UNILATERAL MODIFICATION OF EMPLOYEE HANDBOOKS: A CONTRACTUAL ANALYSIS

I. INTRODUCTION

Sharon Pierson graduated from a prestigious law school in May of 1990. Unable to find other employment, Sharon took a position with the local branch of LawTemps in January of 1991. When LawTemps hired Sharon, it gave her an employee handbook. The employee handbook contained statements that LawTemps could discharge its employees only for just cause. These provisions were sufficiently definite to constitute an offer for a just cause employment contract. Sharon was aware of these handbook provisions and thereafter commenced her employment with LawTemps. Under the law of that jurisdiction, the handbook provisions formed a unilateral contract requiring LawTemps to have just cause to discharge Sharon. After Sharon worked with LawTemps for approximately a year, LawTemps issued a new employee handbook to all of its employees, including Sharon. The second handbook eliminated all just cause assurances contained in the previous handbook. The new employee handbook also contained a conspicuous at-will disclaimer, sufficient to negate whatever contractual effect that handbook may have had. Sharon had notice of the changes in the new handbook and continued to work for LawTemps. Several months later, LawTemps terminated Sharon without cause. Thereafter, Sharon brought an action for breach of contract, asserting that under the terms of her employment contract she could only be terminated for cause. At the trial level, the court granted a motion for summary judgment filed by LawTemps on the ground that the second handbook issued by the company had modified the employment contract formed by the first handbook, thus making Sharon an employee at-will and foreclosing her action for breach of contract. On appeal, the appellate court overturned the trial court's holding and ordered that summary judgment be entered on behalf of the plaintiff, ruling that LawTemps had not properly modified the employment contract formed by the employee handbook issued to Sharon at the inception of her employment; therefore, at the

time of Sharon's termination, that contract's just cause provisions were still in effect and she could only be terminated for cause.

This hypothetical scenario, or something similar to it, has occurred and is occurring throughout the United States and it is likely to occur more frequently as more and more employers attempt to exculpate themselves from potential wrongful discharge liability. Specifically, such employers are issuing new or revised employee handbooks in an effort to modify existing employee handbooks that, due to the specific provisions which they contain, either create or present a risk of creating enforceable just cause employment contracts with their employees. Employers are attempting to reestablish the at-will employment relationship which they once shared with their employees. No one denies that an employer has the right to subsequently issue a new or revised employee handbook; however, when an employer does so, the issue then becomes, what effect, if any, do these subsequent handbooks have on existing just cause employment relationships which were formed under the previous handbook? The trial court and the appellate court presented in the scenario above may be considered to be representative of the two primary positions held among the jurisdictions today concerning an employer's ability to unilaterally modify a just cause employment contract. The courts are not in agreement over this issue. The interesting point to this incongruity is that both courts assert that their position is firmly supported by basic concepts of contract law. That courts reach differing conclusions when applying basic principles of contract law demands examination.

This article examines whether an employer can unilaterally modify, and thus negate any contractual effect of, an employee handbook which confers contractual rights to the employees to whom it has been issued by subsequently issuing a modified version of the original.[1] After a discussion of the emergence of the employment at-will doctrine and its surrounding exceptions, this article surveys the contract analysis applied by those jurisdictions that hold that an employee handbook may create a unilateral contract and those decisions which discuss an employer's ability to unilaterally modify such contracts. This comment

1. This comment will not discuss the validity of those decisions that have held that an employee manual may form a unilateral contract. For a discussion of the issue, *see* Kelly McWilliams, Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335 (1986); Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assesment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1 (1984).

then analyzes, in light of traditional principles of contract formation and modification, the body of law that allows employers to unilaterally modify employee handbooks. Finally, this comment argues that those courts that allow an employer to unilaterally modify an employment contract formed by an employee handbook do so improperly, misapplying basic contract principles. It then entreats all courts that hold that an employee handbook may indeed form a contract to properly treat it as such and repudiate the ability of employers to unilaterally modify the terms of their employee handbooks.

II. THE AT-WILL DOCTRINE

A. History of the Rule

The doctrine of employment at-will applies to hirings that are for an indefinite period of time.[2] Prior to the introduction of the doctrine of employment at-will many American courts followed the common law or "English Rule" with respect to hirings for a term of indefinite duration.[3] At common law, the English Rule presumed that a hiring for an indefinite time period was a hiring for one year.[4] Other American courts presumed that a hiring for a particular sum per pay period was a hiring for the duration of the pay period specified.[5] Still others engaged in no presumptions at all.[6] The doctrine of employment at-will departed from these rules and presumed that hiring for an indefinite period was terminable at the will of either the employer or employee.[7]

The first articulation of the doctrine of employment at-will is generally credited to Horace G. Wood,[8] who in 1877 published a treatise on master and servant law.[9] The oft quoted passage from that text states:

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2. *E.g.*, McWilliams, *supra* note 1, at 335.

3. Daniel A. Matthews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1439 n.20 (1975).

4. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *425. Blackstone stated: "If hiring be general without any particular time limited, the law construes it to be a hiring for a year...." (footnote omitted).

5. *E.g.*, McWilliams, *supra* note 1, at 338, n.10.

6. *Id.* The duration of the employment was a question for the jury.

7. *See* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 at 272 (William S. Hein & Co., Inc. 1981) (1877).

8. *See* Michael J. Phillips, *Disclaimers of Wrongful Discharge Liability: Time for a Crackdown?*, 70 WASH. U. L.Q. 1131, 1133 (1992).

9. WOOD, *supra* note 7.

> 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. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.[10]

This statement, known as "Wood's Rule," came to stand for the proposition that an employee hired for an indefinite period serves at the will of his master, or employer, and may be terminated "for good cause, for no cause, or even for cause morally wrong, without [the employer] thereby being guilty of legal wrong."[11] Similarly, an employee hired for an indefinite period is free to terminate the relationship with his employer at his will without incurring liability.[12]

After the introduction of the at-will doctrine, the courts eventually abandoned the English Rule and other presumptions with respect to hirings for an indefinite period.[13] The doctrine of employment at-will, as stated by Wood, came to be universally adopted throughout the United States, and accordingly, it became known as the "American Rule."[14]

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10. *Id.* §134 at 272 (footnotes omitted).

11. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

12. *E.g.*, WOOD, *supra* note 9, §134 at 272.

13. *See, e.g.*, Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976).

14. *Id.* Some of the earliest cases which adopted the at-will doctrine are: Martin v. New York Life Ins. Co., 42 N.E. 416 (1895); Payne v. Western & Allegheny R.R. Co., 81 Tenn. 507 (1884), *overruled on other grounds by* Hutton v. Waters, 179 S.W. 134 (1915); Arlington Mills Mfg. Co., 43 A. 609 (Super Ct. 1899); East Line & R.R. Co. v. Scott, 10 S.W. 99 (1888).

Commentators have suggested several reasons why the at-will doctrine was so readily accepted. Many opine that the rule's emergence during the Industrial Revolution, when laissez faire economic theory was near its height, was instrumental to its ready acceptance. *See*, e.g., Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 131-35 (1976) (doctrine enhances freedom of enterprise, consistent with concept of capitalism); Susan F. Marrinan, *Employment At-Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155, 158 (1984) (consistent with concept of liberal freedom of contract).

B. *Exceptions to the At-Will Doctrine*

For the greater part of this century, the American Rule, or doctrine of at-will employment, was applied without great challenge in the courts.[15] The doctrine grew and advanced in form, evolving in some jurisdictions from a rebuttable presumption that hirings for an indefinite period were terminable at-will to an absolute presumption that all such hirings were at-will.[16] During the last few decades, however, the doctrine has been under attack from scholars, legislatures and the courts alike[17] because of the perception that it is inequitable and unduly harsh on employees.[18] In an effort to abrogate this inequity, the courts have adopted a common law action for wrongful discharge in certain cases.[19] The courts have recognized four primary common law theories that have significantly limited the scope of the at-will doctrine:[20] (1) public policy considerations; (2) the implied covenant of good faith and fair dealing; (3) contract limitations based on the employers oral assurances; and (4) contract limitations based on employee handbooks.[21] A cursory overview of the first three exceptions follows, with a more detailed survey of the employee handbook exception after that. The general axiom that an at-will employee may be discharged "for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of legal wrong,"[22] is no longer a viable postulation in almost every jurisdiction.[23]

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15. *See, e.g.*, Phillips, *supra* note 8, at 1135.

16. *See, e.g.*, George S. Cabot, 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, 377 (1981) (courts typically did not inquire into circumstances surrounding a hiring for an indefinite period to determine if the presumption of at-will employment might be rebutted).

17. *See, e.g.*, Phillips, *supra* note 8, at 1134-35.

18. *See generally* Blades, *Employment At-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (describes the inequities present in the modern application of the at-will doctrine).

19. *See* Phillips, *supra* note 8, at 1134-35; Kurt H. Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. URB. L. 351, 353 (1984); Claude D. Rohwer, *Terminable At-Will Employment: New Theories for Job Security*, 15 PAC. L.J. 759 (1984).

20. *See, e.g.*, LIONEL J. POSTIC, STATE BY STATE SURVEY OF WRONGFUL DISCHARGE (1994).

21. *Id.*

22. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

23. *See, e.g.*, POSTIC, *supra* note 20.

1. Public Policy

Several jurisdictions have recognized the public policy exception to the at-will doctrine. The public policy exception precludes an employer from terminating any employee for a reason that violates public policy.[24] The vast majority of jurisdictions recognize the public policy exception to the at-will doctrine.[25]

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24. *E.g.*, Mello v. Stop & Shop Cos., 524 N.E.2d 105, 106-07 (1988).

25. Alaska, Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1226 (Alaska 1992); Arizona, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1033 (Ariz. 1985); Arkansas, Sterling Drug v. Oxford, 743 S.W.2d. 380 (Ark. 1988); California, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 9 A.L.R.4th 314 (Cal. 1980); Colorado, Cronk v. Intermountain Rural Elec. Ass'n., 765 P.2d 619 (Colo. Ct. App. 1988); Connecticut, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Delaware, Heller v. Dover Warehouse Mkt., Inc., 515 A.2d 178 (Del. Super. Ct. 1986); District of Columbia, Adams v. George W. Cochran & Co., 597 A.2d 28, 33-34 (D.C. 1991); Hawaii, Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982); Idaho, Ray v. Nampa Sch. Dist. No. 131, 814 P.2d 17, 22 (Idaho 1991); Illinois, Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981); Indiana, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Iowa, Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988); Kansas, Murphy v. City of Topeka—Shawnee County Dep't of Labor Servs., 630 P.2d 186 (Kan. Ct. App. 1981); Kentucky, Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730, 733 (Ky. 1983); Maine, Pooler v. Maine Coal Prods., 532 A.2d 1026, 1027-28 (Me. 1987) (lower courts allowing an action for termination in violation of public policy to go to the jury) *but see* Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Me. 1991) (The Maine Supreme Court has not recognized the public policy exception.); Maryland, Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981); Massachusetts, DeRose v. Putnam Management Co., 496 N.E.2d 428, 431-32, (Mass. 1986); Michigan, Sventko v. Kroger Co., 245 N.W.2d 151, 153-54 (Mich. Ct. App. 1976); Minnesota, Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d, 588, 592 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); Mississippi, McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603 (Miss. 1993); Missouri, Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985); Montana, MONT. CODE ANN. § 39-2-904 (1992) (Montana has enacted a comprehensive wrongful discharge statute); *see also* Keneally v. Orgain, 606 P.2d 127, (Mont. 1980) (decided prior to enactment of the Wrongful Discharge from Employment Act); Nevada, Hansen v. Harrah's, 675 P.2d 394, 397 (Nev. 1984); New Hampshire, Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981); New Jersey, Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980); New Mexico, Vigil v. Arzola, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd on other grounds*, 687 P.2d 1038 (N.M. 1984), *modified in*, Chavez v. Manville Prods. Corp., 777 P.2d 371, 378 (N.M. 1989); New York, Wieder v. Skala, 609 N.E.2d 105, (N.Y. 1992); North Carolina, Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 447 (N.C. 1989); North Dakota, Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794-95 (N.D. 1987); Ohio, Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981, 986-87 (Ohio 1990); Oklahoma, Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989); Oregon, Nees v. Hocks, 536 P.2d 512, 515-16 (Or. 1975); Pennsylvania, Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974); South Carolina, Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985); South Dakota, Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227 (S.D. 1988); Tennessee, Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 445 (Tenn. 1984); Texas, Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); Utah, Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1042 (Utah 1989); Vermont, Payne v. Rozendaal, 520 A.2d 586, 588 (Vt. 1986); Virginia, Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (Va. 1985); Washington,

There are two positions as to exactly what sources embody the public policy of a jurisdiction.[26] Most of the jurisdictions define the exception fairly narrowly.[27] These courts generally state that the public policy of the jurisdiction is embodied in its constitutional or statutory provisions alone.[28] A few states apply the exception more broadly and are willing to look to common law when identifying what constitutes the public policy of that state.[29] Whatever sources the courts are willing to draw upon to determine the public policy of their respective states, however, most seem to be in agreement that the termination in question must have violated a clearly mandated public policy to be actionable.[30] The courts generally refuse to recognize the existence of public policy in broad statutory or general constitutional provisions.[31] Additionally, the courts seem to be in agreement that the determination of public policy is a question of law to be decided by the court.[32]

Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); West Virginia, Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270, 275-76 (W.Va. 1978); Wisconsin, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983); Wyoming, Griess v. Consolidated Freightways Corp. of Del., 776 P.2d 752, 753 (Wyo. 1989). All totaled, 44 states and the District of Columbia have recognized a common law exception to the at-will doctrine for terminations which were in violation of public policy.

The following six states have refused to recognize the public policy exception: Alabama, Meeks v. Opp Cotton Mills, 459 So.2d 814, 815 (Ala. 1984); Florida, Bryant v. Shands Teaching Hosp. & Clinics, 479 So.2d 165, 167-68 (Fla. Dist. Ct. App. 1985); Georgia, Evans v. Bibb Co., 342 S.E.2d 484, 485-86 (Ga. Ct. App. 1986); Louisiana, Franz v. Iolab, Inc., 801 F. Supp. 1537, 1544 (E.D. La. 1992); Nebraska, Blair v. Physicians Mut. Ins. Co., 496 N.W.2d 483, 487 (Neb. 1993); Rhode Island, Pacheo v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993). Although these states do not recognize a common law action for wrongful discharge in violation of public policy, all of them do statutorily provide some protection for at-will employees.

26. *E.g.*, Phillips, *supra* note 8, at 1135-36.

27. *See* Lopatka, *supra* note 1, at 14.

28. *E.g.*, Washington v. Union Carbide Corp., 870 F.2d 957 (4th Cir. 1989) (applying West Virginia law); Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992); Russ v. Pension Consultants Co., Inc., 538 N.E.2d 693 (Ill. Ct. App. 1989); Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985); Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981); Trought v. Richardson, 338 S.E.2d 617 (N.C. Ct. App. 1987); Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989); Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985).

29. *E.g.*, Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989); Payne v. Rozendaal, 520 A.2d 586 (Vt. 1986).

30. *E.g.*, Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 107 (Colo. 1992); Glaz v. Ralston Purina Co., 509 N.E.2d 297, 300 (Mass. App. Ct. 1987); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984).

31. *E.g.*, Nina G. Stillman, *Wrongful Discharge: Contract. Public Policy, and Tort Claims*, 416 P.L.I. 827, 831 (Sept.-Oct. 1991).

32. *E.g.*, Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985); Wright v. Shriners Hosp. for Crippled Children, 589 N.E.2d 1241, 1244 (Mass. 1992); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981); Pearson v. Hope Lumber & Supply Co., Inc., 820 P.2d 443, 444 (Okla. 1991); Dicomes v. State, 782 P.2d 1002 (Wash. 1989).

Terminations that violate public policy can generally be classified into one of the three following categories: (1) the employee is terminated for refusing to engage in an illegal activity;[33] (2) the employee is terminated for reporting an illegal act;[34] and (3) the employee is terminated for exercising a legally protected right.[35] An employee terminated in violation of public policy may be entitled to recover punitive as well as compensatory damages because such an action is recognized as a tort action in many jurisdictions.[36]

2. Implied Covenant of Good Faith and Fair Dealing

Section 205 of the Restatement (Second) of Contracts imposes a duty upon each party to a contract to act in good faith and

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33. *E.g.*, Sarratore v. Longview Van Corp., 666 F. Supp. 1257, 1259 (N.D. Ind. 1987) (applying Indiana law) (employee refused to turn back odometers in violation of federal law); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (employee refused to violate a price-fixing statute); DeRose v. Putnam Management Co., 496 N.E.2d 428 (Mass. 1986) (refused to falsely testify against a co-employee in a criminal trial).

34. *E.g.*, Palmer v. Brown, 752 P.2d 685 (Kan. 1988) (reported Medicaid fraud); Schriner v. Meginnis Ford Co., 421 N.W.2d 755 (Neb. 1988) (employee reported illegal activities of employer); Potter v. Village Bank of New Jersey, 543 A.2d 80 (N.J. Super. Ct. App. Div. 1988) (reported suspicion of employer laundering money); McCool v. Hillhaven Corp., 777 P.2d 1013 (Or. Ct. App. 1989) (reported violations of regulations for patient care). When an employee is terminated for reporting an illegal activity of his or her employer, it is commonly said that the employee was terminated for engaging in "whistleblowing activity." *E.g.*, Wagner v. City of Globe, 722 P.2d 250, 257 (Ariz. 1986).

35. *E.g.*, Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983) (applying Massachusetts law) (engaging in union activities); Meyer v. Byron Jackson Inc., 174 Cal. Rptr. 428 (Cal. Ct. App. 1981); Brown v. Transcon Lines, 588 P.2d 1087 (Or. 1978) (filing a workers' compensation claim); Nees v. Hocks, 536 P.2d 512 (Or. 1975); Reuther v. Fowler & Williams Inc., 386 A.2d 119 (Pa. Super. Ct. 1978) (serving on a jury); Griess v. Consolidated Freightways, 776 P.2d 752 (Wyo. 1989).

36. *E.g.*, Wagner v. City of Globe, 722 P.2d 250, 256 (Ariz. 1986); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336-37 (Cal. 1980); Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 899 (Tenn. 1992). The above cited cases recognize a wrongful discharge action for termination in violation of public policy as an action in tort. *But c.f.* Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 534 (D.C. Cir. 1981); Watassek v. Michigan Dep't of Mental Health, 372 N.W.2d 617, 621 (Mich. Ct. App. 1985) (claim is in contract); Burk v. K-Mart Corp., 770 P.2d 24, 28 n.10 (Okla. 1989); McClung v. Marion County Comm'n, 360 S.E.2d 221, 229 (W. Va. 1987) (employee can recover punitive damages if the employer's conduct was wanton, willful or malicious); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (a contract action). The above cited cases allow for punitive damages, under the appropriate circumstances, for a termination in violation of public policy. *But see* Mursch v. Van Dorn Co., 627 F. Supp. 1310, 1316-17 (W.D. Wis. 1986) (applying Wisconsin law) (punitive damages not available in this recognized a contract action); Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1112 (Mass. 1991) (punitive damages are not available).

exercise fair dealing in fulfilling its obligations under the contract.[37] This duty is commonly known as the implied covenant of good faith and fair dealing,[38] and is a duty implied by law.[39] The covenant of good faith and fair dealing is primarily recognized in insurance contracts[40] and contracts for the sale of goods.[41] A limited number of courts, however, have applied the covenant in the employment context as well, restricting an employer's ability to discharge an at-will employee without incurring liability, and thereby creating an exception to the at-will doctrine.[42]

The courts that apply the covenant to the at-will doctrine fail to agree on how it should be applied.[43] A breach of the implied covenant of good faith and fair dealing, depending on the jurisdiction, is recognized as either a contract or tort action.[44]

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37. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). Additionally, comment (a) to RESTATEMENT (SECOND) OF CONTRACTS § 205 states: "Good faith" means, "performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith'..."

38. *See e.g.*, Phillips, *supra* note 8, at 1136.

39. *Id.*; 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670, at 159 (3d ed. 1957).

40. *E.g.*, Hoyt v. Factory Mut. Liab. Ins. Co., 179 A. 842 (Conn. 1935).

41. *See* U.C.C. § 1-203 (1990).

42. Alaska, Mitford v. DeLasala, 666 P.2d 1000 (Alaska 1983); Arizona, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); California, Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Connecticut, Magnan v. Anaconda Indus., Inc., 479 A.2d 781, 782, 789 (Conn. 1984) (although stating that Connecticut implies the covenant of good faith and fair dealing in at-will employment contracts, the court did not make clear if it recognized a new exception to the at-will doctrine or if it was merely recognizing the implied covenant as part of existing tort law) (*See* Lopatka, *supra* note 1, at 24-25.); Delaware, Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. 1992) (again, it is not clear if Delaware is recognizing a new exception to the at-will doctrine or merely reclassifying the torts of fraud, misrepresentation or deceit as a breach of the implied covenant when they arise in the employment context); Idaho, Metcalf v. Intermountain Gas Co., 778 P.2d 744, 749-50 (Idaho 1989); Massachusetts, Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Montana, Kittelson v. Archie Cochrane Motors, Inc., 813 P.2d 424, 427 (Mont. 1991) (Montana recognizes an action for breach of the impled covenant of good faith and fair dealing with respect to any termination occurring previous to its Wrongful Discharge from Employment Act); Nevada, K-Mart Corp. v. Ponsock, 732 P.2d 1364, 1372 (Nev. 1987); New Hampshire, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1976); *but see* Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981) (The court has interpreted its *Monge* decision to be an acceptance of the public policy exception to the at-will doctrine; no New Hampshire court has since recognized such an action for breach of the implied covenant of good faith and fair dealing); Utah, Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1046 (Utah 1989).

43. *E.g.*, Phillips, *supra* note 8, at 1137.

44. *E.g.*, Metcalf v. Intermountain Gas Co., 778 P.2d 744, 749-50 (Idaho 1989) (contract); K-Mart Corp. v. Ponsock, 732 P.2d 1364, 1372 (Nev. 1987) (tort).

There is much less similarity among the jurisdictions that recognize the implied covenant of good faith and fair dealing as an exception to the at-will doctrine than there is between the jurisdictions that recognize the public policy exception to the doctrine. In some jurisdictions, the implied covenant is applied very narrowly. In these jurisdictions, it only precludes an employer from discharging an at-will employee when the employer has engaged in an effort to deprive the employee of future compensation previously earned.[45] In other jurisdictions, the covenant is applied much more broadly.[46] In one such jurisdiction, the court will consider numerous factors, such as the employee's length of service with the employer and whether the employee was given a reason for his or her termination in an effort to determine if the employee had a reasonable expectation to be discharged only for good cause.[47] If sufficient factors exist, and the jury determines the employee was justified in such an expectation, the employer will be held to have derogated the implied covenant of good faith and fair dealing and to be liable for wrongfully discharging its employee.[48]

Despite the dissimilarities in the manner in which the implied covenant is applied, there are a few general statements concerning the exception which can be made. First, the exception is much less popular than the other exceptions to the at-will doctrine. Far more jurisdictions have rejected the exception than have accepted it because it is seen as an unworkable exception which would unduly burden the courts.[49] Second, among those

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45. *E.g.*, Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21, 26-29 (Mass. 1981) (the implied covenant of good faith and fair dealing does not require an employer to have good cause to discharge an employee, but rather it precludes the employer from terminating the employee in an effort to deprive him of future income for past services).

46. *E.g.*, Lopatka, *supra* note 1, at 24-25.

47. Foley v. Interactive Data Corp., 765 P.2d 373, (Cal. 1988).

48. *Id.*

49. *See supra* note 42 (citing ten jurisdictions which have accepted the implied covenant of good faith and fair dealing) and compare with over thirty jurisdictions which have refused to recognize the exception; Alabama, Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 737 (Ala. 1987); Arkansas, Mansfield v. American Tel. & Tel. Corp., 747 F. Supp. 1329, 1332-33, (W.D. Ark. 1990); Colorado, Farmer v. Central Bancorporation, Inc., 761 P.2d 220, 221-22 (Colo. Ct. App. 1988), *cert. denied*, Sept. 6, 1988; Florida, Kelly v. Gill, 544 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1989); Georgia, Gunn v. Hawaiian Airlines, 291 S.E.2d 779, 780 (Ga. Ct. App. 1982); Hawaii, Parnar v. Americana Hotels, Inc., 652 P.2d 625, 629 (Haw. 1982) ("[T]o imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the

jurisdictions that have recognized the exception, many are retreating from earlier decisions where the exception was enumerated very broadly and are narrowing the exception.[50] The implied covenant of good faith and fair dealing remains a viable limitation on the at-will doctrine in several jurisdictions, but it is doubtful it will ever enjoy widespread acceptance.

3. Oral Assurances

The vast majority of jurisdictions hold that oral assurances of job security communicated by an employer to an at-will employee may limit that employer's ability to terminate that em-

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courts."); Illinois, Spann v. Springfield Clinic, 577 N.E.2d 488, 492 (Ill. Ct. App. 1991); Indiana, Mehling v. Dubois County Farm Bureau Coop. Ass'n, Inc., 601 N.E.2d 5, 8-9 (Ind. Ct. App. 1992); Iowa, Porter v. Pioneer Hi-Bred Int'l, Inc., 497 N.W.2d 870, 871 (Iowa 1993); Kansas, Greenlee v. Board of County Comm'nrs of Clay County, 740 P.2d 606, 610 (Kan. 1987); Kentucky, Wyant v. SCM Corp., 692 S.W.2d 814, 816 (Ky. Ct. App. 1985); Louisiana, Frichter v. Nat'l Life & Accident Ins. Co., 620 F. Supp. 922, 927 (E.D. La. 1985); Maine, Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Me. 1991); Maryland, Suburban Hosp. v. Dwiggins, 596 A.2d 1069, 1076-77 (Md. 1991); Michigan, Cockels v. Int'l. Business Expositions, Inc., 406 N.W.2d 465, 468 (Mich. Ct. App. 1987); Minnesota, Spanier v. TCF, 495 N.W.2d 18, 21 (Minn. Ct. App. 1993); Missouri, Kempe v. Prince Gardner, Inc., 569 F. Supp. 779, 781-82 (E.D. Mo. 1983); Nebraska, Renner v. Wurdeman, 434 N.W.2d 536, 541 (Neb. 1989); New Jersey, Citizens State Bank of N.J. v. Libertelli, 521 A.2d 867, 869 (N.J. Super. Ct. App. Div. 1987); New Mexico, Sanchez v. The New Mexican, 738 P.2d 1321, 1324 (N.M. 1987); New York, Gallagher v. Lambert, 549 N.E.2d 136, 137-38, (N.Y. 1989); North Carolina, Morrocco v. Goodwill Indus. of Northwest N.C., Inc., 1993 WL 268625, (M.D.N.C. 1993) *but see* Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 447-48 (N.C. 1989) (The court seemed to indicate a willingness to imply the covenant.); North Dakota, Hillesland v. Federal Land Bank, 407 N.W.2d 206, 215 (N.D. 1987); Ohio, Sheets v. Rockwell Int'l Corp., 588 N.E.2d 271, 275 (Ohio Ct. App. 1990); Oklahoma, Blanton v. Housing Auth. of Norman, 794 P.2d 412, 417 (Okla. 1990); Oregon, Sheets v. Knight, 779 P.2d 1000, 1008 (Or. 1989); Pennsylvania, Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221, 225 (3d Cir. 1984); South Carolina, Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1364 (D.S.C.1985); South Dakota, Peterson v. Glory House of Sioux Falls, 443 N.W.2d 653, 655 (S.D. 1989); Tennessee, Randolph v. Dominion Bank of Middle Tenn., 826 S.W.2d 477, 479-80 (Tenn. Ct. App. 1991); Texas, Doe v. Smith Kline Beecham Corp., 855 S.W.2d 248, 260 (Tex. Ct. App. 1993); Virginia, Sneed v. American Bank Stationary Co., 764 F. Supp. 65, 67 (W.D. Va. 1991); Washington, Willis v. Champlain Cable Corp., 748 P.2d 621, 624-25 (Wash. 1988); Wisconsin, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983); Wyoming, Hatfield v. Rochelle Coal Co., 813 P.2d 1308, 1309 (Wyo. 1991).

50. *See* Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1143 (N.H. 1981) (The New Hampshire Supreme Court has interpreted its *Monge* decision, in which it recognized and defined the implied covenant of good faith and fair dealing very broadly, to merely have been an acceptance of the public policy exception; no New Hampshire court has since recognized such an action for breach of the implied covenant of good faith and fair dealing.); *see also* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (The California Supreme Court narrowed an action for breach of the implied covenant of good faith and fair dealing and redefined the action from one in tort to one in contract.).

ployee.[51] The "oral assurances" exception is based on contract[52]

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51. The following jurisdictions have recognized that oral assurances may form a just cause employment contract: Alaska, Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983); Arizona, Gesina v. General Elec. Co., 780 P.2d 1376, 1378 (Ariz. Ct. App. 1989); Arkansas, Harris v. Arkansas Book Co., 700 S.W.2d 41 (Ark. 1985); California, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981); Colorado, Cronk v. Intermountain Rural Elec. Ass'n, 765 P.2d 619 (Colo. Ct. App. 1988); Connecticut, D'Ulisse-Cupo v. Board of Directors of Notre Dame High Sch., 503 A.2d 1192, 1196 (Conn. Ct. App. 1986); Delaware, Heideck v. Kent Gen. Hosp., 446 A.2d 1095, 1096-97 (Del. 1982); District of Columbia, Hodge v. Evans Financial Corp., 823 F.2d 559 (D.C. Cir. 1987); Georgia, Barker v. CTC Sales Corp., 406 S.E.2d 88, 90 (Ga. Ct. App. 1991); Hawaii, Morishige v. Spencecliff Corp., 720 F. Supp. 829, 835-36 (D. Haw. 1989) (oral assurances may form promissory estoppel claim); Idaho, Sorenson v. Comm Tek, Inc., 799 P.2d 70, 72-73 (Idaho 1990); Illinois, Koch v. Illinois Power Co., 529 N.E.2d 281, 284-85 (Ill. Ct. App. 1988); Indiana, Mehling v. Dubois County Farm Bureau Coop. Ass'n, Inc., 601 N.E.2d 5, 8 (Ind. Ct. App. 1992); Iowa, Grahek v. Voluntary Hosp. Corp. Ass'n. of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991); Kansas, Allegri v. Providence-St. Margaret Health Ctr., 684 P.2d 1031, 1035-36 (Kan. Ct. App. 1984) (The court expressed that oral assurances could form contract, but no reported case has solely considered this issue.); Kentucky, Hammond v. Heritage Communications, Inc., 756 S.W.2d 152, 154-55 (Ky. Ct. App. 1988); Louisiana, Brodhead v. Board of Trustees for State Colleges & Univs., 588 So. 2d 748, 752 (La. Ct. App. 1991); Maine, Wyman v. Osteopathic Hosp. of Me., Inc., 493 A.2d 330, 334 (Me. 1985); Maryland, Yost v. Early, 589 A.2d 1291 (Md. Ct. App. 1991); Massachusetts, Boothby v. Texon, Inc., 608 N.E.2d 1028, 1035-36, (Mass. 1993); Michigan, Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 884 (Mich. 1980); Minnesotta, Aberman v. Malden Mills Indus., Inc., 414 N.W.2d 769, 771 (Minn. Ct. App. 1987); Mississippi, Bowers Window & Door Co. v. Dearman, 549 So. 2d 1309, 1313 (Miss. 1989); Missouri, Anselmo v. Manufacturers Life Ins. Co., 595 F. Supp. 541, 546 (W.D. Mo. 1984) (very narrow exception); Montana, Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-904 (1992) (alleviating need for oral assurance exception); Nebraska, Ambroz v. Cornhusker Square Ltd., 416 N.W.2d 510, 515 (Neb. 1987); Nevada, American Bank Stationery v. Farmer, 799 P.2d 1100, 1102 (Nev. 1990); New Jersey, Gilbert v. Durand Glass Mfg. Co., 609 A.2d 517, 521-22 (N.J. Super. App. Div. 1992); New Mexico, Kestenbaum v. Pennzoil Co., 766 P.2d 280, 284, (N.M. 1988), *cert. denied*, 490 U.S. 1109 (1989); New York, O'Keefe v. Niagra Mohawk Power Corp., 714 F. Supp. 622, 631-32 (N.D.N.Y. 1989); North Carolina, Rosby v. General Baptist State Convention of N.C., Inc., 370 S.E.2d 605, 607-08 (N.C. Ct. App. 1988), *rev. denied*, 374 S.E.2d 590 (N.C. 1988); Ohio, Bellios v. Victor Balata Belting Co., 724 F. Supp. 514, 517-18 (S.D. Ohio 1989); Oklahoma, Blanton v. Housing Auth. of Norman, 794 P.2d 412, 414-15 (Okla. 1990); Oregon, Seibel v. Liberty Homes, Inc., 752 P.2d 291, 292-93 (Or. 1988); Pennsylvania, Darlington v. General Elec., 504 A.2d 306, 311 (Pa. Super. Ct. 1986); South Dakota, Larson v. Kreiser's, Inc., 472 N.W.2d 761, 762-63 (S.D. 1991) (on appeal after remand); Larson v. Kreiser's, Inc., 427 N.W.2d 833, 833-34 (S.D. 1988); Tennessee, Price v. Mercury Supply Co., 682 S.W.2d 924, 933 (Tenn. Ct. App. 1984); Texas, Goodyear Tire & Rubber Co. v. Portilla, 836 S.W.2d 664, 669 (Tex. Ct. App. 1992); Utah, Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 334 (Utah 1992); Virginia, Graham v. Central Fidelity Bank, 428 S.E.2d 916, 918 (Va. 1993) (oral assurance must be able to satisfy the statute of frauds unless alleged contract can be completed within one year); West Virginia, Sayres v. Bauman, 425 S.E.2d 226, 229-30 (W. Va. 1992); Wisconsin; Garvey v. Buhler, 430 N.W.2d 616, 619-20 (Wis. Ct. App. 1988).

The following jurisdictions have rejected the "oral assurance" exception to the at-will doctrine: Alabama, Kitsos v. Mobile Gas Service Corp., 431 So. 2d 1150, 1151 (Ala.

or promissory estoppel principles.[53] Generally, for an employee to successfully argue that the oral assurances of an employer have formed an employment contract terminable only upon a showing of just cause, the employee must show that the assurances in question were communicated by a person with the authority to bind the employer.[54] If the person who gave the assurances failed to have authority to bind the employer, the employee must show that the employer later ratified those assurances of job security.[55] Additionally, if a court holds that the oral assurances form a contract, the Statute of Frauds must be satisfied if the employer has assured the employee that he will be employed for a time period in excess of one year.[56] In most jurisdictions, an oral assurance that the employee will be employed unless there is just cause to terminate her need not satisfy the Statute of Frauds. An employee who is terminated in breach of his employment contract is entitled to recover compensatory damages for the amount that he would have earned had the termination not occurred, less the amount that he earned or could have earned with reasonable diligence elsewhere after the termination occurred, including the value of fringe benefits lost as a result of the termination.[57] In most jurisdictions, the employee is entitled to future damages until the date that she would have retired or until the employer could have legitimately terminated her. Such an employee also has a duty to mitigate her damages.[58]

4. Employee Handbooks

Similar to the decisions that hold that oral assurances of job security may change the employment relationship from an at-will relationship to a contract requiring just cause for termination,

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1983); *but see* Mullinax v. John's Wholesale Jewelry, 598 So. 2d 838 (Ala. 1992); Florida, Crawford v. David Shapiro & Co., 490 So. 2d 993, 996 (Fla. Dist. Ct. App. 1986).

52. *E.g.*, Kelecheva v. Multivision Cable T.V. Corp., 22 Cal. Rptr. 2d 453, 459 (Ct. App. 1993) (oral assurance is simply treated as another factor to be considered in determining the existence of an implied-in-fact-contract); D'Ulisse-Cupo v. Board of Directors of Notre Dame High Sch., 503 A.2d 1192, 1196 (Conn. Ct. App. 1986).

53. *E.g.*, Morishige v. Spencecliff Corp., 720 F. Supp. 829 (D. Haw. 1989); Cunnison v. Richardson Greenshields Sec., Inc., 485 N.Y.S.2d 272, 274-75 (N.Y. App. Div. 1985); Ganim v. Brown Derby, Inc., 585 N.E.2d 982, 985 (Ohio Ct. App. 1990).

54. *E.g.*, Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1121-22 (1st Cir. 1993).

55. *E.g.*, *Id.*; Gesina v. General Elec. Co., 780 P.2d 1376, 1378 (Ariz. Ct. App. 1989).

56. *E.g.*, Harris v. Arkansas Book Co., 700 S.W.2d 41 (Ark. 1985); Koch v. Illinois Power Co., 529 N.E.2d 281, 286 (Ill. Ct. App. 1988).

57. *E.g.*, White v. American Airlines, Inc., 915 F.2d 1414, 1422-23, (10th Cir. 1990).

58. *E.g.*, Beales v. Hillhaven, Inc., 825 P.2d 212, 216 (Nev. 1992).

the employee handbook exception provides that an employee handbook or manual may confer contractual rights to the employee and bind the employer in its ability to discharge at-will.[59] A great number of jurisdictions have adopted the employee handbook exception to the at-will doctrine in one form or another.[60] Many jurisdictions hold that an employee handbook may create a unilateral contract[61] while the remaining jurisdictions

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59. *E.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983).

60. Alabama, Hoffman-La Roche v. Campbell, 512 So.2d 725, 737 (Ala. 1987); Alaska, Rutledge v. Alyeska Pipeline Serv. Co., 727 P.2d 1050, 1056 (Alaska 1986); Arizona, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1038 (Ariz. 1985); Arkansas, Gladden v. Arkansas Children's Hosp., 728 S.W.2d 501, 505 (Ark. 1987); California, Wood v. Loyola Marymount Univ., 267 Cal. Rptr. 230, 233 (Ct. App. 1990); Colorado, Churchey v. Adolph Coors Co., 759 P.2d 1336, 1348 (Colo. 1988); Connecticut, Carbone v. Atlantic Richfield Co., 528 A.2d 1137, 1142 (Conn. 1987); District of Columbia, Washington Welfare Ass'n v. Wheeler, 496 A.2d 613, 615 (D.C. 1985); Georgia, Lane v. K-Mart Corp., 378 S.E.2d 136 (Ga. Ct. App. 1989); Hawaii. Kinoshita v. Canadian Pac. Airlines, Ltd., 724 P.2d 110, 117 (Haw. 1986); Idaho, Metcalf v. Intermountain Gas Co., 778 P.2d 744, 746-47 (Idaho 1989); Illinois, Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 318 (Ill. 1987); Indiana, Speckman v. City of Indianapolis, 540 N.E.2d 1189, 1192 (Ind. 1989); Iowa, Young v. Cedar County Work Activity Ctr., 418 N.W.2d 844, 847-48 (Iowa 1987); Kansas, Morriss v. Coleman Co., Inc., 738 P.2d 841 (Kan. 1987); Kentucky, Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Louisiana, Keller v. Sisters of Charity of the Incarnate Word, 597 So. 2d 1113, 1115 (La. Ct. App. 1992) (handbook *may form a contract if supported by oral assurance*); Maine, Libby v. Calais Regional Hosp., 554 A.2d 1181, 1183 (Me. 1989); Maryland, Staggs v. Blue Cross of Md., Inc., 486 A.2d 798, 803-04 (Md. Ct. Spec. App. 1985), *cert. denied*, 493 A.2d 349 (Md. 1985); Massachusetts, Jackson v. Action for Boston Community Dev., Inc., 525 N.E.2d 411, 413-14 (Mass. 1988); Michigan, Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Minnesota, Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983); Mississippi, Robinson v. Board of Trustees E. Cent. Junior College, 477 So. 2d 1352, 1353 (Miss. 1985); Nebraska, Jeffers v. Bishop Clarkson Memorial Hosp., 387 N.W.2d 692, 695 (Neb. 1986); Nevada, D'Angelo v. Gardner, 819 P.2d 206, 209, 211-13 (Nev. 1991); New Jersey, Woolley v. Hoffmann-La Roche, 494 A.2d 1257, 1258 (N.J. 1985), *modified on other grounds*, 499 A.2d 515 (N.J. 1985); New Mexico, Newbery v. Allied Stores, Inc., 773 P.2d 1231, 1233-34 (N.M. 1989); North Carolina, Trought v. Richardson, 338 S.E.2d 617, 619-20 (N.C. Ct. App. 1986), *rev. denied*, 344 S.E.2d 18 (N.C. 1986); North Dakota, Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984); Ohio, Mers v. Dispatch Printing Co., 483 N.E.2d 150 (Ohio 1985); Oklahoma, Dangott v. ASG Indus., Inc., 558 P.2d 379, 383-84 (Okla. 1976); Oregon, Yartzoff v. Democrat-Herald Publishing Co., Inc., 576 P.2d 356 (Or. 1978); Pennsylvania, Martin v. Capital Cities Media, Inc., 511 A.2d 830, 837 (Pa. Super. Ct. 1986); South Carolina, Small v. Springs Indus., Inc., 357 S.E.2d 452, 456 (S.C. 1987); South Dakota, Osterkamp v. Alkota Mfg. Inc., 332 N.W.2d 275 (S.D. 1983); Tennessee, Hamby v. Genesco, Inc., 627 S.W.2d 373, 375-76 (Tenn. Ct. App. 1982); Texas, United Transp. Union v. Brown, 694 S.W.2d 630 (Tex. Ct. App. 1985); Utah, Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989); Vermont, Benoir v. Ethan Allen, Inc., 514 A.2d 716, 718 (Vt. 1986); Virginia, Falls v. Virginia State Bar, 397 S.E.2d 671, 673 (Va. 1990); Washington, Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); West Virginia, Cook v. Heck's, Inc., 342 S.E.2d 453, 459 (W. Va. 1986); Wisconsin, Ferraro v. Koelsch, 368 N.W.2d 666, 672 (Wis. 1985); Wyoming, Armstrong v. American Colloid Co., 721 P.2d 1069, 1070 (Wyo. 1986).

61. *E.g.*, Hoffman-La Roche v. Campbell, 512 So. 2d 725 (Ala. 1987); Continental Air

which have recognized a handbook exception have based their holdings on public policy and principles of equity.[62]

III. A SURVEY OF THE LAW OF EMPLOYEE HANDBOOKS AND UNILATERAL MODIFICATION

To properly understand the respective arguments of the courts when considering an employer's ability to unilaterally modify a contract formed by an employee handbook, it is appropriate to examine those decisions that are foundational to this area of law. This section surveys decisions representative of those which have discussed the ability of an employee handbook to form a unilateral contract and an employer's ability to subsequently modify the contract created by the handbook.

A. Employee Handbooks

The seminal case concerning employee handbooks and their ability to form unilateral contracts is *Pine River State Bank v. Mettille*.[63] In that case, Pine River State Bank hired Richard Mettille, in the spring of 1978, as a loan officer.[64] The parties did not enter into a formal employment contract when the employment began, and Mr. Mettille began his duties on a probationary basis.[65] After six months, Mr. Mettille successfully completed his probationary period and the Bank designated him as one of its loan officers.[66] Sometime thereafter, Pine River distributed an employee handbook to all of its employees, including Mr. Mettille.[67] The handbook contained general information concerning vacations, sick leave, hours, and various other matters typical of an employee handbook.[68] In addition, the handbook contained two other sections, one discussing "job security" and the other "disciplinary policy."[69] Mr. Mettille continued his employment with

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Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Jackson v. Action for Boston Community Dev., Inc., 525 N.E.2d 411, 413-14 (Mass. 1988); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

62. *E.g.*, Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

63. 333 N.W.2d 622 (Minn. 1983).

64. *Id.* at 624.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

the bank, and in the spring of 1979, received his annual performance review[70] and a 7% raise.[71] Later, in the fall of that same year, an examination of the bank's loan portfolio was conducted.[72] As a result of that investigation, several "serious" errors were found in many of the loan files of the bank.[73] Mr. Mettille had prepared all but one of the files which contained the errors.[74] Upon such discovery, the bank's president promptly discharged Mr. Mettille.[75] When the discharge occurred no mention was made of the employee handbook, and the bank failed to follow any of the disciplinary procedures it described.[76] Sometime thereafter, Pine River brought an action against Mr. Mettille for the non-payment of two notes that it had issued him.[77] Mr. Mettille responded by bringing a counterclaim against his former employer for breach of contract, alleging that it discharged him without cause and without the proper disciplinary procedures required by his employment handbook.[78] At the trial court, the jury returned a verdict for Mr. Mettille.[79] The bank appealed.

The Minnesota Supreme Court began its opinion by stating that "[w]hether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration."[80] In holding that an employee handbook can form a unilateral contract, the court stated:

> Generally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not their subjective intentions .... An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer ....
>
> If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the hand-

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 625.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

> book to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.[81]

The court then discussed and dismissed "three [common] reasons given for the unenforceability of job termination restrictions in an employment contract of indefinite duration."[82] Namely that: (1) the at-will rule is superior to any restrictions enumerated in a contract of indefinite duration;[83] (2) the requirement of additional consideration is not met;[84] and (3) there is no mutuality of obligation between the parties.[85]

Turning to the facts of the case, the court first analyzed the employee handbook to determine if any of its provisions were sufficiently specific to constitute an offer.[86] The court held that the provision concerning "Job Security" was not specific enough to constitute an offer,[87] but it did find that the "Disciplinary Policy" section was sufficiently explicit to be considered an offer for a just cause employment contract.[88] Next, the court looked

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81. *Id.* at 626-27.

82. *Id.* at 628.

83. *Id.* The court held that the at-will rule is merely a rule of construction and to apply it otherwise so as to preclude restrictions on an employer's ability to terminate its employee's would be violative of the parties freedom of contract. "If 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." *Id.*

84. *Id.* at 628-29. (stating that its rule requiring additional independent consideration to make restrictions upon a contract of indefinite duration enforceable is merely a rule of construction, and that there is nothing precluding two parties from agreeing to waive the additional consideration requirement "if they make clear their intent to do so"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 80 comment a (1981) ("A single performance or return promise may ... furnish consideration for any number of promises.").

85. *Metille*, 333 N.W.2d at 629. The court dismissed all arguments based on lack of mutuality of obligation as wrongful examinations into the adequacy of the consideration. *See* Restatement (Second) of Contract § 79(b),(c) (1981).

86. *Id.* at 630.

87. *Id.* (The Job Security provision simply indicated that the bank employees should have job security because the banking industry is relatively secure. The court stated that such provision was "no more than a general statement of policy.").

88. *Id.* The Disciplinary Policy section provided for a four-step progressive disci-

to see if Mr. Mettille had accepted the offer and provided consideration to make the contract binding.[89] The court held that Mr. Mettille accepted such contract by continuing his employment after he received notice of the handbook[90] and that he furnished consideration by continuing to work for Pine River even though he was free to leave.[91] Therefore, having found the elements of offer, acceptance and consideration, the court held that Pine River was contractually bound to abide by the procedures outlined in its Disciplinary Policy section before terminating Mr. Mettille. Since it did not do so, it breached its contract with Mr. Mettille and was liable for the breach as a matter of law.[92]

The Alabama Supreme Court considered the ability of the terms of an employee handbook to limit an employer's power to discharge an employee in *Hoffman-La Roche v. Campbell*.[93] In *Campbell*, the defendant, Hoffman-La Roche, Inc., and the plaintiff, Mr. Hugh Campbell, had engaged in pre-employment negotiations concerning Mr. Campbell joining Hoffman-La Roche as a pharmaceutical sales representative.[94] At the time of his hiring, Campbell and Hoffman-La Roche entered into a written agreement.[95] The agreement stated the general terms of compensation for Campbell's employment and required that he divest himself of an interest he held in a business which could potentially cause a conflict of interest with his new employer.[96] The considerations recited to support the agreement were the services of Mr. Campbell and the compensation to be paid him for such services.[97] Additionally, at his hiring, Hoffman-La Roche provided Campbell with a copy of its employee handbook.[98] The company representative told Mr. Campbell to "become familiar with the provisions of this handbook."[99] Thereafter, Campbell began his employment

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plinary procedure requiring an oral "reprimand" for the first offense, a written reprimand for the second offense, a second written reprimand and a meeting with the Executive Vice President with the possibility of suspension without pay for the third offense, and termination if no improvement resulted from any of the previous action. The section also stated, "In no instance will a person be discharged from employment without a review of the facts by the Executive Officer." *Id.* at 626.

89. *Id.* at 630.
90. *Id.*
91. *Id.*
92. *Id.* at 630-31.
93. 512 So. 2d 725 (Ala. 1987).
94. *Id.* at 726.
95. *Id.* at 726-27.
96. *Id.*
97. *Id.* at 727.
98. *Id.*
99. *Id.*

with Hoffman-La Roche, achieving great success with the company and garnering top sales awards.[100] Subsequently, however, he began to experience poor health and his performance with Hoffman-La Roche suffered.[101] Mr. Campbell testified that when his health began to suffer he approached his supervisor to inquire whether he should take sick leave or continue to perform his duties.[102] According to Campbell, his supervisor told him to keep working.[103] His supervisor denied the statement.[104] Mr. Campbell's performance continued to decline.[105] The company eventually told Campbell that he had three months to improve his performance or face termination.[106] Approximately three and one-half months later, Hoffman-LaRoche placed Campbell on probation.[107] The company terminated his employment approximately one month later.[108] Mr. Campbell brought a lawsuit against Hoffman-La Roche alleging claims for breach of contract and fraud.[109] The jury returned a verdict for Mr. Campbell on both causes of action, and awarded him damages in the amount of $150,000.[110] The company appealed.

In deciding whether an employee handbook may create a just cause employment contract, the Alabama Supreme Court surveyed the two predominate theories of how an employee handbook may form just such a contract: the legitimate expectations theory adopted by the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield of Michigan*,[111] and the unilateral contract theory adopted by the Minnesota Supreme Court in *Pine River State Bank v. Mettille*.[112] After a thorough discussion of both theories, the court stated its preference for the *Mettille* approach based on unilateral contract principles.[113] The court, explaining its preference, stated that the unilateral contract theory is "more consistent with traditional contract principles than *Toussaint*."[114]

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 726.
110. *Id.*
111. 292 N.W.2d 880 (Mich. 1980).
112. 333 N.W.2d 622 (Minn. 1983).
113. Hoffman-La Roche v. Campbell, 512 So. 2d 725, 731 (Ala. 1987).
114. *Id.* at n.2. The essence of the *Toussaint* theory is that an implied employment

The court considered many of the same arguments the *Mettille* court addressed in its opinion, discussing more specifically, those arguments concerning lack of mutuality of obligation[115] and the "indefinite nature of the time period for performance."[116] The *Hoffman-La Roche* court rejected these arguments just as the *Mettille* court did.[117] The court also dismissed the argument that holding that assurances of job security contained in an employee handbook may form a just cause employment contract interferes with the employer's freedom to run his business.[118] The court stated that "if the employer does not wish the policies contained in an employee handbook to be construed as an offer for a unilateral contract, he is free to so state in the handbook."[119]

After rejecting such arguments, the court summarized its holding as follows:

> [W]e find that the language in a handbook can be sufficient to constitute an offer to create a binding unilateral contract. The existence of such a contract is determined by applying the following analysis to the facts of each case: First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by retaining employment after he has become generally aware of the offer. His actual performance supplies the necessary consideration.[120]

In applying the law to the facts of Mr. Campbell's claim, the court held that the employee handbook Hoffman-La Roche issued to Campbell formed an employment contract that Hoffman-La

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contract to terminate all affected employees only for just cause arises out of the the legitimate expectations of the employees which are rooted in the employee handbook. *See generally* LIONEL J. POSTIC, STATE BY STATE SURVEY OF WRONGFUL DISCHARGE (1994).

115. *Hoffman-La Roche*, 512 So. 2d at 732-33 ("When ... one makes a promise conditioned upon the doing of an act by another, [thereby offering a unilateral contract,] and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable.") (quoting Henderson Land & Lumber Co. v. Barber, 85 So. 35 (1920)).

116. *Id.* at 734 (citing Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983)) "The cases which reason that the at-will rule takes precedence over even explicit job termination restraints, simply because the contract is of indefinite duration, misapply the at-will rule of construction as a rule of substantive limitation on contract formation." *Id.*

117. *Id.* at 732-33, 734. *See also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 628-29 (Minn. 1983).

118. *Hoffman-La Roche*, 512 So. 2d at 734-35.

119. *Id.* at 734.

120. *Id.* at 735.

Roche breached.[121] In so holding, the court determined that the handbook was specific enough to constitute an offer, and Mr. Campbell accepted that offer by continuing to perform after he had notice of it.[122] His continued employment provided the necessary consideration to form the offer into a binding contract.[123]

B. Unilateral Modification of Employee Handbooks

As courts around the United States began to accept and apply the unilateral contract analysis to employee handbooks, as outlined above, employers quite reasonably began examining the handbooks they issued to their employees to determine if those handbooks might create a just cause employment contract. Undoubtedly, after such an examination, many employers were counseled that their existing handbooks placed them at just such a risk. In an effort to avoid wrongful discharge liability, many of these same employers began issuing new or revised handbooks which both deleted all passages capable of being interpreted as sufficient to constitute an offer for just cause employment and inserted an "at-will disclaimer" in their place.[124] As a result, it was not long before the ability of an employer to unilaterally modify a unilateral contract embodied in an employee handbook began to be litigated. The courts which have considered the issue are not in agreement. Some have held that the unilateral modifications are ineffective while more have ruled that such modifications are binding. In order to properly understand these divergent positions, cases consistent with each view are outlined below.

In *Thompson v. Kings Entertainment Co.*,[125] the United States District Court for the Eastern District of Virginia considered the ability of an employer to unilaterally alter the terms of a contract formed by its employee handbook. In this case, Mr. Thompson, the plaintiff, began working at King's Dominion theme park in 1977.[126] In 1980 an employee manual was given to Mr. Thomp-

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121. *Id.*

122. *Id.* at 737.

123. *Id.*

124. *See, e.g.*, Durtsche v. American Colloid Co., 958 F.2d 1007 (10th Cir. 1992) (applying Wyoming law) In an earlier decision the company's employee handbook had been declared to have formed a just cause employment contract. In answer to such decision, the company modified its handbook to avoid liability. The *Durtsche* court considered the efficacy of the unilateral modification. *Id.*

125. 674 F. Supp. 1194 (E.D. Va. 1987).

126. *Id.* at 1195.

son.[127] The manual contained a provision concerning dismissal.[128] Dismissal from King's Dominion was defined as "a separation ... for cause."[129] In 1984, the theme park was purchased by Kings Entertainment Company (Kings).[130] Mr. Thompson retained his position of employment after the purchase of the park by Kings. In July of 1985, Kings issued a new handbook to the park employees.[131] Mr. Thompson signed a form acknowledging his receipt of the handbook.[132] This handbook had no provision analogous to that in the first handbook, but rather stated that "either Kings or the employee 'may terminate [the] employment at any time with or without cause and with or without notice.'"[133] In August of 1985, Mr. Thompson's employment with Kings was terminated.[134] Mr. Thompson then brought an action for breach of his employment contract.[135]

The court, in considering Mr. Thompson's claim, first addressed whether the employee handbook issued in 1980 formed an employment contract terminable only for cause.[136] Noting that the Virginia Supreme Court had not yet ruled on the issue, the court surveyed other jurisdictions and found that the great majority of the jurisdictions which had considered the issue recognized that an employee handbook may form a contract.[137] It held that the employee handbook could form a contract if it was specific enough to constitute an offer, the employee accepted the offer, and it was supported by consideration.[138] The court found that a reasonable jury could find all three of these elements necessary for the formation of a contract,[139] and therefore denied Kings' motion for summary judgment. The motion was based on the ground that the employee handbook could not form a just cause contract.[140]

Disposing of that issue, the court then had to determine if the handbook issued in 1985 superseded the handbook issued in

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *See Id.* at 1196-97.
137. *Id.*
138. *See Id.* at 1197.
139. *Id.*
140. *Id.* at 1198.

1980, thus making Mr. Thompson an at-will employee regardless of the effect of the earlier handbook's provisions. In considering this issue, the court noted the logical appeal of Kings' position, that "[a]n employer who grants rights by issuing a policy handbook. . .[should be allowed to] retract those rights with a similar act."[141] The court rejected Kings' assertion, however, that such a modification should be automatic and effective "upon the issuance of the Handbook."[142] In answering Kings' argument, it stated that it could not distinguish any reason for treating the second handbook any differently from the first.[143] As the court explained, "In other words, as with the 1980 manual, the 1985 handbook [should] be construed as an offer of employment terms which Thompson could accept or reject."[144] The court then examined the 1985 handbook under the same analysis it applied to the handbook issued in 1980, that is, the handbook must constitute an offer, be accepted, and be supported by consideration.[145] It found Kings' argument that Mr. Thompson assented with knowledge to the terms of the 1985 handbook by continuing in his employment to be lacking.[146] It noted that if it were to adopt Kings' position, for an employee to effectively reject the offer present in a modified employee handbook he "could not remain silent and continue to work.[147] Instead, such employee would have to give specific notice of rejection to the employer to avoid having his actions construed as acceptance."[148] The court noted that this position would be "inconsistent with general contract law."[149] Accordingly, in the absence of sufficient evidence to demonstrate that Mr. Thompson accepted the terms of the new

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See Id.* at 1198-99.
146. *Id.*
147. *Id.* at 1199.
148. *Id.*
149. *Id. See also* S. Williston, A TREATISE ON THE LAW OF CONTRACTS §§ 67, 91 (W. Jaeger 3d ed. 1957). In discussing how King's position was inconsistent with general contract law, the court stated:

> In the absence of special relations between the parties or other circumstances, the offeree need make no reply to the offer and his silence and inaction cannot be construed as assent. Nor does the mere fact that the employee has continued to work constitute acceptance where, as here, the employee possessed the right to work until discharged for just cause. At most, the significance of the continued labor is ambiguous.

Id. (citations omitted).

handbook, the court denied Kings' motion for summary judgment, roundly rejecting the theory that an employer may unilaterally modify the terms of an employment contract.[150]

In *Sadler v. Basin Electric Power Cooperative*,[151] the Supreme Court of North Dakota held that an employer may unilaterally alter the terms of employment contracts. In that case, Donald Sadler had been employed by Basin Electric Power Cooperative (hereafter Basin) for over nineteen years, commencing in 1976.[152] In 1980, Sadler received an employee handbook which stated, "'Permanent employees cannot be terminated without a just cause.'"[153] Sadler received an "updated" handbook in 1982 and again in 1983.[154] The handbook issued in 1983 defined "just cause" as "referring to insubordination, theft, etcetera."[155] In 1985, another handbook was issued, this one stating that "dismissal for cause. . .include[d] 'elimination of a position due to lack of work or a continued need for the position.'"[156] In 1985, after that year's handbook had been issued, Sadler was terminated by Basin during a company restructuring.[157] Sadler then brought an action for wrongful discharge in breach of contract.[158] He claimed that the handbook issued in 1980 formed his employment contract with Basin,[159] and argued that since that was the handbook which formed his contract, he could only be terminated for just cause as defined in that particular handbook.[160] The 1980 handbook's definition of just cause was limited, as Sadler interpreted it, to termination for "employee misconduct," which did not include reductions in work force.[161]

At issue in the case was the jury instruction given regarding unilateral contracts.[162] Sadler objected to the portion which read:

> Unilateral contract modification of the employment contract may be a repetitive process.... In the case of a unilateral contract for employment, where an at-will employee retains

150. *Id.*
151. 431 N.W.2d 296 (N.D. 1988).
152. *See id.*
153. *Id.* at 297.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 296.
158. *Id.*
159. *Id.* at 297.
160. *Id.*
161. *Id.*
162. *Id.* at 300.

> employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation and in that matter, an original employment contract may be modified or replaced by a subsequent unilateral contract.[163]

The court held that the instruction was proper.[164] In reaching it's decision the court quoted a portion from a Washington Supreme Court decision. In that decision, the court stated:

> When the employment relationship is not evidenced by a written contract and is indefinite in duration, the parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for any work performed. In this contractual relationship, the employer exercises substantial control over both the working relationship and his employees by retaining independent control of the work relationship. Thus, the employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule.[165]

Therefore, the jury could properly find that the 1985 employee handbook, which allowed for the termination of a position "due to lack of ... continued need for the position," applied to Sadler. Because Sadler continued to work after Basin issued the modified handbook in 1985 with knowledge of the conditions of the handbook, he was deemed to have assented to a new unilateral contract with Basin. Just as a unilateral employment contract may be formed, so may it be modified.[166] Thus, Basin effectively

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163. *Id.*

164. *Id.*

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

166. *See id.* at 298. The court alluded to the fact that if Sadler continued in his employment with Basin with knowledge of the changes in the employee handbook the discussion of other issues would be immaterial. The court quoted *Pine River State Bank v. Mettille* (discussed *supra* part III.A.). The court in *Pine River* stated:

> In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractrual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

Pine River State Bank v. Mettille, 333 N.W.2d 622, 623 (Minn. 1983).

modified its previously existing employment contract with Sadler.

The Colorado Court of Appeals, in *Ferrera v. A.C. Nielsen*,[167] also held that an employer's unilateral modifications of an employee handbook were binding upon its employees. In that case, the plaintiff, Beverly Ferrera, was hired by A.C. Nielsen d/b/a Neodata (hereafter Neodata) in 1980.[168] She was issued an employee handbook in 1982 and again in 1986.[169] In 1987, Neodata terminated Ms. Ferrera's employment because she allegedly falsified her time card.[170] Ms. Ferrera brought an action against Neodata for wrongful discharge in violation of an implied contract of employment and promissory estoppel.[171] The trial court granted Neodata's motion for summary judgment on the grounds that the 1986 handbook contained a conspicuous at-will disclaimer and therefore it could not create a just cause employment contract.[172] Ms. Ferrera argued on appeal that the handbook issued in 1982 applied to her action, not the one issued in 1986, and therefore summary judgment should be reversed.[173] The Colorado Court of Appeals rejected her argument. It acknowledged that an employee handbook may indeed create a contract,[174] but stressed that contracts of indefinite duration should not ordinarily be construed to be permanent.[175] The court defined the offer expressed in an employee handbook to be merely an offer, not to discharge the employee in contravention of the handbooks terms unless, and until, those terms are thereafter changed by the employer with proper notice given to the employee.[176] The court held that an employer's right to modify an employee handbook is presumed.[177] Therefore, Neodata's 1986 modification of its 1982 handbook was binding upon Ms. Ferrera because, although the 1982 handbook may have created an employment contract, Neodata was merely acting within the terms of its offer under that handbook when it subsequently modified it in 1986.[178]

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167. 799 P.2d 458 (Colo. Ct. App. 1990).
168. *Id.* at 459.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 459-60.
173. *Id.* at 460.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* (The court stated, "It would be unreasonable to think that an employer intended to be permanently bound by promises in a handbook, leaving it unable to respond flexibly to changing conditions.").
178. *Id.*

IV. AN EMPLOYER'S ABILITY TO UNILATERALLY MODIFY THE TERMS OF AN EMPLOYMENT CONTRACT IN LIGHT OF SUBSTANTIVE CONTRACT PRINCIPLES

Pine River State Bank v. Mettille[179] and *Hoffman-La Roche v. Campbell*[180] hold that an employee handbook can form a unilateral contract between the employer and employee and thus preclude the employer's ability to terminate the employee at its will. The decisions of several other jurisdictions also hold that an employee handbook which contains assurances of job security can limit an employer's ability to discharge an employee at-will. These decisions mirror the unilateral contract analysis applied by the courts in *Mettille* and *Hoffman-La Roche*.[181] One factor which makes the decisions of these courts unique in comparison to decisions of courts which have followed Michigan's approach to the employee handbook issue as promulgated in *Toussaint v. Blue Cross & Blue Shield of Michigan*,[182] is that these courts rest their holdings upon basic concepts of contract formation.[183] They do not appeal to broad notions of public policy or an employee's reasonable expectations to reach their conclusion that an employer may be bound by the terms of its employee handbook.[184] Rather, they

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179. 333 N.W.2d 622 (Minn. 1983).

180. 512 So. 2d 725 (Ala. 1987).

181. *See* Toth v. Square D Co., 712 F. Supp. 1231 (D.S.C. 1989); Adams v. Square D Co., 775 F. Supp. 869 (D.S.C. 1991); Thompson v. Kings Entertainment Co., 674 F. Supp. 1194 (E.D. Va. 1987); Ferrera v. A.C. Nielson, 799 P.2d 458 (Colo. Ct. App. 1990); Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988); Hanly v. Riverside Methodist Hosps., 603 N.E.2d 1126 (Ohio Ct. App. 1991).

182. 292 N.W.2d 880 (Mich. 1980).

183. *See, e.g.*, Hoffman-La Roche v. Campbell, 512 So. 2d 725, 728 (Ala. 1987) (The court emphasized that it was not recognizing an exception to the at-will doctrine, but rather was merely applying substantive contract principles to the issue at hand.); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) That court stated:

> [T]his is a breach of contract case; we are determining if there was a contract, what were its terms, and was it breached. We are not dealing with a discharge that is retaliatory, in bad faith or abusive . Nor do we have before us the question ... whether public policy should constrain an 'at-will' firing.

Id. at 630.

184. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 892 (Mich. 1980). The court stated:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor

are remarkably uniform in their analysis and application of the law to this issue. This author believes that it is in light of this uniformity, both of analysis and application of relatively objective contract law, that the contrariety among the courts as to the ability of an employer to unilaterally modify an employee handbook and thus establish or reestablish an at-will employment relationship with all affected employees, is somewhat surprising and worthy of examination.

Since the courts which recognize the ability of an employer to unilaterally modify the terms of an employment contract formed by an employee handbook are equally in agreement with the courts that do not allow for such a modification that the question, in either case, is one of contract law;[185] it follows that at least one of these two groups of courts is applying those "basic concepts" of contract law incorrectly. This article argues that unequivocal statements that an employer can unilaterally modify the terms of an employment contract arising as a result of the provisions of an employee handbook by issuing a second, revised handbook are in error.

The fallacy is that the modification of a contract is completely analogous to its formation. Employers should not be allowed to unilaterally modify the terms of an employment contract however it may be formed. To so allow would be in dereliction of contract law. To demonstrate this position, it is necessary to examine the basic concepts of contract formation and modification, namely: offer, acceptance, and consideration, in the context of a unilateral contract formed by an employee handbook.[186]

> 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. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation.

Id.

185. *Compare* Sadler v. Basin Elec Power Coop., 431 N.W.2d 296, 300 (N.D. 1988) (allowing an employer to unilaterally modify an employee handbook on the basis of contract principles) *with* Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1198 (E.D. Va. 1987) (holding that unilateral modification of an employee handbook is invalid on the basis of contract principles).

186. This article is neither intended to, nor will it, deal with the validity of the "employee handbook exception" itself. That employee handbooks may form enforceable just cause employment contracts will be conceded to the courts. At issue is an employer's ability to unilaterally modify an employee handbook after it has already given rise to a just cause contract.

To effectively modify a contract, there must be (1) an offer to modify the contract, (2) acceptance of that offer, and (3) consideration.[187] This rule can hardly be denied. Yet, most, if not all, courts which have allowed an employer to unilaterally modify the terms of an employment contract do not even address these issues.[188] Instead, these courts often merely rely upon a general rule cited from an earlier, perhaps seminal, case in the area as justification for their decision. This general rule provides:

> In the case of a unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation and in that manner, an original employment contract may be modified or replaced by a subsequent unilateral contract.[189]

However, in considering an employer's ability to unilaterally modify an employee handbook, the courts reliance on this general rule, without considering more, is misplaced, for the rule was initially stated in an opinion where the court was discussing the *formation* of a unilateral contract, not its modification.[190] The rule does not, without considering other factors, automatically apply to the subsequent modification of the contract merely because it could be properly applied to the contract's formation.[191] The court, in cases where an employee handbook was found to be sufficiently specific to constitute an offer for a just cause employment contract, in keeping with general principles of contract law, had to consider if the offer had been accepted and if it was supported by consideration. The court, by simply incorporating the circumstances peculiar to determining if an offer in an employee handbook has created a contract, by stating the general rule, was merely stating a systematic way to determine whether the offer to form a contract was accepted and supported by consideration, thereby forming a contract. However, due to special considera-

187. *See, e.g.*, Toth v. Square D Co., 712 F. Supp. 1231, 1235-36 (D.S.C. 1989).

188. *See, e.g.*, Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296, 300 (N.D. 1988).

189. *Id. See also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983).

190. *Id.*

191. *See* Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1198 (E.D. Va. 1987).

tions concerning the modification of a contract, this same general rule cannot simply be transferred and applied in a case involving such a modification.[192] If one moves beyond the general rule, and actually applies basic contract principles to the issue of unilateral modification of an employment contract, one finds that the courts which have held that an employer may unilaterally modify an employment contract have misspoken.

A. Offer

This article does not dispute those opinions which hold that a new or revised employee handbook may constitute an offer for modification of an existing employment contract. To constitute an offer, a statement must invite the one to whom it is communicated, the offeree, to enter into a bargain with the offeror such that the offeree can bind the offeror if he so chooses.[193] Consistent with this rule, the courts have held that an employee handbook may constitute an offer if it contains provisions which are sufficiently specific to be classified as inviting the employees to enter into a unilateral contract with the employer.[194] If the handbook contains such provisions, to be binding, they must be communicated to the employees.[195] An employer cannot object that it did not intend its employee handbook to constitute an offer; such an argument is immaterial. Whether a handbook constitutes an offer to enter into a unilateral contract does not depend on the employer's subjective intentions, but rather upon the handbook's outward manifestations.[196]

B. Acceptance

Courts which hold that an employee handbook can form a just cause employment contract and those that additionally hold that an employer may unilaterally modify a just cause employment contract by subsequently issuing a revised handbook, in order to find that a contract has been created, must imply the

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192. *Id.*

193. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981).

194. Hoffman-La Roche v. Campbell, 512 So.2d 725, 734 (Ala. 1987); Ferrera v. A.C. Nielson, 799 P.2d 458, 460-61 (Colo. Ct. App. 1990); Mettille, 333 N.W.2d 622, 626 (Minn. 1983); Hanly v. Riverside Methodist Hosp., 603 N.E.2d 1126, 1130 (Ohio Ct. App. 1991).

195. Adams v. Square D Co., 775 F. Supp. 869, 873 (D.S.C. 1991); Hoffman-La Roche v. Campbell, 512 So.2d 725, 734 (Ala. 1987).

196. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

employee's acceptance of such contracts. Where the courts have found that such a contract has been formed or modified, the employees are not expressly communicating their assent to the terms of the handbook. Therefore, since the courts are implying the employees' acceptance of the offer, it is reasonable to inquire upon what basis they are doing so.

Restatement (Second) of Contracts § 19 states that the conduct of an individual may manifest assent to an offer to contract.[197] The conduct of an individual may manifest assent if the party intended to engage in the conduct and "[knew] or ha[d] reason to know that the other party may infer from his conduct that he assente[d]."[198] Therefore, in cases where the court is considering if an employee handbook has created a just cause employment contract, the court appears to act reasonably in implying that an employee, with knowledge of the terms of the handbook, by either beginning to work, or continuing to work, after the issuance of the handbooks, accepted the terms of the just cause employment contract.[199] Implying the employee's assent to the terms of a modified or revised employee handbook is more problematic, however. Employers argue, and those courts which allow them to unilaterally modify their employment contracts agree, that just as in the case above, the courts should imply that the employees, by continuing to work with knowledge of the revised handbooks terms, have assented to the proposed modification set forth in the handbook.[200] Such a position, however, is contrary to established law. As one court has commented concerning such an employer's argument:

> Accordingly, an employee seeking to reject the offer could not remain silent and continue to work. Instead, such an employee would have to give specific notice of rejection to the employer to avoid having his actions construed as acceptance. Requiring an offeree to take affirmative steps to reject an offer, however, is inconsistent with general contract law.[201]

Under general contract law, continuing to perform and insisting on one's rights under an existing contract are not proper grounds from which to imply a party's assent to a subsequent modification

197. RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).
198. *Id.*
199. *E.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983).
200. *See* Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296, 300 (N.D. 1988).
201. Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1199 (E.D. Va. 1987).

of that contract.[202] Therefore, courts which imply an employee's assent to the terms of a revised employee handbook merely from the fact that the employee continued to work after the issuance of such handbook, do so improperly.

C. Consideration

Courts which allow an employer to unilaterally modify an employee handbook and subsequently form an at-will employment contract rarely address the issue of consideration. However, as with all contracts, to modify an existing just cause employment contract, the employer must provide consideration to all of its employees who would be affected by the modification.[203] Absent the inclusion of some new term or benefit which inures to the employees' advantage, any attempted modification by the employer must fail for lack of consideration,[204] for the Pre-Existing Duty Rule holds that the performance of a legal duty is not consideration unless it differs in some way, beyond a mere pretense of a bargain, from the duty actually owed.[205]

In the case of the unilateral modification of a just cause employment contract, the employer has a pre-existing duty to only discharge its employees for just cause and in compliance with the terms of their contract; therefore, a subsequent "promise" that the employer will discharge its employees at its will, whenever, and for whatever reason it desires cannot constitute consideration. A promise to do less than one is legally obligated to do cannot constitute consideration.[206] As one court commented:

> Once the contract has been created, the employer is legally bound by the terms of its promise which are enforceable by the employee.... The [employer] must therefore show that the [employees] assented to modify the alleged contract to reflect the terms of the revised handbook and that they received ... consideration to support that modification.[207]

Absent a showing of new or additional consideration on the part of the employer, a modification cannot be binding. Those courts

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202. *Id. See also*, 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 91 (W. Jaeger 3d ed. 1957).

203. *See* Toth v. Square D Co., 712 F. Supp. 1231, 1235-36 (D.S.C. 1989).

204. *Id.*

205. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

206. *See, e.g.*, Foakes v. Beer, 1884 L.R. 9 A.C. 605 (H.L.); RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

207. Toth v. Square D Co., 712 F. Supp. 1231, 1235-36 (D.S.C. 1989).

which allow an employer to unilaterally modify a just cause employment contract without inquiring as to whether the employer has provided consideration for the modification are in violation of the principles of contract they claim to be following, and the modification cannot be properly supported.

V. CONCLUSION

The modification of a contract is not completely analogous to its formation. To argue that a contract is effectively modified simply because the same transactions which led to its formation have again occurred is an overly simplistic and incorrect axiom. A contract formed by an employee handbook is no different from a contract formed by any other means, as the courts which apply a unilateral contract analysis to such handbooks have espoused. It has yet to be discovered why different assumptions and rules of contract should be applied to issues which touch upon, in some way, the doctrine of employment at-will. There is no distinguishing feature. Until courts can properly justify their disparate treatment of employment contracts which happen to have been formed by an employee handbook from all others, they must be treated the same. Therefore, if an employer desires to modify existing just cause employment relationships to those terminable at-will, it must comport with traditional principles of contract modification; providing consideration for and obtaining assent to any such modification.

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