Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis

I. INTRODUCTION

The average employee is largely unprotected from arbitrary termination by his employer.[1] Although unions can provide job security, they protect less than sixteen per cent of the working population.[2] For most employees, however, there is a general presumption that employment contracts are terminable at the will of either party.[3] Despite this presumption, courts have applied contract principles and general policy considerations to determine whether an employment-at-will relationship existed in wrongful termination cases.[4] Recently, in *Woolley v. Hoffman-La Roche, Inc.*,[5] the New Jersey Supreme Court used this type of analysis to examine the employment-at-will relationship.

In October 1969, Hoffmann-La Roche, Inc. hired Richard Woolley to be a section head in its central engineering depart-

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[1] *See* English v. College of Medicine & Dentistry, 73 N.J. 20, 23, 372 A.2d 295, 297 (1977) (stating common law position that employer has "unbridled authority to discharge").

[2] *See* Adams, *Changing Employment Patterns of Organized Workers*, 108 MONTHLY LAB. REV. 25, 29 (1985). Only 15.6% of private-sector workers were unionized, according to the most updated survey. *See id.*

[3] *See generally* Adair v. United States, 208 U.S. 161 (1908). The Supreme Court explained the employment-at-will presumption as follows:

> [I]t is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.

Id. at 174-75.

[4] *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Allegri v. Providence-St. Margaret Health Center, 9 Kan. App. 2d 659, 684 P.2d 1031 (1984); Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371 (Minn. App. 1984); Shiddell v. Electro Rust-Proofing Corp., 34 N.J. Super. 278, 112 A.2d 290 (App. Div. 1954); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977).

[5] 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

ment.[6] No written employment contract existed between the parties.[7] In addition, the employees of Hoffmann-La Roche were neither unionized nor under a collective bargaining agreement.[8]

Soon after Woolley commenced work in mid-November, Hoffmann-La Roche furnished him with its personnel policy manual; the manual had Woolley's name and the date printed on the cover.[9] One section of the manual listed five categories of employee termination.[10] This section was followed by a detailed description of the termination procedures followed by Hoffmann-La Roche before an employee could be fired for cause.[11]

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6 *Id.* at 286, 491 A.2d at 1258.

7 *Id.* Hoffmann-La Roche admitted that it was unusual for employees, except the medical staff, to have individual contracts. *Id.* at 299, 491 A.2d at 1265.

8 *See id.* at 296-97 & n.6, 491 A.2d at 1264 & n.6.

9 *Id.* at 286, 287 n.2, 491 A.2d at 1258, 1259 n.2.

10 *See id.* at 310-11 app., 491 A.2d at 1271-72 app. The five categories of termination were defined as follows:

> — *Layoff* means termination of employment on the initiative of the company under circumstances, normally lack of work, such that the employee is subject to recall. He/she may be reinstated without loss of seniority if recalled within one year of the date of layoff.
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> — *Discharge due to Performance* means termination of employment on the initiative of the company under circumstances generally related to the quality of the employee's performance, whereby the employee is considered unable to meet the requirements of the job. In this case, the employee is not subject to recall or reinstatement.
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> — *Discharge, Disciplinary* means termination of employment on the initiative of the company for reasons of misconduct or willful negligence in the performance of job duties such that the employee will not be considered for re-employment.
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> — *Retirement* means termination of active work by the employee at the age or under conditions set forth in the company's retirement plan, under which the employee receives retirement pay and enjoys other benefits.
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> — *Resignation* means termination of employment on the initiative of the employee. Employees are expected to give no less than two weeks notice of resignation. An employee who resigns will retain no reinstatement or re-employment rights. Resignation requested is a category of information on the Personnel Action Form and means termination of employment, for cause, on the initiative of the company. "Mutual Agreement" terminations must be further identified as either discharge due to performance or disciplinary for purposes of severance pay eligibility. . . . For any purposes, terminations are effective on the last day worked, unless otherwise specified by the Department Head.

Id.

11 *See id.* at 311-13 app., 491 A.2d at 1272-73 app. The termination procedures provided as follows:

> IV. GUIDELINES FOR DISCHARGE DUE TO PERFORMANCE
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> In keeping with the company's concern for all employees, termination of employment on the initiative of the company under circumstances generally related to the quality of the employee's job performance deserves

No category was set forth in the manual for discharge without

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special consideration. We would like to insure that every reasonable step has been taken to help the employee continue in a productive capacity. It is the responsibility of each manager and supervisor to develop the people working for him/her. In cases of unsatisfactory job performance, which may develop into termination of employment, each manager and supervisor should consider the following:

A. Has the employee been made aware of the problem in specific terms?
B. Are the suggestions as to how these problems can be eliminated in writing?
C. Has assistance been offered to the employee to help the employee remedy the situation?
D. Has the employee been given a sufficient amount of time and help to remedy the situation?

If a situation related to poor job performance has just come to a manager's or supervisor's attention, joint evaluation between the employee and the manager is recommended. The manager should try to determine the cause of the problem. Is it lack of experience in the job, education, motivation, employee personal problems, or personality conflict? Once the cause is identified, the employee should be given time, if possible, to remedy the situation. The manager should also be considering ways to remedy the situation and to improve the individual's performance. This may mean the use of outside sources to develop the employee and/or the job to put the employee on an appropriate career path. Other alternatives are:

A. Changing the employee's responsibilities in his/her present job.
B. Reassignment to a different job in the department.
C. Encouraging the employee to bid into an area where his/her chances of success are felt to be better.
D. A change to a position of lesser responsibility.

If, after sufficient time and consideration of the above, the employee does not remedy the situation, the supervisor should then proceed with the termination of the employee. . . .

V. GUIDELINES FOR DISCIPLINARY TERMINATIONS

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The termination of any employee for disciplinary causes must follow the procedures as set forth in Section 9.1 through 9.4 of the Personnel Policy Manual.

VI. TERMINATION PROCEDURE

It is the responsibility of the *manager* to:

— Notify the Payroll Department and the Personnel Department of the cause and date of termination;
— Notify the employee of the cause and date of termination;
— Prepare a Personnel Action Form stating the reason for termination and forward this to the Personnel Department.

It is the responsibility of the *Personnel Department* to:

— Provide the terminating employee with Termination Procedure Forms;
— Contact the terminating employee and set up an appointment for an interview (preferably the last day of work);
— Review Termination Procedure Forms for completeness and required clearance signatures;

cause.[12]

Woolley was promoted in 1976 and again in January 1977, becoming the group leader for the civil engineering, the piping design, the plant layout, and the standards and systems sections.[13] In March 1978, Woolley was asked to prepare a report regarding piping problems in a company building in Nutley, New Jersey.[14] The report was completed and filed with Woolley's immediate superior on April 5, 1978.[15] On May 3, 1978, Woolley's supervisors requested his resignation.[16] He was informed that the general manager of the corporation's engineering department had "lost confidence" in his work.[17] Woolley refused to resign.[18] After his resignation was again requested and Woolley again refused to resign, the company fired him in July of 1978.[19]

Woolley then initiated a suit against Hoffmann-La Roche, alleging breach of contract.[20] Woolley claimed that the express and

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— Notify the Dispensary, Payroll Department and Credit Union of the termination;
— Provide appropriate Unemployment Compensation information and forms to the terminating employee;
— Conduct appropriate follow-up correspondence with the company that the terminated employee has accepted employment, stating the continuing nature of the patent secrecy agreement. Copies of the letter should go to the employee and the Personnel file;
— Forward all termination procedure forms to the Personnel Department Record Room.

It is the responsibility of the *Payroll Department* to:
— Verify that the terminating employee has no outstanding financial liabilities to the company;
— Issue and mail a final pay check upon completion of all termination procedures and receipt of a copy of the Personnel Action Form.

It is the responsibility of the *HLR Federal Credit Union* to:
— Check the status of the terminating employee with respect to:
- balances due the employee;
- outstanding Credit Union loans;
and to make arrangements for an interview with the employee for purposes of proper disposition of any amounts due either the employee or the Credit Union.

Id.

12 *Id.* at 287 n.2, 491 A.2d at 1259 n.2.

13 *Id.* at 286, 491 A.2d at 1258.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* In his complaint, Woolley further alleged "intentional infliction of emotional distress, and defamation." *Id.* Woolley later agreed to dismiss these claims. *Id.*

implied promises contained in Hoffmann-La Roche's employment policy manual constituted a binding and enforceable contract.[21] Woolley argued that pursuant to this contract, he could only be fired for cause and only after adherence to the dismissal procedures set forth in the policy manual.[22] Consequently, Woolley alleged that because he was fired without cause and the termination procedures were disregarded, his dismissal constituted a breach of contract.[23]

The trial court, holding that Hoffmann-La Roche was not contractually bound by its manual, granted the defendant's motion for summary judgment.[24] The appellate division agreed that Woolley's employment was terminable at will and thus affirmed the judgment.[25] Upon Woolley's appeal, the New Jersey Supreme Court granted certification.[26] The supreme court held that the express and implied promises contained in a policy manual distributed to employees could modify the employment-at-will relationship between the employer and the employee.[27] Accordingly, the court reversed the judgment and remanded the case to the trial court.[28]

II. DEVELOPMENT OF THE EMPLOYMENT-AT-WILL RULE

The concept of employment at will was first developed in 1877 by an American legal theorist, H.G. Wood.[29] In his treatise

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21 *Id.* at 286-87, 491 A.2d at 1258.

22 *Id.*

23 *Id.* at 287, 491 A.2d at 1258.

24 *Id.*

25 *Id.*, 491 A.2d at 1259.

26 Woolley v. Hoffmann-La Roche, Inc., 91 N.J. 548, 453 A.2d 865 (1982).

27 *See Woolley*, 99 N.J. at 285-86, 307-08, 491 A.2d at 1258, 1269-70.

28 *Id.* at 307, 491 A.2d at 1269. The supreme court held that on remand, Woolley was to be given the full benefit of the manual he received from Hoffmann-La Roche. *Id.* Unfortunately, Richard Woolley died prior to the supreme court's decision. *Id.* at 287 n.3, 491 A.2d at 1259 n.3. His claim for damages survived, however, and the issue was left to be determined by the trial court. *Id.* at 287 n.3, 308, 491 A.2d at 1259 n.3, 1270. Furthermore, the supreme court ruled that the trial court need only decide the issue of whether the provisions contained in the policy manual were binding. *See id.* at 307, 491 A.2d at 1270. According to the court, the issue of whether Woolley was fired for good cause was irrelevant because the employer failed to follow the procedures outlined in the manual. *Id.* at 307-08, 491 A.2d at 1270. In a subsequent order, however, the court stated that the "good cause" issue was still open because the court had mistakenly believed "that Hoffmann-La Roche had conceded that it had failed to conform to the contractual termination provisions." Woolley v. Hoffmann-La Roche, Inc., 101 N.J. 10, 10-11, 499 A.2d 515, 515, *modifying* 99 N.J. 284, 491 A.2d 1257 (1985).

29 *See* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

on master-and-servant relationships, Wood departed from the established common law presumption of one-year employment contracts;[30] he argued that there should be no durational presumption.[31] Early judicial interpretation of "Wood's Rule" resulted in the traditional employment-at-will doctrine: the employer or employee may terminate the relation "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[32]

Although "Wood's Rule" lacked legal support,[33] it was consistent with the idea of unrestrained freedom to contract and with the general laissez faire attitude of the industrial revolution.[34] It permitted the growing United States economy a desirable flexibility in employment relations.[35] The employment-at-will rule was considered equitable, based on the premise that the employer and the employee held equal bargaining positions.[36] The employee could protect himself from dismal working conditions by accepting more favorable employment, while the employer could maintain his work force by retaining the most productive employees.[37] The employment-at-will rule was subsequently

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30 *See* 2 W. BLACKSTONE, COMMENTARIES *425. Blackstone stated: "If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity . . . but the contract may be made for any larger or smaller term." *Id.* (footnote omitted).

31 *See* H. G. WOOD, *supra* note 29, § 134, at 272. Wood stated:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.

Id. (footnotes omitted).

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

33 *See* DeGiuseppe, *The Effect of the Employment-at-Will Rule on Employment Rights to Job Security and Fringe Benefits*, 10 FORD. URB. L.J. 1, 6 (1981); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974).

34 *See* Marrinan, *Employment at-Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155, 158 (1984); *see also* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 131-35 (1976) (stating employment-at-will rule is consistent with development of capitalism).

35 *See* Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. J. URB. L. 351, 353 (1984).

36 *See id.*; Marrinan, *supra* note 34, at 158.

37 *See* Decker, *supra* note 35, at 353.

supported by the courts and attained fruition in the early part of this century.[38]

The employment-at-will rule, however, can have a harsh and inequitable impact on employees.[39] Thus, authorities have moved toward abrogating the rule by protecting against "wrongful" discharges.[40] For example, the United States Congress passed Title VII of the Civil Rights Act,[41] which protects workers against discharge on the basis of "race, color, religion, sex, or national origin."[42] The New Jersey Legislature has enacted a similar statute.[43] Judicial decisions have also had a significant impact in modifying the rule.[44] Specifically, three theories have been successfully argued by wrongfully discharged employees: the public policy exception, the implied covenant of good faith and fair dealing, and the employment contract limitation.[45]

A. The Public Policy Exception

The public policy exception arises when an employee is discharged for refusing to violate a law or act against the public in-

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38 *See* Summers, *supra* note 33, at 485.

39 *See generally* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (discussion of the potential inequity of employment-at-will relationship).

40 *See* Decker, *supra* note 35; DeGiuseppe, *supra* note 33; Rohwer, *Terminable-at-Will Employment: New Theories for Job Security*, 15 PAC. L.J. 759 (1984) (all discussing erosion of the employment-at-will rule).

41 Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

42 *Id.* § 703(a)(1), 78 Stat. at 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (1982)). The following statutes are other examples of Federal legislation limiting the employment-at-will rule: Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1982); Age Discrimination in Employment Act, 29 U.S.C. § 623 (1982); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (1982). *See generally* Decker, *supra* note 35, at 353-55 (discussing Federal regulations affecting the employment-at-will relationship).

43 *See* N.J. STAT. ANN. § 10:5-4 (West 1976). In 1980, a bill was proposed in the New Jersey Assembly limiting the right to terminate nonunion employees "*after the first consecutive 6 months of an individual's employment*" only for good cause. *See* A. 1832, 199th N.J. Leg., 1st Sess. 1 (1980).

44 Decker, *supra* note 35, at 355 & n.39.

45 *See* Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 6 (1984). *See generally id.* at 6-26 (discussing public policy, good faith and fair dealing, and contract exceptions to employment-at-will theory).

This comment will analyze the three most popular theories. Other theories include intentional infliction of emotional distress, defamation, prima facie tort, negligence, and interference with employment contracts. *See, e.g.*, DeGiuseppe, *supra* note 33, at 40; Marrinan, *supra* note 34, at 172.

terest at his employer's demand.[46] New Jersey recognized the public policy exception in *Pierce v. Ortho Pharmaceutical Corp.*[47] Dr. Grace Pierce was employed by the Ortho Pharmaceutical Corp. (Ortho) as the associate director of medical research.[48] Ortho was a developer and manufacturer of reproductive and therapeutic drugs.[49] In 1975, Dr. Pierce worked on developing a drug called loperamide, which could be used as a treatment for diarrhea.[50] Because the formula contained saccharin, a compound of questionable safety, Pierce and her fellow developers agreed that the drug would be unsuitable for consumption in the United States.[51] The defendant insisted, however, that the development of loperamide continue.[52] Dr. Pierce believed that continued development of a drug that might be harmful to humans would violate her Hippocratic oath and ethical standards.[53] Accordingly, she refused to continue her work on loperamide.[54] Within a

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46 *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936-37 (1983). The public policy exception has been used in the following circumstances: (1) when an employee was fired for failure to give false testimony at a trial or hearing, *e.g.*, Petermann v. Local 396, Int'l Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981); (2) when an employee was fired for filing a workers' compensation claim, *e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981) (per curiam); (3) when an employee was fired for refusing to become involved in illegal price-fixing, *e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); (4) when an employee was fired for refusing to engage in false labeling, *e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); and (5) when an employee was fired for "whistleblowing" on illegal conduct, *e.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Watassek v. Department of Mental Health, 143 Mich. App. 556, 372 N.W.2d 617 (1985); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978); *see also* Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277 (1983) (discussing "whistleblower's" utility to society).

47 84 N.J. 58, 417 A.2d 505 (1980). *See generally Beyond* Pierce v. Ortho Pharmaceutical Corp.: *The Terminable-at-Will Doctrine in New Jersey*, 37 RUTGERS L. REV. 137, 141-49 (1984) (examining public policy exception to employment at will in New Jersey).

48 *Pierce*, 84 N.J. at 62, 417 A.2d at 506.

49 *Id.*

50 *Id.*, 417 A.2d at 506-07.

51 *Id.*, 417 A.2d at 507. Loperamide, however, had already been marketed in Europe. *Id.*

52 *See id.*

53 *See id.* at 63, 417 A.2d at 507.

54 *See id.* Upon being removed from the loperamide project, Dr. Pierce met with her supervisor regarding a new assignment. *Id.* After the meeting, she believed that "she was being demoted, even though her salary level would not be decreased." *Id.*

month, Dr. Pierce resigned.[55] She then initiated a wrongful discharge action against Ortho, complaining that she was forced to leave her job.[56]

Endorsing the public policy exception, the court opined that an employee had a cause of action for a discharge that violated public policy.[57] According to the court, public policy was formulated by the legislature, administrative agencies, and the judiciary.[58] The court posited that a professional code of ethics could also be a source of public policy, but "that the Hippocratic oath [did] not contain a clear mandate of public policy that prevented Dr. Pierce from continuing her research on loperamide."[59] Accordingly, the court found that Dr. Pierce was not wrongfully discharged.[60] The court reasoned that to hold otherwise would seriously hinder the development of new drugs by drug manufacturers.[61]

B. The Implied Covenant of Good Faith and Fair Dealing

Another doctrine, the implied covenant of good faith and fair dealing, creates an obligation on the employer to use good faith in terminating an employee.[62] The few jurisdictions adopting this exception to the employment-at-will rule found that an obligation of good faith and fair dealing is implied in each employment contract.[63] This concept was first applied in *Monge v.*

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55 *See id.* at 63-64, 417 A.2d at 507.

56 *See id.* at 64, 417 A.2d at 508.

57 *Id.* at 72, 417 A.2d at 512.

58 *See id.*

59 *Id.* at 76, 417 A.2d at 514.

60 *Id.*

61 *Id.*

62 *See generally* Lopatka, *supra* note 45, at 23-26 (examination of covenant of good faith and fair dealing); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836-44 (1980) (same).

63 Decker, *supra* note 35, at 358; *e.g.*, Cleary v. American Airlines, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 727-28 (1980); Magnan v. Anaconda Indus., 193 Conn. 558, 568-69, 479 A.2d 781, 786-87 (1984); Fortune v. National Cash Register Co., 373 Mass. 96, 103, 364 N.E.2d 1251, 1256 (1977); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 184, 638 P.2d 1063, 1066 (1982); Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). *Contra* Gordon v. Matthew Bender & Co., 562 F. Supp. 1286 (N.D. Ill. 1983); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. App. 1985); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Holloway v. K-Mart Corp., 113 Wis. 2d 143, 334 N.W.2d 570 (Ct. App. 1983). *See generally* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670, at 159 (3d ed. 1957) (at common law "there exists an implied covenant of good faith and fair dealing" in every contract).

Beebe Rubber Co.[64]

In *Monge*, the employee refused to accept a date with her foreman and was subsequently harassed, demoted, and fired.[65] The employee sought damages, claiming a breach of her employment contract.[66] The New Hampshire Supreme Court held in favor of the employee, reasoning that a discharge "motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[67]

The implied covenant of good faith and fair dealing has also been used where an employee was terminated without cause following a long record of service.[68] In *Fortune v. National Cash Register Co.*,[69] a salesman under an employment-at-will contract had been terminated after twenty-five years of employment with the National Cash Register Company (National).[70] The evidence indicated that National had terminated the employee in order to avoid paying him a "bonus credit."[71] The Massachusetts Supreme Court ruled for the plaintiff, holding that the "implied covenant of good faith and fair dealing" in the employment contract was breached by the defendant.[72]

C. *Employment Contract Limitations*

The basic employment-at-will contract can be supplemented by additional terms that can restrict the employer's power to terminate the employee.[73] Courts have adopted these terms as con-

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64 114 N.H. 130, 316 A.2d 549 (1974).

65 *See id.* at 131-32, 316 A.2d at 550-51. The evidence showed that the company's personnel manager was aware that the foreman "used his position to force his attentions on the female employees under his authority." *Id.* at 132, 316 A.2d at 551.

66 *Id.*

67 *Id.* at 133, 316 A.2d at 551 (citations omitted).

68 *E.g.*, McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

69 373 Mass. 96, 364 N.E.2d 1251 (1977).

70 *See id.* at 97, 100, 364 N.E.2d at 1253, 1254.

71 *Id.* at 105, 364 N.E.2d at 1258.

72 *See id.* at 104-05, 364 N.E.2d at 1257. The court stated: "We hold that [National's] written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of contract." *Id.* at 101, 364 N.E.2d at 1255-56.

73 *See, e.g.*, Thompson v. American Motor Inns, Inc., 623 F. Supp. 409, 416 (W.D. Va. 1985); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 228, 685 P.2d 1081, 1087 (1984) (en banc); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985).

tractual modifications to the employment-at-will rule.[74] Sources of modifying terms have included hiring letters,[75] oral assurances,[76] and written policy manuals.[77]

In *Hillman v. Hodag Chemical Corp.*,[78] the plaintiff and the corporation held discussions concerning a job opportunity.[79] Subsequently, the corporation sent the plaintiff a letter stating that it would employ the plaintiff "to perform such functions as assigned for two years minimum and at $15,400 per year."[80] After working for a few months, the plaintiff was fired without cause.[81] The Illinois Court of Appeals found that the language in the hiring letter modified the employment-at-will relationship between the parties and created an employment term of two years.[82]

In *Martin v. Federal Life Insurance Co.*,[83] an employer had given oral assurances of permanent employment during pre-employment negotiations.[84] The plaintiff decided to accept the employer's offer and reject another job offer.[85] Subsequently, the plaintiff's employment was terminated by the company, and he instituted an action for wrongful discharge.[86] The court held that the oral representations could be contractually enforceable.[87]

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74 *See supra* note 73.

75 *See, e.g.*, Integon Life Ins. Corp. v. Vandegrift, 11 Ark. App. 270, 669 S.W.2d 492 (1984).

76 *See, e.g.*, Morris v. Chem-Lawn Corp., 541 F. Supp. 479, 481 (E.D. Mich. 1982) (evidence of oral assurances creates issue of material fact); Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958, 959 (Alaska 1983) (same).

77 *See infra* note 98.

78 96 Ill. App. 2d 204, 238 N.E.2d 145 (1968).

79 *See id.* at 206-07, 238 N.E.2d at 147.

80 *Id.*

81 *See id.* at 206, 238 N.E.2d at 146.

82 *Id.* at 208-09, 238 N.E.2d at 148. Because both parties signed the hiring letters, the court held that the letters imposed obligations on both the employer and the employee. *See id.* at 209, 238 N.E.2d at 148.

83 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982).

84 *Id.* at 598, 440 N.E.2d at 1001. The employer orally promised that "he would retain plaintiff until he retired from all business pursuits or no longer wished to be employed at Federal, so long as he continued to perform satisfactorily." *Id.*

85 *Id.* Plaintiff refused a job offer from a competitor of Federal Life Insurance Company. *Id.*

86 *See id.*

87 *Id.* at 603-04, 440 N.E.2d at 1004. The court stated: "[W]e believe that when the employee gives up another offer in exchange for and in reliance upon the employer's promise of permanent employment, that contract, if proved, is enforceable." *Id.* at 602-03, 440 N.E.2d at 1004. *Contra* Bird v. J.L. Prescott Co., 89 N.J.L. 591, 99 A. 380 (1916).

In *Bird*, the employee was injured while on the job. *Id.* at 591, 99 A. at 381. In exchange for his forbearance from suit against the company, the employer offered him a "life job." *Id.* at 591-92, 99 A. at 381. In addition to the oral assurance, the

Although courts have found other communications sufficient to be contractually enforceable, employment policy manuals appear to be the most significant means to modify the employment-at-will relationship.[88] A number of jurisdictions, however, have held that policy manuals do not evidence an intent to contract, but are simply communications of the company's "philosophy," having a nonbinding effect.[89] For example, in *Johnson v. National Beef Packing Co.*,[90] an employee was hired by the National Beef Packing Company and given a "Company Policy Manual"; the manual guaranteed that "[n]o employee shall be dismissed without just cause."[91] In denying the employee's wrongful termination claim, the court reasoned that the manual failed to create a contract because "[i]t was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy."[92]

In 1980, the Michigan Supreme Court, in the landmark decision of *Toussaint v. Blue Cross & Blue Shield*,[93] recognized that a company policy manual could modify the employer's right to at-

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company gave the plaintiff a written document guaranteeing permanent employment. *Id.* at 592, 99 A. at 381. In refusing to enforce the employment contract, the court noted that nothing was mentioned pertaining to wages. *Id.* The court held that both communications "amount to no more than a friendly assurance of employment and are not sufficiently definite to make an enforceable contract." *Id.*

88 *See* Lopatka, *supra* note 45, at 17 & n.92. The author stated:

> Although the public policy exception to the employment-at-will doctrine may be the most widely recognized at the moment, for several reasons the implied-in-fact contract term exception is potentially more pervasive and perilous. Until recently, courts have not regarded a nonunion employer's unilateral representations or policy statements regarding job security, evaluations, disciplinary procedures, and the like as binding contractual commitments.

Id. at 17 (footnotes omitted). The enforcement of policy manuals is significant because these manuals often give nonunion employees the only communication as to the terms of their employment. *See* 14 EMPLOYMENT COORDINATOR (RESEARCH INST. OF AM.) ¶ PM-11,051 (1985). One looseleaf service states: "Employee handbooks serve as official notification to the employees of company policy and benefits. . . . [T]hey are important to the company from an employee relations standpoint." *Id.*

89 *See, e.g.*, Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982); *see also* W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 93 (1985) (stating courts reject personnel policies as part of employment contract where policies are only general expressions of good will).

90 220 Kan. 52, 551 P.2d 779 (1976).

91 *Id.* at 54, 551 P.2d at 781.

92 *Id.* at 55, 551 P.2d at 782.

93 408 Mich. 579, 292 N.W.2d 880 (1980).

will termination of employees.[94] Charles Toussaint was hired by Blue Cross and was given a company policy manual that contained disciplinary procedures and assurances of employee termination "for just cause only."[95] Toussaint was terminated after five years of employment, and he subsequently commenced an action for wrongful discharge.[96] The court found that the assurances in the manual could become part of the employment contract if they created legitimate expectations on the part of the employee.[97] The *Toussaint* decision has been followed by the majority of jurisdictions.[98] New Jersey recently joined these jurisdictions by recognizing the enforceability of promises in policy manuals through its ruling in *Woolley v. Hoffmann-La Roche, Inc.*[99]

III. THE *WOOLLEY* COURT'S ANALYSIS

In *Woolley*, the New Jersey Supreme Court applied traditional contract principles to determine whether a policy manual could be the basis of an enforceable contract between the employee

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94 *See id.* at 624-25, 292 N.W.2d at 897.

95 *Id.* at 597-98, 292 N.W.2d at 884. In addition, Toussaint was orally assured that he would have continued employment "as long as [he] did [his] job." *Id.* at 597, 292 N.W.2d at 884.

96 *Id.* at 595, 292 N.W.2d at 883.

97 *Id.* at 598-99, 292 N.W.2d at 885.

98 *See* Barger v. General Elec. Co., 599 F. Supp. 1154, 1164 n.8 (W.D. Va. 1984) (listing 18 jurisdictions that have shown implied or express willingness to enforce provisions contained in policy manuals). The total number of jurisdictions supporting enforcement of policy manual provisions has risen to 29 as a result of the following decisions: Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221 (3d Cir. 1984) (applying Pennsylvania law); Barger v. General Elec. Co., 599 F. Supp. 1154 (W.D. Va. 1984); Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Jackson v. Kinark Corp., 282 Ark. 548, 669 S.W.2d 898 (1984); Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 (1985); Larrabee v. Penobscott Frozen Foods, Inc., 486 A.2d 97 (Me. 1984); Staggs v. Blue Cross, 61 Md. App. 381, 486 A.2d 798 (1985); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983); Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985).

The following jurisdictions have been unwilling to enforce provisions contained in policy manuals: White v. ITT, 718 F.2d 994 (11th Cir. 1983) (applying Georgia law); White v. Chelsea Indus., 425 So. 2d 1090 (Ala. 1983); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982); Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985); Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18 (1979); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175 (Tex. Civ. App. 1983).

99 *See Woolley*, 99 N.J. at 285-86, 491 A.2d at 1258.

and the employer.[100] Chief Justice Wilentz, writing for a unanimous court, held that absent a prominent disclaimer, the terms of a personnel manual could be considered a contractual offer to a company's employees.[101] The court reached this conclusion by first examining the circumstances under which the Hoffmann-La Roche manual was distributed.[102]

The court noted that, in general, individual employees did not execute formal contracts with Hoffmann-La Roche.[103] The employees also were not unionized or under a collective bargaining agreement with the company.[104] Therefore, the court observed that the company policy manual provided the only information regarding the employees' status.[105] The court stated that it was probable that the employees regarded the manual as setting forth the terms of their employment.[106] As a basis for its reasoning, the court noted that the document was carefully organized and had "all of the appearances of corporate legitimacy."[107] Chief Justice Wilentz further pointed out that when an employee is notified of "company policy," he knows that policy

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100 *See id.* at 297-304, 491 A.2d at 1264-68. Prior to its analysis, the court posed two questions: "[S]hould the legal effect of the dissemination of a personnel policy manual by a company with a substantial number of employees be determined solely and strictly by traditional contract doctrine? Is that analysis adequate for the realities of such a workplace?" *Id.* at 289-90, 491 A.2d at 1260. Through its decision, the court answered both questions in the affirmative.

101 *Id.* at 285-86, 491 A.2d at 1258. The court held that unless there was a disclaimer "unmistakably" indicating that the provisions were nonbinding or there was other similar evidence of the "employer's intent not to be bound," the provisions would be binding. *Id.* at 307, 491 A.2d at 1269-70.

102 *See id.* at 298-300, 491 A.2d at 1264-66.

103 *Id.* at 299, 491 A.2d at 1265; *see supra* note 7.

104 *See Woolley*, 99 N.J. at 296 & n.6, 491 A.2d at 1264 & n.6. The court noted that "[t]he trial court viewed the manual as an attempt by Hoffmann-La Roche to avoid a collective bargaining agreement." *Id.* at 296, 491 A.2d at 1264 (footnote omitted).

105 *See id.* at 298-99, 491 A.2d at 1265.

106 *See id.* at 299, 491 A.2d at 1265.

107 *Id.* The court also reasoned that the title, "Personnel *Policy* Manual," dispelled any doubt that the manual was a representation of Hoffmann-La Roche's official "policy." *Id.*

Hoffmann-La Roche argued that the manual was nonbinding because it was changed and amended periodically during the term of Woolley's employment. *See id.* at 287 n.1, 299, 491 A.2d at 1258 n.1, 1265. The court rejected this argument. *See id.* at 299-300, 491 A.2d at 1265-66. The supreme court reasoned that because the changes almost always benefited the employees, which earned Hoffmann-La Roche a favorable reputation in its labor relations, it was just as easy to conclude that the company wanted to keep its benefits current, similar to its competitors who were parties to collective bargaining agreements. *See id.* at 299, 491 A.2d at 1265.

should be heeded.[108]

The court held that the employment manual was an offer of employment terms; thus, the court turned to the issue of the employee's acceptance of those terms.[109] The court stated that the employee accepted the offer by performing his job.[110] Chief Justice Wilentz noted that a unilateral contract analysis was the logical method of dealing with the facts before the court.[111] He pointed out that most personnel policy manuals were produced, distributed, and periodically amended voluntarily by the employer without employee negotiation.[112] Because the manual did not seek a promise from any of the employees, the court noted that continued work was the reasonable means of acceptance.[113] Additionally, the court implied that under the unilateral contract analysis, the employee's continued work without an obligation to do so constituted the consideration to form a binding contract.[114]

The court also examined the underlying policy considerations of its holding.[115] The chief justice emphasized the importance of job security to the employee.[116] He deemed this concept

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108 *Id.*

109 *See id.* at 302, 491 A.2d at 1267.

110 *See id.* The court observed that acceptance is contingent upon what was bargained for—either a return promise forming a bilateral contract, or a performance forming a unilateral contract. *Id.*

111 *See id.*; *infra* note 158.

112 *See id.*

113 *See id.* The court reasoned that once the manual was distributed, all employees, whether commencing work before or after its distribution, were subject to the manual's terms. *Id.* at 305 n.10, 491 A.2d at 1268 n.10. Furthermore, the court noted that even without specific knowledge or reliance on the terms of the manual, an employee benefited from the manual's promises. *Id.* The court stated that the employee's reliance was presumed. *Id.* at 304, 491 A.2d at 1268 (relying on Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958).

114 *See id.* at 302, 491 A.2d at 1267. Although the court used a unilateral contract analysis, it mentioned alternative contractual theories that might be used to enforce the provisions of an employment manual. *See id.* at 303 n.9, 491 A.2d at 1267 n.9. The court noted that such alternatives included the following: a third party beneficiary theory, in which all the employees would be the beneficiaries; the doctrine of unconscionability, as annunciated in the Uniform Commercial Code; and the theory of promissory estoppel, as formulated in the *Restatement (Second) of Contracts*. *Id.* The court failed to state whether any of these alternative theories could have been used successfully by Woolley. *See id.*

115 *See id.* at 297, 491 A.2d at 1264. The court stated that its holding was based on "the common law of contracts interpreted in the light of sound policy applicable to this modern setting." *Id.*

116 *Id.* at 297-98, 300, 491 A.2d at 1264, 1266. The employee's point of view was perhaps best illustrated by the popular character Willie Loman in Arthur Miller's *Death of a Salesman*. Subsequent to his employment discharge, Willie complained:

"the single most important objective of the workforce."[117] The court observed that other aspects of employment—pay, benefits, working conditions, and hours—are mere contingencies to job security.[118] Other policies the court sought to promote were "basic honesty" and fairness in employment relationships.[119] The supreme court opined that it would not permit an employer to offer alluring benefits and inducements only to disavow them summarily, regardless of the employer's good faith belief that the provisions were unenforceable.[120] Noting that the average worker was incapable of analyzing the policy manual in terms of substantive legal validity, the court believed that it was reasonable for the workers to interpret the manual as giving them the fundamental protection of job security.[121] Utilizing the persuasive policy considerations of job security, fairness, and honesty underlying its contractual analysis,[122] the supreme court recognized a new limitation to the employment-at-will rule.[123] Mindful of its departure from prior law, the court stated that "any application of the employee-at-will rule . . . must be tested by its legitimacy today and not by its acceptance yesterday."[124]

> I put thirty-four years into this firm. . . . You can't eat the orange and throw the peel away—a man is not a piece of fruit!

W. HOLLOWAY & M. LEECH, *supra* note 89, at vii-viii (quoting A. MILLER, DEATH OF A SALESMAN, act II, at 82 (1949)).

117 *Woolley*, 99 N.J. at 300, 491 A.2d at 1266. The court further noted that "the reasons for giving such provisions binding force are particularly persuasive." *Id.*

118 *Id.* The court observed that without the fundamental protection of job security, "all other benefits are vulnerable." *Id.*

119 *Id.* at 309, 491 A.2d at 1271.

120 *Id.* at 300, 491 A.2d at 1266. The court noted that when a policy manual, "purporting to give job security, is distributed by the employer to a workforce, substantial injustice may result if that promise is broken." *Id.* at 297, 491 A.2d at 1264.

121 *See id.* at 300-01, 491 A.2d at 1266.

122 *See supra* notes 115-121 and accompanying text. The court noted:

> No longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee. . . . [T]his Court [is] no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest, and the extent to which our deference to one or the other serves or disserves the needs of society as presently understood.

Woolley, 99 N.J. at 291, 491 A.2d at 1261.

123 *See Woolley*, 99 N.J. at 285-86, 491 A.2d at 1258.

124 *Id.* at 292, 491 A.2d at 1262 (citation omitted).

IV. UNILATERAL CONTRACT ANALYSIS: ENFORCING AN AGREEMENT BASED ON PERFORMANCE

The employment-at-will rule has been explained as a rule of construction rather than a rule of substantive law.[125] In other words, courts have allowed either contracting party to prove that an employment relationship other than "at will" was intended, despite the at-will presumption.[126] Judicial interpretations of terms or promises in company policy manuals, however, have been inconsistent; some courts have used estoppel theories,[127] others have used pure contractual doctrine,[128] and still others have found the promises wholly unenforceable.[129]

The unilateral contract analysis provides the most logical means for the enforcement of provisions in policy manuals. It realistically explains the employment relationship when the employer sets the terms of employment because the relationship is inherently based on performance rather than on promises. Although the classification of some contracts as unilateral has been criticized,[130] it continues to gain popularity.[131]

One contemporary writer has observed that "the most notable expansion of unilateral contract analysis has occurred in disputes between employers and employees."[132] For example,

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125 *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 546, 688 P.2d 170, 172 (1984); Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983).

126 *See, e.g.*, Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480, 1485 (E.D. Mich. 1983); Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 56, 83 A.2d 817, 818 (Law Div. 1951); *see also* RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1958) ("circumstances surrounding the employment may . . . indicate that the parties have contracted with reference to a period of time").

127 *See* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). The *Toussaint* court discussed the case in terms of the estoppel elements of reliance and reasonable expectations rather than in terms of contractual elements. *See id.* at 598-99, 292 N.W.2d at 885.

128 *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 228-31, 685 P.2d 1081, 1087-88 (1984).

129 *See supra* note 98 (listing cases holding policy manuals unenforceable).

130 *See generally* Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance* (pts. 1 & 2), 48 YALE L.J. 1 , 779 (1938-1939); Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515 (1955) (both criticizing use of unilateral contract analysis).

131 *See* Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 559 (1983).

132 *Id.* Use of the unilateral contract in employment relations, however, is not a new development. *See, e.g.*, Henderson Land & Lumber Co. v. Barber, 17 Ala. App. 337, 85 So. 35 (1920); Orton & Steinbrenner Co. v. Miltonberger, 74 Ind. App. 462, 129 N.E. 47 (1920); Roberts v. Mays Mills, Inc., 184 N.C. 406, 114 S.E. 530

courts have previously used the unilateral contract as the framework for analyzing pension benefit,[133] severence pay,[134] bonus,[135] and profit-sharing cases.[136] Courts have failed, however, to utilize fully the unilateral contract analysis when resolving policy manual cases.[137] These courts have often ignored the concepts of offer and acceptance and have focused solely on the issues relating to consideration.[138] Because all three of these elements are part of traditional contract doctrine, however, courts should analyze each one when considering alleged breaches of promises contained in employers' policy manuals.[139]

A. Offer

An offer has been defined as "an expression by one party of his assent to certain definite terms."[140] The offeror's intent to

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(1922); Scott v. J.F. Duthie & Co., 125 Wash. 470, 216 P. 853 (1923) (all applying unilateral contract principles in context of employee bonuses).

133 *See, e.g.*, Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975); Marvel v. Dannemann, 490 F. Supp. 170 (D. Del. 1980); Amicone v. Kennecott Copper Corp., 19 Utah 2d 297, 431 P.2d 130 (1967); Jacoby v. Grays Harbor Chair & Mfg. Co., 77 Wash. 2d 911, 468 P.2d 666 (1970).

134 *See, e.g.*, Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976); Hercules Powder Co. v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949).

135 *See, e.g.*, Sigrist v. Century 21 Corp., 519 P.2d 362 (Colo. Ct. App. 1973); Gustafson v. Lindquist, 40 Ill. App. 3d 152, 351 N.E.2d 280 (1976); Toch v. Eric Schuster Corp., 490 S.W.2d 618 (Tex. Civ. App. 1972).

136 *See, e.g.*, Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 231 A.2d 800 (1967); Evo v. Jomac, Inc., 119 N.J. Super. 7, 289 A.2d 551 (Law Div. 1972); Garner v. Girard Trust Bank, 442 Pa. 166, 275 A.2d 359 (1971).

137 *See infra* note 138.

138 *See, e.g.*, Brooks v. Trans World Airlines, 574 F. Supp. 805 (D. Colo. 1983); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

139 *See generally* Tobias v. Montgomery Ward & Co., 362 N.W.2d 380, 381 (Minn. Ct. App. 1985). The *Tobias* court stated: "[A] handbook or manual may become part of the employment contract if the requirements for formation of a unilateral contract are met. Those requirements are: an offer, communicated to the offeree, an acceptance by the offeree, and consideration." *Id.* (citations omitted). Other courts have utilized the unilateral contract analysis to enforce policy manual provisions. *See, e.g.*, Thompson v. American Motor Inns, Inc., 623 F. Supp. 409 (W.D. Va. 1985); Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 (1985); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976).

140 1 A. CORBIN, CORBIN ON CONTRACTS § 11, at 23 (3d ed. 1961). The Supreme Court of Minnesota emphasized the importance of the definiteness of the offer; it stated: "The offer must be definite in form . . . . [G]eneral statements of policy are no more than that and do not meet the contractual requirements for an offer." Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983).

contract is normally examined from the offeree's point of view.[141] Specifically, an objective standard is used, in which a determination is made of what a reasonable person in the position and circumstances of the offeree would consider the offeror's manifestations to mean.[142] To determine the effect of a manual on a "reasonable" employee, courts must consider the specificity of the document, the surrounding circumstances, and any other factors evidencing the employer's intent.[143] Considering the nature of the employment relationship, it is reasonable that a person who accepts a job would believe that he is bound to follow company policy. The employee would similarly expect the employer to follow its own policy. If the policy is articulated in a manual, it further emphasizes the importance of the provisions within.[144] Therefore, in many cases, an employee is justified in believing that promises contained in policy manuals are part of the employer's offer of employment.[145]

The New Jersey Supreme Court stated in *Woolley* that a policy manual containing a prominent disclaimer would not constitute a binding employment contract.[146] A disclaimer clearly demonstrates the employer's intent concerning the effect of the manual.[147] The disclaimer exception is therefore consistent with the "offer" analysis; a clear disclaimer renders an employee's expectation of a manual's guarantees unreasonable.[148] A clear and

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141 *See generally* E. FARNSWORTH, CONTRACTS § 36, at 114 (1982) ("[I]t is enough that the [offeree] had reason to believe that the [offeror] had that intention [to contract].").

142 J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 24 (2d ed. 1977). This has been called the "objective test." *Id.* at 25.

143 *See* E. FARNSWORTH, *supra* note 141, § 3.10, at 125. The author stated:

> [E]ach [case] turns on its own special facts. A court will look first to the language of the particular proposal. It will then take account of any prior communications between the parties. It will also consider such circumstances as the completeness of the suggested bargain and the number of persons to whom the proposal is addressed.

Id.; *see also* Dennis v. Thermoid Co., 128 N.J.L. 303, 303, 25 A.2d 886, 886 (1942) ("the intention of the parties must be found as a fact from all the circumstances surrounding the employment").

144 *See Woolley*, 99 N.J. at 299, 491 A.2d at 1265.

145 Otherwise, if employees' "legitimate expectations" flowing from policy manuals are not enforced, then the manuals could be considered as "full of sound and fury . . . Signifying nothing." *See* W. SHAKESPEARE, *Macbeth*, act V, scene V, in THE COMPLETE WORKS OF SHAKESPEARE 1069 (H. Craig & D. Bevington eds., rev. ed. 1973).

146 *See Woolley*, 99 N.J. at 307, 491 A.2d at 1269-70.

147 *See id.*; DeGiuseppe, *supra* note 33, at 53.

148 *See, e.g.*, Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480 (E.D. Mich. 1983). In *Batchelor*, the plaintiff claimed that a personnel booklet modified the em-

prominent disclaimer evincing an employer's intent not to be bound renders a policy manual incapable of being an offer that can be accepted.[149] The clarity of the language in the disclaimer is of crucial significance to the employer because of the presumption that ambiguities in provisions will be resolved against the party drafting the offer.[150]

B. Acceptance

Acceptance of an offer has been defined as "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."[151] Because courts have found that policy manuals can be offers to contract, the issue arises as to how the employee's assent is to be manifested in order for the employer's promises to become enforceable. Acceptance is typically communicated by one of two forms: a bargained-for return promise or a bargained-for action or inaction.[152] Modern contract doctrine suggests that where an offer ambiguously states the mode of acceptance, the offeree may express his intent to accept by any means reasonable under the circumstances.[153]

Contracts are generally categorized as bilateral or unilateral.[154] An acceptance by a promise forms a bilateral contract.[155] In contrast, a unilateral contract is formed when an offer is ac-

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ployer's right to terminate employees at will. *Id.* at 1486. The court, however, found that her employment application, which contained a disclaimer of job security, became a part of her employment contract. *See id.* at 1484. The disclaimer read: *"[M]y employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself."* *Id.* at 1483; *see also* Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344, 346 (E.D. Mich. 1980) (disclaimer deprived plaintiff of any legitimate expectation of just-cause termination). *But see* Ferraro v. Koelsch, 124 Wis. 2d 154, 164, 368 N.W.2d 666, 671 (1985) (holding procedures in company policy manuals may become part of employment contract despite disclaimer in employment application).

149 Although an express disclaimer may evidence an employer's intent, an oral assurance to the contrary may override a disclaimer. *See* Schipani v. Ford Motor Co., 102 Mich. App. 606, 614, 302 N.W.2d 307, 311 (1981). In *Schipani*, the court stated that "under appropriate circumstances, oral promises may negate the effect of disclaimers which are intended to absolve employers from liability for policies presented in handbooks or other employer literature." *Id.*

150 *See, e.g., In re* Miller, 90 N.J. 210, 221, 447 A.2d 549, 555 (1982) ("Where an ambiguity appears in a written agreement, the writing is to be strictly construed against the draftsman.").

151 RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981).

152 *See id.* § 50 comment a.

153 *See, e.g., id.* § 30(2). *See generally* Note, *Acceptance of Unclear Offers*, 60 YALE L.J. 1043 (1951).

154 *See* 1 S. WILLISTON, *supra* note 63, § 13, at 23.

155 *See id.*

cepted by a performance.[156] Although some authorities have repudiated the distinction between the bilateral contract and the unilateral contract,[157] the latter is clearly useful in employment manual cases.[158] In circumstances similar to *Woolley*, the unilateral contract analysis enables courts to use contract principles for determining the existence of an enforceable promise without straining to find a return promise.[159] In a unilateral contract, only the offeror makes a promise. So long as the promise remains in effect, the offeror has a duty to uphold it, while the offeree gains a right to the benefit of that promise.[160] Accordingly, in policy manual cases, the employer has a duty to abide by its policy manual, while the employee has a right to the promises the manual confers.

For an offer to be accepted, it must be communicated to the offeree.[161] As a general rule, an acceptance can only be validly consummated with knowledge of the offer.[162] In addition, courts examining unilateral contract relationships often require proof of reliance on the offer before a performance will act as an acceptance.[163] In policy manual cases, however, courts generally do not

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156 *See id.* In discussing the employer-promised "bonus" case, one commentator notes that

> the offered promise is almost always so made as to make it unnecessary for the employee to give any notice of his assent. It is sufficient that he continues in the employment as requested. It is certain that after so continuing in performance, the employer cannot withdraw or repudiate his promise without liability . . . . *A unilateral contract exists.*

1 A. CORBIN, *supra* note 140, § 70, at 294 (emphasis added).

157 *See supra* note 123 and accompanying text.

158 *See Woolley*, 99 N.J. at 302, 491 A.2d at 1267. The *Woolley* court stated:

> The unilateral contract analysis is perfectly adequate for that employee who was aware of the manual and who continued to work intending that continuation to be the action in exchange for the employer's promise; it is even more helpful in support of that conclusion if, but for the employer's policy manual, the employee would have quit.

Id. (citation omitted).

159 *See* Pettit, *supra* note 131, at 591.

160 *See* E. FARNSWORTH, *supra* note 141, at 109-10.

161 1 S. WILLISTON, *supra* note 63, § 33, at 92. A policy manual directed and distributed to all employees is a sufficient "communication." *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 630 (Minn. 1983). When a manual is not distributed, however, the offer is not communicated and thus cannot be accepted. *E.g.*, Tobias v. Montgomery Ward & Co., 362 N.W.2d 380, 382 (Minn. Ct. App. 1985); *cf.* Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494, 497 (Mo. 1971) (although policy manual was undistributed, it could still be communicated to employee).

162 1 A. CORBIN, *supra* note 140, § 59; RESTATEMENT OF CONTRACTS § 53 (1932).

163 *See, e.g.*, Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891). In *Hamer*, the plaintiff was promised $5000 "if he . . . refrain[ed] from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years

inquire into the knowledge and reliance of the employee.[164] Nevertheless, proving these elements could become a significant obstacle for the employee claiming a wrongful termination.[165]

An exception exists, however, to the "knowledge" and "proof of reliance" rules. It arises when an offeror contracts with a class of offerees.[166] Where an offer is generally communicated to a class, reliance on the offer may be *presumed*.[167] While this idea is applied in collective bargaining agreements,[168] it can be analogously applied to employment manual cases. As the court in *Woolley* stated, "[i]f reliance is not presumed, a strict contractual analysis might protect the rights of some employees and not others."[169] Thus, when an employer chooses to offer promises in the form of a policy manual that logically serve its own interests[170] to a class of beneficiaries (its employees), the members of that class should be allowed the full benefit of the promises in-

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of age." *Id.* at 540, 27 N.E. at 256. The court ruled that because the plaintiff's reliance on the promise led to his performance, there was an enforceable contract. *See id.* at 546, 27 N.E. at 257.

164 *See* Pettit, *supra* note 131, at 580.

165 *See, e.g.*, O'Connor v. Eastman Kodak Co., 65 N.Y.2d 724, 481 N.E.2d 549, 492 N.Y.S.2d 9 (1985) (reliance upon specific representation needed); Patrowich v. Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, *aff'd on other grounds per curiam*, 63 N.Y.2d 541, 473 N.E.2d 11, 483 N.Y.S.2d 659 (1984).

166 *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981) (standardized contracts should be "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the terms of the writing"). The employment contract based on a distributed policy manual can be considered a standardized agreement—in essence, it is a nonunion "collective bargaining agreement." *See* Pettit, *supra* note 131, at 583. Such an agreement involving a group of employees, therefore, should not require a showing of reliance. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 613 & n.25, 292 N.W.2d 880, 892 & n.25 (1980); Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 145-46, 143 A.2d 762, 765 (App. Div. 1958).

167 *See, e.g.*, Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958). The *Anthony* court stated that when at-will employees are extended promises by the employer, "reliance is presumed, just as it always is presumed that everything an employer agrees to pay or give in return for service by an employee was relied upon by the latter in going to work after being apprised as to the terms of compensation." *Id.* at 145-46, 143 A.2d at 765. Furthermore, a purpose of tailoring standardized employment contracts, *see supra* note 157, to a group of employees "is to eliminate bargaining over details of individual transactions." RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1981). If knowledge or reliance is not presumed, "that purpose would not be served if a substantial number of [employees] retained counsel and reviewed the standard terms." *See id.*

168 *See Woolley*, 99 N.J. at 304 n.10, 491 A.2d at 1268 n.10.

169 *Id.*

170 *See generally Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892 (noting that employment policies and practices are designed to "[secure] an orderly, cooperative and loyal work force").

tended. Courts should follow this principle notwithstanding any evidentiary impediment such as knowledge or reliance on the part of the employees.

C. *Consideration*

Consideration has been explained as a "legal detriment that has been bargained for and exchanged for the promise."[171] Basic contract doctrine requires that consideration, in the form of an act or forbearance, must be rendered in exchange for the employer's offer in order to create an enforceable unilateral contract.[172] The requirement of consideration has been crucial in most courts' analyses regarding the contractual effect of employment manuals.[173] These courts generally focus on two issues: whether an additional or independent consideration is necessary and whether "mutuality of obligation" is needed.

One common issue courts must determine regarding consideration in an employment case is whether consideration additional and independent to an employee's continued service is necessary to make a promise communicated by a policy manual enforceable. Courts that have found policy manuals to be contractually enforceable have held that continued performance satisfies the requirement of consideration.[174] These courts are essentially correct.

In discussing the issue of independent consideration, a fundamental distinction must be made concerning the application of the doctrine of consideration. In contracts of "permanent" or "lifetime" employment, courts may rightfully require a clear showing of the employer's intent to be bound; hence, additional consideration may be necessary.[175] The requirement of additional consideration, however, has been described as serving only an evidentiary function.[176] Thus, being more a rule of construc-

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171 J. CALAMARI & J. PERILLO, *supra* note 142, at 134-35 (footnotes omitted).

172 *See id.* at 134.

173 *See, e.g.*, cases accompanying *infra* notes 174 & 183.

174 *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325-27, 171 Cal. Rptr. 917, 925 (1981); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984); Pine River State Bank v. Mettile, 333 N.W.2d 622, 627 (Minn. 1983).

175 *See Woolley*, 99 N.J. at 294-95, 491 A.2d at 1262-63.

176 *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925; *see also* Eilen v. Tappin's Inc., 16 N.J. Super. 53, 56, 83 A.2d 817, 818 (Law Div. 1951) (the requirement of additional consideration "is merely a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract").

tion than of substance,[177] it clearly should not be applied rigidly to all employment contract cases.

The basic employment-at-will contract consists of the payment of wages for the employee's services and does not require independent consideration. Additional employer offerings such as increased job security, fringe benefits, and bonuses are extensions of the basic employment contract and similarly should not require independent consideration.[178] An employer supplements contracts of indefinite duration with benefits and inducements in order to generate a more productive work force.[179] If additional consideration were required, many claims by employees for these inducements would be unfairly voided, while still allowing an employer to take advantage of the employee's increased production.

The other issue addressed by courts examining the policy manual's effect on the employment relation has been whether "mutuality of obligation" is necessary. The doctrine of mutuality of obligation holds that both parties must be bound by the contract; if not, neither party is bound.[180] Inherent in the concept of the unilateral contract as applied to the employment relationship, however, is that only *one* party gives a binding promise, while the other renders a *performance* to make the contract enforceable.[181] Historically, lack of mutuality was misapplied by courts to strike down claims arising out of employment contracts.[182] Modern courts, though, have held that consideration rather than mutuality of obligation is required.[183] As Corbin

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177 Pine River State Bank v. Mettile, 333 N.W.2d 622, 629 (Minn. 1983).

178 *See* W. HOLLOWAY & M. LEECH, *supra* note 89, at 45.

179 *See id.* at 46. The authors state:

> An express or implied promise of job security . . . is often an ingredient in the complex of benefits and salary that make up the environment of an efficient work place. . . . [I]t is reasonable to surmise that the employer at least believes that the encouragement of continuing employment and policies of job security and fairness have a favorable impact on productivity.

Id.

180 1 A. CORBIN, *supra* note 140, § 152, at 2.

181 *See id.* at 13-14.

182 W. HOLLOWAY & M. LEECH, *supra* note 89, at 52-53.

183 *E.g.*, Pine River State Bank v. Mettile, 333 N.W.2d 622, 629 (Minn. 1983); Helle v. Landmark, Inc., 15 Ohio App. 3d 1, 12, 472 N.E.2d 765, 776 (1984). The *Helle* court stated that

> [a]s a contract defense, the mutuality doctrine has become a faltering rampart to which a litigant retreats at his own peril. Under contemporary analysis of unilateral contracts, the "mutuality" doctrine crumbles of its own weight. . . . Thus understood, a unilateral contract lacks "mutuality" only when there is a *failure of consideration.*

noted of the employment situation,

> the employee has made no return promise and has retained the power and legal privilege of terminating the employment "at will". The employer's promise is supported by the service that has been begun or rendered or by the other executed consideration or action in reliance. There is a valid unilateral contract; there is an obligation although there is no "mutality of obligation."[184]

Therefore, under a unilateral contract analysis, courts should find valid contractual obligations arising from employment manuals, although "mutuality of obligation" may appear to be lacking.

V. CONCLUSION

The *Woolley* decision is indicative of a steady judicial departure from strict adherence to the employment-at-will rule. The rule has been increasingly abrogated by courts under circumstances where its blind acceptance could not be justified in modern society. Many decisions similar to *Woolley* accentuate underlying policy arguments so as to overshadow effectively a strong contractual argument. Applying a unilateral contract analysis, however, is the appropriate means for examining promises communicated within a company policy manual.

Although *Woolley* answered many questions regarding the status of the employment-at-will rule in New Jersey, the acceptance of a contract limitation to the rule creates many new issues to be resolved. For example, the court declined to decide when and how a policy manual could be changed by an employer.[185] While it appears a manual can be altered freely, there may be some limitation on amendments to job security provisions.[186] Another unanswered question is whether the decision will have a retroactive effect. In light of New Jersey precedent, it is possible that *Woolley* will be given at least partial retroactive application,

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Id. (citations omitted).

184 1 A. CORBIN, *supra* note 140, § 152, at 14 (footnote omitted).

185 *See Woolley*, 99 N.J. at 309, 491 A.2d at 1270-71. The court in *Woolley* posited that, in general, changes to policy manuals would be permitted. *See id.* The court stated: "We express no opinion, however, on whether or to what extent [changes] are permitted when they adversely affect a binding job security provision." *Id.*, 491 A.2d at 1271.

186 *See, e.g.*, Langdon v. Saga Corp., 569 P.2d 524, 527-28 (Okla. Ct. App. 1976) ("employer remains free to modify such policies prospectively" so long as there is no interference with accrued contractual rights); *cf.* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 615, 292 N.W.2d 880, 892 (1980) (policy manual "can be unilaterally amended by the employer without notice to the employee").

weighing all interests involved.[187]

The *Woolley* decision will have a tremendous impact on the employer-employee relationship. The court indicated that the decision should not cause the employer to become "reluctant" in distributing policy manuals. It is probable, however, that many employers will be overly cautious and will distribute manuals devoid of job security language. Furthermore, employers may begin to include disclaimers in employment manuals or to avoid issuing manuals at all for fear of suit. Employers that seek the highest quality in their work force, however, may be compelled to guarantee job security to nonunion workers through communications such as company policy manuals. Although the more immediate effect of *Woolley* will be a wave of wrongful discharge litigation, the court will achieve what it sought to accomplish: greater fairness and equity in the employment relationship.

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[187] *See generally* Coons v. American Honda Motor Co., 96 N.J. 419, 476 A.2d 763 (1984) (discussing history of applying decisions retroactively in New Jersey), *cert. denied*, 105 S. Ct. 808 (1985).