contractual limitation on the doctrine in the context of employment handbooks must, if at all, be based on either a just cause provision or grievance procedures, both of which deal directly with the issue of job security.

The dissent in Banas argued that the terms contained in the employment handbook could modify the employee’s at will status, despite the

157. Id. Banas also brought an action for defamation based on remarks about the dismissal made by two of the employer’s officers. Id.

158. Id. The employment handbook contained the following provision: “Employees are not generally permitted to work on personal jobs during company time or on company premises. However, supervisors will often cooperate by giving permission for you to use our equipment and waste material for your personal work.” Id. at 641. Banas did not argue that he had a contractual right to a specific duration of employment. Id. at 656 (Beck, J., concurring in part and dissenting in part). Rather, he argued that the handbook provisions formed the basis of a unilateral contract that limited the employer’s power to terminate the employee under those terms. Id.

159. Id. at 648.

160. Id. at 646. The court also recognized that proof of consideration in addition to services rendered may be sufficient to establish that the employment was not at will but for a definite time. Id. at 646-47.

161. Id. at 647-48. The court stated, “Since here the handbook did not contain, expressly or by clear implication, any just cause provision, appellee has shown nothing to take his case out of the settled employee-at-will rule.” Id. at 648. The court also observed that the employment handbook did contain provisions regarding procedures to be followed with respect to “Disciplinary Action.” Id. at 647-48 n.10. These procedures required review of at least two supervisors prior to dismissal. Id. at 647 n.10. The court noted that Banas did not raise this issue, most likely because the record revealed that two supervisors did review his case. Id. at 647-48 n.10.

The court in a dictum indicated that if the handbook contained a just cause provision, Banas’ claim might have had merit. Id. at 647-48. However, a majority of the court would not specifically address this issue since it was deemed irrelevant to Banas’ claim. Id. at 647. In addition, the court rejected the notion that an employee who is discharged may rely on the terms of a handbook under the doctrine of promissory estoppel. Id. at 648 n.12. Although the court recognized that promissory estoppel may be applied when consideration for an existing promise is absent, the court stressed that in Banas the doctrine could not provide a basis for relief because there was no promise and therefore no reliance. Id.
fact that such terms do not deal with job security. Applying a unilateral contract analysis, the dissent opined that by remaining on the job after an employee is given a handbook, all of the provisions of the handbook "are binding on both parties as conditions of employment until modified by a subsequent offer and acceptance of new conditions."  

IV. ANALYSIS: PARAMETERS OF THE EMPLOYMENT HANDBOOK AS A LIMITATION ON THE EMPLOYMENT AT WILL DOCTRINE

It is submitted that the drastic social and economic changes that have occurred within the employment relationship since the late nineteenth century warrant the limitations that have been placed upon the employment at will doctrine. The Woolley court relied on these changes to justify enforcing a contract against an employer based on terms contained in an employment handbook. The Banas court, though refusing to place liability on the employer based on a specific term in its employment handbook, also recognized the need to limit the employment at will doctrine. Moreover, the use of contract remedies, as seen in Pine River, Toussaint, and Woolley, has become especially important in light of the shortcomings of other means of limiting the employment at will doctrine such as collective bargaining, statutory remediation, and contractual terms.

162. Id. at 655-56 (Beck, J., concurring in part and dissenting in part). The dissent explained that the handbook acts as a framework in which to examine the employee's employment at will status. Id. Just as public policy may carve out exceptions to employment at will, so may the particular terms of an employment manual. Id. at 656 (Beck, J., concurring in part and dissenting in part).

163. Id. at 658 (Beck, J., concurring in part and dissenting in part). The Superior Court of Pennsylvania has very recently addressed another variation on the terms found in a handbook which an employee alleged limits the employment at will rule. Martin v. Capital Cities Media Inc., No 01064 (Pa, Super. June 12, 1986). In Martin, the employment handbook listed a number of acts such as dishonesty or fighting which provide grounds for discharge. Id. In the handbook, the employer stressed that the list of acts was not inclusive and that the employee could be fired for "any other just causes." Id. The handbook did not indicate that employees would be fired for just cause only, nor did the handbook set forth procedures for termination of employees. Id. The court held that such terms do not create a term of the employment contract limiting the employment at will doctrine. Id.

164. The greatest change affecting the employment relationship has been the decrease in the employee's bargaining power with the employer. For a discussion of the social and economic factors contributing to this change, see supra note 18 and accompanying text.

165. 99 N.J. at 290-92, 491 A.2d 1260-62. In Woolley, the Supreme Court of New Jersey stressed that the interests of employers must be balanced against those of the employees, even though this restricts the employment at will doctrine, in order to assure stability in employment relations. Id. For a further discussion of the Woolley court's interpretation of the changes in the employment relationship, see supra notes 147-49 and accompanying text.

166. 502 A.2d at 646. In Banas, the court recognized the existence of statutory exceptions to the employment at will doctrine as well as numerous cases recognizing a public policy exception. Id.
The need to limit the employment at will doctrine, however, cannot alone justify finding an enforceable contract based on representations in an employment handbook. Indeed, even though the common law employment at will doctrine developed with little justification, it is now a firmly entrenched component of our common law tradition. Accordingly, courts should not enforce changes limiting the employment at will doctrine absent proper and articulable justifications.

Initially, Wood fashioned the rule establishing the employment at will doctrine in terms of a rebuttable presumption. Many American jurisdictions treated the rule, however, as precluding enforcement of employment contracts with an indefinite term of employment. Thus, a critical question in evaluating the employment handbook as a limitation on the employment at will doctrine is to determine whether the doctrine is a substantive limitation on contract formation or merely a rule of construction. Most recent cases dealing with employment handbooks, including Pine River, Toussaint, and Woolley, have found the employment at will doctrine to be a mere rule of construction. This result is justified in light of the parties' freedom to contract.

167. For a discussion of the limitations of collective bargaining, statutory remedies, and tort remedies, see supra notes 24, 37 & 52 and accompanying text.

168. For a discussion of the criticism of Wood's rule, see supra note 12 and accompanying text.

169. Though commentators suggest that Horace Wood adopted the employment at will doctrine without supporting authority, many jurisdictions in the nineteenth century nonetheless followed the doctrine by simply citing Wood's statement of it. For a discussion of the acceptance of Wood's formulation, see supra notes 11-15 and accompanying text.

170. As one writer comments, the law of employment is "an area of law which has traditionally been characterized by a lack of clear analysis and careful reasoning." Note, supra note 10, at 394. It is submitted that courts should heed the concerns expressed by this commentator, and resist the temptation to restrict the employment at will doctrine in the absence of proper legal justification.


172. See Toussaint, 408 Mich. at 603, 292 N.W.2d at 887 (“Some courts saw the rule as requiring the employee to prove an express contract for a definite term in order to maintain an action based on termination of the employment.”).


175. Pine River, 333 N.W.2d at 628. See also Note, supra note 53, at 211-12 (employment at will doctrine as rule of construction is justified based on parties' freedom of contract).
the Minnesota Supreme Court in *Pine River* observed that "[i]f the parties choose to provide in their employment contract of indefinite duration for provisions of job security, they should be able to do so." 176

Assuming the employment at will doctrine is to be treated as a rule of construction, evidence that the parties agreed to terms regarding job security may rebut the presumption of employment at will. Therefore, having satisfied this threshold determination, a proper analysis must shift its focus to the basis for finding an agreement between the employer and employee regarding job security. As indicated above, courts recently have relied upon a unilateral contract analysis to bind the employer to job security provisions found in the employment handbook. 177

It is submitted that the promise necessary for the formation of a unilateral contract exists where the employer includes in the employment handbook either a just cause provision or a statement of termination procedures. 178 Courts holding that there is no promise contained in an employment handbook have stressed that there are no definite terms contained in the handbook specifying the duration of employment. 179 This criticism, however, assumes that the employment at will doctrine is a substantive limitation on the formation of employment contracts of indefinite duration. Yet, it is submitted that the employment at will doctrine has been properly treated by most courts, including *Toussaint*, *Pine River*, and *Woolley*, as a rule of construction. 180 This interpretation has been soundly justified based on the parties' freedom of

176. 333 N.W.2d at 628.
177. In the unilateral contract analysis, the promisor manifests his intention that he wishes performance from the promisee in exchange for his own promise. J. MURRAY, *supra* note 72, § 6, at 10-11. The contract is formed when the promisee completes performance. *Id.* § 6, at 11. For a further discussion of unilateral contract analysis and its application to the employment relationship, see *supra* notes 94-98 and accompanying text.
178. As Perritt pointed out in discussing *Pine River*, *Toussaint*, and other cases dealing with employment handbooks, "the promise element was easy to satisfy; the employer had communicated reasonably explicit assurances that employment would be terminated only for cause or only after exhaustion of certain procedures." H. PERRITT, *supra* note 15, § 4.7, at 131.
179. See, e.g., *White v. Chelsea Indus.*, 425 So. 2d 1090, 1091 (Ala. 1983) (since there is no agreement specifying definite duration of employment, relationship is one of employment at will); *Heideck v. Kent Gen. Hosp.*, Inc., 446 A.2d 1095, 1096 (Del. 1982) (where handbook does not set out definite term of employment, "at will" status is not altered); *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 7, 328 N.E.2d 775, 778 (1975) (even assuming reliance of employee may validate contract, in absence of promise that employment will continue for definite period, relationship is terminable at will). For a further discussion of this view of the legal insignificance of other representations contained in employment handbooks, where the handbook fails to specify an employment term, see *supra* note 102 and accompanying text.
180. For a discussion of the treatment of the employment at will doctrine as a rule of construction as expressed in *Toussaint*, *Pine River*, and *Woolley*, see *supra* note 174 and accompanying text.
Therefore, as Pine River indicates, the employer’s willingness to agree to employment on particular terms of unspecified duration may constitute an offer as long as the offer is definite in form.\(^{182}\) Just cause provisions and representations regarding termination procedures are adequately explicit statements made by the employer regarding job security and may be treated as offers—and enforceable promises upon acceptance by employee performance.\(^{183}\)

While just cause provisions and termination procedures provide an explicit promise by the employer regarding job security, a question raised by Banas is whether the terms in a handbook not dealing with job security directly may provide a contractual basis for limiting the employment at will doctrine. In Banas, an employee alleged breach of contract upon his termination for personal use of company property and equipment, despite the fact that a handbook given to the employee stated that employees may use company property and equipment with their supervisor’s permission.\(^{184}\) It appears unlikely that the jurisdictions not recognizing just cause provisions or termination procedures as enforceable promises will recognize handbook provisions unrelated to job security as a basis for limiting the employment at will doctrine.\(^{185}\) It is unclear, however, whether jurisdictions that regard just cause provisions and statements as to termination procedures as enforceable promises will allow non-job security provisions to create an enforceable promise. A court such as Pine River, applying a strict unilateral contract analysis, may agree with the majority in Banas that only job security provisions provide the basis for an enforceable promise limiting the employment at will doctrine.\(^{186}\) A court applying a more liberal interpretation of unilateral contract principles, such as Woolley, might agree with the dissent in Banas and find an enforceable promise based on non-job security

\(^{181}\) For a discussion of freedom of contract as a basis for interpreting the employment at will doctrine as a rule of construction, see supra note 175 and accompanying text.

\(^{182}\) 333 N.W.2d at 626.


\(^{184}\) 502 A.2d at 638. For further discussion of the facts of Banas, see supra notes 154-63 and accompanying text.

\(^{185}\) Clearly, a jurisdiction holding that handbook provisions dealing with termination procedures are not enforceable promises because they do not define a specific duration of employment will not find an enforceable promise based on a provision such as the one in Banas, dealing with the employee’s use of company materials. See Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975).

\(^{186}\) The court in Pine River stressed that “[a]n employer’s general statements of policy are no more than that and do not meet the contractual requirements of an offer.” 333 N.W.2d at 626. The court was referring to a general statement made by the employer that the employee “had a great future with the company.” Id. However, non-job security provisions may also be viewed as mere “general statements of policy” because the employer has not clearly stated that he intends the statements to limit his ability to discharge an employee.
provisions. 187

Regardless of whether a promise can be derived from statements in the handbook, the fact that an employee must establish a validating device to make the promise enforceable under a unilateral contract analysis presents a major obstacle. 188 It is submitted, however, that an employer makes an enforceable promise by including a just cause provision or statement of termination procedures in a handbook because these representations induce the employee to continue working for the employer. 189 Embracing this position, the Toussaint court reasoned that policy statements found in a handbook are contractually enforceable because “the employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with the job security and the conviction that he will be treated fairly.” 190 Similarly, the Woolley court added that an employer does not unintentionally set forth general statements of policy in employment handbooks, but rather provides an employee with benefits for the purpose of remaining competitive with, and to ensure success against, other employers. 191

187. The court in Woolley used language indicating that employees may expect to be able to exercise rights given to them in the handbook without being fired. 99 N.J. at 297-98, 491 A.2d at 1264. The court stated that “when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment . . . the judiciary . . . should construe them in accordance with the reasonable expectations of the employees.” Id.

188. For example, courts at one time required proof of consideration in addition to services rendered in order to make the promise enforceable. For a discussion of the traditional requirements of mutuality of obligation and additional consideration, see supra notes 75-81 and accompanying text.

189. The employer, by expressing its policies, knows the employee will probably be more productive and cooperative because of these policies. The employer is aware of this when developing the guidelines contained in the handbook. It is the fact that the employer knows he or she will receive this reaction from the employee that provides the validation device for the contract.

Numerous commentators have remarked on the benefits derived by employers due to representations made in employment handbooks. One commentator, for example, states that “[e]mployers do not issue employment handbooks simply out of altruistic impulses; they expect to receive some benefit. Likewise, employees do not read and comply with handbooks simply because they have warm feelings about their employer; they, too, expect to receive some benefit.” Note, supra note 53, at 219. Similarly, another commentator has observed:

The benefits [an employer receives] include improving employees' attitudes and work performance, discouraging employees from joining unions, and increasing the employer's ability to attract and retain qualified, career-conscious employees. Thus, employers, by promulgating and distributing employee manuals, may receive the advantages of lower employee turnover and reduced costs of training fewer new employees.

Comment, supra note 37, at 262 (footnote omitted).

190. 408 Mich. at 613, 292 N.W.2d at 892.

191. 99 N.J. at 299, 491 A.2d at 1265. When discussing the importance to the employer of the handbook distributed in the Woolley case, Judge Wilentz noted that “the employer wanted to keep it up to date, especially to make cer-
Under a proper analysis, then, two bases exist for a court to find a contract where an employer provides an employee with a handbook. In one scenario, an employer intends to set forth job security provisions in its handbook in exchange for a productive and cooperative work force. In this situation there is bargained for consideration as the validation device.\textsuperscript{192} In the second scenario, an employer does not actually intend to bargain for an employee's willingness to abide by its policies, but it is reasonable for an employee to rely on the promise made by the employer. Here, the concept of promissory estoppel or detrimental reliance provides the means of validating the contract.\textsuperscript{193}

Although a unilateral contract analysis does present a practical means for courts to restrict the employment at will doctrine, it is hardly a doctrinal panacea. A unilateral contract analysis will justify restricting the employment at will doctrine only so long as the analysis is strictly applied.\textsuperscript{194} In this respect, the Pine River, Toussaint, and Woolley courts did not agree on whether a unilateral contract agreement exists where an employee lacks an awareness of the terms of the handbook. The Pine River court applied a strict unilateral contract analysis, that is, it required that the terms be expressly communicated to the employee.\textsuperscript{195} However, the Toussaint court, in finding a unilateral contract, did not apply as strict an analysis. Toussaint involved an employee who received a handbook in response to his inquiry regarding job security.\textsuperscript{196} Thus, the employee clearly knew of the terms concerning termination procedures found in the employment handbook. The Toussaint court held that the company policy contained in the handbook was contractually enforceable, given this employer's good reputation in labor relations, that the benefits conferred were sufficiently competitive with those available from other employers, including benefits found in collective bargaining agreements." \textit{Id.}

\textsuperscript{192} For example, the Pine River court stated, "If parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so." 333 N.W.2d at 628. In fact, the jury in Pine River found that the bank intended the handbook to be binding. \textit{Id.} at 630 n.6.

\textsuperscript{193} For example, in Langdon v. Saga Corp., the employer denied that he intended the statements contained in the handbook to be binding. 569 P.2d 524, 526 (Okla. Ct. App. 1977). The court held that where an employee foregoes his or her right to refuse future performance in reliance or in partial reliance on the policies set forth in the handbook, an employer will be bound to those policies. \textit{Id.} at 527.

\textsuperscript{194} For a discussion of a strict unilateral contract analysis, see \textit{supra} notes 192-93 and accompanying text. The significance of strictly applying a unilateral contract analysis is that in order to validate the contract and find the employer's promise enforceable, the employee must be aware of the terms contained in the handbook. An employee cannot either "bargain for" or "rely on" the terms of the handbook without knowledge of the terms. See Note, \textit{supra} note 53, at 213 (before plaintiff can find relief in contract, he must show that he was generally aware that his employer published policies contained in handbook).

\textsuperscript{195} 333 N.W.2d at 626.

\textsuperscript{196} 408 Mich. at 598, 292 N.W.2d at 885.
ble, especially since the employer had made his policy known to the employee.197 Extending the strict analysis of the Pine River court, however, the Toussaint court in a dictum indicated that an enforceable contract could still be found where the terms of a handbook were not communicated to the employee.198

The Woolley court made the strongest and most expansive application of unilateral contract analysis to date, allowing the formation of a unilateral contract where an employee was not aware of the terms of the handbook.199 In Woolley, the court expressly noted the absence of proof that the employee either relied on the handbook in continuing his work or bargained for the employer's promise.200 The court, relying on the dictum in Toussaint, created a presumption of reliance.201 Consequently, the court held that an employee need not be aware of the terms of the handbook in order for those terms to constitute an enforceable promise between an employee and an employer.202

It is submitted that the strict adherence to unilateral contract principles in Pine River is preferable to the extension of these principles suggested in Toussaint and Woolley. Recognizing the presumption created in Woolley and discussed in the dictum in Toussaint would defeat the very justification upon which the employer's promise is enforced.

The unilateral contract is validated either through bargained for consideration or promissory estoppel. Regarding bargained for consideration, the employer intends that the distribution of its handbook containing job security provisions will create a benefit injuring to the employer in the form of a more productive work force.203 Regarding promissory estoppel, the employer, as a result of the distribution of the handbook, can reasonably expect to induce some action or forebearance

197. Id. at 614, 292 N.W.2d at 892.
198. Id. at 614-15, 292 N.W.2d at 892. The Toussaint court stressed that the employer does not have to set forth any policies in the handbook, but where it does establish policies, the employer is obligated to abide by them. Id. at 613, 292 N.W.2d at 892. Thus, the court stated, "No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally." Id. (footnote omitted).
199. 99 N.J. at 304, 491 A.2d at 1268.
200. Id. at 304-05 n.10, 491 A.2d at 1268 n.10.
201. Id. at 303-04, 491 A.2d at 1268 (quoting Toussaint, 408 Mich. at 613, 292 N.W.2d at 892). The Woolley court did not indicate whether this presumption was rebuttable. Id.
202. Id. at 304, 491 A.2d at 1268. The Woolley court reasoned that if reliance was not presumed, a strict contract analysis might unevenly protect some employees and not others. Id. at 304 n.10, 491 A.2d at 1268 n.10. The court gave as an example the situation where an employee did not know of the existence of the manual yet continued to work. Id. Such an employee's continued work would not be a bargained for detriment. Id.
203. For a discussion of the benefits received by an employer as a result of issuing a handbook, see supra note 189 and accompanying text.
on the part of the employees. This action or forebearance by the employees in most cases involves affirmative employee action—increased productivity. Where reliance or bargained for exchange is presumed, the handbook provisions will be unfairly enforced against the employer because the employee may not be aware of the handbook provisions and therefore, the employer does not receive the advantages of a more productive workforce and the employer would not reasonably expect to induce such action (or any other action or forebearance) on the part of its employees. Indeed, if the need to protect the employee who is not even aware of the handbook's terms is so great, the remedy should be provided through legislation rather than through a manipulation of unilateral contract principles.

In addition to concerns that courts will overextend the unilateral contract analysis to effect over-broad restrictions on the employment at will doctrine, the practical impact on the workplace of enforcing statements in handbooks warrants examination. As a result of decisions such as Pine River, Toussaint, and Woolley, employers may simply decide to remove from their employment handbooks any provisions pertaining to job security or to retain these provisions but include disclaimers in the handbook. As a consequence, numerous commentators maintain that an employee is in no better position than he or she was prior to the enforcement of the handbook provisions.

204. See Restatement (Second) of Contracts § 90 (1981).
205. The Woolley court argues that reliance must be presumed because it would be unfair for some employees to have the benefit of a handbook while others do not. 99 N.J. at 304 n.10, 491 A.2d at 1268 n.10. However, it is submitted that the employer should only have to keep his promise regarding job security provisions where he receives the benefit of a more productive worker. In this regard, it is fair that some workers receive benefits under the handbook while others do not.
206. For a discussion of proposed legislation that would require all employers to fire only upon a showing of just cause, see supra note 37 and accompanying text.
207. For a discussion of the employer's ability to delete job security provisions from the employment handbook, see supra note 108 and accompanying text.
208. For a discussion of the employer's ability to include disclaimers in order to avoid contractual liability for job security provisions, see supra notes 109-10 and accompanying text.
209. One commentator has noted that the ultimate result of enforcing handbook provisions may be a mixed blessing for at will employees. Note, supra note 173, at 242. Employees working for employers who maintain job security provisions will find protection. Id. However, the long-term effect of enforcing these provisions may be to decrease protection of employees at will because
Two points merit attention with respect to the effect of enforcing handbook provisions on the protection of at will employees. First, there may be employers who will accept contractual liability in return for the benefits received from the employees. Under this scenario, the recent developments simply clarify the rights of the parties. Second, the purpose of imposing contractual liability is not to create new rights for the employee, but merely to ensure fairness in the employment relationship. It is better that no job security provisions are announced than to have an employee read guarantees of job security and rely on them, only to learn that they are not enforceable.

Despite criticism that enforcement of handbook provisions will adversely affect the status of the employee at will, the employment relationship will inevitably be enhanced in several ways. As a result of Pine River, Toussaint, Woolley, and Banas, employers will re-examine the policies and goals set forth in their employment handbooks. Also, by making the provisions of the handbook contractually enforceable, the courts have injected certainty and predictability into the employment relationship. This in turn will result in a greater degree of understanding between an employer and employee regarding the employment relationship and therefore diminish the amount of litigation arising from the discharge of an employee.

Courts have consistently held that where there are no policies, there can be no reliance. As one commentator states, "An employer may determine that discharge for cause is a good personnel policy not only because it may be required by the contract or personnel policies but also because of the beneficial psychological impact it would have on the workforce." Connolly, Murg & Scharman, Abrogating the Employment-at-Will Doctrine: Implications for an Employer's Personnel Policies and Handbooks, 2 Preventive L. Rep. 53, 57 (1983). For a discussion of the various benefits received by an employer providing employees with assurances of job security in an employment handbook, see supra note 189 and accompanying text.

For a discussion of the harshness of the employment at will doctrine and the changes in the employment relationship that have given the employer an unfair bargaining advantage, see supra note 18 and accompanying text.

The Toussaint court emphasized:
An employer who establishes no personnel policies instills no reasonable expectations of performance . . . [However, if] there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. 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.

408 Mich. at 619, 292 N.W.2d at 894-95.

The employer knows that the inclusion of job security provisions leads to a contractual obligation to follow them. The employee in reading these provisions and relying on them may feel more secure about his job.

For a discussion of the effect of the handbook in diminishing litigation between employers and employees, see Comment, supra note 37, at 264.
IV. Conclusion

The background of the industrial revolution and laissez-faire economics, under which the employment at will doctrine developed, no longer exists. Accordingly, in the contemporary economic and industrial climate, an employee's lack of bargaining power has become an important factor in evaluating the employment relationship. As a result, several limitations on the employment at will doctrine have developed.

One of the most recent trends in limiting the employment at will doctrine is the finding of an express or implied in fact contract from the provisions regarding job security that an employer sets forth in its employment handbook. To effect this limitation, courts have properly resorted to a unilateral contract analysis. In this analysis, the terms in the handbook, whether a just cause provision or an explanation of termination procedures, constitute a promise. Further, this promise is made enforceable where an employee continues working with an awareness of the terms contained in the employment handbook. The validation device making the agreement enforceable, either bargained for consideration or promissory estoppel, is based on the benefit of a productive workforce that the employer receives as a result of the issuance of the handbook.

Although the unilateral contract analysis typically applied in employment handbook cases is fundamentally sound, recent decisions have differed on the extent to which a strict unilateral contract analysis should be followed. In this regard, this note concludes that neither detrimental reliance nor bargained for consideration should be presumed. To maintain clarity and fairness under the unilateral contract analysis, it is submitted that the court should make knowledge of the terms of the handbook a predicate to the formation of a contract. By so doing, the outcome resulting from the application of unilateral contract principles will accord with the proffered justification for enforcing a unilateral contract in this context—that the employer benefits from a more productive workforce. Finally, a unilateral contract analysis achieves the laudatory result of providing certainty in the employment relationship, while preventing an employer from making illusory promises.

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