NOTE:CONTRACTS OF CONVENIENCE: PREVENTING EMPLOYERS FROM UNILATERALLY MODIFYING PROMISES MADE IN EMPLOYEE HANDBOOKS

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Author: Brian T. Kohn*

* Managing Editor, Cardozo Law Review, J.D. Candidate (June 2003). The author owes a great debt of gratitude to Professor Arthur Jacobson, whose guidance and encouragement made this Note possible. He also wishes to thank the past and present members of the Cardozo Law Review who assisted in the publication of this Note. Above all, the author would like to thank his wife, Shara, and his parents for their love and support.

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Introduction

In the midst of a booming economy in 1986, [1] California telephone giant Pacific Bell [2] unilaterally issued a written no-layoff policy covering all of the company's supervisory

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[1] See Daniel Rosenheim, Economy to Continue Its Bull Run, S.F. Chron., Dec. 29, 1986, at 21 (reporting on the national economy's steady growth and strong prospects for the future); see also Daniel Rosenheim, Jobless Rate Drops in State, Rises in U.S., S.F. Chron., Oct. 4, 1986, at 1 (reporting on a drop in California's unemployment rate and a corresponding increase in the state's total employment to a record 12.57 million employed workers).

[2] Pacific Bell is the largest telephone company in California, providing local telephone service to more than seventy-five percent of Californians. Press Release, SBC Communications/Pacific Telesis Group, Statement (Nov. 5, 1996) available at http://www.sbc.com/press_room/news_search/1,5932,31,00.html?query=19961105-1 (last visited Jan. 22, 2003). In 1997, the company was acquired by SBC Communications Inc., which also owns Southwestern Bell, Ameritech, Southern New England

employees. [3] In [*800] response, numerous Pacific Bell managers chose not to look for employment elsewhere, even at a time when many companies aggressively pursued qualified job candidates. [4] However, just five years later, as the economy faltered [5] and at a time when the company's managers most needed to rely upon Pacific Bell's promise of job security, the company unilaterally terminated the policy. [6] Sixty company managers sued Pacific Bell in

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Telecommunications, Nevada Bell, and a sixty percent equity interest in Cingular Wireless, its joint venture with BellSouth, which serves more than twenty million wireless customers. See SBC - Company Profile: The Global Company, at http://www.sbc.com/press_room/press_kit/0,5931,21,00.html (last visited Jan. 22, 2003). The company employs more than 180,000 employees, including 55,000 in California. Id. In 2001, the company's revenues neared $ 46 billion, placing the company twenty-seventh on the 2002 Fortune 500 list. See id.

[3] See Asmus v. Pac. Bell, 999 P.2d 71, 73 (Cal. 2000). The "Management Employment Security Policy" guaranteed job security for all Pacific Bell managers who continued to meet the company's changing business expectations. Id. Even if a particular manager's job was eliminated, the policy promised "reassignment to and retraining for other management positions." Id. The policy was to remain in effect "so long as there [was] no change that [would] materially affect Pacific Bell's business plan achievement." Id.

Such policies, often issued in the form of employee handbooks, are thought to produce substantial benefits for employers, including the boosting of morale and the creation of a loyal workforce. See Stephen Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 Indus. Rel. L.J. 326, 337-38 (1991/1992) (focusing in large part on employers' use of disclaimers to avoid contractual obligations when issuing employee handbooks). See also Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 892 (Mich. 1980) (describing how employee handbooks can improve relationships within the workplace). In Asmus, Pacific Bell informed its employees in a leaflet distributed when the company implemented the policy that it was being established "in support of a business partnership among all elements of the work force." Memorandum from Pacific Bell to the company's management employees (August 1986) (on file with author). This memorandum was introduced into evidence by Pacific Bell as an exhibit to a declaration by Margaret Cerrudo, a director in the company's Human Resources department, as part of Pacific Bell's summary judgment motion.

However, in a large majority of states, including California, such unilaterally adopted policies also create contractual obligations, overcoming the presumption of employment at will. See, e.g., Scott v. Pac. Gas & Elec. Co., 904 P.2d 834, 839 (Cal. 1995) (holding that a company's policy requiring just cause to demote employees can become an implied-in-fact contract term); see also Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 317 (Ill. 1987) (listing state courts that have adopted this rule). For an extensive discussion of the doctrine of at will employment and the effect of handbooks on the employer-employee relationship, see infra Part I.B.

[4] Telephone Interview with Arthur Lazear, Partner, Hoffman & Lazear (January 28, 2002) (transcript on file with author). Hoffman, who represented the former Pacific Bell managers in their suit against the company, also stated that at least one high-ranking manager rejected an unsolicited offer in reliance on Pacific Bell's promise of job security. Id.

[5] Pacific Bell's Chief Executive Officer, Phil Quigley, wrote several letters to the company's employees in which he discussed Pacific Bell's struggle to remain competitive. On January 8, 1990, he first expressed concern about the future of the no-layoff policy: "However, given the reality of the marketplace, changing demographics of the workforce and the continued need for cost reduction, the prospects for continuing this policy are diminishing - perhaps, even unlikely." Petitioners' Opening Brief at 5, Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000) (No. S074296). More than 18 months later, on October 1, 1991, Quigley again wrote to his employees. This time, however, Quigley did not equivocate; he informed Pacific Bell managers that they were on notice that the company was canceling their employment security policy, effective April 1, 1992. "We are now at the point where fundamental shifts in the marketplace realities suggest strongly that our ability to compete successfully is dependent on achieving more flexibility in how we conduct our business … . In my judgment, this requirement for flexibility is incompatible with any form of management employment security." Id.

[6] See Asmus, 999 P.2d at 74. But see Brief of Amicus Curiae California Employment Law Council in Support of Petitioners at 6, Asmus v. Pac. Bell, 999 P.2d 71 (2000) (No. S074296) (arguing that by providing employees with six months of notice prior to modifying the policy, Pacific Bell did "everything a good employer should do").

federal court in 1996 for breach of contract, claiming that the no-layoff policy [*801] had become a term of their implied-in-fact employment contract, [7] which Pacific Bell could not unilaterally modify. [8]

Were the managers at the phone company entitled to rely on their employer's promise of employment security? Or did the express language of the unilaterally adopted policy create nothing more than a contract of convenience, binding only until the company decided to terminate it? Although it is now widely accepted that an employer's unilateral issuance of an employee handbook or policy manual can give rise to a contractual relationship, [9] courts have split sharply on the issue of whether an employer may subsequently make unilateral modifications to the resulting implied-in-fact contract. [10] The courts that have permitted employers to unilaterally modify such contracts [11] have based their decisions on a mixture of public policy and the principles behind unilateral [12] contract formation. [13]

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[7] An "implied-in-fact contract" is defined as a "contract that the parties presumably intended, either by tacit understanding or by the assumption that it existed." Black's Law Dictionary 322 (7th ed. 1999).

[8] Asmus, 999 P.2d at 74. Aside from alleging breach of contract, the employees also sought declaratory and injunctive relief, as well as damages for breach of fiduciary duty, fraud, and violations of the Employee Retirement Income Security Act. Id. All but eight of the sixty plaintiffs had signed releases waiving their right to bring claims based on Pacific Bell's termination of the employment security policy. Id. Thus, the District Court for the Northern District of California granted Pacific Bell's summary judgment motion against those fifty-two former managers. Id.

[9] See cases cited infra note 66 (listing cases adopting the handbook exception to the at will rule).

[10] Compare Asmus, 999 P.2d at 77 (allowing an employer to unilaterally modify - without the traditional requirements of offer, acceptance and consideration - contractual obligations created by the issuance of an employee handbook), with Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999) (refusing to allow an employer to unilaterally modify a handbook promise that had become an implied-in-fact employment contract). The Asmus majority refers to the position of courts that allow employers to unilaterally modify promises made in employment handbooks as the majority position. See Asmus, 999 P.2d at 76. However, a comparable number of courts have adopted the position that employers may not unilaterally revise or revoke such covenants. See, e.g., Demasse, 984 P.2d at 1144. For an extensive discussion of decisions adopting each approach, see infra Part II.

[11] These courts typically have required that the employer provide the affected employee with reasonable notice of the proposed modification. See, e.g., Asmus, 999 P.2d at 76.

[12] A "unilateral contract" is a "contract in which only one party makes a promise or undertakes a performance." Black's Law Dictionary 326 (7th ed. 1999). "Many unilateral contracts are in reality gratuitous promises enforced for good reason with no element of bargain." Id. (quoting P.S. Atiyah, An Introduction to the Law of Contract 126 (3d ed. 1981)). For a discussion of unilateral contract analysis in the employee handbook context, see infra notes 98-107 and accompanying text.

[13] See, e.g., Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988) (holding that an employer may unilaterally modify the provisions of an implied handbook contract by merely issuing a subsequent handbook). For a further discussion of this and other decisions permitting the unilateral modification of contractual terms implied from employee handbooks, see infra Part II.A.

[*802] In the early 1990s, however, two student comments undermined this approach and dramatically changed the way in which courts analyzed such controversies. [14] These commentators found unilateral modification unfair to employees who might reasonably rely on the policies included in their handbooks [15] and in contravention of traditional principles of contract law. [16] Writing at a time when only a handful of courts had considered the issue of unilateral modification to employee manuals or policies, [17] the commentators called on courts to compel employers seeking to revise or terminate such policies to comport with the requirements for modification of a bilateral contract [18] by providing additional consideration [19] and gaining the mutual assent [20] of each affected employee. [21] Many of the courts that subsequently refused to allow employers to unilaterally modify implied-in-fact employment contracts have largely adopted the reasoning set forth in these [*803] comments. [22]

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[14] See Richard J. Pratt, Comment, Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment At-Will Doctrine, 139 U. Pa. L. Rev. 197 (1990); Stephen Carey Sullivan, Comment, Unilateral Modification of Employee Handbooks: A Contractual Analysis, 5 Regent U. L. Rev. 261 (1995).

[15] See Pratt, supra note 14, at 222 (arguing that by enforcing obligations implied from employment contracts, employers will not be able to "promise at one moment what they could just as easily take away at the next").

[16] See Sullivan, supra note 14, at 288 (arguing that the modification of a contract created by the issuance of an employee handbook is not analogous to its formation).

[17] See Pratt, supra note 14, at 219-20 (finding that only "a handful of jurisdictions" have considered the issue); see also Sullivan, supra note 14, at 281 (stating that the judicial application of unilateral contract analysis to handbooks prompted employees to begin challenging the lawfulness of subsequent unilateral modifications of the resulting implied contracts).

[18] A "bilateral contract" is defined as a "contract in which each party promises a performance, so that each party is an obligor on that party's own promise and an obligee on the other's promise." Black's Law Dictionary 319 (7th ed. 1999).

[19] Consideration" is "something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee." Black's Law Dictionary 300-01 (7th ed. 1999).

A "consideration" has been explained to be "any act of the plaintiff from which the defendant, or a stranger, derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed, or inconvenience suffered by the plaintiff with the assent, express or implied, of the defendant … "

Id. at 301 (quoting Thomas E. Holland, The Elements of Jurisprudence 286 (13th ed. 1924)).

[20] Mutual assent" is defined as an "agreement by both parties to a contract, usually in the form of offer and acceptance." Black's Law Dictionary 1039-40 (7th ed. 1999). This concept is often referred to as a "meeting of the minds." Id.

[21] See Pratt, supra note 14, at 225 (stating that courts should apply traditional prerequisites of contract modification to modifications of covenants created by the issuance of employee handbooks); see also Sullivan, supra note 14, at 293 (finding that contracts formed by employee handbooks should be treated no differently than contracts formed in any other way).

[22] See, e.g., Demasse v. ITT Corp., 984 P.2d 1138, 1143-44 (Ariz. 1999) (citing affirmatively the arguments made by Pratt and Sullivan in refusing to allow an employer to unilaterally modify an employment contract created by the issuance of an employee handbook). For a further discussion of this and other decisions opposing the unilateral modification of implied-in-fact employee handbook contracts, see infra Part II.B.

Notwithstanding the compelling arguments propounded by these courts and commentators, in Asmus v. Pacific Bell, [23] the California Supreme Court held that, because the company had created the employee policies unilaterally, there was no reason to prevent the company from terminating them in the same manner. [24] Following the reasoning adopted by many of the previous courts that had reached similar conclusions, [25] the California Supreme Court held that it would be inconsistent to require consideration apart from the employee's continued performance to modify a unilaterally adopted employment policy when such consideration was not necessary to bind the parties to the initial covenant. [26] Similarly, the court pointed out that an employee's continued employment typically constitutes acceptance of the initial offer of an implied employment contract. [27] It followed, then, that the employee accepted the employer's offer of a contract modification by maintaining employment after notice of the change. By continuing to work without objecting, such an employee effectively assented to the modification. [28]

Despite the cogency of the California Supreme Court's analysis, [29] the intuition of the commentators and the anti-modification courts that the result is unfair to employees seems correct, [30] especially when applied to the Pacific Bell managers who relied on their employer's promise of job security. [31] Nevertheless, [*804] the commentators' suggestion that bilateral

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[23] 999 P.2d 71 (Cal. 2000).

[24] Id. at 77. The Asmus decision came over a vigorous dissent by California Supreme Court Chief Justice George. Id. at 81 (George, C.J., dissenting). For a detailed discussion of the chief justice's analysis, see infra notes 199-205 and accompanying text.

[25] For an extensive discussion of these cases, see infra Part II.A.

[26] Asmus, 999 P.2d at 78-79.

[27] Id.

[28] Id.

[29] See discussion supra notes 23-28, infra notes 191-98 and accompanying text (analyzing the Asmus majority's decision).

[30] See discussion infra Part II.B (surveying the decisions of courts that have refused to allow employers to unilaterally modify or revoke promises contained in employee handbooks); see also infra Part III.A (examining the commentators' disapproval of unilateral modification).

[31] Asmus, 999 P.2d at 94-95 (George, C.J., dissenting).

The majority endorses a patently unfair, indeed unconscionable, result - permitting an employer that made a promise of continuing job security to its employees in order to retain their services during a period of good job prospects, to repudiate that

principles ought to govern the modification of implied-in-fact contracts based on employee handbooks [32] is a bare assertion that cannot by itself weaken the force of the California Supreme Court's characterization of the legal relationship between the employer and the employee at the moment of modification. [33] Courts should apply bilateral principles to a legal relationship that they have traditionally analyzed according to the unilateral contract model only upon the basis of substantial doctrinal justification. [34] However, those who have advocated for the application of bilateral principles to the modification of handbook obligations have never successfully articulated contract doctrines that require such a treatment. [35]

This Note argues that, despite the California Supreme Court's decision in Asmus, [36] as well as prior decisions with which it is in [*805] accord, courts should not permit an employer to modify an existing contractual relationship with its workforce without providing additional consideration

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promise with impunity several years later when the employer determined that it was no longer in its interest to honor its earlier commitment.

Id. While the plaintiffs' forbearance made the presence of reliance readily apparent in Asmus, identifying the reliance interest in handbook cases is not always so straightforward. Yet most courts that prohibit employers from unilaterally modifying handbook promises base their decisions, at least in part, on the need to protect employees' reasonable reliance on such promises. See, e.g., Brodie v. Gen. Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997) (noting generally the need to protect the employee's reliance without discussing how the plaintiffs before the court had relied on handbook promises). Such a hunt for reliance, however, is largely unnecessary.

On this issue, the works of Lon Fuller and William Perdue, Jr., and P.S. Atiyah are particularly instructive. See L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages: 1, 46 Yale L.J. 52 (1936); P.S. Atiyah, The Rise and Fall of Freedom of Contract (1979). In their classic two-part examination of the nature of contract damages, Fuller and Perdue argued that the reliance interest - not expectancy - provided the strongest basis for enforcing contracts. See Fuller & Perdue, supra, at 60-62. Furthermore, they argued that the primary reason for protecting the expectation interest is that it offers the most efficient way to protect and promote reliance. Id. Years later, Atiyah, acknowledging the influence of Fuller and Perdue, found reliance the only legitimate reason for enforcing contracts. See Atiyah, supra, at 1-7, 771-78. Atiyah argued that the existence of a contract is itself evidence of reliance and is enforced because it is relied on as a matter of law. See id.

[32] See generally Pratt, supra note 14; Sullivan, supra note 14.

[33] Essentially, the commentators and anti-modification courts acknowledge that a unilateral approach is sufficient to create enforceable handbook rights, but demand a bilateral approach to revise those rights. See Befort, supra note 3, at 360. Under this approach, the modification is effective only if it meets the requirements for the formation of a new bilateral contract - namely mutual assent and consideration. See id. This approach is typically supported by the recitation of "traditional principles of contract law" and notions of fairness. See, e.g., Asmus, 999 P.2d at 90 (George, C.J., dissenting).

[34] Cf. Befort, supra note 3, at 360 (finding that the anti-modification courts fail to demonstrate why a bilateral approach is necessary to modify a unilaterally created employment contract).

[35] See id. While Professor Befort demonstrates flaws with the arguments in favor of and against unilateral modification, his primary objection to the approach of the anti-modification courts is their failure to rest their holdings on satisfactory doctrinal grounds. See id.

[36] See generally Asmus, 999 P.2d at 71.

and receiving each employee's assent. [37] Furthermore, this Note proposes a doctrinal basis for adopting such a rule. Part I traces the history of the doctrine of at will employment, as well as exceptions to the rule, focusing particularly on the development of the handbook exception. Part II surveys existing case law regarding unilateral modification of implied contracts created by an employer's promulgation of employee handbooks and policies, outlining the conflicting manner in which courts across the country have resolved the issue. Part II particularly addresses the California Supreme Court's majority and dissenting opinions in Asmus v. Pacific Bell, [38] which received considerable media attention because of the expected impact the decision would have on the state's employers. [39] Part III analyzes these contrasting approaches and considers how other commentators have addressed the issue. Part III then proposes a doctrinal justification for imposing bilateral principles on the modification of handbook obligations. Specifically, Part III concludes that courts should imply into any contract created by an employer's unilateral issuance of an employee handbook a promise by the employer not to modify the handbook's terms.

I. The Doctrine of Employment At Will and the Development of the Handbook Exception

A. The Doctrine of Employment At Will

The doctrine of employment at will [40] emerged in the middle of [*806] the nineteenth century in response to the onset of the Industrial Revolution. [41] The at will regime sought to bring

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[37] See discussion infra Part II.B (examining cases that have refused to allow employers to unilaterally modify handbook contracts).

[38] 999 P.2d at 71.

[39] Newspaper and magazine reports treated the decision, which permitted Pacific Bell to unilaterally terminate a no-layoff policy it had adopted five years earlier, as judicial authority for employers to "break promises to workers." E.g., Maura Dolan, Ruling Lets Employers Rescind Their Promises, L.A. Times, June 2, 2000, at A27 (describing how the decision will benefit most employers in California by allowing them to rescind generous personnel policies); Judy Greenwald, Employer Can Rescind Promise; Court Finds Notice of Change Sufficient, Crain's Bus. Ins., June 12, 2000, at 1 (stating that the decision recognized the need to provide employers with flexibility, but could lead to diminished employee loyalty); State Supreme Court Says Firms Can Take Away Worker Rights By Changing Policies, Associated Press Newswires, June 2, 2000 (describing the decision as a "very significant victory for employers").

[40] Employment at will" is defined as "employment that is usually undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause." Black's Law Dictionary 545 (7th ed. 1999).

[41] See Richard Harrison Winters, Note, Employee Handbooks and Employment-At-Will Contracts, 1985 Duke L.J. 196, 198 (1985) (proposing the use of traditional contractual analysis to determine whether an employer's unilateral adoption of an

employment law more in line with the fashionable contract philosophies of the day, [42] and represented a dramatic change from the previous notions that governed the employment relationship. [43] The traditional master-servant law, known as the "English Rule," presumed that a hiring for an indefinite duration was for one year. [44]

Under the new doctrine, however, unless the parties specified a definite term of employment, the relationship was presumed to be at will, giving employers the freedom to fire workers for any reason or no reason at all. [45] Treatise writer Horace Gray Wood first articulated this preference for absolute freedom of contract in the employee context in 1877, when he defined the emerging "American Rule." [46] Wood wrote:

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 [*807] 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. [47]

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employee handbook can create contractual obligations). The rising development of large-scale industry at the time substantially increased the demand for labor. Id. The larger workforces, however, created a need for employers to enjoy unfettered control over their employees. Id. Under the doctrine of employment at will, the employer could more easily manage his workforce to meet his business needs and could freely dismiss unproductive or disruptive employees. Id.

[42] See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1826 (1980) (proposing that courts should protect at will employees by either implying a contract term allowing only for good faith discharges or creating a tort duty preventing employers from terminating an employee absent good faith). The growing industrial needs comported well with the emerging contract principle of the time - freedom of contract. Id. By affording employers greater freedom in their dealings with their workforces, the at will rule strove to foster economic growth. Id.

[43] See Sullivan, supra note 14, at 263.

[44] See id. Aside from the time element, the master-servant relationship also imposed far greater responsibilities on the employer than did the at will relationship. See Pratt, supra note 14, at 198. For example, under the traditional law governing the master-servant relationship, the employer was responsible for the servant's health and well-being. See id.

[45] See Elizabeth H. Confer, Tenth Circuit Survey: Employment Law, 76 Denv. U. L. Rev. 805, 806 (1999) (tracing the history of the at will employment doctrine and the development of exceptions to the at will regime). "Whereas early American masters had some responsibility to the public as well as to their servants when they turned dependent servants out on the world, under [this] formulation, masters could simply fire employees who had no contracts." Black's Law Dictionary 545 (7th ed. 1999) (quoting Mark A. Rothstein et al., Employment Law 1.4, at 9-10 (1994)).

[46] See H.G. Wood, A Treatise on the Law of Master and Servant 134, at 272 (1877).

[47] Id. (citations omitted).

Although modern commentators and courts have questioned Wood's portrayal of the law at that time, [48] courts across the country quickly adopted his position. [49] For nearly a century, employers adhered to the doctrine of at will employment with few challenges in the courts. [50] Despite this general adherence to the doctrine, [51] commentators and an increasing number of courts have criticized the rule as unfair. [52] The critics argue that by granting employers the absolute power to terminate employees, the doctrine promotes an unequal employment relationship. [53] This [*808] imbalance, in turn, leaves employees vulnerable to unfettered employer coercion. [54] In failing to cure the inherent disparity of power in the employment

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[48] See Kelly McWilliams, Note, The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine, 31 Vill. L. Rev. 335, 338 n.12 (1986) (complaining that Wood offered virtually no analysis to support the adoption of the new rule). In fact, Wood cited just four cases as authority for his proposition - none of which truly supported his theory. See id. (citing Wilder v. United States, 5 Ct. Cl. 462 (1869), rev'd on other grounds, 80 U.S. 254 (1871); De Briar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871)). See also Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1030 (Ariz. 1985) ("As commentators and courts later would point out, none of the four cases cited by Wood actually supported the rule.").

[49] The leading case was Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884) ("All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."). See also Martin v. N.Y. Life Ins. Co., 42 N.E. 416 (N.Y. 1895) (relying on Wood's definition of the employment at will doctrine).

[50] In fact, in cases where the parties did not expressly agree on a specific duration of employment, the scope of the at will rule actually widened in some jurisdictions from a rebuttable presumption to an absolute presumption of employment at will. See Sullivan, supra note 14, at 265.

[51] See, e.g., Lord v. Goldberg, 22 P. 1126 (Cal. 1889) (demonstrating just how pervasive the at will doctrine had become). The defendants had promised the plaintiff in Lord "permanent" employment, provided that he made his best efforts on behalf of the defendants. Id. at 1127. The court held that "permanent" meant that the employment "was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation." Id. at 1128. Other courts have interpreted the Lord holding to mean that permanent employment is nothing more than employment terminable at will. See, e.g., Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 888 (Mich. 1980).

[52] See, e.g., Michael D. Strong, Note, Personnel Policy Manuals as Legally Enforceable Contracts: A Limitation on the Employer's Right to Terminate At Will, 29 Washburn L.J. 368, 371-74 (1990) (criticizing the harshness and inflexibility of the at will rule and its use as a "shield to protect the employer against liability"). But see Richard A. Epstein, Symposium, In Defense of the Contract At Will, 51 U. Chi. L. Rev. 947 (1984). Professor Epstein argues that the inherent flexibility of the employment at will doctrine is necessary for employers to be able to adapt quickly to changes in the marketplace. See id. at 982. Furthermore, he suggests that the "occasional cases" in which an employee is unjustly discharged under the at will rule is an acceptable price to pay for the many occasions where the rule provides a reasonable private response to the myriad of problems that arise in the context of labor contracting. See id.

[53] See Winters, supra note 41 (recognizing the benefits of the at will regime to employers and its potentially harsh effects on employees). The inequality can be further illustrated by comparing the importance of the job to the employee, and the worker to the employer. See, e.g., Befort, supra note 3, at 330. As the employer always has substantially greater resources than the employee, the loss of a single worker to an employer ordinarily has little impact on the employer's business. See id. However, to the typical employee, the loss of work - and the paycheck that comes with that work - is often devastating. See id.

[54] See Pratt, supra note 14, at 201-02. The unequal relationship between employers and employees is further exacerbated by the recent increase in emphasis on job retention caused by technological advances requiring increased expertise in specific fields. See id.

relationship, the United States is now the only industrialized nation in the world that does not offer its workers any statutory protection against wrongful or unjust dismissals. [55]

While neither the federal government nor the vast majority of states have gone so far as to require just cause for an employee's termination, [56] legislatures and courts have made substantial inroads into the at will rule. [57] Congress imposed the first substantial limitations on the at will doctrine with the passage in 1935 of the National Labor Relations Act [58] and in 1964 of Title VII [*809] of the Civil Rights Act. [59] Three judicially created exceptions to the at will rule soon followed. [60] First, over the past two decades, the vast majority of jurisdictions have adopted a public policy exception grounded in tort law. [61] Courts have barred employers from

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[55] See Note, supra note 42, at 1835-36 (discussing the ways in which industrialized nations such as West Germany and Japan protect their workforces from unjust termination and proposing that American courts should either imply in all employment relationships a contract term allowing only good faith discharges or create a tort duty permitting employers only to discharge in good faith).

[56] Montana has adopted the "Wrongful Discharge from Employment Act," which prohibits employers from terminating employees without just cause. See Mont. Code Ann. 39-2-902 to -914 (1987). "While such a call has not gone entirely unheeded, it is apparently too novel for many present day legislatures." Pratt, supra note 14, at 202-03 (footnotes omitted).

[57] See Sullivan, supra note 14, at 265. "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,' is no longer a viable postulation in almost every jurisdiction." Id. (quoting Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884)) (footnotes omitted).

[58] National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. 151-168 (1982)). In upholding the constitutionality of the law, also known as the Wagner Act, the U.S. Supreme Court explained that before the Act's passage, "a single employee was helpless in dealing with an employer." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

Congress preceded passage of the Wagner Act with the lesser-known Railway Labor Act of 1926, which gave railroad employees the right to bargain with their employers without fear of unjust discharge. See Railway Labor Act of 1926, Ch. 347, 44 Stat. 577 (1926) (codified at 45 U.S.C. 151-162 (1982)).

The National Labor Relations Act recognized the power of organized labor, essentially requiring management to negotiate in good faith with its workforce and setting the structure for collective bargaining that is still followed today. See Epstein, supra note 52, at 947. More than ninety percent of the resulting labor agreements have included language limiting the right of employers to terminate employees without cause. See, e.g., McWilliams, supra note 48, at 342.

The number of workers able to claim protection under collective bargaining agreements, however, has steadily declined since 1960, when just over thirty percent of the non-agriculture workforce carried union cards. See Befort, supra note 3, at 331. Today, only 13.5 percent of American workers are members of a labor union. See U.S. Census Bureau, Statistical Abstract of the United States: 2001, at 411 (2001). The decline in union membership has increased the need for exceptions to the at will doctrine, as fewer workers can rely on the protection provided by union. See Befort, supra note 3, at 331.

[59] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. 2000e-2000e-17 (1982)). Title VII prohibits employers from discharging employees who are part of protected classes based on race, sex, religion, and national origin. Id. Following the enactment of the federal discrimination statute, numerous states passed similar laws. See Befort, supra note 3, at 332.

[60] See Befort, supra note 3, at 332 (discussing the erosion of the at will regime).

terminating employees for (1) refusing to engage in illegal activity, [62] (2) reporting an illegal act, [63] and (3) exercising a legally [*810] protected right. [64] The second judicially created exception to the at will rule borrows from the law governing commercial transactions to read a covenant of good faith and fair dealing into employment agreements. [65] Third, courts in nearly every jurisdiction now recognize the employee handbook exception, which provides that an employee handbook or policy statement may create contractual obligations that limit the employer's ability to terminate, or even discipline, employees at will. [66]

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[61] Under this exception, courts will not enforce an at will employment agreement, much like any other contract, if enforcement would offend firmly rooted notions of public policy. See Sullivan, supra note 14, at 266-67. See also Hurd v. Hodge, 334 U.S. 24 (1948) (striking down as contrary to public policy restrictive covenants imposing racial restrictions on the transfer of real property). Chief Justice Vinson explained the public policy exception:

The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Id. at 34-35 (citations omitted). Courts have repeatedly applied this long-standing contractual principle, which applies with equal force in the state courts, to restrict unjust terminations, with only New York, Alabama and Georgia remaining unwilling to adopt this exception. See Mark E. Brossman et al., Beyond the Implied Contract: The Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting, Practicing Law Institute: Litigation and Administrative Practice Course Handbook 18 (Order No. H0-00B4 2001).

[62] See Tameny v. Atl. Richfield Co., 610 P.2d 1330 (Cal. 1980) (holding that plaintiff's complaint stated a cause of action in tort for wrongful discharge, where employer terminated him for refusing to violate a price fixing statute). The court stated: "We hold that an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order." Id. at 1336-37. See also DeRose v. Putnam Mgmt. Co., 496 N.E.2d 428 (Mass. 1986) (holding that plaintiff's dismissal for refusing his supervisor's request to perjure himself at the criminal trial of a former co-worker violated public policy); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987) (holding that an employer wrongfully terminated an employee who refused to violate anti-pollution laws by pumping leaded fuel into cars designed for unleaded).

[63] See Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (holding that an at will employee dismissed for bringing statutory violations to his supervisor's attention sufficiently alleged a cause of action for wrongful discharge); Palmateer v. Intn'l Harvester Co., 421 N.E.2d 876 (Ill. 1981) (holding that an employee discharged for providing law enforcement agency with information implicating a co-worker in a criminal investigation was wrongfully terminated).

[64] See Stepanischen v. Merchs. Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983) (applying Massachusetts law) (holding that the discharge of an employee for engaging in union activities violated public policy); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) (upholding judgment in favor of an employee discharged for filing a worker's compensation claim).

[65] See Befort, supra note 3, at 333-34 (noting that a minority of jurisdictions have adopted this exception). "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Cf. U.C.C. 1-203 (1998) (applying an obligation of good faith and fair dealing to contracts for the sale of goods). In the leading case adopting this analysis, the Massachusetts Supreme Court held that a company breached the implied covenant by firing a salesman to avoid paying sales commissions he had already earned. See Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977). For an extensive discussion of the many applications of the covenant of good faith and fair dealing, see Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369 (1980).

[66] See, e.g., Hoffman-La Roche v. Campbell, 512 So.2d 725 (Ala. 1987); Parker v. Mat-Su Council on Prevention of Alcoholism & Drug Abuse, 813 P.2d 665 (Alaska 1991); Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170 (Ariz. 1984); Gladden v. Ark. Children's Hosp., 728 S.W.2d 501 (Ark. 1987); Scott v. Pac. Gas & Elec. Co., 904 P.2d 834 (Cal. 1995); Churchey v. Adolph

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B. The Handbook Exception

Employers have long provided their workers with company policies and rules through the distribution of handbooks or policy manuals. [67] While the size and content of these personnel manuals differ greatly among employers, [68] most include a mix of substantive and procedural rules. [69]

Historically, courts had flatly rejected the notion that a contractual obligation could arise out of an employee handbook. [70] For example, in Johnson v. National Beef Packing Co., [71] the

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Coors Co., 759 P.2d 1336 (Colo. 1988); Torosyan v. Boehringer Ingelheim Pharms. 662 A.2d 89 (Conn. 1995); Wash. Welfare Ass'n v. Wheeler, 496 A.2d 613 (D.C. 1985); Lane v. K-Mart Corp., 378 S.E.2d 136 (Ga. Ct. App. 1989); Kinoshita v. Canadian Pac. Airlines, Ltd., 724 P.2d 110 (Haw. 1986); Metcalf v. Intermountain Gas Co., 778 P.2d 744 (Idaho 1989); Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987); Speckman v. City of Indianapolis, 540 N.E.2d 1189 (Ind. 1989); Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995); Morriss v. Coleman Co., Inc., 738 P.2d 841 (Kan. 1987); Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Keller v. Sisters of Charity of the Incarnate Word, 597 So. 2d 1113 (La. Ct. App. 1992); Libby v. Calais Reg'l Hosp., 554 A.2d 1181 (Me. 1989); Staggs v. Blue Cross of Md., Inc., 486 A.2d 798 (Md. Ct. Spec. App. 1985), cert. denied, 493 A.2d 349 (Md. 1985); Jackson v. Action for Boston Cmty. Dev., Inc., 525 N.E.2d 411 (Mass. 1988); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Bobbitt v. Orchard, Ltd., 603 So.2d 356 (Miss. 1992); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. Ct. App. 1985); Jeffers v. Bishop Clarkson Mem'l Hosp., 387 N.W.2d 692 (Neb. 1986); D'Angelo v. Gardner, 819 P.2d 206 (Nev. 1991); Woolley v. Hoffmann-La Roche, 491 A.2d 1257 (N.J. 1985), modified on other grounds, 499 A.2d 515 (N.J. 1985); Garcia v. Middle Rio Grande Conservancy Dist., 918 P.2d 7 (N.M. 1996); Hanchard v. Facilities Dev. Corp., 651 N.E.2d 872 (N.Y. 1995); Trought v. Richardson, 338 S.E.2d 617 (N.C. Ct. App. 1986), rev. denied, 344 S.E.2d 18 (N.C. 1986); Hammond v. N.D. State Pers. Bd., 345 N.W.2d 359 (N.D. 1984); Mers v. Dispatch Printing Co., 483 N.E.2d 150 (Ohio 1985); Dangott v. ASG Indus., Inc., 558 P.2d 379 (Okla. 1976); Yartzoff v. Democrat-Herald Publ'g Co., Inc., 576 P.2d 356 (Or. 1978); Martin v. Capital Cities Media, Inc., 511 A.2d 830 (Pa. Super. Ct. 1986); Small v. Springs Indus., Inc., 357 S.E.2d 452 (S.C. 1987); Osterkamp v. Alkota Mfg. Inc., 332 N.W.2d 275 (S.D. 1983); Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. Ct. App. 1982); United Transp. Union v. Brown, 694 S.W.2d 630 (Tex. Ct. App. 1985); Berube v. Fashion Ctr., Ltd., 771 P.2d 1033 (Utah 1989); Benoir v. Ethan Allen, Inc., 514 A.2d 716 (Vt. 1986); Falls v. Va. State Bar, 397 S.E.2d 671 (Va. 1990); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Cook v. Heck's, Inc., 342 S.E.2d 453 (W. Va. 1986); Ferraro v. Koelsch, 368 N.W.2d 666 (Wis. 1985); Armstrong v. Am. Colloid Co., 721 P.2d 1069 (Wyo. 1986).

[67] See Pratt, supra note 14, at 206. Such policies are typically disseminated to employees upon their hiring, but employers also may unilaterally issue them to an existing workforce. See id. Employers often will require employees to sign a form indicating receipt and understanding of the manual. See id.

[68] See Befort, supra note 3, at 335. While some employee handbooks consist of no more than a welcome message and vague policy statements, others painstakingly define the employer's policies governing all aspects of the workplace and contain "far more detail than the average collective bargaining agreement." Id.

[69] See id. The substantive sections typically include job descriptions and information regarding the employer's business and goals, while the procedural sections often outline rules concerning disciplinary procedures, employee benefits, and compensation schedules. Id.; see also Pratt, supra note 14, at 206 (discussing the use of handbooks in the workplace).

[70] See, e.g., Johnson v. Nat'l Beef Packing Co., 551 P.2d 779 (Kan. 1976) (holding that the terms of an employee handbook were not binding). Before the at will rule had garnered wide scale acceptance, a small number of courts considered company policy as a way to fill in the holes of an incomplete contract. See Winters, supra note 41, at 200. However, once the at will doctrine became pervasive, most courts refused to afford personnel manuals any contractual weight. Id.

Kansas Supreme Court rejected an employee's attempt to bind his former employer to the terms of a company policy manual. [72] The court addressed the handbook's significance: "It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was [*812] evidenced by the defendant's unilateral act of publishing company policy." [73]

The Johnson case followed the traditional approach to the at will doctrine. [74] Under this approach, if the employee did not furnish the employer consideration atypical of the employment relationship itself, promises included in an employee handbook were unenforceable. [75] Thus, if an employee wanted to bind an employer to a handbook provision promising to terminate only for just cause, the employee would have to provide the employer with a benefit outside the regular duties associated with the job. [76] Courts were reluctant to oblige an employer to abide by the terms of a company policy manual that granted the employee valuable benefits such as job security without requiring the employee to provide the employer anything in return. [77]

Slowly, however, courts began to ponder the rigidity of the at will rule and sought to soften its sometimes harsh effects. [78] As four members of the Alabama Supreme Court stated in their

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[71] 551 P.2d at 779.

[72] Id. In suing his former employer for wrongful discharge, Lenard Johnson argued that a clause in his employee manual that declared the company would only terminate an employee for just cause constituted an implied contract of employment. Id. at 781. The great majority of breach of contract claims that arise from employee handbooks involve the failure of employers to follow "just cause requirements" or disciplinary procedures outlined in their manuals. See McWilliams, supra note 48, at 354.

[73] Johnson, 551 P.2d at 782.

[74] See Winters, supra note 41, at 201-03 (discussing the traditional judicial treatment of employee handbooks).

[75] See Johnson, 551 P.2d at 782.

[76] See Bussard v. Coll. of St. Thomas, 200 N.W.2d 155 (Minn. 1972) (holding the presumption of at will employment can be overcome where the employee purchases "permanent employment" by furnishing consideration which is uncharacteristic of the employment relationship itself). Merely working is not sufficient consideration because the employee is already obligated to work in exchange for a salary. See Pratt, supra note 14, at 207.

[77] See Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 151 (Neb. 1980) (holding that where a company distributes a policy manual while an employee is already on the job and that employee does not provide consideration aside from his work product, the company is not contractually bound).

[78] See, e.g., Small v. Springs Indus., Inc., 357 S.E.2d 452, 455 (S.C. 1987) ("Due to the potential for gross inequality … a majority of states has determined that a handbook can alter the employment status. South Carolina, as a progressive state which wishes to see that both employer and employee are treated fairly, now joins those states.") (citation omitted). Although an employee handbook issued by the defendant in this case provided for a four-step disciplinary process, the plaintiff was discharged after only a single warning. Id. at 453.

dissent to the decision in Meeks v. Opp Cotton Mills, Inc., [79] the law of contracts must adapt to meet the changing needs of society and the business community. [80] Within a decade of the Kansas Supreme Court's refusal in Johnson to acknowledge the contractual [*813] obligations inherent in employee handbooks, [81] the Supreme Courts of Michigan [82] and Minnesota [83] dramatically improved the right of the American worker to rely upon company policy manuals and employee handbooks. [84] The courts achieved this result, however, employing substantially different approaches. [85]

The Michigan Supreme Court created the handbook exception to the at will employment doctrine in Toussaint v. Blue Cross & Blue Shield. [86] Toussaint claimed that upon his hiring, he inquired about job security and a company officer presented him with a manual of Blue Cross

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[79] 459 So.2d 814, 816 (1984) (Beatty, J., dissenting). The majority declined to reevaluate its adherence to the employment at will doctrine, refusing to allow the plaintiff to sue his former employer for dismissing him because he filed a worker's compensation claim. Id. at 814.

[80] Id. at 816-17 (Beatty, J., dissenting) ("The employment-at-will rule is not set indelibly in stone. It is part of the common law, judicially created, and within the power of judicial reform… . The employment-at-will rule is yet another area in which there is a great need for judicial reform.") (citations omitted).

[81] 551 P.2d 779, 782 (Kan. 1976); see also Edwards v. Citibank, N.A., 425 N.Y.S.2d 327 (App. Div. 1980) (finding the employer's issuance of a policy manual that outlined termination procedures did not estop the company from terminating an employee without following those procedures); Richardson v. Charles Cole Mem'l Hosp., 466 A.2d 1084, 1085 (Pa. Super. Ct. 1983) ("Appellant's unilateral act of publishing its policies did not amount to the "meeting of the minds' required for a contract. The terms of the handbook were not bargained for by the parties and any benefits conferred by it were mere gratuities.").

[82] See Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980) (relying on the legitimate expectations of employees in treating the terms of an employee handbook as an implied contract).

[83] See Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (relying on unilateral contractual analysis to enforce an employee handbook as an implied contract).

[84] Under the precedents set in these cases and now followed in most jurisdictions, employees are able to rely on their employers' statements regarding job security and benefits made in employee handbooks and personnel manuals. See Toussaint, 292 N.W.2d at 880; Pine River, 333 N.W.2d at 622.

[85] See discussion infra notes 86-107 and accompanying text.

In addition, a small number of jurisdictions enforce handbook terms as contractual obligations based on promissory estoppel. See Hammond v. N.D. State Pers. Bd., 345 N.W.2d 359, 361 (N.D. 1984) (holding that an employer is estopped from ignoring the procedures set forth in an employee handbook); see also Befort, supra note 3, at 343-44; Pratt, supra note 14, at 214-16.

The Restatement (Second) of Contracts defines promissory estoppel: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can only be avoided by enforcement." Restatement (Second) of Contracts 90 (1981). This approach eliminates the usual hunt for bargaining and consideration, as promissory estoppel requires neither. See Pratt, supra note 14, at 214. Instead, promissory estoppel is used only to protect the reasonable reliance of employees on promises made by an employer in a personnel manual. Id.

[86] 292 N.W.2d at 880 (upholding jury verdict for plaintiff who claimed he was discharged in violation of employee handbook provisions mandating termination only for just cause).

personnel policies [87] that stated the company's policy was to treat employees "in a fair and consistent manner and to release employees for just cause only." [88] His [*814] termination, he claimed, violated the spirit of those provisions. [89]

The Toussaint court, at a time when no other court had enforced the terms of a personnel manual as an employment contract, [90] recognized that the provisions outlined in employee handbooks and manuals are not mere gratuities. [91] Instead, the court found the issuance of a handbook can enhance relationships within the workplace: "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." [92] Under Toussaint, an employer has no obligation to establish personnel policies. [93] However, the court stated that once such

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[87] Id. at 884. Toussaint testified that he also received oral assertions of job security from the officer. Id.

[88] Id. at 893. The manual that Blue Cross distributed to all employees, including Toussaint, contained more than 250 pages of elaborate polices and procedures governing eleven topics, including hiring, compensation, vacations, emergency procedures, disciplinary actions, and termination. Id. at 905.

Toussaint was hired in 1967 as an assistant to the company treasurer. Id. at 902. Toussaint was responsible for administering the company car policy. Id. According to the testimony of several Blue Cross employees, management became dissatisfied with Toussaint's job performance after five years and asked for his resignation. Id. at 903. At Toussaint's request, management's decision to request his resignation was reviewed by the company's Personnel Department, which upheld the decision. Id. In response, Toussaint sued Blue Cross, claiming the company violated the terms of its personnel manual, which required, among other provisions, that the company provide written or oral warnings before terminating an employee. Id. Blue Cross based its defense largely on the simple premise that courts had not previously found the issuance of an employee handbook to create contractual obligations. Id. at 897. See, e.g., Johnson v. Nat'l Beef Packing Co., 551 P.2d 779 (Kan. 1976) (rejecting an employee's attempt to bind his employer to the terms of an employee handbook). For a detailed discussion of Johnson, see discussion supra notes 70-77 and accompanying text.

[89] Toussaint, 292 N.W.2d at 903.

[90] See Clyde W. Summers, Employment At Will in the United States: The Divine Right of Employers, 3 U. Pa. J. Lab. & Emp. L. 71 (2000) (describing the development of exceptions to the doctrine of at will employment).

[91] Toussaint, 292 N.W.2d at 892. The court stated:

We hold that employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring.

Id. In so holding, the Toussaint court rejected the traditional argument that additional consideration and mutuality of obligation were necessary to form a contract based on the terms of an employee handbook, holding instead that these established contractual principles were merely rules of construction - not of substance. Id. at 885.

[92] Id. at 892.

[93] See id. at 894.

policies are issued in an employee handbook, the employer cannot then choose to ignore them. [94] The court [*815] emphasized that by issuing a detailed handbook, Blue Cross created a situation "instinct with obligation," [95] which might have led employees to reasonably rely on the promulgated policies. [96] The Michigan Supreme Court's interpretation of employee handbooks as enforceable contracts was rooted in notions of reliance and is often said to be based on the employee's "legitimate expectations" created by the employer's written policy statements. [97]

Three years later, the Minnesota Supreme Court applied a different analysis to reach the same result in the seminal case of Pine River State Bank v. Mettille. [98] The Pine River court enforced the provisions of an employee handbook based solely on unilateral contract principles. [99] Mettille claimed that after he had completed his probationary period as a loan officer at Pine River State Bank, the bank distributed an employee handbook to its employees. [100] The handbook included a section that outlined a three-step disciplinary procedure requiring at least

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[94] Id. at 895 ("Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.").

An "illusory promise" is defined as a "promise that appears on its face to be so insubstantial as to impose no obligation on the promisor; an expression cloaked in promissory terms but actually containing no commitment by the promisor." Black's Law Dictionary 1229 (7th ed. 1999). "An apparent promise which, according to its terms, makes performance optional with the promisor no matter what may happen, or no matter what course of conduct in other respects he may pursue, is in fact no promise. Such an expression is often called an illusory promise." Id. (quoting Samuel Williston, A Treatise on the Law of Contracts 1A, at 5 (Walter H.E. Jaeger ed., 3d ed. 1957)).

[95] Toussaint, 292 N.W.2d at 892. The Toussaint court borrowed its language from the classic opinion of Justice Cardozo in Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917). In Wood, which involved a contract in which fashion impresario Lucy, Lady Duff-Gordon granted Wood the right to put her endorsement on a clothing line, the New York Court of Appeals held that where an express contract may be lacking, "the whole writing may be "instinct with an obligation,' imperfectly expressed," so as to form a valid contract. Wood, 118 N.E. at 214 (citation omitted).

[96] See Toussaint, 292 N.W.2d at 884.

[97] Id. at 885; see also Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 730 (Ala. 1987) (recognizing Toussaint as the leading case utilizing the "legitimate expectations" theory to accord legal significance to the terms of employee handbooks).

[98] 333 N.W.2d 622 (Minn. 1983) (upholding award of damages to plaintiff who claimed that he was terminated in violation of contractually binding provisions included in an employee handbook).

[99] Id. at 627 ("We conclude, therefore, that personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable as part of the original employment contract."). For a definition of "unilateral contract," see supra note 12.

[100] Pine River, 333 N.W.2d at 624. The handbook, drafted by the bank's president, contained information about the bank's employment policies, including, among other provisions, sick leave, vacation time, confidentiality, and disciplinary procedures. Id. The bank president, E.A. Griffith, testified at trial that the handbook was intended solely "as a source of information for employees." Id. He further testified that "he never intended the handbook to become part of an employee's employment contract with the bank." Id.

two reprimands before an employee could be terminated. [101] Mettille claimed that his firing, [*816] carried out without reprimands, violated the terms of the handbook, which he asserted was part of his employment contract with the bank. [102]

In finding that the bank's handbook created an enforceable employment contract, the Pine River court eschewed many of the common arguments against holding an employer contractually liable for the terms of a handbook. [103] The court held that the formation of a unilateral employment contract requires only that the handbook promises be specific enough to constitute an offer [104] and that such promises be communicated to the employee by dissemination of the handbook. [105] The Pine River court further [*817] stated that the employee accepts the

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[101] Id. at 626. Even after two reprimands, the handbook called for discharge only for "an employee whose conduct does not improve as a result of the previous action taken." Id.

[102] Id. at 624. Mettille was hired in 1978 as a loan officer for Pine River State Bank at a salary of $ 12,000 a year. Id. In this capacity, Mettille was responsible for making loans and filing regulatory documents related to the loans. Id. In April 1979, Mettille received a performance evaluation and a seven percent pay raise. Id. However, the following September, state bank officials conducted an examination of the bank, discovering numerous failures to comply with applicable law and regulations. Id. The bank called these errors "serious" and immediately fired Mettille. Id. at 625. Unemployed, Mettille fell behind in payments on two notes borrowed from his former employer, which sued him to recover the loans. Id. Mettille counterclaimed, arguing that the company violated the terms of its employee handbook, which required at least two reprimands before dismissal. Id. Mettille further claimed that the errors he allegedly had committed were far from serious and that he was fired because of a personality dispute. Id.

[103] Id. at 627-29. First, the court rejected the argument that because the original contract, which was at will, did not specify a duration, the parties could not have intended to be bound by any of the restrictions on termination included in the handbook. Id. at 628. The court stated that this argument misinterprets the employment at will doctrine, which it considered a rule of construction, and not a rule that substantively limits the formation of a contract. Id. "There is no reason why the at will presumption needs to be construed as a limit on the parties' freedom to 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.

Next, the court tackled the argument that a provision for job security is not enforceable without the employee providing consideration separate from the employee's ordinary work product. Id. The court likened the requirement of additional consideration to the at will rule, calling it "more a rule of construction than of substance." Id. at 629. Therefore, the court held that if the parties express clear intent that the employer may only terminate pursuant to the terms of a handbook or other agreement, the employee's continued performance, despite his freedom to leave, constitutes sufficient consideration. Id.

Finally, the court rejected the argument that mutuality of obligation is required to enforce job security provisions. Id. The court held that the mutuality doctrine in this case was nothing more than a veiled inquiry into the adequacy of consideration, which Minnesota and most other states prohibit. Id. See, e.g., Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949) (holding that mere inadequacy of consideration will not void a contract).

[104] See Pine River, 333 N.W.2d at 626. The court, however, stated that not all statements included in employee handbooks or personnel manuals would be sufficiently "definite in form" to rise to the level of an enforceable covenant. Id. "An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer." Id.

[105] Id. The court reasoned that an employer might make an offer of a unilateral contract in a personnel manual to reduce the transactional costs of negotiating and writing separate employments contracts with each employee. See id. at 627; see also Note, supra note 42 for an extensive discussion of contract bargaining and the high costs associated with it.

handbook offer by commencing or continuing to work. [106] The employee's choice to continue or commence performance while retaining the right to resign also supplies the consideration supporting the employer's promises in the handbook. [107]

Subsequent courts have found the Pine River approach to be "more consistent with traditional contract principles than Toussaint." [108] In Hoffman-La Roche, Inc. v. Campbell, [109] the Alabama Supreme Court affirmed a jury verdict against the employer, holding that guidelines governing termination procedures contained in the company's employee handbook created a contractual obligation that made the employment relationship terminable only by compliance with those provisions. [110] Before reaching this conclusion, however, the court first had to consider whether Alabama should recognize a handbook exception to the employment at will doctrine. [111] In searching for a doctrinal basis to establish the exception, the court considered the approaches adopted by the courts in Pine River and Toussaint. [112] Although finding the Michigan Supreme Court's "legitimate expectations" argument to be "well-reasoned and logical," the Hoffman-La Roche court ultimately adopted the traditional contractual analysis of Pine River. [113]

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[106] Pine River, 333 N.W.2d at 627. "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." Id.

[107] Id. For a definition of "consideration," see supra note 19; see also Brewer v. First Nat'l Bank of Danville, 120 S.E.2d 273, 279 (Va. 1961) ("Consideration is, in effect, the price bargained for and paid for a promise. It may be in the form of a benefit to the party promising or a detriment to the party to whom the promise is made.").

[108] See, e.g., Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 731 n.2 (Ala. 1987) (holding that employee handbook provisions, if they meet the requirements for formation of a unilateral contract, may create contractual obligations).

[109] Id.

[110] Id. at 737. The handbook, given to Hugh Campbell at the time of his hiring, established a four-step disciplinary process the company would follow, absent the employee's commission of an expressly enumerated "serious offenses." Id. at 737 n.5. Campbell successfully argued that the company ignored this policy and terminated him when his job performance deteriorated as a result of a serious illness. Id. at 727-28.

[111] Id. at 728-29 (noting that an increasing number of jurisdictions have adopted this exception because employee handbooks "are not simply corporate illusions, full of sound … signifying nothing") (citation omitted).

[112] Id. at 730-31 (recognizing these as the "two leading cases representative of those jurisdictions according legal significance to language contained in employee handbooks").

[113] Id. at 731 n.2 ("We find the unilateral contract analysis set out in Pine River to be both consistent with sound traditional contract principles and in accord with existing Alabama caselaw.").

II. Existing Case Law: A Split Over Whether Employers May Unilaterally Modify Contracts Created by the Distribution of Employee Handbooks

The courts in Toussaint [114] and Pine River, [115] while clearly establishing the potential contractual obligation created by the issuance of employee handbooks, [116] left open the question of whether an employer who has entered into such a covenant may subsequently unilaterally modify or revoke the handbook provisions. [117] The courts that have considered this issue have primarily split over whether to apply unilateral or bilateral principles to attempted modifications of existing handbook promises. [118]

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[114] 292 N.W.2d at 880; see also discussion supra notes 86-97 and accompanying text (analyzing the Toussaint decision).

[115] 333 N.W.2d at 622; see also discussion supra notes 98-107 and accompanying text (analyzing the Pine River decision).

[116] The Toussaint and Pine River decisions had a profound effect on employment law. See Befort, supra note 3, at 348 (finding that the "judicial transformation of employee handbooks into enforceable obligations sent shock waves throughout the management sector"). Nearly all courts agree on the general rule, that a contract of employment for an indefinite period is terminable at will by either party. See, e.g., Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314, 317 (Ill. 1987) (recognizing presumption of at will employment). Following the courts in Toussaint and Pine River, however, the vast majority of courts have held that an employee can overcome the default rule by proffering evidence that the parties contracted to the contrary. See id. For example, an employee can use terms of an employment manual to rebut the employment at will presumption. See, e.g., Towns v. Emery Air Freight, Inc., No. C-3-86-576, 1988 WL 156258, at 1 (S.D.Ohio June 30, 1988) (denying an employer's summary judgment motion because a question of fact existed as to whether the parties intended to contract out of an at will relationship).

[117] See Pratt, supra note 14, at 216 (pointing out that the courts in Toussaint and Pine River, in dicta, endorsed the employer's right to unilaterally amend an employment contract implied from an employee handbook).

[118] Compare Ferrera v. A.C. Neilson, 799 P.2d 458 (Colo. Ct. App. 1990) (holding that an employer may unilaterally modify the terms of a personnel handbook simply by issuing a revised handbook), with Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995) (holding that an employer's distribution of a revised employee handbook does not automatically bind the parties to a modification of an existing covenant). But see Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989) (ignoring contractual analysis in holding that employers have the unilateral right to modify handbook contracts).

Note that employers can avoid much of the controversy surrounding the contractual weight of employee handbooks or personnel manuals. See, e.g., Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170, 174 (Ariz. 1984). The Leikvold court found that personnel policies can become part of employment contracts, but held that such a finding depends on the particular language used in the manual, as well as other actions taken by the employer. Id. However, the court also emphasized that employers can easily avoid such obligations:

Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason.

Id. Numerous courts have used this rationale to reject claims of implied employment contracts arising from employee handbooks. See, e.g., Lee v. Sperry Corp., 678 F. Supp. 1415, 1418 (D. Minn. 1987) (explaining that an explicit and conspicuous disclaimer and statement of employment at will negated the existence of any employment contract); Woolley v. Hoffmann-La Roche, 491 A.2d 1257 (N.J.), modified on other grounds, 499 A.2d 515 (N.J. 1985).

What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the

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A. The Argument in Favor of Allowing Unilateral Modification

The vast majority of courts that have allowed employers to unilaterally revoke or modify implied employee handbook contracts have relied on a "reverse" unilateral approach. [119] These courts conclude that because the employer created the handbook unilaterally, the employer may also unilaterally terminate or modify the resulting contractual obligations with reasonable notice. [120]

For example, in Sadler v. Basin Elec. Power Coop., [121] the [*820] Supreme Court of North Dakota held that an employer may unilaterally alter the terms of an implied handbook contract simply by issuing a subsequent handbook. [122] Basin had employed Donald Sadler for about four years when, in 1980, the company issued an employee handbook that, among other provisions,

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manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Id. at 1271.

[119] See Befort, supra note 3, at 357-58 (describing the "reverse" unilateral model as one in which an employer may modify existing contract terms implied from an employee handbook simply by repeating the transactions that led to the contract's formation). See also Chambers v. Valley Nat'l Bank, 721 F. Supp. 1128 (D. Ariz. 1988) (applying Arizona law); White v. Fed. Express Corp., 729 F. Supp. 1536 (E.D. Va. 1990), aff'd, 939 F.2d 157 (4th Cir. 1991) (applying Virginia law); Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000); Ferrera, 799 P.2d at 458; Elliot v. Bd. of Trustees, 655 A.2d 46 (Md. Ct. Spec. App. 1995); Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988); Fleming v. Borden, Inc., 450 S.E.2d 589 (S.C. 1994); Allan v. Sunbelt Coca-Cola Bottling Co., No. 88- CP-18-936, 1989 WL 299243, at 1 (S.C. Com. Pl. Aug. 15, 1989); Gaglidari v. Denny's Rests., Inc., 815 P.2d 1362 (Wash. 1991); Govier v. N. Sound Bank, 957 P.2d 811 (Wash. Ct. App. 1998).

[120] Courts adhering to this approach argue that the contractual principles essential to unilateral contract formation seem "equally applicable to the opposite transformation." Lee, 678 F. Supp. at 1418 (noting in dicta that if an employee handbook did create contractual obligations, a subsequent unilaterally amended handbook could supercede the first); see also Asmus, 999 P.2d at 77 (finding that because the employer created the handbook's provisions unilaterally, the employer may terminate unilaterally with reasonable notice). For a further discussion of Asmus, see supra notes 1-8, 23-28, infra notes 191-205 and accompanying text.

Note that not all courts require the employer to provide employees with "reasonable notice" of a unilateral modification of rights granted in an employee handbook. See, e.g., Chambers, 721 F. Supp. at 1128 (allowing employers the unrestricted right to modify contractual obligations implied from employee manuals).

[121] 431 N.W.2d at 296; see also Leathem v. Research Found. of City Univ., 658 F. Supp. 651, 655 (S.D.N.Y. 1987) (applying New York law) (stating, in dicta, that an employer unilaterally modifies the terms of a handbook contract by issuing a subsequent handbook).

In Leathem, the Research Foundation issued personnel policies in 1977 that included detailed procedures for disciplinary actions and terminations. Id. at 653. In 1982, however, the Research Foundation issued a subsequent handbook that clearly established an at will employment relationship. Id. After Leathem was dismissed in 1983, he filed an action, alleging that his employment contract included just cause provisions promulgated in the 1977 handbook. Id. at 654-55. Relying on New York law, the District Court held that the 1977 policy did not rise to the level of an enforceable covenant, but that even if it did, the at will provision of the 1982 handbook would have superceded the previous requirement of just cause. Id. at 655.

[122] Sadler, 431 N.W.2d at 300.

stated that "permanent employees cannot be terminated without a just cause." [123] After issuing at least three revised handbooks during the following five years, [124] Basin terminated Sadler during a company restructuring. [125] On Sadler's appeal to the North Dakota Supreme Court, the court's decision hinged on which of Basin's many personnel manuals governed the company's termination procedures. [126] The court, relying on dicta in Pine River [127] and [*821] Thompson v. St. Regis Paper Co., [128] held that an employer controls the employment relationship by maintaining the right to unilaterally modify implied contractual obligations at any time. [129]

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[123] Id. at 297. Neither the initial handbook, nor a revised handbook distributed two years later, defined just cause. Id.

[124] Id. The handbook distributed in 1983 included a definition of "just cause" that referred to "insubordination, theft, etcetera." Id. The 1983 edition also included, for the first time, a contractual disclaimer and a reservation of the unfettered right to modify the terms of the handbook. Id. In 1983, Donald Sadler received yet another handbook, which included, for the first time, language within the "just cause" termination policy referring to potential layoffs due to "lack of work or a continued need for the position." Id.

[125] Id. at 296. Upon his discharge, Sadler brought an action for wrongful discharge, claiming that the initial handbook created his employment contract with Basin, and as such, he only could be terminated for "just cause," as defined in that document. Id. at 297. Although just cause was not defined in the original handbook, Sadler testified that he interpreted it as "conditions like drinking on the job, insubordination, dereliction of duties, and so forth." Id. at 299. Sadler's supervisor at the time the initial handbook was distributed, James L. Grahl, testified that he intended the handbook to "tell employees that they would not be terminated for frivolous or insubstantial reasons, that they would not be terminated unless there were substantial misconduct or lack of performance or breach of faith." Id.

[126] Id. at 298. After a jury verdict for Basin, Sadler appealed, specifically questioning a jury instruction given at the trial court that defined unilateral contracts. Id. at 300. The instruction, borrowing heavily from the dicta of Pine River, stated:

Unilateral contract modification of the employment contract may be a repetitive process. Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify handbook provisions.

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.

Id.; see also Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983). The court found no error in this instruction. Sadler, 431 N.W.2d at 300.

[127] 333 N.W.2d at 627 (granting contractual weight to employee handbooks, but then, while not considering the issue, assuming that employers still reserved the right to unilaterally modify such policies).

[128] 685 P.2d 1081 (Wash. 1984) (holding that promises found in an employee manual may, in certain circumstances, contractually obligate the employer). In dicta, the Washington Supreme Court addressed modification of the at will employment relationship, stating: "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." Id. at 1087. These statements, relied on by the Sadler court, do not appear to address unilateral modification of contractual obligations arising from employee handbooks. See id.

[129] Sadler, 431 N.W.2d at 300. Therefore, the court found the final handbook, which allowed for terminations due to "lack of work or a continued need for the position" determinative of Sadler's rights, and affirmed the jury verdict below. Id. at 297. The court concluded that Basin communicated the offer of the modified handbook by distributing the handbook to its employees, and Sadler accepted and provided consideration by continuing to work while retaining the right to resign. Id. at 300.

By applying the requirements of offer, consideration and mutual assent necessary for the creation of a unilateral employment contract under Pine River [130] to the modification context, courts have permitted employers to lawfully amend personnel policies in the same manner in which the employers adopted the handbooks. [131] In Chambers v. Valley National Bank, [132] [*822] the United States District Court for the District of Arizona, while finding that employers are bound to follow handbook promises at least until they are modified or withdrawn, [133] stated: "The inclusion of the disclaimer in the 1985 publications may best be considered an offer of a modification to a unilateral contract of employment, which plaintiff accepted by continuing her employment with defendant." [134]

While the Chambers decision gave employers the right to unilaterally amend employee handbook contracts at any time without limitation, [135] other courts allowing for unilateral modification of such covenants have taken a more restrictive approach. [136] The South Carolina

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[130] See supra notes 104-07 and accompanying text (explaining these requirements).

[131] See Chambers v. Valley Nat'l Bank, 721 F. Supp. 1128 (D. Ariz. 1988) (applying Arizona law) (upholding the bank's unilateral modification of an employee handbook). Although the defendant in Chambers removed the case from Arizona state court to the District Court for the District of Arizona on a federal question and pendent jurisdiction, the federal court applied state law to the contractual issues. Id. at 1129-32. Other courts and commentators often have cited Chambers for the proposition that employers may modify employee handbooks in the same unilateral manner in which the employers adopted the policies. See Befort, supra note 3, at 358; see also Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112, 117 (Mich. 1989). But see Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999), in which the Arizona Supreme Court, which had not previously ruled on this issue, held that an employer may not unilaterally modify a handbook promise without satisfying the traditional requirements of bilateral modification. For a further discussion of Demasse, see infra notes 162-71 and accompanying text.

[132] 721 F. Supp. at 1128. The bank had employed Chambers for fourteen years when it updated the bank's personnel manual to include a "clear and conspicuous" disclaimer of any contractual obligation arising from the handbook. Id. at 1131. Two years after adding the disclaimer, the bank placed Chambers on probation and fired her little more than one month later, ostensibly because of "performance problems." Id. at 1129. Chambers responded by bringing this action, alleging, among other claims, wrongful termination in violation of her implied-in-fact contractual rights to specific disciplinary procedures included in the handbook originally provided to her. Id. The District Court granted summary judgment in the bank's favor on Chamber's state contractual claims. Id. at 1132-33.

[133] See id. at 1132 (citation omitted).

[134] Id. at 1131-32 (explaining that this analysis treats unilaterally adopted employment contracts like all other types of contracts, in that they can be modified by the parties at any time).

[135] See generally id.

[136] See, e.g., Fleming v. Borden, Inc., 450 S.E.2d 589 (S.C. 1994) (requiring employers to notify employees of revisions to handbook contracts). Five years earlier, the South Carolina Court of Common Pleas similarly held that an employer could unilaterally modify an employee handbook by adding conspicuous disclaimers to ensure employment at will. See Allan v. Sunbelt Coca-Cola Bottling Co., No. 88- CP-18-936, 1989 WL 299243, at 1 (S.C. Com. Pl. Aug. 15, 1989).

In Allan, the defendant had employed Michael Allan for eight years when the company distributed an employee handbook. Id. The handbook stated that the company would treat its employees with "individual dignity" and would try to "provide permanent,

Supreme Court, in Fleming v. Borden, [137] permitted unilateral modification, but only where the employer provided affected employees with reasonable notice of the alteration. [138] The court based its decision on the nature of the [*823] employment relationship, arguing that "the employer-employee relationship is not static. Employers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees." [139]

However, not all courts that permit unilateral modification are in accord as to what constitutes reasonable notice. [140] For example, in Elliott v. Board of Trustees, [141] the Maryland Court of Special Appeals disagreed with the Fleming court's requirement of actual notice, instead concluding that "a uniform, system wide distribution of a disclaimer will generally constitute reasonable notice," even if a particular employee does not receive actual notice. [142] Upon

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steady work… ." Id. However, in 1985 and 1988, the defendant issued conspicuous disclaimers of permanent employment. Id. at 2. Shortly after Sunbelt issued the second disclaimer, the company laid Allan off during a round of company wide cutbacks. Id. at 1. Allan responded with this suit, alleging that the defendant breached his implied employment contract created by, among other factors, the initial employee handbook. Id. At the close of Allan's case, the trial court granted defendant's motion for a directed verdict. Id.

Although Allan had claimed he had never signed either disclaimer, the court found that his express assent to the modification was unnecessary. Id. at 5. The court applied a unilateral analysis to the alleged contract, finding that by returning to work the day after his employer added the disclaimers, Allan furnished sufficient consideration and acceptance of the modification. Id.

137 450 S.E.2d at 589. In 1985, Borden unilaterally amended its employee handbook to add a disclaimer of contractual obligation. Id. at 594. The company, which had employed Kathy Fleming since 1981, terminated her in 1986 for excessive unexcused absences. Id. at 591. Three years after her dismissal, Fleming sued Borden for breach of contract based on the pre-1985 handbook, which contained disciplinary procedures, but no disclaimer. Id. at 594. Borden conceded that it had not followed the disciplinary procedures outlined in the earlier handbook, but argued that the 1985 handbook, including the disclaimer, superceded the prior handbook. Id.

138 Id. at 596. The court concluded that in the employment context, reasonable notice requires actual notice, and the question of whether the employer had provided actual notice of a modification is a question of fact for the jury to decide. Id. In this case, Fleming admitted receiving the handbook, but argued that she was informed that the revised document contained only insubstantial changes. Id. The South Carolina Supreme Court held that this question of fact was properly submitted to the jury, and affirmed a jury verdict for the employer. Id.

139 Id. at 595 (specifically rejecting the bilateral approach to handbook modification).

140 See Elliot v. Bd. of Trustees, 655 A.2d 46 (Md. Ct. Spec. App. 1995) (holding that an employer may unilaterally modify an employment termination policy so long as reasonable notice is provided).

141 Id. The defendant-appellee Board of Trustees operated the Montgomery County Community College.

142 Id. at 52. The courts that have required reasonable notice before allowing unilateral modification of promises contained in employee handbooks have placed considerable emphasis on what constitutes reasonable notice. See, e.g., Gaglidari v. Denny's Rests., Inc., 815 P.2d 1362, 1367 (Wash. 1991) ("It is unfair to place the burden of discovering policy changes on the employee."); see also Fleming, 450 S.E.2d at 596 (requiring actual notice).

In Gaglidari, the Washington Supreme Court refused to afford contractual weight to several new editions of an employee handbook that the company provided to new employees and left in employee lounges for review by existing employees. 815

James Elliott's hiring by the Montgomery County [*824] Community College in 1979, his supervisor lent him a copy of the college's policies and procedures manual. [143] When Elliott was promoted in 1988, the college issued him his own copy of the handbook. [144] Although the Elliott court chastised the college for the inconspicuous placement in the modified handbook of the disclaimer of contractual obligation, [145] the court nevertheless rejected Elliott's appeal. [146] The

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P.2d at 1367. The court did, however, find an effective modification in the handbook's final revision, which was promulgated just months before the incident that led to Gaglidari's dismissal. Id.

Denny's hired Ronda Gaglidari as a bartender in 1980, providing her with a 1979 personnel manual on her first day. Id. at 1364. The manual included a section on termination procedures providing that fighting on duty was grounds for immediate dismissal. Id. The periodic revisions of the handbook contained express disclaimers of contractual obligation, along with a change in the provision regarding termination for fighting. Id. at 1367. Under the new handbooks, which Denny's claimed superceded the 1979 edition, fighting on the premises - even if not while on duty - supplied grounds for immediate dismissal. Id. The company terminated Gaglidari in 1987 because of her role in an off-duty fracas at the restaurant, and Gaglidari brought this action for breach of contract. Id. at 1365.

The Washington Supreme Court stated that while an employer may unilaterally amend or revoke policies established in an employee handbook, a unilateral change will not be valid if the affected employees do not receive reasonable notice. Id. at 1367. The court further found that the distribution of revised handbooks only to new employees and in employee lounges did not provide the necessary notice to affect a unilateral revision of the 1979 employee handbook. Id. However, under a unilateral analysis, the court did find an effective modification in Gaglidari's signed receipt of an alcoholic beverage handbook that included the amended language on fighting on the premises. Id. "Defendant extended an offer by providing the handbook and training plaintiff on alcoholic beverage service in accordance with the requirements contained in the handbook. Plaintiff accepted the offer by signing for the handbook and participating in the training. The consideration was plaintiff's continuation of her employment." Id.

Seven years later, the Washington Court of Appeals similarly held that an employer may modify employment terms without an employee's consent where the employer established those terms by a unilateral contract. See Govier v. N. Sound Bank, 957 P.2d 811 (Wash. Ct. App. 1998). In Govier, the plaintiff was hired as a loan originator in 1991, acknowledging on her first day of work receipt of an employee handbook that promised the bank would only dismiss an employee for cause. Id. at 813.

In 1993, the bank attempted to unilaterally modify Govier's terms of employment, asking her to sign a contract that allowed either party to terminate employment for any reason by providing twenty days notice. Id. at 814. When Govier refused to sign the contract, she was terminated. Id. Finding that her refusal to agree to the employer's terms of employment constituted a constructive resignation, the Court of Appeals held that an employer may unilaterally amend or revoke polices established in employee handbooks, even if the employer did not expressly reserve the right to do so when issuing the handbook. Id. at 815.

[143] Elliott, 655 A.2d at 48. Elliott, who was promoted in 1988 to a supervisory position, was accused by a female employee of sexual harassment in 1992. Id. The same year, the college disciplined Elliott by demoting him, transferring him to a satellite campus, and issuing to him a "last chance letter" warning him that any future indiscretion would lead to immediate termination. Id. The following year, the college fired Elliott after charging him with violating policy by leaving work early without permission. Id. After filing an unsuccessful internal appeal of his dismissal, Elliott filed this suit alleging breach of his employment contract. Id. The trial court granted the college's motion for summary judgment. Id. at 49.

[144] Id. at 48-49. Also in 1988, the college issued a revised version of its policies and procedures, although it is unclear whether the new manual was in place at the time of Elliott's promotion. Id. The college claimed in a memorandum accompanying the new policies that the new manual was issued in order to make it easier to read. Id. That memorandum, however, did not mention that the new manual changed the "inherent nature of the employment relationship" from one requiring good cause for termination to at will employment. Id.

[145] Id. at 51 n.1 ("We nevertheless perceive that the better practice might well be to have such disclaimer language in bold print, at the very beginning of the introduction or in some other way prominently highlighted within the introduction.").

[146] Id. at 55.

Maryland Court of Special Appeals based its holding on the notion that an employer must enjoy the unfettered right to unilaterally modify the contractual relationship it had previously established through the issuance of an employee handbook. [147]

[*825] In Ferrera v. Nielsen, [148] the Colorado Court of Appeals held that where an employer issues a policy manual without an express reservation of the employer's right to later unilaterally modify the handbook, such a reservation is presumed. [149] Nielsen hired Ferrera in 1980, issuing her a handbook two years later that limited the company's right to discharge her and included no disclaimer or reservation of the employer's right to amend the handbook. [150] By the time the company fired Ferrera in 1987, it had distributed a revised handbook that incorporated a conspicuous disclaimer, but no longer included a just cause termination provision. [151] Under the

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[147] Id. at 51. Therefore the latter manual superceded any earlier editions so long as the modification met the requirements for unilateral formation. Id.

Other courts, while approving of an employer's authority to unilaterally disclaim rights previously granted in an employee manual, have established an additional limitation on that right. See White v. Fed. Express Corp., 729 F. Supp. 1536, 1547-48 (E.D. Va. 1990), aff'd, 939 F.2d 157 (4th Cir. 1991) (applying Virginia law); see also Progress Printing Co. v. Nichols, 421 S.E.2d 428, 430 (Va. 1992) (noting an exception for vested benefits to the general rule that an employer retains the right to modify its policies at any time). The White court held that companies such as Federal Express "plainly [have] the power to expand, constrict, or even eliminate contract terms incorporated from the Manual," so long as those terms had not yet vested in the company's employees. 729 F. Supp. at 1548.

Three of the four plaintiffs in White, all of whom were couriers, were discharged for alleged misconduct, including tardiness. Id. at 1542. In response, they brought this suit, alleging, among other claims, that Federal Express breached the terms of their employment contract by not following the grievance procedures set out in the company's personnel manual. Id. at 1547. The company had amended its handbook in 1987 to expressly disclaim that the document created any contract rights or changed the employment relationship from at will. Id. at 1548.

While the plaintiffs claimed Federal Express was obligated to follow the disciplinary procedures set forth in the earlier handbooks, the court held that those procedures had not vested by the time the company unilaterally modified the policies. Id. at 1547-48. In granting summary judgment in favor of Federal Express, the court found that the right to a grievance procedure outlined in the handbook could not vest until the grievance actually arose because otherwise the employer would be unable to ever amend the grievance procedures. Id. at 1549. Cf. Hercules Powder Co. v. Brookfield, 53 S.E.2d 804, 809 (Va. 1949) (holding that despite an express reservation allowing the company to discontinue a severance plan at any time, such a modification could not deprive the plaintiff of benefits already earned prior to the company's decision to discontinue the plan).

[148] 799 P.2d 458 (Colo. Ct. App. 1990) (permitting an employer to unilaterally modify implied contractual obligations created by the distribution of an employee handbook).

[149] Id. at 460.

[150] Id. Nielsen, doing business as Neodata Services, issued all employees a revised handbook in 1986. Id. at 459. The updated document included no just cause provision, but instead "expressly reserved the right to discharge an employee whose conduct "in the opinion of the Company' warrants it." Id. at 461.

[151] Id. Beverly Ferrera was terminated after the company concluded she had falsified her time card; this was the second time Nielsen had accused her of such misconduct. Id. at 459. In response to her dismissal, Ferrera sued, alleging wrongful discharge based on, among others, an implied contract theory. Id. The trial court granted the defendant's motion for summary judgment, which the Colorado Court of Appeals affirmed in this decision. Id. at 459-60.

Ferrera court's analysis, an employer may modify promises contained in a handbook simply by issuing a new handbook. [152] The [*826] 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." [153]

Several courts have eschewed the unilateral contract analysis altogether, relying instead on public policy grounds. [154] In Bankey v. Storer Broadcasting Co. (In re Certified Question), [155] the plaintiff claimed that his dismissal, ostensibly for poor job performance, was in violation of the defendant's 1980 personnel policy, which stated that the company would not terminate employees without just cause. [156] The employer, however, argued that a revised policy, issued the following year, restored the original at will employment relationship. [157] Rather than considering the applicability of unilateral contract theory to subsequent modifications of implied employee contracts, the Michigan Supreme Court considered how [*827] such revisions

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[152] Id. at 460 (noting that the employer must inform employees of any amendments to the handbook).

[153] Id. According to the Ferrera court, this holding does not render the promises included in an employee handbook worthless. See id. "An employer's unilateral offer in a handbook will therefore ordinarily be construed as a promise not to discharge any employee without cause or without following specified procedures, unless the handbook is changed, and the employee is advised of such change, before a discharge." Id. (citations omitted).

[154] See Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989); Hogue v. Cecil I. Walker Mach. Co., 431 S.E.2d 687 (W. Va. 1993) (holding that an employer may amend or even revoke existing employee handbooks that have created implied contract rights so long as the employer provides reasonable notice of the change to affected employees). Although the Bankey court acknowledged that contractual obligation may be implied from the distribution of employee handbooks, the court treated such promises only as "policies." 443 N.W.2d at 120. As such, the court relied on dictionary definitions of "policy" to argue that the provisions of an employee handbook create nothing more than "a flexible framework for operational guidance, not a perpetually binding contractual obligation." Id. Such a finding, however, directly contravenes the Michigan Supreme Court's own statements in Toussaint. For a detailed discussion of Toussaint, see supra notes 86-97 and accompanying text.

[155] 443 N.W.2d at 112 (holding that an employer may, without reservation of the right to do so, unilaterally modify its personnel policies, so long as the employer provides affected employees with reasonable notice of the impending change). The Michigan Supreme Court did note that employers should not view its decision as one allowing changes made in bad faith, such as "the temporary suspension of a discharge-for-cause policy to facilitate the firing of a particular employee in contravention of that policy." Id. at 120.

[156] Id. at 113-14. Kenneth Bankey, who worked for thirteen years as a salesman for the defendant, claimed that, in reliance upon the just cause discharge policy, he chose not to seek employment elsewhere. Id. at 113. The case was removed to the United States District Court for the Eastern District of Michigan, which found that the just cause policy, included in the company's 1980 Personnel Policy Digest, contractually obligated the defendant. Id. at 114. The court overruled defendant's motion for a directed verdict and a jury awarded damages to Bankey. Id. On appeal, the United States Court of Appeals for the Sixth Circuit certified a question to the Michigan Supreme Court, asking whether an employer may unilaterally modify a contractual employment relationship created by the employer's unilateral issuance of personnel policies. Id. at 113. The Michigan Supreme Court answered in the affirmative. Id.

[157] Id. at 114. The company's revision, unilaterally adopted, clearly stated that "employment is at the will of the company." Id.

affected both the employer and the employee. [158] As the employer initially promulgated the procedures to secure an "orderly, cooperative and loyal work force," [159] any subsequent policy change narrowing the employees' rights should have a corresponding negative impact on the employer. [160] Additionally, the Michigan Supreme Court also expressed concern that if employers were not permitted to unilaterally adjust their published personnel policies, short of successful renegotiation of the policies with each affected employee, "many employers would be tied to anachronistic policies in perpetuity… ." [161]

B. The Argument Against Allowing Unilateral Modification

In the recent case of Demasse v. ITT Corp., [162] the Arizona Supreme Court held that once an employment contract is created by the employer's issuance of a personnel handbook, the employer may not unilaterally modify the terms of that relationship. [163] The [*828] Demasse

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[158] Id. at 119. Relying on the reasoning first advanced in the court's previous decision in Toussaint, the court here stated that "written personnel policies are not enforceable because they have been "offered and accepted' as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies." Id. Under this analysis, when an employer issues personnel procedures, the employer hopes "to promote an environment conducive to collective productivity." Id.

[159] Toussaint, 292 N.W.2d at 892 (explaining why an employer would promulgate handbook policies that benefit the workforce).

[160] Bankey, 443 N.W.2d at 119. The court found that the employer would lose the more productive work force sought by the issuance of such policies. Id. This injury to the employer provides a compelling deterrent to employers that should prevent companies from amending employment policies except when completely necessary. See id. See also Pratt, supra note 14, at 219 (presenting the argument for allowing unilateral changes by employers).

[161] Bankey, 443 N.W.2d at 120. The court declared that this would be especially troublesome to employers operating in today's economic climate, where companies must have the ability to adapt to business changes to remain competitive. Id. at 121. Closely linked to this concern, the court suggested that where successful renegotiation with each employee was not possible, an employer could "find itself obligated in a variety of different ways to any number of different employees… ." Id. at 120.

The West Virginia Supreme Court relied heavily on the rationale of the Bankey decision to reach a similar conclusion in Hogue v. Cecil I. Mach. Co., 431 S.E.2d 687 (W. Va. 1993). The court echoed the Michigan Supreme Court's concerns in Bankey, stating "the implied contract theory that modifies at will employment cannot be used to completely freeze an employer's right to alter or revoke personnel policies to meet changing business conditions." Hogue, 431 S.E.2d at 691.

[162] 984 P.2d 1138 (Ariz. 1999) (refusing to allow an employer to modify the terms of a handbook contract absent additional consideration and each employee's assent).

[163] Id. at 1144. Other courts have reached a similar conclusion. See Robinson v. Ada S. McKinley Cmty. Serv., Inc., 19 F.3d 359 (7th Cir. 1994); Towns v. Emery Air Freight, Inc., No. C-3-86-576, 1988 WL 156258, at 1 (S.D. Ohio June 30, 1988) (applying Ohio law); Toth v. Square D Co., 712 F. Supp. 1231 (D.S.C. 1989) (applying South Carolina law); Thompson v. Kings Entm't Co., 674 F. Supp. 1194 (E.D. Va. 1987) (applying Virginia law); Ex parte Amoco Fabrics and Fiber Co., 729 So.2d 336 (Ala. 1998); Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995); Doyle v. Holy Cross Hosp., 708 N.E.2d 1140 (Ill. 1999); Brodie v. Gen. Chem. Corp., 934 P.2d 1263 (Wyo. 1997). See also Restatement, supra note 85, 45 (stating that in the unilateral context, once the offeree accepts the offer by commencement of performance, the offeror cannot change the terms).

court, noting that implied-in-fact employment contracts have the same legal effect as express contracts, [164] found that successful alterations of promises implied from employee handbooks require: (1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration. [165] By [*829] requiring these elements for an effective modification of promises contained in an employee handbook, the Arizona Supreme Court effectively transformed the original unilateral employer-employee relationship to one that is bilateral. [166]

Six ITT employees, each of whom had worked for the company for at least 10 years, were laid off shortly after the company unilaterally amended a personnel policy to include a disclaimer of any guarantee of continued employment. Demasse, 984 P.2d at 1141. Over an undisclosed number of years, ITT issued five employee handbooks that included a provision guaranteeing that layoffs, if necessary, would be conducted according to seniority. Id. at 1140. Although each of the handbooks contained this provision, the later versions also included the disclaimers. Id. The first disclaimer provided that "nothing contained herein shall be construed as a guarantee of continued employment." Id. at 1141. In the fifth and final handbook, an additional disclaimer apparently sought to grant ITT the right to modify personnel policies through methods other than issuing new handbooks. Id. Four years later, ITT informed its employees that its layoff policy would no longer be based on seniority, but instead on each employee's "abilities and documentation of performance." Id. Within 15 days, four of the plaintiffs were laid off; nine months later, the other two plaintiffs received their pink slips. Id.

In response, the six former ITT employees brought an action in federal district court, claiming ITT breached their implied-in-fact employment contracts. Id. The United States District Court for the District of Arizona allowed ITT to unilaterally modify the policy, relying on its prior holding in Chambers v. Valley National Bank. Id. at 1142. For a detailed discussion of Chambers, see supra notes 131-35 and accompanying text. On appeal, the United States Court of Appeal for the Ninth Circuit, recognizing that no Arizona appellate court had considered this issue, certified the following question:

Once a policy that an employee will not be laid off ahead of less senior employees becomes part of the employment contract … as a result of the employee's legitimate expectations and reliance on the employer's handbook, may the employer thereafter unilaterally change the handbook policy so as to permit the employer to layoff employees without regard to seniority?

Demasse, 984 P.2d at 1140 (citation omitted).

[164] See id. at 1144 (arguing that the rule prohibiting unilateral modification applies whether the contract was formed unilaterally or bilaterally, whether it was express or implied). See also Restatement, supra note 85, 19, cmt. a ("There is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others.").

[165] See Demasse, 984 P.2d at 1144. The majority's decision came over a vigorous dissent by Vice Chief Justice Jones, who rejected the application of bilateral principles to a unilateral relationship. Id. at 1156 (Jones, V.C.J., dissenting). The vice chief justice argued that to require an employer seeking to modify an employee handbook to provide employees with additional consideration would unduly restrict "managerial flexibility in the workplace." Id. Furthermore, the dissent observed that employers have the absolute right to shut down their businesses, an action which economic circumstances may require. Id. at 1155 (Jones, V.C.J., dissenting). The vice chief justice noted:

When the employer chooses in good faith, in pursuit of legitimate business objectives, to eliminate an employee policy as an alternative to curtailment or total shutdown, there has been forbearance by the employer. Such forbearance constitutes a benefit to the employee in the form of an offer of continuing employment. The employer who provides continuing employment, albeit under newly modified contract terms, also provides consideration to support the amended policy manual.

Id. However, a company's decision not to exercise its right to go out of business cannot constitute consideration unless such forbearance is bargained for. See Restatement, supra note 85, 71 (finding that a forbearance may constitute consideration if it is "sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise").

[166] Cf. Demasse, 984 P.2d at 1153 (Jones, V.C.J., dissenting) (arguing that this transformation undermines the employment at will rule and is unsupported by prior Arizona jurisprudence). But see Toth v. Square D Co., 712 F. Supp. 1231 (D.S.C. 1989) (applying South Carolina law) (applying bilateral principles to an employer's attempt to modify a unilaterally adopted employment policy).

Assuming that ITT's issuance of the revised handbook constituted a valid offer, the Arizona Supreme Court then analyzed the effectiveness of the attempted modification. [167] In tackling the issue of consideration, the court determined that the employees' continued employment alone was insufficient to support a modification. [168] The court also found dubious the argument that the employees' continued job performance after issuance of the new handbook constituted acceptance of ITT's offer of a modification. [169] The Arizona Supreme Court concluded that if continued employment did constitute acceptance, the employees would have had no choice but to resign in order to protect their rights under the existing contract. [170] The Demasse court further argued that to allow unilateral modification of employment contracts would render most handbook contracts illusory. [171]

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[167] See Demasse, 984 P.2d at 1144.

[168] Id. at 1145 ("Any other result brings us to an absurdity: the employer's threat to breach its promise of job security provides consideration for its rescission of that promise.").

[169] Id. at 1145-46.

[170] Id. The court also suggested that if the employees' continued performance constituted acceptance, the employee would have to take affirmative steps in order to reject the offer. Id. at 1146. While the court found it appropriate to require an employee take affirmative steps, beyond continued performance, to accept an employer's offer of a contract modification, it concluded that "requiring an offeree to take affirmative steps to reject an offer … is inconsistent with general contract law." Id. (citations omitted).

[171] Id. at 1147.

If a contractual job security provision can be eliminated by unilateral modification, an employer can essentially terminate the employee at any time, thus abrogating any protection provided the employee. For example, an employer could terminate an employee who has a job security provision simply by saying, "I revoke that term and, as of today, you're dismissed" - no different from the full at-will scenario in which the employer only need say, "You're fired." This, of course, makes the original promise illusory.

Id.

In perhaps the first case to consider unilateral modification of an employee handbook, the United States District Court for the Eastern District of Virginia refused to allow an employer to unilaterally amend the company's personnel policies. See Thompson v. Kings Entm't Co., 674 F. Supp. 1194 (E.D. Va. 1987) (applying Virginia law). Thompson began working at Kings Dominion theme park in 1977 and the company issued him a handbook in 1980 that defined "dismissal" as "a separation initiated by Kings Dominion for cause." Id. at 1195. However, the theme park's ownership changed four years later, and in 1985, the park's new operator issued a revised handbook providing that the company could "terminate employment at any time with or without cause and with or without notice." Id. Shortly after issuing the revised handbook, Kings terminated Thompson, who brought this action alleging breach of contract. Id.

Kings argued on its motion for summary judgment that when an employer unilaterally grants rights in an employee handbook, the employer maintains the ability to retract those rights with a similar act. Id. at 1198. In rejecting the defendant's motion, the Thompson court noted the logical appeal of Kings' argument, but ultimately concluded that the employee must do more than continue working to manifest acceptance of the modification offer. Id. at 1199. The court stated:

In this case, it is assumed that the employer has bargained away its right to terminate the employee without just cause. To permit that employer to unilaterally convert the employee's status to terminable-at-will merely by issuing a second handbook to

[*830] The Arizona Supreme Court's analysis in Demasse encompassed many of the arguments proffered by courts that had previously rejected employers' attempts to unilaterally modify or revoke contractual obligations implied from unilaterally adopted employee handbooks. [172] While all of the prior cases generally hinted at the need to require the elements necessary for bilateral modification in the handbook context, these decisions were based largely on either the lack of additional consideration or the [*831] employer's failure to receive the affected employee's assent to the modification. [173]

A majority of the anti-modification courts have primarily balked at the lack of consideration flowing from the employer to the employee when the employer attempts to unilaterally modify policies promulgated in a handbook previously distributed to the workforce. [174] For example, in Doyle v. Holy Cross Hospital, [175] the Illinois Supreme Court found that the modification of an

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that effect would do violence to this policy. By requiring the elements of contract modification to be met, a court can ensure that the employee has assented to and received consideration in exchange for the change in status.

Id. at 1198. See also Robinson v. Ada S. McKinley Cmty. Servs., Inc., 19 F.3d 359 (7th Cir. 1994) (applying Illinois law) (reversing the District Court for the Northern District of Illinois' decision granting the employer's summary judgment motion). In Robinson, the United States Court of Appeals for the Seventh Circuit held that one party to a contract - even an implied-in-fact unilateral contract - "cannot by his own acts release or alter its obligation." Id. at 363. Eight years after the employer in Robinson issued a handbook guaranteeing permanent employment for workers who completed a six-month probationary period, the employer unilaterally revised the manual to disclaim all contractual obligations. Id. at 360. The revised handbook included a disclaimer in which the employer reserved the right to modify any of the manual's provisions without notice to the employees. Id. Upon Claudine Robinson's hiring as director of foster care services in 1979, she received a copy of McKinley's 1978 personnel manual. Id. at 360. Three years after McKinley issued the revised handbook, the agency discharged Robinson, who brought this suit for breach of her implied employment contract. Id. The District Court for the Northern District of Illinois granted McKinley's summary judgment motion. Id. In reversing the district court's decision, the Robinson court found that valid modification requires an offer, acceptance, and consideration. Id. at 364. Any other decision, the Robinson court warned, would result in a ruling "contrary to basic contract principles and notions of fairness." Id. at 363.

[172] See generally Demasse, 984 P.2d at 1138. See also cases cited supra note 163.

[173] See, e.g., Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995) (highlighting the difficulty in finding the employee's assent to an attempted modification). See, e.g., Doyle v. Holy Cross Hosp., 708 N.E.2d 1140 (Ill. 1999) (focusing on the element of consideration). Other courts have mixed their discussion of contract law with arguments based on the inherent unfairness of unilateral modification. See, e.g., Brodie v. Gen. Chem. Corp., 934 P.2d 1263 (Wyo. 1997) (relying on the lack of additional consideration and the employee's reliance on the policies included in the employee handbook).

[174] See, e.g., Doyle, 708 N.E.2d at 1140-41 (applying "traditional principles" of contract law to find that to effectively modify a unilaterally adopted employee handbook, the employer must provide fresh consideration to the affected employees).

[175] 708 N.E.2d at 1140. Four nurses, each of whom had worked for the hospital for at least nineteen years, were terminated after the hospital issued repeated disclaimers and amendments to an employee handbook, which the hospital had distributed to all new and existing employees in 1971. See id. at 1143. The 1971 handbook included a section entitled "Economic Separation," which stated, in pertinent part, that: "Holy Cross Hospital is committed to providing a working environment where employees feel secure in their job." Id. at 1142. The section warned that certain economic circumstances could lead to the elimination of jobs. Id. If the hospital were forced to conduct any such layoffs, however, the handbook provided guidelines for how the hospital would

existing contract, like its formation, required consideration to be enforceable. [176] However, unlike the courts that have permitted [*832] employers to unilaterally modify contractual obligations implied from employee handbooks, [177] the Doyle court never looked to the employees for the consideration necessary to make the modification binding. [178] Instead, the court concluded that by adding a disclaimer of contractual obligation to the handbook, the hospital "provided nothing of value to the plaintiffs and did not itself incur a disadvantage. In fact, the opposite occurred: the plaintiffs suffered a detriment - the loss of rights previously granted to them by the handbook - while the defendant gained a corresponding benefit." [179]

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select employees for termination, including consideration of the employee's job classification, length of continuous hospital service, and ability and fitness to perform the required work. Id.

Over the following twelve years, the hospital issued several disclaimers. Id. at 1143. Finally, in 1983, after all four of the plaintiffs had begun working for the defendant, the hospital again revised its policies, with the new handbook stating:

The Personnel Policies and other various Hospital employee and applicant communications are subject to change from time to time and are not intended to constitute nor do they constitute an implied or express contract or guarantee of employment for any period of time.

The employment relationship between the Hospital and any employee may be terminated at any time by the Hospital or the employee with or without notice.

Id. In November of 1991, the hospital fired the four nurses, who filed a breach of contract action against the hospital just eight days later. Id. The nurses claimed that their discharges violated the "Economic Separation" terms of the 1971 handbook. Id. at 1142. After several amended complaints and remands, the Circuit Court of Cook County granted the defendant's motion to dismiss the plaintiffs' amended complaint. Id. The appellate court reversed, finding the hospital's repeated modifications to the personnel manual lacked consideration and were unenforceable. Id. at 1143.

[176] Id. at 1145. Similarly, in Towns v. Emery Air Freight, Inc., the United States District Court for the Southern District of Ohio held that where an employer and employee affirmatively disclaimed any contractual obligation several months after an employee began work under the terms of an implied handbook contract, the waiver was ineffectual. No. C-3-86-576, 1988 WL 156258, at 3 (S.D. Ohio June 30, 1988) (applying Ohio law). The court rejected the employer's summary judgment motion, reasoning that, because the employee already possessed the rights created by the employer's handbook, the employee would have had to receive additional consideration in return for a waiver of those rights. Id. For a further discussion of the requirement of consideration, see supra notes 19 and 103 and accompanying text.

[177] See, e.g., Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988) (finding consideration for an employer's unilateral modification in the employee's continued performance while retaining the right to resign). Applying such an analysis to Doyle would require the employees to quit their jobs in order to preserve their existing rights under the personnel manual. See Doyle, 708 N.E.2d at 1146.

[178] See Doyle, 708 N.E.2d. at 1145. The court stated: "Because the defendant was seeking to reduce the rights enjoyed by the plaintiffs under the employee handbook, it was the defendant, and not the plaintiffs, who would properly be required to provide consideration for the modification." Id.

[179] Id. Under the Illinois Supreme Court's analysis, to execute a valid revision of an implied handbook contract, an employer must provide fresh consideration, either in the form of a new benefit to the employee or detriment to the employer, or some other bargained-for exchange resulting in the employee's continued employment. Id.

Courts have encountered similar difficulty when searching for "conclusive evidence" of an employee's assent to an employer's attempted modification. [180] In Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc., [181] the Connecticut Supreme Court first [*833] noted that when an employer issues a personnel manual that confers on an employee rights greater than the employee previously enjoyed, the employee's continued job performance ordinarily can be construed as acceptance of the employer's offer of the new rights. [182] However, where the employer's proposed modification reduces the employee's rights under an existing contract, a different result is required. [183] In concluding that an employer may not unilaterally modify an employment contract implied from a personnel manual, the Torosyan court held that to infer acceptance of the modification from the employee's continued employment would leave the employee with "no way to insist on those contractual rights" for which the employee had previously bargained. [184]

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[180] See, e.g., Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89, 99 (Conn. 1995) (holding that mere distribution of an amended personnel manual and the employee's continued performance on the job cannot bind the parties to a modification of an existing employment agreement).

[181] 662 A.2d at 89. In Torosyan, a chemist fired by the defendant after three years of employment claimed his termination violated the terms of an employee manual provided to him on his first day of work. Id. at 92. The personnel manual included, among other provisions, a section entitled "The Right to Manage," which stated that "the company recognizes its right and obligation to operate and manage its facilities. This includes the right to hire, discharge for cause, promote, demote, reclassify and assign work to employees." Id. at 94. Company officials also provided oral assertions to the plaintiff during the recruitment process to the effect that the defendant would "take care" of him as long as he did "a good job." Id. About two years later, however, the company provided its employees with an updated employee manual. Id. at 95. Among other changes, the revised handbook eliminated the requirement of "just cause" for terminations and added a list of unacceptable practices that, if violated, could lead to disciplinary procedures including dismissal. Id. Shortly thereafter, the defendant accused the plaintiff of violating one such practice by falsifying an expense report, and terminated his employment without cause. Id. at 92. The plaintiff, Anushavan Torosyan, then brought this action for, among other claims, breach of an implied contract of employment. Id. The trial court found for the plaintiff. Id.

[182] Id. at 98. The court supported this proposition by explaining that an employer's likely motive for offering increased benefits, such as job security, to its employees is that the employer will gain the employees' loyalty. Id. Therefore, the court found, "it is logical to view continued employment as acceptance of, and consideration for, such promise." Id. at 99. See also Henry H. Perritt, Jr., Employee Dismissal Law and Practice 4.37 (3d ed. 1992) (recognizing that an employee's continued performance may, under certain circumstances, constitute acceptance of and supply consideration for an employer's offer of a unilateral contract).

[183] Torosyan, 662 A.2d at 99. The employee's continued work after notice of a revised manual "that substantially interferes with an employee's legitimate expectations about the terms of employment … cannot be taken as conclusive evidence of the employee's consent to those terms." Id.

[184] Id. The Alabama Supreme Court reached an analagous conclusion in Ex parte Amoco Fabrics and Fiber Co., 729 So.2d 336 (Ala. 1998). In affirming the Court of Civil Appeals' reversal of the trial court's summary judgment for Amoco, the Alabama Supreme Court held that both parties must mutually assent to a modification of an implied employment contract. Id. at 340. The plaintiffs, Danny Stokes and Phillip Williams, who began working for Amoco in 1985 and 1987, respectively, claimed that throughout their employment, layoffs were conducted on a seniority basis. Id. at 337. However, on the eve of Amoco's sale of

Several other courts, while recognizing the contractual analysis adopted by many of the courts opposing an employer's right to unilaterally modify employee handbooks, have also relied heavily upon "notions of fairness." [185] For example, in Toth v. [*834] Square D Co., [186] the United States District Court for the District of South Carolina concluded that if an employer were permitted to revoke an employee's rights under an implied handbook contract simply by issuing a new edition, then the employer "could ignore his own mandatory policies" and the handbook "would not be worth the paper on which it [was] printed." [187] The court suggested that such a rule would be "patently unjust." [188] Similarly, in Brodie v. General Chemical Corp., [189] the

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the facility in which the plaintiffs worked, they were terminated to facilitate the sale. Id. at 338. Stokes and Williams brought suit, claiming their dismissals violated the company's long-time seniority policy, as set out in Amoco's policy manual. Id. Amoco, however, argued that because it had revised its personnel handbook to include a disclaimer of contractual obligation, the layoff policy did not rise to the level of a contract. Id. at 340. The Alabama Supreme Court refused to give effect to the disclaimer, as it was not in existence when the company first promulgated the layoff policy and secured the plaintiffs acceptance through their continued employment. Id. The plaintiffs' continued employment after Amoco revised the handbook did not constitute assent to the modification. Id.

[185] See, e.g., Brodie v. Gen. Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997) (finding policy considerations favor the employees when an employer attempts to unilaterally modify contractual obligations implied from an employee handbook).

[186] 712 F. Supp. 1231 (D.S.C. 1989) (applying South Carolina law) (holding that an employer's unilateral modification of an employment contract offended established principles of contract law and public policy). But see Fleming v. Borden, 450 S.E.2d 589 (S.C. 1994) (allowing unilateral modification of implied employment contracts as long as the employer provides the affected employees with reasonable notice of the modification). The Fleming court stated that one could view its findings as consistent with the Toth decision because the District Court in Toth merely held that whether a disclaimer in a revised handbook effectively modified the original employment contract was a question for the jury. Id. at 595. The South Carolina Supreme Court stated that the Toth court's attack on the notion that an employer could unilaterally modify an existing employment contract came largely as dicta. Id.

[187] Toth, 712 F. Supp. at 1235 (citation omitted). In Toth, fourteen discharged employees sued their former employer for breach of an implied contract. Id. at 1233. The employees claimed that under the company's employee handbook, the defendant was required to terminate employees in reverse order of seniority. Id. The court denied the defendant's motion for summary judgment, which was based, in part, on the company's distribution of a revised handbook that included a disclaimer of all contractual rights. Id. at 1234.

[188] Id. at 1235 (citation omitted). Switching from policy concerns to contract law, the District Court was no less firm in its holding that once a unilateral contract has been created, any subsequent modification requires the bilateral principles of mutual assent and consideration. Id.

[189] 934 P.2d at 1263 (finding that a valid unilateral modification of an employee handbook job security provision would substantially interfere with the employees' valuable contractual right). In Brodie, two years after the employer revoked the company's long-standing handbook policies to eliminate any supposed employment rights beyond at will status, the company substantially reduced its workforce. Id. at 1265. Three of the laid-off employees brought this action, claiming their terminations constituted a breach of a contractual obligation created by the defendant's personnel manual. Id. at 1264. After a jury verdict in favor of the employer, a panel of the United States Court of Appeals for the Tenth Circuit reversed, citing the Wyoming Supreme Court's decision in Wilder v. Cody Country Chamber of Commerce. Id. at 1265; see also Wilder, 868 P.2d 211 (Wyo. 1994) (requiring fresh consideration for the modification of an existing contract). However, after a separate panel of the Tenth Circuit issued a contradictory opinion in another case, the Tenth Circuit recalled its mandates in both cases and certified the following question to the Wyoming Supreme Court:

Wyoming Supreme Court noted [*835] the strong reliance interests of employees who are promised valuable benefits in employee handbooks. [190]

C. Balancing the Competing Arguments

In Asmus v. Pacific Bell, [191] in which the California Supreme Court considered whether an employer could independently terminate an employment security policy that had become an implied-in-fact unilateral contract, both sides of the argument were sharply drawn. [192] Adopting the analysis from several of the decisions discussed above, [193] the Asmus majority concluded that as long as the employees received reasonable notice and their vested benefits were not interfered with, the employer could terminate a [*836] unilaterally adopted personnel policy. [194]

Does the principle approved in Wilder v. Cody Country Chamber of Commerce, that a "promise by an employer or an employee under a subsisting contract to do more or take less than that contract requires is invalid unless the other party gives or promises to give something capable of serving as consideration" apply in employee handbook contract cases?

Brodie, 934 P.2d at 1264 (citation omitted). In answering the certified question in the affirmative, the Brodie court rejected the notion that an employee's continued performance could constitute consideration to bind an employer's proposed modification because "the employee is merely performing duties under the preexisting contract." Id.

[190] See Brodie, 934 P.2d at 1268. The court rested its decision on the aforementioned contract principles, but asserted that even if it were to accept the defendant's argument that the case should have been decided on public policy grounds, the result would be unchanged. See id. The Brodie court gave little weight to the defendant's concern that to effectively modify an employee handbook, an employer would have to negotiate on an individual basis with each employee. See id. The defendant's policy-based arguments mirrored those that the Michigan Supreme Court relied upon in its decision in the Bankey case. Id. at 1267-68. For a further discussion of Bankey, see supra notes 154-61 and accompanying text. See also Helle v. Landmark, Inc., 472 N.E.2d 765, 777 (Ohio Ct. App. 1984) (holding that while an employer is free to modify its policies prospectively and without disturbing an employee's vested rights, an employer may not "disregard its contractual obligations merely because it [is] economically advantageous to do so").

[191] 999 P.2d 71 (Cal. 2000) (allowing an employer to unilaterally modify contractual obligations created by the distribution of a personnel policy). See also discussion supra notes 1-8, 23-28 and accompanying text.

[192] Asmus, 999 P.2d at 76. The United States Court of Appeals for the Ninth Circuit certified the following question to the California Supreme Court: "Once an employer's unilaterally adopted policy - which requires employees to be retained so long as a specified condition does not occur - has become a part of the employment contract, may the employer thereafter unilaterally [terminate] the policy, even though the specified condition has not occurred?" Id. at 72-73.

Although the certified question presented this issue in the context of the occurrence of a specified condition, the court quickly, and curiously, presumed that the specified condition was unascertainable, and then proceeded to consider only whether an employer may unilaterally modify a unilaterally adopted employee handbook that had become part of the employment contract. Id. at 75-79. The court essentially found that there was no adequate way to measure "changes materially affecting [Pacific Bell's] business plan achievement," which was the specified condition referred to in the certified question. See id. at 80.

[193] See generally id. (citing Leathem v. Research Found. of City Univ., 658 F. Supp. 651 (S.D.N.Y. 1987) (applying New York law); Elliott v. Bd. of Trustees, 655 A.2d 46 (Md. Ct. Spec. App. 1995); Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989); Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988); Fleming v. Borden, 450 S.E.2d 589 (S.C. 1994); Gaglidari v. Denny's Rests., Inc., 815 P.2d 1362 (Wash. 1991)). See also discussion supra Part II.A (examining these and other cases permitting unilateral modification of unilaterally adopted personnel policies).

[194] Asmus, 999 P.2d at 81.

The majority held that because the employer created the policy unilaterally, the employer could terminate it in the same manner. [195] The court also expressed policy concerns, suggesting that in certain cases, distressing economic circumstances could force an employer to choose between revoking burdensome employee policies, or laying off its entire work force and going out of business. [196] The court found that although Pacific Bell was obligated to follow the terms of the policy as long as it remained in effect, the company was entitled to terminate the employment security policy at any time. [197] The majority argued that any other finding would leave the employer "unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles." [198]

The California Supreme Court narrowly [199] decided Asmus over a vigorous dissent by Chief Justice George, [200] who argued that an employer could not effectively modify an employee handbook merely by providing notice of the new terms and obtaining each [*837] employee's continued performance under the existing agreement. [201] Instead, the chief justice would have

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[195] Id. at 77. Under this analysis, Pacific Bell made its offer by distributing the modified policy to affected employees. Id. at 78-79. The employees' acceptance, as well as consideration, were inferred from their continued employment. Id.

[196] Id. at 78. This portion of the California Supreme Court's analysis borrowed heavily from the vice chief justice's dissent in Demasse v. ITT Corp., 984 P.2d 1138, 1155 (Ariz. 1999) (Jones, V.C.J., dissenting). See Asmus, 999 P.2d at 78. For further discussion of this argument, see supra note 165.

[197] Asmus, 999 P.2d at 79. Thus, the employees enjoyed the benefit of the policy until such time that the employer decided to terminate it. Id. "Although a permanent no-layoff policy would be highly prized in the modern workforce, it does not follow that anything less is without significant value to the employee or is an illusory promise." Id. But see Respondents' Brief on the Merits at 15, Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000) (No. S074296) (arguing that such an interpretation of the no-layoff policy would be illusory). "In other words, while the employees were still employed, they were not laid off; the employer did not lay anyone off until it decided that it wanted to abolish its no-layoff policy. This interpretation of [Pacific Bell's] obligation obviously renders that obligation meaningless." Id. at 15-16.

[198] Asmus, 999 P.2d at 78.

[199] The Supreme Court of California split 4-3 with one judge sitting by designation. Id. at 81.

[200] Id. at 81-94 (George, C.J., dissenting). The chief justice's dissent, when considered in conjunction with the majority opinion, provides a cogent look at the opposing sides of the debate over unilateral modification in the context of implied employment contracts.

The dissent spent considerable time disagreeing with the majority's initial finding that the specified condition referred to in the certified question is not ascertainable, arguing that Pacific Bell's "intention as expressly set forth in the MESP is that the company would reassess its employment security commitment only if major changes in the economy or public policy had a significant negative effect on its rate of return, its earnings, and ultimately the viability of its business." Id. at 87 (George, C.J., dissenting). However, the chief justice also attacked the majority's analysis of the underlying legal issue, refusing to concede that an employer has the right to unilaterally modify the terms of an employee handbook that has created contractual obligations. Id. at 88 (George, C.J., dissenting).

[201] Id.

held that an employer may not unilaterally modify a personnel policy that has become part of an employment contract without providing additional consideration and gaining the assent of each affected employee. [202] Furthermore, the chief justice argued that in order to modify a no-layoff policy, the employer is the party that must provide the new consideration in exchange for the employees' agreement to relinquish the valuable right to job security. [203] The dissent also found lacking the supposed assent of the employees to the modification. [204] Where an existing contract already protects the employees' right to job security, their continued performance after notice of a decrease in that protection cannot be construed as acquiescence to the modification. [205]

III. The Case for the Application of Bilateral Principles to Modifications of Employee Handbooks Contracts: An Implied Promise Not to Modify Is Inherent in Every Employment Contract

A. Past Attempts by Courts and Commentators to Resolve This Issue

Two previous commentators have considered whether employers may unilaterally revise employee handbooks, each concluding that courts should not permit unilateral modification. [206] In his 1990 comment in the University of Pennsylvania Law Review, Richard Pratt argued that under either a contractual or [*838] fairness analysis, an employer is bound by the provisions made in an employee handbook and cannot later unilaterally revise those terms. [207] Pratt found the traditional requirements of bilateral contract modification, specifically mutual assent and

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[202] Id. For a discussion of other courts adopting the chief justice's proposed holding, see supra Part II.B.

[203] See Asmus, 999 P.2d at 90 (George, C.J., dissenting). The dissent stated that the employer provided no consideration to the employees in exchange for the reduction of their contractual rights, arguing, to the contrary, that in modifying the policy, the employer was promising to do less than it was already legally obligated to do under the original handbook contract. Id. While the majority looked to the actions of the employees to find the consideration necessary to execute the modification, the dissent argued that continued employment under less favorable conditions could in no way be described as a benefit to the employees constituting consideration. Id.

[204] See id. at 92 (George, C.J., dissenting).

[205] Id. at 93 (George, C.J., dissenting) (arguing that in such a situation, the "employee's only choice would be to resign or to continue working, either of which would result in the loss of the benefits at issue").

[206] See Sullivan, supra note 14; see also Pratt, supra note 14. See also supra notes 15-21 and accompanying text (discussing the commentators' criticism of cases permitting unilateral modification of employee handbook promises).

[207] See Pratt, supra note 14, at 220-25.

consideration, necessary to successfully revise a unilaterally adopted employee handbook. [208] Turning to notions of reliance and equity, the author found the rationale supporting the recognition of the original handbook exception to the at will doctrine equally applicable to modification. [209] Similarly, Pratt argued that to allow an employer to ignore the provisions of a handbook that has induced the reliance of employees would violate fundamental notions of fairness. [210] Pratt quickly disposed of the public policy arguments that employers often raise when attempting to unilaterally revise or revoke personnel handbooks, arguing that pleas for managerial flexibility and uniformity of contract terms for the entire workforce pale in comparison to the potential for inequity to employees who have come to count on their employers' promises of job security or favorable disciplinary procedures. [211]

Five years later, Stephen Carey Sullivan used a similar contractual analysis in his comment in the Regent University Law Review, [212] arguing that the general rule governing formation of [*839] unilateral employment contracts "cannot simply be transferred and applied in a case involving … a modification." [213] Instead, Sullivan, like Pratt, urged the application of bilateral principles to attempted modifications of promises contained in employee handbooks. [214] While

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[208] See id. at 221. Pratt argued that consideration beyond continued employment is necessary in the modification context because the employee is already performing under an enforceable implied contract. Id. Therefore, to construe the employee's continued performance as acceptance would necessarily require the employee to take affirmative steps to reject the proposed modification. Id. Such a construction of contractual modification would be inconsistent with long-standing contract law. Id.

[209] See id. at 222. The handbook exception was created to protect employees "from the inequities of illusory promises held out to them." Id. Employers, Pratt insisted, must be held to their promises. Id.; see also supra Part I.B (describing the emergence of the handbook exception).

[210] See Pratt, supra note 14, at 222-23. This argument, the author notes, is essentially premised on the principles of promissory estoppel. Id. at 223; see also supra note 85 (defining promissory estoppel).

[211] See Pratt, supra note 14, at 223 (calling such arguments "insubstantial or speculative"). But see Brief of Amicus Curiae California Employment Law Council in Support of Petitioners at 3, Asmus v. Pac. Bell, 999 P.2d 71 (2000) (No. S074296) (arguing that to not allow employers to unilaterally modify contractual obligations created by the distribution of employee handbooks would "threaten" and "wreak havoc" on the workplace and the employee-employer relationship). "A decision that deters, rather than encourages, employer policymaking undermines the very stability and harmonious work environment [California] wants its employers to achieve." Id. at 20.

[212] See Sullivan, supra note 14, at 287-93. Sullivan based his findings largely on the analysis provided by the District Court for the Eastern District of Virginia in Thompson v. Kings Entertainment Co., 674 F. Supp. 1194 (E.D. Va. 1987). See Sullivan, supra note 14, at 281-84. The Thompson court found that employers should be bound by their promises to prevent them from offering "with one hand what [they] take away with the other." 674 F. Supp. at 1198 (citation omitted). For an extensive discussion of Thompson, see supra note 171.

[213] Sullivan, supra note 14, at 290.

both authors, much like the anti-modification courts, advocated the use of bilateral principles, they also mimicked the courts in their failure to provide a sound doctrinal basis for such a treatment. [215] Instead, Pratt accurately highlighted the inequities inherent in the contrary approach, which would allow an employer who couches personnel policies in binding terms to subsequently disregard these policies when they become burdensome or economically restrictive. [216] However, by merely [*840] relying upon diffuse references to contract principles and vague notions of fairness, these commentators have made their position no more tenable than the contrary model. [217]

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[214] Id. In calling for consideration and acceptance to bind an attempted revision of a handbook, Sullivan took particular exception to the notion that an employee's continued performance after an employer proposes revoking the employee's contractual right to job security could satisfy either requirement. Id. at 292. Sullivan stated:

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.

Id.

[215] Pratt relied largely upon policy concerns to justify the application of bilateral principles. See Pratt, supra note 14, at 222-23. Sullivan, however, merely stated that because the opposite approach does not comport with "basic concepts" of contract law, the use of bilateral principles is necessary. See Sullivan, supra note 14, at 288.

From a doctrinal perspective, Sullivan's use of the "pre-existing duty" rule is helpful in exposing the problematic nature in inferring an employee's assent and consideration to a proposed modification through continued employment. See id. at 292. However, this argument alone is insufficient to invalidate the position of the pro-modification courts that rely on the formation of implied employment contracts as their model for modification. See supra Part II.A (surveying the cases allowing employers to unilaterally revise or revoke implied handbook promises).

Under the pre-existing duty rule, a promise to do less than one is legally obligated to do cannot constitute consideration. See Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884). However, this rule, as defined by the House of Lords in Foakes, does not have nearly enough force today for Sullivan to make it the cornerstone of his argument against allowing unilateral modification of implied employment contracts. See, e.g., Angel v. Murray, 322 A.2d 630, 636 (R.I. 1974) ("It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall.") (citation omitted). Perhaps the Uniform Commercial Code provides the greatest departure from the traditional pre-existing duty rule. See U.C.C. 2-209(1) (1998) (permitting the modification of sales contracts in good faith without consideration). The drafters of section 2-209 recognized that, at times, both parties to a contract may benefit from a modification, and, therefore, requiring new consideration for all good faith adjustments makes little sense. See U.C.C. 2-209, Official Comment 1. In relying on the pre-existing duty rule, Sullivan seemingly failed to consider that just as parties to a sales contract might desire to modify in good faith because they value the long-term benefits resulting from their relationship, an employer and employee could have similar incentive to modify in good faith and without consideration.

[216] See Pratt, supra note 14, at 222. For support, Sullivan plainly states: "The fallacy is that the modification of a contract is completely analogous to its formation." Sullivan, supra note 14, at 288.

[217] See generally Pratt, supra note 14; Sullivan, supra note 14. See also cases cites supra Part II.A (permitting unilateral modification).

Neither the courts in favor of or against unilateral modification of implied employment contracts provide any justification firmly rooted in contract law for their positions. [218] Nevertheless, a majority of the courts on both sides of the issue claim their decisions are grounded in traditional principles of contract law. [219] From a doctrinal standpoint, however, the position espoused by each side is imperfect. [220] As discussed above, most of the courts that have permitted employers to modify unilaterally implied employment contracts have primarily argued "that a contract is effectively modified simply because the same transactions which led to its formation have again occurred." [221] However, these courts have offered no valid support for the [*841] proposition that the original implied employment agreement lacks the legal weight and binding effect of a bilateral contract. [222] No rationale exists that would support the revision or revocation of an implied employment contract, unlike any other contract, without the approval of the

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[218] Decisions based on notions of fairness and equity have thus far done little to bring uniformity to this issue. See discussion supra Part II. In an effort to prevent future disagreement, an analysis consistent with traditional principles of contract law must be developed. Cf. Sullivan, supra note 14, at 288 (arguing that modification of contracts implied from the distribution of employee handbooks must conform with contract law).

[219] Compare Thompson v. Kings Entm't Co., 674 F. Supp. 1194, 1198 (E.D. Va. 1987) (finding the application of contract principles prohibits the unilateral modification of a personnel manual), with Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296, 300 (N.D. 1988) (permitting an employer to unilaterally modify an employee handbook on the basis of contract principles). See also Sullivan, supra note 14, at 288 (noting that the majority of courts both permitting and opposing unilateral modification of employee handbook provisions are in agreement that the question is answered with an analysis of the basis principles of contract law). But see Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112 (Mich. 1989) (eschewing traditional contract analysis in favor of public policy considerations).

[220] See Befort, supra note 3, at 360. Professor Befort stated:

The pro-modification courts pile fiction upon fiction in implying a revised unilateral contract based on the new handbook. These courts' conclusion that an employee's continued work performance provides both acceptance and consideration is counter-intuitive where the employee loses rather than gains rights… . On the other hand, the anti-modification courts fail to explain why a unilateral contract approach is sufficient to establish enforceable handbook rights but a bilateral approach is necessary to effect a revision of these rights.

Id.

[221] Sullivan, supra note 14, at 293. See, e.g., Chambers v. Valley Nat'l Bank, 721 F. Supp. 1128 (D. Ariz. 1988) (applying Arizona law) (allowing an employer to modify an existing unilaterally adopted employment contract simply by repeating the transactions that led to the contract's formation). See also discussion supra Part II.A.

As the Michigan Supreme Court in Bankey expressly rejected the unilateral contractual analysis in allowing an employer to modify an existing employment contract, Bankey and its progeny are inapposite and need not be discussed. See Bankey, 443 N.W.2d 112, 117 (Mich. 1989). For a more extensive discussion of Bankey, see discussion supra notes 154-61 and accompanying text.

[222] See Respondents' Brief on the Merits at 12, Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000) (No. S074296) ("The difference between unilateral and bilateral contracts lies not in their force or effectiveness but only in the nature of their formation."). The manner in which parties form a contract has no effect on the enforceability of the promise. See Restatement, supra note 85, 19 cmt. a.

promisee and without bargained-for consideration flowing to the promisee in exchange for the loss of existing contractual rights. [223]

The anti-modification courts and commentators have also found little support in contract law for their preferred result, which would apply bilateral principles to the modification of unilaterally adopted implied employment contracts. [224] Rather, these courts, particularly the Arizona Supreme Court in Demasse v. ITT Corp., [225] necessarily base their use of bilateral principles on the injustice perpetuated on employees who might rely on promises made in personnel manuals only to watch helplessly as their employer unilaterally revokes those promises. [226] In considering public policy and notions of fairness, the Demasse approach is appealing. [227] Unfortunately, on its face, the proposition that courts must treat modification of unilateral employment contracts differently than formation has no more grounding in contract law than does the contrary argument that an employer should be allowed to unilaterally revise a personnel handbook merely because that is how the contract was created. [228]

[*842]

B. Proposal for the Inclusion of an Implied Promise Not to Modify in All Unilaterally Adopted Implied Employment Contracts

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[223] See Pratt, supra note 14, at 225 (calling such a proposition "inconsistent with general contract law").

[224] See Befort, supra note 3, at 360 (finding the contract principles relied upon by the anti-modification courts to be lacking).

[225] 984 P.2d 1138 (Ariz. 1999). Although alone among the anti-modification courts in doing so, the Demasse court does rely, at least in part, upon Section 45 of the Second Restatement of Contracts for the proposition that once a unilateral offer is accepted by commencement of performance, its terms cannot be changed. Id. at 1144. Cf. Torosyan v. Boehringer Ingelheim Pharm., Inc., 662 A.2d 89 (Conn. 1995) (citing Section 45 for a primer on the creation of unilateral contracts). See also Restatement, supra note 85, 45. However, the Demasse court does not go nearly far enough in exploring the utility of Section 45. For a detailed discussion of the utility of Section 45 to the question of unilateral modification of implied handbook contracts, see infra notes 239-56 and accompanying text.

[226] See discussion supra Part II.B.

[227] See generally Demasse, 984 P.2d at 1138.

[228] See Befort, supra note 3, at 360 (finding that the courts in favor of applying bilateral principles to the modification of unilaterally adopted employee policies provide no doctrinal basis for such a treatment). These courts simply offer the bilateral approach, without substantial support, as a cure for the injustice that unilateral modification could perpetuate on employees. Cf. Toth v. Square D Co., 712 F. Supp. 1231, 1234-35 (D.S.C. 1989) (applying South Carolina law) (applying bilateral principles in the modification context after railing against the unfairness of unilateral modification).

A contract approach exists, however, that would necessitate the application of bilateral principles to attempted revisions of implied employment contracts. Courts should imply into all unilaterally adopted employee policies a subsidiary promise by the employer not to modify that policy. [229] Under this proposed model, an employer could not unilaterally revise the terms of an employee handbook without rendering the initial employment contract illusory. [230] Accordingly, to execute a valid modification of an implied employment contract, the employee must consent to the alteration and receive additional consideration from his employer. [231]

In Ferrera v. Nielsen, [232] the Colorado Court of Appeals held that an implied reservation of the employer's right to unilaterally modify is included in every handbook. [233] Such a finding, however, transforms every covenant implied from an employee handbook into an illusory contract. [234] Thus, under the Ferrera analysis, handbook promises of employment security actually provide employees no security at all. [235] Such an injustice requires a [*843] conclusion

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[229] See infra notes 232-56 and accompanying text (providing support for the use of an implied promise not to modify in the employee handbook context and offering examples of the concept's use in other areas).

[230] See Demasse, 984 P.2d at 1147 (noting that if an employer can set employee policies and subsequently disregard them, the policies are illusory). See also supra note 94 (defining "illusory promise").

[231] This model provides for the same result as the one reached by the courts that have previously prohibited employers from unilaterally modifying implied handbook contracts. For an extensive discussion of these cases, see supra Part II.B.

[232] 799 P.2d 458 (Colo. Ct. App. 1990) (holding that an employer reserves the unfettered right to unilaterally modify contractual obligations created by the distribution of an employee handbook).

[233] Id. at 460. See also Perritt, supra note 182, 4.44 ("The employer should be presumed to have reserved the power impliedly to modify the employment security promise any time before a termination is effected.").

[234] See Respondents' Brief on the Merits at 16-17, Asmus v. Pac. Bell, 999 P.2d 71 (Cal. 2000) (No. S074296). The employees argued:

There is an inherent absurdity in the claim that an employee's contractual right to job security can be unilaterally withdrawn by the employer. In an employment security agreement, the very essence of the benefit lies in the certainty of its continued existence. Job security is of no value unless it is, in fact, secure… . That promise is illusory if it is itself revocable at will.

Id.

[235] See id. at 17 (arguing that when an employer reserves the right to unilaterally modify promises made in employee handbooks, the employer "can never actually give up its right to at will termination, even if it promises to do so"). Courts adhering to the notion that employers may unilaterally modify implied employment contracts essentially sanction the right of employers to issue valuable personnel policies when the companies need to induce the continued performance of their employees and then revoke these policies when the economics no longer make sense. See, e.g., Doyle v. Holy Cross Hosp., 708 N.E.2d 1140, 1147 (Ill. 1999) (rejecting an employer's attempt to unilaterally modify handbook provisions). The employer has thus maintained an orderly workforce at a time when its business environment necessitated stability, and then lawfully revoked the employees' benefits when business circumstances changed. See, e.g., Bankey v. Storer Broad. Co. (In re Certified Question), 443 N.W.2d 112, 119 (Mich. 1989) (permitting employers to unilaterally modify promises contained in employee handbooks). However, at the same time, the employees relied on the policies at a time when job opportunities were abundant elsewhere, and then lost the

contrary to the one reached in Ferrera. [236] Indeed, the Colorado Court of Appeals correctly recognized the existence of a subsidiary promise inherent in all implied employment contracts created by the distribution of personnel manuals. [237] However, the Ferrera court erred in finding that the subsidiary promise implicitly reserved the right of employers to unilaterally revise personnel policies. Instead, the implied promise inherent in every employment contract is a promise not to unilaterally modify the existing covenant. [238]

Such a promise finds support in the Second Restatement of Contracts. [239] Section 45 provides that an offeror cannot revoke a unilateral offer once an offeree has commenced performance, [240] effectively implying a subsidiary promise not to revoke. [241] Thus, [*844] the subsidiary promise prevents the potential injustice of permitting revocation or modification after the promisee has commenced performance. [242] Applying this analysis in the handbook context, the

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right to job security when the market was tighter and the employees would most need to rely on the policies. See, e.g., Brodie v. Gen. Chem. Corp., 934 P.2d 1263, 1268 (Wyo. 1997) (prohibiting employers from unilaterally modifying handbook contracts).

[236] See Ferrera, 799 P.2d at 460 (implying an agreement in employee handbooks reserving the employer's right to unilaterally modify the handbook's terms).

[237] Id.

[238] See infra notes 239-43, 250-56 and accompanying discussion.

[239] See generally Restatement, supra note 85, 45. Section 45 - "OPTION CONTRACT CREATED BY PART PERFORMANCE OR TENDER" - states:

Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Id.

[240] Id. Comment b to Section 45 states that this rule "is designed to protect the offeree in justifiable reliance on the offeror's promise … ." Id. at cmt. b. Applying these principles to the employment arena, an employer would be unable to "promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice." Toth v. Square D. Co., 712 F. Supp. 1231, 1234 (D.S.C. 1989). See also Taylor v. Multnomah County Deputy Sheriff's Ret. Bd., 510 P.2d 339, 343 (Or. 1973) (applying the implied promise not to revoke in the employment arena).

[241] The concept of the "subsidiary promise not to revoke" first appeared in Section 45 of the First Restatement of Contracts. See Restatement (First) of Contracts 45 (1932) (regarding revocation of an offer of a unilateral contract). The First Restatement explained that in the unilateral context, the main offer "includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer." Id. 45 cmt. b (explaining how the subsidiary promise binds the offeror to the covenant once the offeree commences performance). While the Second Restatement of Contracts treats 45 somewhat differently, it reaches the same result without expressly describing the "subsidiary promise." See Restatement, supra note 85, 45.

[242] See Restatement, supra note 85, 45; see also Alfred S. Konefsky, Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel, 65 U. Cin. L. Rev. 1169, 1216-17 (1997) (discussing the utility of the implied promise not to revoke).

employee's commencement or continuation of employment after the employer's unilateral issuance of a personnel manual would furnish the consideration necessary for the subsidiary promise not to modify or revoke. [243]

The California Supreme Court most notably adopted Section 45's mandate in Drennan v. Star Paving Co. [244] In Drennan, Justice Traynor implied a subsidiary promise not to revoke in finding a subcontractor's bid irrevocable when relied upon by a general contractor preparing its own bid. [245] While courts have not widely utilized this concept outside of the bid context, the Oregon Supreme Court has implied a promise not to revoke in the employment context. [246] In Taylor v. Multnomah County Deputy [*845] Sheriff's Retirement Board, [247] the court refused to allow the defendant to modify the terms of a retirement system for sworn law enforcement personnel to exclude those in plaintiff's class after the plaintiff tendered part performance. [248] The court found

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[243] See Restatement, supra note 85, 45.

[244] 333 P.2d 757 (Cal. 1958) (upholding a judgment for the plaintiff in an action to recover damages caused by the defendant's refusal to perform certain paving work in accordance with a bid submitted to the plaintiff).

[245] Id. at 760. Justice Traynor wrote: "The subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon." Id. Justice Traynor, although certain of the utility of this implied promise in the unilateral context, was less certain about its application to bilateral contracts, where performance does not constitute acceptance or the consideration for the implied subsidiary promise not to revoke. Id. Traynor, however, relied on the principles of promissory estoppel to find the absence of consideration in the bilateral setting "not fatal" to the enforcement of the subsidiary promise. Id.

Although many states have adopted the Drennan analysis, several courts and commentators have criticized Justice Traynor's opinion for its "lack of symmetry of detrimental reliance in the bid process." See Pavel Enter., Inc. v. A.S. Johnson Co., 674 A.2d 521, 527-28 (Md. 1996) (refusing to allow a general contractor to recover against a subcontractor who submitted the low bid but then withdrew). By implying a subsidiary promise not to revoke to bids, the commentators complain, the subcontractors are bound to the general contractor, but the general contractor is not bound to the subcontractors. Id.

[246] See Taylor v. Multnomah County Deputy Sheriff's Ret. Bd., 510 P.2d 339 (Or. 1973). Although not completely analogous to most the cases discussed supra Part II, the Oregon Supreme Court's use of the subsidiary promise concept demonstrates its applicability outside of its narrow use adopted by the California Supreme Court in Drennan, 333 P.2d at 757.

[247] Taylor, 510 P.2d at 339. Plaintiff, a corrections officer, brought a mandamus proceeding to force the defendants to accept her application for membership in a special retirement program for law enforcement personnel that offered benefits superior to those provided by the regular retirement plan applicable to other county employees. Taylor v. Multnomah County Deputy Sheriff's Ret. Bd., 502 P.2d 601 (Or. Ct. App. 1972), rev'd, 510 P.2d 339 (Or. 1973). By ordinance, the county had created the retirement plan for law enforcement personnel. Taylor, 510 P.2d at 340. The plaintiff sought admission to the pension fund, and tendered an application and the required contributions from her wages. Id. at 342. However, the defendants claimed that the plaintiff's position as a corrections officer, although performed under oath as a deputy sheriff, did not qualify for the plan under the county's definition of "law enforcement personnel." Id. at 341. Defendants subsequently modified the ordinance to specifically exclude, among others, corrections officers from participation in the pension plan. Id. at 340. The Circuit Court, Multnomah County, granted the writ, but the Court of Appeals reversed. Taylor, 502 P.2d at 601.

[248] Taylor, 510 P.2d at 342-43. The Oregon Supreme Court found the county's adoption of the pension plan constituted an offer of a unilateral contract, which the plaintiff accepted through her part performance, which consisted of her asking to participate in

that the plaintiff's request to join the fund and her tender of the required contribution of her wages constituted the consideration necessary to bind the defendant to an implied subsidiary contract not to modify or revoke its unilateral offer of the retirement plan. [249]

The general model promulgated by the Restatement and followed by the Drennan and Taylor courts should be applied to attempted modifications of implied employee handbook contracts. [250] Consequently, where unilateral contracts are implied from the distribution of employee handbooks under Pine River or Toussaint, [251] the employer and employee have also entered into a subsidiary agreement prohibiting the employer from unilaterally revising the handbook's policies. [252] The employee's commencement or continuation of performance with notice of the new policies, which provides the necessary consideration under Pine River for the original handbook promise, also binds the [*846] parties under the subsidiary agreement. [253]

By implying a subsidiary promise not to modify in all unilaterally adopted handbook contracts, employers would no longer have the ability to treat as illusory contractual obligations created by the distribution of personnel manuals. [254] Instead, as the anti-modification courts have urged, to effectively revise a unilaterally imposed handbook contract, the employer must comport with the traditional principles of bilateral modification by providing additional consideration and gaining each employee's assent. [255]

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the plan and tendering the required contributions from her wages. Id. at 342. "Part performance" is defined as the "accomplishment of some but not all of one's contractual obligations." Black's Law Dictionary 1144 (7th ed. 1999).

[249] Taylor, 510 P.2d at 342-43.

[250] See discussion supra notes 239-49 and accompanying text; see also Konefsky, supra note 242, at 1217-20 (discussing Justice Traynor's opinion in Drennan and Section 45 of the First Restatement of Contracts).

[251] See discussion supra Part I.B (recounting the development of the handbook exception to the employment at will doctrine); see generally McWilliams, supra note 48 (discussing the emergence and application of the handbook exception).

[252] See supra notes 239-49 and accompanying text (discussing the subsidiary promise not to revoke).

[253] See id. See also supra notes 104-07 and accompanying text (outlining the requirements set forth by the Minnesota Supreme Court in Pine River for the creation of an implied handbook contract); Pine River v. Mettille, 333 N.W.2d 622 (Minn. 1983).

[254] See, e.g., Demasse v. ITT Corp., 984 P.2d 1138, 1140 (Ariz. 1999) (holding that employers who disregard the provisions of employee handbooks are treating the resulting contractual obligation as illusory).

[255] See sources cited supra note 163 (applying bilateral principles to employers' attempted modifications of unilaterally adopted employee handbooks).

Although a regime promoting an equal relationship between the employer and employee is preferable, no court that has thus far considered this issue has reached such a result. Therefore, to the extent that this Note's conclusion simply reallocates the power

Conclusion

Courts should imply a subsidiary promise not to modify to the contractual obligations created by an employer's unilateral issuance of an employee handbook. [256] Such a treatment is consistent with the traditional principles of contract law and would protect much of the American workforce from the injustice that may result when an employer offers "with one hand what [they] take[] away with the other." [257] The Pine River and Toussaint [*847] courts created the handbook exception to the employment at will doctrine specifically to prevent employers from setting forth policies in employee handbooks as a way to retain a skilled and loyal workforce only to later disregard those policies when they become onerous. [258] To allow an employer to unilaterally modify an implied employment contract created under Pine River or Toussaint seriously undermines the seminal decisions of these courts. The substantial value to the employees of the employment security policy that the California Supreme Court permitted Pacific Bell to revoke in Asmus [259] underscores the indefensibility of continuing to allow employers to unilaterally modify implied-in-fact contracts created by the employer's distribution of employee handbooks. [260]

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from the employer to the employee, note that the employer still has the ability to maintain ultimate control over the relationship. See, e.g., Leikvold v. Valley View Cmty. Hosp., 688 P.2d 170, 174 (Ariz. 1984) (emphasizing that employers are free not to issue employee handbooks at all or can issue handbooks, but clearly disclaim all contractual obligations).

Furthermore, traditional principles of contract interpretation favor the employee in such cases. See Clyde W. Summers, Symposium, The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will, 52 Fordham L. Rev. 1082, 1107 (1984) ("The law here, as in consumer contracts, has a responsibility to protect the weaker party."). Similarly, courts should construe contract terms most strongly against their author. See United States v. Seckinger, 397 U.S. 203, 210 (referring to this proposition as a "general maxim" of contract law). In the employment context, it is the employer who drafts the contract, while the employee - typically the weaker party - must agree to its term in order to secure or maintain employment. See Govier v. N. Sound Bank, 957 P.2d 811 (Wash. Ct. App. 1998) (holding that an employee's refusal to agree to an employer's "reasonable terms of employment" included in a handbook constituted a constructive resignation).

[256] See supra discussion Part III.B (proposing such a model).

[257] Thompson v. Kings Entm't Co., 674 F. Supp. 1194, 1198 (E.D. Va. 1987) (applying Virginia law) (refusing to allow an employer to unilaterally amend the company's personnel policies) (citation omitted). For an extensive discussion of Thompson, see supra note 171.

[258] See discussion supra Part I.B (discussing the emergence of the handbook exception).

[259] 999 P.2d 71 (Cal. 2000). For an extensive discussion of Asmus, see supra notes 1-8, 23-28, and 191-205 and accompanying discussion.

[260] Note that not all personnel policies rise to the level of an enforceable covenant. As the Minnesota Supreme Court stated in Pine River: "An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer." 333 N.W.2d at 626. Therefore, where an employer issues policies regarding the workplace of substantially less consequence than a promise of no layoffs or specific disciplinary procedures, the employee should bear the burden of showing substantial reliance and intention of the parties to create a binding covenant. Id.

Thus, the anti-modification courts, beginning with the District Court for the Eastern District of Virginia in Thompson v. Kings Entertainment Co., [261] have appropriately rejected employers' repeated attempts at unilateral modification or revocation. However, because the anti-modification courts have never properly rested their decisions on adequate principles of contract law, [262] courts across the country have yet to near a consensus on this issue, which is of critical importance to employers and millions of non-unionized American workers. [263] By implying a promise not to modify in all employment contracts created by the distribution of personnel manuals, courts would have a solid doctrinal basis for preventing employers from manipulating personnel policies as they see fit.

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[261] 674 F. Supp. at 1194.

[262] See Befort, supra note 3; see also discussion supra notes 34, 35, 220, 228 (recognizing Professor Befort's criticism of the anti-modification court's contractual analysis).

[263] See discussion supra notes 39, 58 (discussing, respectively, the substantial impact this issue can have on the workplace and the diminishing number of American workers who belong to labor unions).