
A SUBJECTIVE APPROACH TO CONTRACTS?: HOW COURTS INTERPRET EMPLOYEE HANDBOOK DISCLAIMERS

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INTRODUCTION

Employment law in America generally operates under the presumption that employment for an unspecified or indefinite term is considered “at-will.”¹ This means that employment can be terminated by either the employee or employer at any time and for any reason, excepting improper discriminatory reasons, or for no reason at all.² Over the past two decades, the once almost irrebuttable presumption that such employment is at-will has increasingly been weakened by courts.³ Through a combination of both tort and contract doctrine rationales, courts have mitigated the sometimes harsh results of the rigid employment-at-will presumption. These courts have allowed for wrongful discharge suits under a number of different theories, including violation of public policy, breach of the implied duty of good faith and fair dealing, and breach of implied contract.⁴ This latter theory will be the focus of this Article.

This Article specifically focuses on the approaches courts have taken in finding that a termination constitutes a breach of contract based on promises made in personnel manuals, even when such manuals include a disclaimer repudiating any intent to contract on the part of the employer. Part I examines the history of employment at will in the

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1. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT LAW* 41 (2004).

2. *Id.*

3. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 332-34 (1991/1992).

4. *Id.*

United States and, in particular, the movement from an at-will to an at least partially “for cause” regime. Part II introduces the basic elements of contract formation and examines how courts have utilized these elements in finding the existence of an employment contract in the absence of a written or oral agreement to that effect.

Part III examines the significance of the introduction of disclaimers into employment manuals and summarizes some of the current thinking about these disclaimers. Part IV examines court decisions that have analyzed the disclaimer issue. Specifically, I analyze cases that are fairly similar in their factual contents, but where the courts came to differing conclusions, either finding that the disclaimer was effective and, thus, there was no implied-in-fact contract, or finding the disclaimer was ineffective and, therefore, holding that a valid contract existed. I will study the courts’ reasoning in these cases and attempt to extract the underlying logic and motivation of various courts in reaching opposing outcomes. Ultimately, after close examination, it seems that the courts split their case analysis along two basic lines: courts who find in favor of the employer often focus on the employer’s intent in including the disclaimer in the manual, while courts who find for the employee tend to concentrate their analyses on the expectations that the employee handbook gave to the employee in terms of job security. After examining certain matched cases in this way, Part V summarizes the current debate about whether employment at will should be protected and preserved. Specifically, it focuses on two relatively new studies about the true misconceptions employees hold about the concept of job security. Part VI attempts to understand how such considerations of employee behavior should fit into the analysis of courts in employment manual disclaimer cases. I conclude by suggesting some additional factors that courts should consider when determining the validity of a personnel manual as an implied contract of employment for at will employees.

I. THE HISTORY OF EMPLOYMENT AT WILL

The American common law presumption that employment for an unspecified period of time is considered “at-will” can generally be traced back to Horace Wood. In his 1877 *A Treatise on The Law of Master and Servant*, 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 [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.⁵

This rule quickly spread across the United States and in 1895 the rule was adopted by the New York Court of Appeals in *Martin v. New York Life Insurance Co.*⁶ The *Martin* court held that an indefinite hiring was presumed to be at-will and that a specific rate of payment (e.g., \$5000 per year) did not give rise to a presumption that the contract was intended to be for that duration.⁷ From this time on, many other cases were disposed of simply by a referral to the employment at will rule.⁸ This was a devastating blow to the worker and, as Feinman notes:

The [employment-at-will] rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.⁹

While the rise of unionization brought with it collective bargaining agreements specifying that unionized workers could only be fired for good cause, many non-unionized workers were still left vulnerable to the unyielding harshness of the employment-at-will presumption.¹⁰ Eventually, courts began to weaken the nearly irrefutable presumption that, unless otherwise stated, employment for an unspecified time period was terminable at will.

Courts have begun to chip away at the presumption of employment at will in several ways. First, courts are allowing tort claims for a wrongful discharge alleged in violation of public policy. For example, in *Nees v. Hocks*,¹¹ the Supreme Court of Oregon held that an employer could be liable to an employee for damages arising from the employee's

5. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) (citing H.G. WOOD, A TREATISE OF THE LAW OF MASTER AND SERVANT 272 (1877)).

6. 42 N.E. 416, 417 (N.Y. 1895).

7. Feinman, *supra* note 5, at 128 (explaining the holding of *Martin v. New York Life Insurance Co.*).

8. *Id.* at 128-29.

9. *Id.* at 133.

10. Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-05 (1967).

11. 536 P.2d 512 (Or. 1975).

discharge when the employee was fired for fulfilling her obligation to perform jury duty.¹² Similarly, in *Petermann v. International Brother of Teamsters*,¹³ a California appeals court ruled that an employer could be liable in tort for firing an employee because the employee refused to testify falsely on the employer's behalf.¹⁴ These tort claims are based on the reasoning that "employers should not use their contractual right to terminate the employment relationship in a manner that might frustrate the third-party interests of the public."¹⁵

The second way in which courts have begun to undermine the presumption of employment at will is by reading a covenant of good faith and fair dealing into employment agreements.¹⁶ For example, courts have held that an employer breached its covenant of good faith and fair dealing when it terminated an employee in order to avoid paying him his anticipated commissions.¹⁷

Finally, the courts have also used pure contract doctrine in order to erode the doctrine of employment at will. This third method used by courts is the focus of this Article.

II. THE APPLICATION OF CONTRACT DOCTRINE TO EMPLOYMENT AT WILL

A. *The Basics of Contract Formation*

The Restatement (Second) of Contracts defines a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹⁸ A promise is further defined as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."¹⁹ Finally, under the Restatement (Second) of Contracts, "the formation of

12. *Id.* at 516.

13. 344 P.2d 25 (Cal. Ct. App. 1959).

14. *Id.* at 27.

15. SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 694 (2004).

16. Befort, *supra* note 3, at 333-34 (noting that this approach is "rooted in both tort and contract law"). "This covenant requires that parties to a contract refrain from acting in bad faith to frustrate one another's expectations of receiving the benefits of their bargains." *Id.*

17. *Id.* (citing *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1254 (Mass. 1977)).

18. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

19. *Id.* § 2.

a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”²⁰ Therefore, the basic elements of a contract are mutual assent and consideration. Mutual assent often takes the form of an offer and acceptance, but such occurrence need neither be formal nor in writing to be enforceable. The touchstone of contract law is intent of the parties and courts do their best when interpreting contracts to respect the will of the parties in forming the contract.

Courts have been particularly open to the theory that employee handbooks may, under certain circumstances, constitute an implied employment contract even where no express agreement between employer and employee existed.²¹ Reacting to the increasing willingness of courts to find an implied contract by the provision of such policy manuals to employees, employers began to include disclaimers in the manuals, repudiating any intent to be contractually bound by the manuals’ contents.²² Courts have been divided in the effect they give to such disclaimers.²³ Some have pronounced that no contract could possibly exist given that the employer has stated that he or she does not intend to be contractually bound,²⁴ while others have focused on the reasonable expectations that the manual gives to employees and the relative obscurity of such disclaimers as compared to the entirety of the handbook.²⁵

B. Contract Law Applied to the Employment Relationship

For many years, courts, using the will theory of contracts, utilized contract law as a bulwark of protection for the employment-at-will presumption.²⁶ Courts often took the views that either the parties intended the employment to be at-will, any long-term employment agreement was lacking in mutuality of obligation, or that the employee needed to provide independent consideration for long-term

20. *Id.* § 17.

21. *See, e.g.,* Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (N.J. 1985); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980).

22. Befort, *supra* note 3, at 328.

23. *See id.* at 351.

24. *Id.* at 349.

25. *Id.* at 366-67 (citing McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866, 870 (Wyo. 1990)).

26. *See* Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COM. L.J. 17, 24-25 (2006).

employment.²⁷ Modern courts have slowly begun to discard the last two reasons as fundamentally inconsistent with the contract law's general refusal to examine the adequacy of consideration for a contract.²⁸ Furthermore, as more and more employees are bringing suit for wrongful termination based on implied contracts, courts have begun to question whether there really was mutual intent that the employment be at-will.²⁹ Thus, "[w]ith most of the barriers to contract analysis presented by the employment at will doctrine swept away," the application of traditional contract approaches to the employment relationship has proceeded in many modern courts.³⁰ Courts have recognized certain contractual rights within the employment relationship that may arise from oral statements made by management, employment offer letters and replies, employment application forms, performance appraisals, compensation and benefit statements, employers' practices and policies, and employee handbooks and personnel manuals.³¹ Although all of these are important bases for finding employee contractual rights, this Article focuses on the way in which courts have attached potential contractual entitlements to employee handbooks and personnel manuals.

C. The Employee "Handbook Exception" to Employment At Will

There are several different purposes served by the employee handbook. Such a handbook, which outlines the policies and procedures of the employer, is often given to the employee upon hiring or soon after. The handbook may serve to: (1) inform employees of the rules of the organization and the advantages of being employed there; (2) fulfill newer federal laws requiring that employees be provided information relating to the employer's policies on safety, benefits and non-discrimination; and/or (3) inform employees about how they can expect the procedures of the organization to be applied to them in their individual capacity.³²

Handbooks often serve to shape employee expectations about

27. See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 17 (4th ed. 2002).

28. *Id.*

29. *Id.* at 16.

30. *Id.* at 17.

31. See DANIEL MURNANE MACKAY, EMPLOYMENT AT WILL AND EMPLOYER LIABILITY 61-62 (1986).

32. *Id.* at 65-66.

disciplinary procedures and job security, and thus many courts have found them to be binding under an implied contract theory. As Paul Berks summarizes, “[u]nder the ‘handbook exception,’ an employer could unwittingly limit his ability to terminate an employee by disseminating a handbook that granted to employees the rights on the job beyond those traditionally recognized by the employment-at-will rule.”³³

One of the first cases to recognize that an employee handbook could create an implied contract was *Woolley v. Hoffmann-La Roche, Inc.*³⁴ In *Woolley*, the plaintiff was hired without a written employment contract, but received a personnel manual one month after being hired.³⁵ He was fired and sued his former employer, claiming that the termination clauses of the personnel manual requiring certain procedures before termination were contractually enforceable.³⁶ The New Jersey Supreme Court agreed, holding that:

when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of ‘grudgingly’ conceding the enforceability of these provisions . . . should construe them in accordance with the reasonable expectation of the employees.³⁷

The *Woolley* opinion was presaged by *Toussaint v. Blue Cross and Blue Shield of Michigan*,³⁸ in which the Michigan Supreme Court held that when an employer chooses to create an environment where the employee believes that the employment policies and practices are established, fair and uniformly applied to each employee, then the employer has created “a situation ‘instinct with an obligation.’”³⁹ The reasonable expectation test developed by *Toussaint* and *Woolley* has been used by many courts since these decisions and “[v]irtually all jurisdictions that have considered the question have concluded that unilaterally promulgated personnel manuals and employee handbooks can give rise to enforceable promises of job security.”⁴⁰

33. Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-At-Will*, 4 EMP. RTS. & EMP. POL’Y J. 231, 232 (2000).

34. 491 A.2d 1257 (N.J. 1985).

35. *Id.* at 1258.

36. *Id.*

37. *Id.* at 1264 (citing *Savarese v. Pyrene Mfg. Co.*, 89 A.2d 237, 240 (1952)).

38. 292 N.W.2d 880 (Mich. 1980).

39. *Id.* at 892.

40. ESTREICHER & HARPER, *supra* note 1, at 58. See *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987); *O’Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843,

III. THE RISE OF DISCLAIMERS IN EMPLOYEE HANDBOOKS

A. *The Judicial Impetus for Disclaimers*

Although *Woolley* appeared to be a victory for employees and a serious blow to employment at will, the *Woolley* court also established a way for employers to retain their at-will status. The court said that:

All this opinion requires of an employer is that it be fair. . . . 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 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.⁴¹

Soon after this decision, employers began to include such disclaimers in their employee handbooks and personnel manuals.⁴² Although the *Woolley* court appeared to have given employers an unambiguous way to deny any intent to be bound by the policies of a handbook or manual, the cases spawned by these disclaimers soon proved that the *Woolley* directives were anything but clear. While many courts have held that such disclaimers are effective in warding off a *Woolley* claim,⁴³ others have held that they are not. Specifically, courts have held disclaimers to be invalid in negating an implied contract when the wording is not clear,⁴⁴ the disclaimer is not prominent enough,⁴⁵ or

845 (Mass. 1996); *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213, 214-16 (Mont. 1983); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 443 (N.Y. 1982); *Simpson v. W. Graphics Corp.*, 643 P.2d 1276, 1278 (Or. 1982); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984).

41. *Woolley*, 491 A.2d at 1271.

42. *Befort*, *supra* note 3, at 348.

43. *See, e.g.*, *Gonsalves v. Nissan Motor Corp. in Hawai'i, LTD.*, 58 P.3d 1196, 1217 (Haw. 2002); *Eldridge v. Evangelical Lutheran Good Samaritan Soc'y*, 417 N.W.2d 797, 800 (N.D. 1987); *Bailey v. Perkins Rest., Inc.*, 398 N.W.2d 120, 123 (N.D. 1986); *Suter v. Harsco Corp.*, 403 S.E.2d 751, 755 (W. Va. 1991); *Trabing v. Kinko's Inc.*, 57 P.3d 1248, 1254 (Wyo. 2002); *Roberson v. Wal-Mart Stores, Inc.*, 44 P.3d 164 (Ariz. Ct. App. 2002).

44. *See, e.g.*, *Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 311 (Mich. Ct. App. 1981).

the disclaimer is not adequately communicated to the employee.⁴⁶ Although courts have tried to articulate clear and reliable rationales in deciding whether a disclaimer is effective or not, the resulting case law differs from state to state and is sometimes even contradictory. As Kelby Fletcher laments, “[t]here is currently no consistency in explaining the basis for the employee handbook exception to termination at will.”⁴⁷

This lack of consistency also extends to the disclaimer aspect of the handbook exception.⁴⁸ This Article analyzes the underlying motivations of courts’ decisions in disclaimer cases in light of their seeming irreconcilability.

B. Scholarly Discussions of Disclaimers

Other commentators have also proffered unifying theories as to what courts are really doing in these handbook cases. In her article, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, Rachel Leiser Levy evaluated disclaimer cases in which the court found the disclaimer to be ineffective.⁴⁹ She concluded that such courts were really creating a penalty default rule which forces employers to inform employees about the reality of employment at will.⁵⁰ While her analysis is a helpful contribution to the discourse on disclaimers, it only focuses on half the story. For, it is critical to understand the reasoning and motivations of

45. See, e.g., *Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 561 (N.J. 1994).

46. See, e.g., *Ferraro v. Koelsch*, 368 N.W.2d 666, 671-72 (Wis. 1985).

47. Kelby D. Fletcher, *The Disjointed Doctrine of the Handbook Exception to Employment At Will: A Call for Clarity Through Contract Analysis*, 34 GONZ. L. REV. 445, 464 (1998/1999). See also Rachel Leiser Levy, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 719 (2005) (“[I]ncreased judicial application of common law exceptions to employment at will has caused the law surrounding employment termination to become increasingly confused and unpredictable.”); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 219 (2001) (noting that as a consequence of decisions by courts that sometimes find employment manuals to be contractual and sometimes do not, “the law is in flux in many states”).

48. See Elinor P. Schroeder, *Handbooks, Disclaimers and Harassment Policies: Another Look at Clark County School District v. Breedon*, 42 BRANDEIS L.J. 581, 585 (2004) (noting that judicial decisions about the adequacy of disclaimers are “all over the board”). See also Gabriel S. Rosenthal, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH. L. REV. 1157, 1172 (1996) (discussing “the inconsistent treatment that disclaimers have received”); Sunstein, *supra* note 47, at 219 (noting the inconsistent court treatment of handbooks and disclaimers).

49. See Levy, *supra* note 47, at 700-18.

50. *Id.* at 697.

courts who do find disclaimers to be effective and, thus, find no implied-in-fact contract on the basis of the employee handbook. These cases, as much as the cases which discount the effectiveness of disclaimers, are informative as to what courts are really doing in this area.

This Article analyzes matched cases—one that found for the employer and one that found against the employer in similar fact circumstances—to undertake a more comprehensive analysis of courts' underlying motivations in deciding disclaimer cases. The Article, in essence, starts one step back from Levy's by analyzing not only the consequences of the courts' decisions, but rather the factors and reasoning that underlie decisions. This is done in an attempt to find a cohesive theory that explains the discrepancy in outcomes in cases with seemingly similar facts.

Gabriel Rosenthal posits that decisions concerning employment handbooks in general can be "reduced to whether or not the discharged employees had the reasonable expectation that their status as employees at will had been altered."⁵¹ However, as discussed in Part IV, *infra*, those courts that find a disclaimer to be valid often completely ignore the reasonable expectations of the employee, instead focusing solely on the objective intent of the employer in including the disclaimer in the manual. In a similar vein to Rosenthal, Stephen F. Befort believes that courts' decisions whether or not to enforce disclaimers basically center on equity:

Where handbooks make no promises of job security or contain only vague statements of policy, courts have little difficulty adhering to theory and enforcing the terms of disclaimers. But where handbooks make explicit promises or otherwise foster reasonable employee expectations, courts tend to downplay theory and find reasons to require jury consideration of the handbook provisions as a whole.⁵²

While this is likely a true statement, it seems that there may be more to the disclaimer decisions. For, as discussed below in Part IV *infra*, courts often come to completely different outcomes in these cases even when faced with very similar fact patterns.

This Article attempts to better understand the true underlying motivations for courts' disclaimer decisions by actually delving into these decisions themselves in a consistent way, i.e., pairing cases with similar facts and different outcomes. While others have analyzed

51. See Rosenthal, *supra* note 48 at 1177.

52. See Befort, *supra* note 3 at 369.

disclaimer cases and why courts find the way they do, this Article attempts to do so in a more systematic way and concludes that courts, even when faced with similar fact situations, often decide disclaimer cases differently depending on whether they focus on the objective intent of the employer in including the disclaimer or the reasonable expectations of the employee when faced with the disclaimer in the context of the entire employee handbook.

As discussed in Part VI, *infra*, the implications of these findings on the usefulness of the employment-at-will regime is complicated further by the studies evidencing that employees do not really understand the concept of employment at will and are overly optimistic when it comes to their perceived job security.

IV. ANALYSIS OF CURRENT EMPLOYEE HANDBOOK DISCLAIMER CASES

A. Methodology

Although scholars lament the apparent incomprehensibility and inconsistency of the differing decisions in the employee handbook arena,⁵³ upon further analysis it seems that perhaps courts do divide along somewhat predictable and understandable rationales for their decisions either to enforce or invalidate a disclaimer. Below, several cases are analyzed by applying various state laws concerning the force to be given to employee handbook disclaimers.

These cases were chosen as a result of reading over one hundred state and federal cases decided in the last twenty years involving breach of contract, employment at will, employee handbooks and disclaimers. Cases were chosen based on the criteria that they have similar fact patterns but different holdings. In the interest of brevity, six matched pairs of cases are examined. They are as follows:

53. See *supra* notes 47-52 and accompanying text.

Court Does Not Enforce the Disclaimer	Court Does Enforce the Disclaimer
<i>Dillon v. Champion Jogbra, Inc.</i> , 819 A.2d 703 (Vt. 2002).	<i>Byrd v. Imperial Palace of Mississippi</i> , 807 So. 2d 433 (Miss. 2001).
<i>McDonald v. Mobil Coal Producing, Inc.</i> , 820 P.2d 986 (Wyo. 1991).	<i>Hoff v. City of Casper-Natrona County Health Department</i> , 33 P.3d 99 (Wyo. 2001).
<i>Jones v. Central Peninsula General Hospital.</i> , 779 P.2d 783 (Alaska 1989).	<i>Trabing v. Kinko's, Inc.</i> , 57 P.3d 1248 (Wyo. 2002).
<i>Ferguson v. Host International, Inc.</i> , 757 N.E.2d 267 (Mass. App. Ct. 2001).	<i>Abel v. Auglaize County Highway Department</i> , 276 F. Supp. 2d 724 (N.D. Ohio 2003).
<i>Austin v. Howard University</i> , 267 F. Supp. 2d 22 (D.C. Dist. Ct. 2003).	<i>Bickley v. FMC Technologies, Inc.</i> , 282 F. Supp. 2d 631 (N.D. Ohio 2003).
<i>Strass v. Kaiser Foundation Health Plan of Mid-Atlantic</i> , 744 A.2d 1000 (D.C. 2000).	<i>Acevedo v. Ledgecrest Health Care</i> , No. CV00509027, 2001 Conn. Super. LEXIS 3001 (Conn. Super. Ct. Oct. 18, 2001). ⁵⁴

In analyzing the courts' decision making process in the divergent holdings, special attention is paid to certain factual details, including the reason for termination, the elements in the employee handbook, the prominence of the disclaimer and the number of the disclaimers contained in the handbook, whether the employee had to sign an acknowledgement of the disclaimer, the exact wording of the disclaimer and whether the employee signed other disclaimers in the course of applying for or accepting the job. A summary of the presence or absence of these factors in the six matched pairs of cases appears in Appendix A and a summary of the disclaimer language in each of the cases appears in Appendix B. In the course of this analysis, I also note any general rationales relied upon by the courts in supporting their decisions. In essence, I test Kelby Fletcher's contention that the cases in

54. This is an unreported decision, but an analysis of the case is nevertheless relevant for the purposes of this Article.

the employee handbook arena are utterly irreconcilable.⁵⁵

B. Analysis of State Supreme Court Cases

1. *Dillon v. Champion Jogbra, Inc.* and *Byrd v. Imperial Palace of Mississippi*

a. Facts of *Dillon*

In *Dillon v. Champion Jogbra, Inc.*,⁵⁶ the plaintiff appealed the order of the trial court granting summary judgment to the defendants in her action for wrongful termination.⁵⁷ Dillon contended that the court erred in finding that her at-will employment status was not altered by the terms of her employment manual and in finding that the undisputed facts did not give rise to a claim for promissory estoppel.⁵⁸

Dillon's employer, Champion Jogbra ("Jogbra"), had an employee manual that it distributed to its employees at the time of their employment.⁵⁹ The first page of the manual contained a disclaimer that stated:

The policies and procedures contained in this manual constitute guidelines only. They do not constitute part of an employment contract, nor are they intended to make any commitment to any employee concerning how individual employment action can, should, or will be handled. Champion Jogbra offers no employment contracts nor does it guarantee any minimum length of employment. Champion Jogbra reserves the right to terminate any employee at any time "at will," with or without cause.⁶⁰

However, Jogbra had also developed a "Corrective Action Procedure" which established a progressive discipline system for employees.⁶¹ The discipline policy stated that it would be carried out in "a fair and consistent manner" and used language that was mandatory in

55. See *supra* Fletcher, note 47.

56. 819 A.2d 703 (Vt. 2002).

57. *Id.* at 704.

58. *Id.* at 704-05.

59. *Id.* at 705.

60. *Id.*

61. *Id.*

tone.⁶²

When Dillon began working for Jogbra in January 1997 as a part-time employee, she was given a copy of the employee handbook.⁶³ She was soon hired full-time, but reassigned to a temporary position when her supervisor expressed that the new job did not suit her.⁶⁴ Dillon was encouraged to apply for other jobs within the company, but told that if she could not find one, she would be terminated at the end of December 1998.⁶⁵ Dillon left Jogbra in December 1998 when her temporary position was terminated after she was unsuccessful at finding another job within the company.⁶⁶ She then sued for wrongful termination, including claims for breach of implied contract and promissory estoppel.⁶⁷ These claims were the subject of appeal in this case.⁶⁸

b. Court's Decision and Reasoning on the Breach of Contract Issue in
Dillon

On appeal, the Vermont Supreme Court reversed the granting of summary judgment with respect to the breach of contract claim, while upholding summary judgment for the promissory estoppel claim.⁶⁹ In reversing summary judgment on the breach of contract claim, the court first noted that:

[A]t-will employment relationships have fallen into disfavor. . . . In the implied contract context, we have noted that motivating policy considerations that inform this trend: when an employer takes steps to give employees the impression of job security and enjoys the attendant benefits that such an atmosphere confers, it should not then be able to disregard its commitments at random.⁷⁰

The court went on to note that mere boilerplate language of a disclaimer does not necessarily negate job security provisions and that “[a]n employer not only may implicitly bind itself to terminating only for cause through its manual and practices, but may also be bound by a

62. *Id.*

63. *Id.*

64. *Id.* at 705-06.

65. *Id.* at 706.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 705.

70. *Id.* at 706 (citing *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466, 471 (Vt. 1993)).

commitment to use only certain procedures in doing so.”⁷¹ Moreover, the court found that although the employer included a disclaimer on the first page of the manual, it acted inconsistently as an at-will employer by developing elaborate policies governing employee discipline and discharge.⁷² The court stated, “[a]ll of these terms are inconsistent with the disclaimer at the beginning of the manual, in effect sending mixed messages to employees.”⁷³ The court concluded that because the terms of the disclaimer were ambiguous regarding an employee’s status as at-will and Jogbra’s policies appeared to be inconsistent with an at-will regime, summary judgment on the implied contract issue was improper.⁷⁴

c. Facts of *Byrd*

In *Byrd v. Imperial Palace of Mississippi*,⁷⁵ the plaintiff, Byrd, asserted a claim for wrongful termination by her employer based upon the provisions in her employee handbook.⁷⁶ The trial court granted Imperial’s motion for summary judgment and Byrd appealed.⁷⁷

Byrd was hired by Imperial in 1997 and, at that time, was provided with an employee handbook.⁷⁸ The handbook contained a provision stating that all employees were at-will and that the employee handbook did not constitute an express or implied contract, but was rather just an overview of the company’s rules and benefits.⁷⁹ Additionally, the handbook contained a provision entitled “Employment At Will Doctrine” reminding employees that were at-will and could be terminated or could quit at any time without cause.⁸⁰ The handbook also contained a section entitled “Grievances” providing a procedure for employees to bring grievances if terminated.⁸¹ Byrd argued that she had filed a timely grievance about her termination, but was not provided with a hearing as required under the terms of the employee handbook and, therefore, Imperial had breached the terms of what she deemed to be an

71. *Id.* at 707 (citing *Ross v. Times Mirror, Inc.*, 665 A.2d 580, 585 (Vt. 1995)).

72. *Id.* at 708-09.

73. *Id.*

74. *Id.* at 709.

75. 807 So. 2d 433 (Miss. 2001).

76. *Id.* at 434.

77. *Id.* at 433.

78. *Id.*

79. *Id.* at 434.

80. *Id.*

81. *Id.* at 435.

employment contract.⁸²

d. Court's Decision and Reasoning on the Breach of Contract Issue in
Byrd

The Mississippi Supreme Court found that there was no implied contract in this case because of the disclaimers contained in the employee handbook.⁸³ The court specifically distinguished the case from other cases where no disclaimer was involved and focused on Imperial's intention to retain its right to terminate its employees at any time without cause.⁸⁴ The court concluded, "we uphold Imperial's right to discharge Byrd, even in light of the grievance procedure, because of the handbook's statement that Imperial did not intend to waive its right to unilaterally terminate an employee by promulgating the handbook."⁸⁵

e. Comparison of *Dillon* and *Byrd*

i. Similarities

Although the factual situations of *Dillon* and *Byrd* were not identical, there were many similarities in the two cases. First, the plaintiff in each case specifically acknowledged receipt of the employment manual with the respective disclaimers.⁸⁶ Also, each plaintiff was fired for non-discriminatory, seemingly legitimate reasons.⁸⁷ Additionally, the disclaimers were located in prominent places, perhaps even more prominent in *Dillon* where the court found the disclaimer to be more ineffective than in *Byrd*.⁸⁸ The wording of each disclaimer appear to be equally clear, with each stating that the manual's terms are not intended to create a contract and constitute only guidelines. Both disclaimers stated that the employer retained the right to terminate the employee at any time, with or without cause.⁸⁹

82. *Id.* at 435-37.

83. *Id.* at 438.

84. *Id.*

85. *Id.*

86. *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703, 705 (Vt. 2002); *Byrd*, 807 So. 2d at 433.

87. *Dillon*, 819 A.2d at 706; *Byrd*, 807 So. 2d at 438.

88. *Dillon*, 819 A.2d at 705; *Byrd*, 807 So. 2d at 434.

89. *Dillon*, 819 A.2d at 705; *Byrd*, 807 So. 2d at 434.

ii. Differences

Although the language of the disclaimers was similar, the number of disclaimers differed in the two cases. While the handbook in *Dillon* contained only one disclaimer on the front page, the *Byrd* handbook contained multiple disclaimers with none on the first page.⁹⁰

Ultimately, it seems that the *Dillon* and *Byrd* courts approached the respective cases with very different mindsets. The *Dillon* court, from the outset, noted that employment at will had fallen into disfavor and that “[w]hen an employer takes steps to give employees the impression of job security and enjoys the attendant benefits that such an atmosphere confers, it should not then be able to disregard its commitments at random.”⁹¹ The *Dillon* court also stated that the disclaimer was ineffective because its presence, along with that of the progressive discipline policy, sent mixed messages to employees.⁹² This language and the rationale of the court seemed to focus on the way in which a reasonable employee would interpret the message sent by the employer.

In contrast, the *Byrd* court seemed mostly to focus on the intent of the employer and what the employer was trying to convey and gave no attention as to how this message would be perceived by the employees. For the *Byrd* court, it was enough that there was a prominent disclaimer telling employees that the employee made no promises.⁹³ The *Byrd* court made no mention, unlike the *Dillon* court, of the effect of the disclaimer in combination with the grievance policy and, instead, analyzed the disclaimer’s language in isolation and the employer’s intent conveyed by it.⁹⁴

2. *McDonald v. Mobil Coal Producing, Inc.* and *Hoff v. City of Casper-Natrona County Health Department*

a. Facts of *McDonald*

In *McDonald v. Mobil Coal Producing, Inc.*,⁹⁵ the plaintiff, McDonald, challenged his dismissal from employment with the

90. *Dillon*, 819 A.2d at 705; *Byrd*, 807 So. 2d at 434-35.

91. *Dillon*, 819 A.2d at 706.

92. *Id.* at 709.

93. *Byrd*, 807 So. 2d at 438.

94. *Id.* at 437-38.

95. 820 P.2d 986 (Wyo. 1991).

defendant, Mobil Coal, claiming breach of contract and breach of the covenant of good faith and fair dealing.⁹⁶ The trial court granted summary judgment for the defendant on both claims and McDonald appealed.⁹⁷ A plurality of the Wyoming Supreme Court reversed the granting of summary judgment.⁹⁸ Mobil then petitioned for a rehearing to review and clarify the Wyoming Supreme Court's decision and that rehearing resulted in this opinion, reaffirming the reversal of summary judgment.⁹⁹

McDonald began working for Mobil Coal in 1987.¹⁰⁰ When he applied for the job, he signed an application form which stated, "I agree that any offer of employment, and acceptance thereof, does not constitute a binding contract of any length, and that such employment is terminable at the will of either party"¹⁰¹ When he began work for the defendant, McDonald received the employee handbook containing a disclaimer as part of the welcome statement which read, in part, "[This handbook] is not a comprehensive policies and procedures manual, nor an employment contract. . . . While we intend to continue policies, benefits and rules contained in this handbook, changes or improvements may be made from time to time by the company."¹⁰² The disclaimer was not set off by a border and was not in larger print, nor was it capitalized.¹⁰³ The handbook then went on to outline both a procedure for dealing with employee mistakes and a five-step progressive discipline schedule, the use of which was at the company's discretion.¹⁰⁴

A co-worker of McDonald made a complaint against him and when McDonald approached his supervisor about the incident he was told "not [to] worry about what had been said."¹⁰⁵ McDonald claimed that Mobil Coal's course of conduct led him to believe that the company would continue to follow the procedures outlined in the handbook concerning the co-worker's complaint unless he were otherwise notified and since the company then terminated him without following the procedure, Mobil Coal breached its implied employment contract with

96. *Id.* at 987.

97. *Id.* at 987-88.

98. *Id.*

99. *Id.* at 988.

100. *Id.*

101. *Id.*

102. *Id.* at 989.

103. *Id.*

104. *Id.* at 990-91.

105. *Id.* at 991.

McDonald.¹⁰⁶ The court found that granting summary judgment on this issue was improper because there was a genuine issue of material fact as to whether the contents of the employee handbook modified the plaintiff's at-will employment status.¹⁰⁷

b. Court's Decision and Reasoning on the Breach of Contract Issue in
McDonald

In finding that “[t]he meaning and effect of this employment contract . . . remains unresolved,” the court focused on the inconspicuousness and ambiguousness of the disclaimer in the handbook and merely noted the additional disclaimer contained in the employment application the plaintiff had signed.¹⁰⁸ The court pointed out that the disclaimer in the handbook was not set off or in capital letters and was merely in the general welcoming section of the book.¹⁰⁹ The court further stated that “the disclaimer was unclear as to its effect on the employment relationship.”¹¹⁰

In a particularly strong statement of its view of contract law, the court explained that:

For persons untutored in contract law, such clarity is essential No explanation was given in the disclaimer that Mobil did not consider itself bound by the terms of the handbook. Instead, McDonald would have been led to draw inferences from the handbook language: that it was intended to be a guide, and that Mobil intended to continue the policies, benefits and rules contained in the handbook. The same paragraph which disclaimed a contract also informed Mr. McDonald that he could discuss “any questions” he might have with his supervisor . . . and urged him to . . . keep [the handbook] in a safe and readily available place.¹¹¹

The court seemed to concentrate on the reasonable expectations of McDonald in light of his inexperience with the law. Although this statement seemed to inject a very subjective element into contractual interpretation, the court went on to clarify its reasoning:

106. *Id.*

107. *Id.*

108. *Id.* at 988, 991.

109. *Id.* at 989.

110. *Id.*

111. *Id.*

Under the “objective theory” of contract formation, contractual obligation is imposed not on the basis of the subjective intent of the parties, but rather upon the outward manifestations of a party’s assent sufficient to create reasonable reliance by the other party. That Mobil did not subjectively “intend” that a contract be formed is irrelevant, provided that Mobil made sufficient intentional, objective manifestations of contractual assent to create reasonable reliance by McDonald. . . . Mobil’s subjective “intent” to contract is irrelevant, if Mobil’s intentional, objective manifestations to McDonald indicated assent to a contractual relationship.¹¹²

The court concluded that the statements in the handbook about employee discipline procedures and processes for dealing with employee error could lead a reasonable person to conclude that Mobil intended to make legally binding promises and thus, summary judgment was improper.¹¹³

c. Facts of *Hoff*

In *Hoff v. City of Casper-Natrona County Health Department*,¹¹⁴ the plaintiff, Hoff, sued his former employer based on the events surrounding his termination. In his three-count suit he alleged breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of public policy.¹¹⁵ The defendant then moved for summary judgment on all of the counts.¹¹⁶ The Wyoming Supreme Court affirmed the trial court’s grant of summary judgment in favor of the defendant on all claims.¹¹⁷

Hoff was hired by the defendant to be their Director of the Environmental Health Division in 1985.¹¹⁸ At that time, the defendant had not adopted a written personnel manual.¹¹⁹ Several years later, however, a committee chaired by Hoff was formed to propose a new personnel manual.¹²⁰ The manual, adopted in 1991, contained language regarding employment-at-will; however, “this language was not separate

112. *Id.* at 990.

113. *Id.* at 991.

114. 33 P.3d 99 (Wyo. 2001).

115. *Id.* at 100.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 101.

120. *Id.*

or conspicuous.”¹²¹ The manual also contained a progressive discipline policy.¹²²

In July 1991, Hoff signed a separate form acknowledging that the rules and regulations contained in the personnel manual were intended to give guidance and were not contractual.¹²³ Hoff was terminated in October 1998 due to a difference in approaches between himself and the new Health Officer.¹²⁴ He claimed that the 1991 manual created a contractual right to be fired for cause, which was breached upon his termination.¹²⁵

d. Court’s Decision and Reasoning on the Breach of Contract Issue in *Hoff*

In finding that no implied contract existed between the plaintiff and the defendant, the court focused on the objective manifestations of intent by the city health department.¹²⁶ The court focused on the language of the acknowledgement form signed by Hoff and noted that “[t]he Health Department made clear its intention not to be legally bound by stating in a separately acknowledged disclaimer that the personnel rules and regulations were not a contract.”¹²⁷

e. Comparison of *McDonald* and *Hoff*

i. Similarities

As in the other cases discussed above, the plaintiffs in both *McDonald* and *Hoff* based their claim of an implied contract on the progressive discipline policies outlined in their respective employers’ handbooks.¹²⁸ Both handbooks contained disclaimers in the beginning of the books and both handbooks later set forth procedures and reasons that could lead to termination of employment.¹²⁹ Additionally, both

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 101-02.

125. *Id.* at 102.

126. *Id.* at 103.

127. *Id.*

128. *Hoff*, 33 P.3d at 104-06; *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 987, 991 (Wyo. 1991).

129. *Hoff*, 33 P.3d at 101; *McDonald*, 820 P.2d at 991.

plaintiffs signed separate acknowledgement forms of the employer's intention to employ them on an at-will basis.¹³⁰

ii. Differences

Although the employee handbooks in both *McDonald* and *Hoff* contained disclaimers, the *McDonald* disclaimer did not state that the handbook could not be construed as a contract, but did state that the policies in the book could be changed from time to time.¹³¹ The court in *McDonald* focused on the lack of clarity of the handbook disclaimer and found that it may not be sufficient to negate intent to be bound by the terms in the handbook.¹³² However, the *McDonald* court mentioned, but seemed to give no weight to the second disclaimer that was signed by the plaintiff when she applied for employment. That disclaimer did say that an offer of employment is not a binding contract for any length of time and that employment is terminable at will.¹³³

Although this second disclaimer in *McDonald* would seem to strengthen the defense, the court virtually ignored it and looked to the reasonable expectations of the employee as shaped by the employment handbook.¹³⁴ The court took into consideration the fact that the employee is not educated in contract law, reasoning that "for persons untutored in contract law, . . . clarity is essential."¹³⁵ This is a striking statement in the context of a contract case because the mutual assent of the parties is being viewed through the lens not of the reasonable person, but rather of the reasonable employee "untutored in contract law."¹³⁶

The court then went on to defend itself from the claim of injecting subjectivity into contractual interpretation.¹³⁷ Surprisingly, however, it did so not by focusing on the objective intent of the employee, the party that it has just looked at in a seemingly subjective manner, but rather by shifting its focus to the employer.¹³⁸ The court then looked objectively at Mobil Coal's manifestations of assent, noting that "Mobil's subjective 'intent' to contract is irrelevant, if Mobil's intentional, objective

130. *Hoff*, 33 P.3d at 101; *McDonald*, 820 P.2d at 989.

131. *McDonald*, 820 P.2d at 989.

132. *Id.* at 991.

133. *Id.* at 988.

134. *Id.* at 991.

135. *Id.* at 989.

136. *See id.*

137. *Id.* at 990.

138. *Id.* at 990-91.

manifestations to McDonald indicated assent to a contractual relationship.”¹³⁹ In sum, it seems the court looked subjectively at the plaintiff’s intent to contract in light of the plaintiff’s ability to understand what she was assenting to, while at the same time insisting that only Mobil’s objective manifestations of assent to contract were relevant to whether a contract was formed. That is, the court allowed the plaintiff to objectively manifest her assent to the employment at will terms of the contract, while finding that she should not be bound by this assent because she did not understand what she was agreeing to. On the other hand, Mobil Coal should be bound to the terms it objectively assented to (i.e., the progressive discipline schedule) even though it may subjectively not have intended for these to be binding and may have even manifested this intent not to be bound in its disclaimer. This court, like others we have seen, relied on the influence of the handbook terms on the reasonable expectations of the employee and, in this case, defines reasonableness subjectively in terms of the bargaining power and, particularly, the knowledge of and familiarity with contracts, of the two parties.¹⁴⁰

In the *Hoff* case, which, like *McDonald*, was decided by the Wyoming Supreme Court, the court looked only to the objective intent of the employer as manifested by the disclaimer language in the handbook.¹⁴¹ The court refused to consider the plaintiff’s subjective expectations as framed either by his knowledge of contract law nor by his knowledge of the employer’s practice of routinely employing the progressive discipline process.¹⁴² The court also focused on the separate disclaimer signed by Hoff, in stark opposition to what the same Supreme Court, writing ten years earlier, had done in *McDonald*.¹⁴³

In sum, the courts in *McDonald* and *Hoff* again illustrate the continuing struggle between the recognition and consideration of the reasonable expectations of employees and the intent of the employer. Furthermore, the *McDonald* court inserted a subjective element into its definition of the reasonable employee and, thus, allows for consideration of unequal bargaining power when considering the effect of a disclaimer.¹⁴⁴ Each of these perspectives seems to shape and almost

139. *Id.* at 990.

140. *Id.* at 989-91.

141. *Hoff v. City of Casper-Natrona County Health Dep’t*, 33 P.3d 99, 103 (Wyo. 2001).

142. *Id.*

143. *Compare Hoff*, 33 P.3d at 103 (focusing on the “separate acknowledgement signed by Hoff”), with *McDonald*, 820 P.2d at 989-91 (referring to both disclaimers at issue in the aggregate).

144. *McDonald*, 820 P.2d at 989-90.

dictate the outcome of the cases and illustrates the willingness of courts who find for the plaintiff to focus on the reasonableness of the plaintiff's expectations as informed by the employee handbook and courts who find for the defendant to focus solely on the intent of the employer in including a disclaimer, as evidenced only by the language of the disclaimer itself and not the whole of the employee handbook.

3. *Jones v. Central Peninsula General Hospital* and *Trabing v. Kinko's, Inc.*

a. Facts of *Jones*

The plaintiff in *Jones v. Central Peninsula General Hospital*,¹⁴⁵ alleged that her termination was a breach of her implied employment contract with her employer and also a violation of the covenants of good faith and fair dealing.¹⁴⁶ She further brought a claim for defamation and for reckless interference with her employment contract against one of her supervisors.¹⁴⁷ The superior court granted summary judgment in favor of the defendant on all these claims and plaintiff appealed.¹⁴⁸

The plaintiff, Jones, was employed by the hospital as a nurse in 1971.¹⁴⁹ In 1974, the hospital issued a personnel manual which provided for termination for cause and an employee grievance procedure.¹⁵⁰ The hospital later issued a second manual which exempted supervisory employees from the grievance procedures, but stated that all permanent (i.e., non-probationary) employees would only be able to be fired for cause.¹⁵¹ This second manual also contained a disclaimer which read "[t]he purpose of this manual is to provide information to all . . . employees. It is not a contract of employment nor is it incorporated in any contract of employment between the Society and any employee."¹⁵²

The plaintiff, who had been promoted to a supervisory nurse, was fired in 1978 for events that allegedly took place during her shift one

145. 779 P.2d 783 (Alaska 1989).

146. *Id.* at 784.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 785.

151. *Id.*

152. *Id.* at 787.

night.¹⁵³ Jones, a supervisory employee, was not allowed to file a grievance in accordance with the terms of the personnel manual.¹⁵⁴ She argued that as a result of the terms of in the 1974 and 1978 personnel manuals, the hospital modified the terms of her at-will employment and, thus, she could only be fired for cause.¹⁵⁵

b. Court's Decision and Reasoning on the Breach of Contract Issue in
Jones

The Alaska Supreme Court held that the granting of summary judgment for the defendant was inappropriate.¹⁵⁶ The court found that the 1978 manual did, indeed, become part of the plaintiff's employment contract and, thus, required that she be fired only for good cause.¹⁵⁷ In reaching this conclusion, the court reviewed the case history in other jurisdictions on the issue of the recognition of implied contract terms that modify an employee's at-will status.¹⁵⁸ The court noted "a strong trend in favor of recognizing implied contract terms that modify the power of an employer to discharge an employee [without cause.]"¹⁵⁹

The court then went on to discuss the effect of a disclaimer on such an implied contract and found that although a disclaimer may sometimes defeat such a claim, the disclaimer in this case was insufficient to do so.¹⁶⁰ In finding the disclaimer to be ineffective, the court emphasized the ambiguous nature of a manual that contained a "one-sentence disclaimer, followed by 85 pages of detailed text covering policies, rules, regulations, and definitions"¹⁶¹ which "are to be applied consistently and uniformly."¹⁶² Further, the court pointed out that the disclaimer did not inform the employer that his or her job was terminable at will with or without reason, but rather stated that all probationary employees could be fired for cause and then went on to list fifteen non-exclusive acts or omission that could lead to termination for cause.¹⁶³ The court also reasoned that because of the extensive listing of

153. *Id.* at 785.

154. *Id.*

155. *Id.*

156. *Id.* at 789.

157. *Id.*

158. *Id.* at 785-89.

159. *Id.* at 786 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 384 (Cal. 1988)).

160. *Id.* at 787-88.

161. *Id.* at 788.

162. *Id.* at 788 n.4.

163. *Id.* at 788.

employee rights in the text of the manual, the manual “creat[ed] the impression, contrary to the ‘disclaimer,’ that employees are to be provided with certain job protections. Employers should not be allowed to ‘instill . . . reasonable expectations of job security’ in employees, and then withdraw the basis for those expectations when the employee’s performance is no longer desired.”¹⁶⁴ All of these considerations led the court to conclude that the 1978 personnel manual constituted an implied employment contract under which the plaintiff could only be fired for cause.¹⁶⁵

c. Facts of *Trabing*

In *Trabing v. Kinko’s, Inc.*,¹⁶⁶ the plaintiff sued her former employer for breach of implied contract, promissory estoppel, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress.¹⁶⁷ The district court granted summary judgment for the defendant on all of these claims and *Trabing* appealed.¹⁶⁸

When *Trabing* was hired as a branch manager for Kinko’s in December 1992, she signed an Employment Agreement which stated that “Kinko’s and the co-worker understand that the co-worker is employed at will, which means that the co-worker or Kinko’s may terminate the employment at any time, with or without cause and with or without advance notice.”¹⁶⁹ The Agreement also stated that “this agreement constitutes the full extent of the agreement between myself and Kinko’s regarding the terms of my employment.”¹⁷⁰ *Trabing* also signed an acknowledgement that she received the defendant’s employee handbook, which outlined Kinko’s policies, including its discipline system.¹⁷¹ Although the handbook contained a disclaimer stating that employment was to be at-will and that the handbook should not be construed as creating a contract, Kinko’s conceded that this disclaimer was not sufficiently conspicuous.¹⁷²

In 1998, *Trabing* began experiencing problems working with her

164. *Id.* at 788 (quoting *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984)).

165. *Id.* at 789.

166. 57 P.3d 1248 (Wyo. 2002).

167. *Id.* at 1250.

168. *Id.*

169. *Id.* at 1251.

170. *Id.* at 1253.

171. *Id.* at 1251.

172. *Id.* at 1253.

subordinates and her supervisor's evaluations of her work progressively declined.¹⁷³ At this time, Trabling was given three days to draft an improvement plan for herself; she failed to complete such a plan and was ultimately terminated.¹⁷⁴ She sued, claiming, in part, that the employee handbook created an implied contract under which she could only be terminated for cause and through the procedures outlined in the discipline system.¹⁷⁵ The Wyoming Supreme Court found that summary judgment was appropriate for defendant on the breach of implied contract claim.¹⁷⁶

d. Court's Decision and Reasoning on the Breach of Contract Issue in
Trabling

In finding that there was no implied employment contract in this case, the *Trabling* court relied not on the disclaimer in the employment manual, but rather on the disclaimer contained in the Employment Agreement that Trabling had signed the day she began to work.¹⁷⁷ The court noted that although the disclaimer in the handbook was admittedly too inconspicuous to effectively negate an implied contract, the Employment Agreement clearly stated that employment was at-will and the employer could terminate employment at any time for any or no reason.¹⁷⁸ The court said that “[p]arties to a contract are presumed to have knowledge of the terms of the contract and its effects” and since there was an express contract that employment was at-will, no implied contract to the contrary could be found.¹⁷⁹ The court concluded that:

These employment documents [the employee handbook and the Employment Agreement] were given to Trabling in the same time frame, separated only by a couple of days, before she began work, making them in essence part of one transaction. Moreover, the express agreement accomplished what a conspicuous disclaimer appearing in the handbook itself would have accomplished—it informed Trabling that she was employed at will, Kinko's could terminate her employment at any time with or without notice or cause, it constituted the full agreement between herself and Kinko's, Kinko's was not

173. *Id.* at 1251.

174. *Id.* at 1252.

175. *Id.*

176. *Id.* at 1254.

177. *Id.*

178. *Id.*

179. *Id.* at 1253 (citing *First State Bank v. Am. Nat'l Bank*, 808 P.2d 804, 806 (Wyo. 1991)).

bound by any inconsistent agreement or representations, and it superceded [sic] any previous agreements. Any ambiguity created by the absence of a conspicuous disclaimer in the handbook was resolved upon issuance of the employment agreement to Trabing when she began work¹⁸⁰

e. Comparison of *Jones* and *Trabing*

i. Similarities

Both *Jones* and *Trabing* involved situations in which the plaintiff claimed an implied contract based on the progressive discipline policies contained in the employee handbook.¹⁸¹ Furthermore, each handbook contained rather inconspicuous and somewhat unclear disclaimers, which made the handbooks as a whole ambiguous on the question of the employees' at-will statuses.¹⁸² Both employees were fired for declining performance and inability to work with others.¹⁸³

ii. Differences

The major difference between *Jones* and *Trabing* is the absence or existence of another agreement containing a prominent and more clearly articulated disclaimer. These two cases were paired together to illustrate the profound difference that an entirely separate agreement can have on the court's interpretation of the contractual implications of an employee handbook.

Although the court and, surprisingly, the defendant in *Trabing* admitted that the disclaimer was inconspicuous, the court still found that summary judgment for the defendant was proper on the breach of implied contract claim due to the existence of an employee agreement containing a more clearly stated disclaimer.¹⁸⁴ The court, as seems customary when finding for a defendant in these cases, emphasized the clarity of the employer's intent as expressed in the employment agreement and rejected any claim as to the ambiguity of intent when this

180. *Id.* at 1254.

181. *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 785 (Alaska 1989); *Trabing*, 57 P.3d at 1252.

182. *Jones*, 779 P.2d at 788; *Trabing*, 57 P.3d at 1254.

183. *Jones*, 779 P.2d at 785; *Trabing*, 57 P.3d at 1252.

184. *Trabing*, 57 P.3d at 1254.

document was combined with the employee handbook.¹⁸⁵ It stated “the express agreement accomplished what a conspicuous disclaimer appearing in the handbook itself would have accomplished”¹⁸⁶ The court in *Trabing*, moreover, rigidly adhered to contract doctrine in justifying its decision, noting that “[w]hen these principles [of contract law] are applied, the express agreement supercedes [sic] any implied contract which otherwise may have existed by virtue of the employee handbook.”¹⁸⁷ There is no mention of the possibility that an employee, unfamiliar with contract law, may not have fully understood the deference the agreement was to be given over the handbook policies. Any notion of employee expectations are completely absent from the opinion.

This is in sharp contrast to *Jones*, where the court finds the disclaimer ineffective because the employee manual created “the impression, contrary to the ‘disclaimer,’ that employees are to be provided with certain job protections.”¹⁸⁸ In taking a less formalist approach to the issue, this court even admonished the employer in the case, stating “[e]mployers should not be allowed to ‘instill . . . reasonable expectations of job security’ in employees, and then withdraw the basis for those expectations when the employee’s performance is no longer desired.”¹⁸⁹ Again, the attentiveness to the employee’s expectations dominates the reasoning of the court in finding for the plaintiff in *Jones*, while the focus on employer intent is foremost in the court’s rationale in finding for the defendant in *Trabing*.

C. Analysis of State and Federal Lower Court Decisions

1. *Ferguson v. Host International, Inc.* and *Abel v. Auglaize County Highway Department*

a. Facts of *Ferguson*

In *Ferguson v. Host International, Inc.*,¹⁹⁰ another case involving

185. *Id.* at 1253.

186. *Id.* at 1254.

187. *Id.* at 1253.

188. *Jones*, 779 P.2d at 788.

189. *Id.* (citing *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984)).

190. 757 N.E.2d 267 (Mass. App. Ct. 2001).

progressive discipline policies, the Appeals Court of Massachusetts had to decide whether the trial court judge was correct in ordering summary judgment to be entered for the defendant on the plaintiff's claim for breach of an implied employment contract.¹⁹¹ The plaintiff, Ferguson, was employed by Host International as a sales clerk for a Dunkin Donuts store located in Logan International Airport.¹⁹² The plaintiff became engaged in a verbal exchange with a customer and was reprimanded by his supervisor.¹⁹³ Nothing more was made of the incident until the plaintiff was fired four days later.¹⁹⁴ The plaintiff did not have the opportunity to present his side of the incident.¹⁹⁵ Host argued that the plaintiff was an at-will employee who could be discharged at any time for any non-discriminatory reason.¹⁹⁶ The plaintiff countered that he had rights greater than an employee at will, which he had been accorded by the personnel policies manual that defendant had given to plaintiff and which plaintiff had signed when he was first hired.¹⁹⁷

The manual contained a section, following the welcome, entitled "ABOUT THE BOOK," and in the third paragraph of that section there was a disclaimer by which the employer disclaimed any intent to confer contractual rights on employees.¹⁹⁸ There was also a section entitled "PROBATIONARY PERIOD," which told employees that they could be terminated without notice during their first ninety days.¹⁹⁹ In a later section called "PROGRESSIVE DISCIPLINE," employees were told that those who violate company policies would receive a warning and that if they feel the warning is not accurate, they should exercise their "Guarantee of Fair Treatment."²⁰⁰ This guarantee, described later in the book, stated, "[w]e recognize that being human, mistakes may be made in spite of our best efforts. We want to correct such mistakes as soon as they happen."²⁰¹ Therefore, the company stated that an employee is given a three-step procedure to follow when he has a problem and is guaranteed a discussion with his supervisor and others in

191. *Id.* at 268.

192. *Id.*

193. *Id.* at 268-69.

194. *Id.* at 268.

195. *Id.* at 269.

196. *Id.*

197. *Id.*

198. *Id.* at 269-70.

199. *Id.* at 270.

200. *Id.*

201. *Id.* at 271 (quoting the text of the personnel policies manual at issue in this case).

management.²⁰² Another section, entitled “CONDUCT ON THE JOB,” explained that employees can be terminated under progressive discipline if they have two written warnings and a third violation occurs.²⁰³ That section also explained that certain violations are so serious that they warrant immediate termination.²⁰⁴ Examples of such violations, such as possession of a lethal weapon on the job and alcohol abuse on the job, were given.²⁰⁵ The plaintiff contended that he had a contractual right to such process and since he was not afforded the process, the company breached its contract.

b. Court’s Decision and Reasoning on the Breach of Contract Issue in *Ferguson*

The Appeals Court held that the trial court’s granting of summary judgment for defendants on the breach of contract claim was improper.²⁰⁶ The court began by noting the benefits that management secures through the distribution of personnel manuals, saying “[m]anagement distributes personnel manuals because it is thought to be in its best interests to do so. Such a practice encourages employee security, satisfaction, and loyalty and a sense that every employee will be treated fairly and equally.”²⁰⁷ The court went on to note that since management has much to gain from the circulation of such manuals, “[c]ourts recently have been reluctant to permit management to reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer.”²⁰⁸ Therefore, the court concluded that, according to the *Woolley* reasonable expectations, “employees may have a reasonable expectancy that management will adhere to a manual’s provisions.”²⁰⁹

The court further found that the two clauses containing the disclaimer in the manual were “the functional equivalent of fine print. They appear buried in the general, introductory portion of the manual, in

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 274.

207. *Id.* at 272 (quoting *O’Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843, 843 (Mass. 1996)).

208. *Id.* (quoting *O’Brien*, 664 N.E.2d at 843).

209. *Id.* (quoting *O’Brien*, 664 N.E.2d at 843).

a section not as likely to attract the employees' attention as the very specific lists of obligations and benefits set out in the bulk of the manual."²¹⁰ The court found that the inconspicuousness of the disclaimers, combined with the reasonableness of employees in interpreting the progressive discipline policies to be binding on the employer, rendered the disclaimers insufficient to negate the conferral of any contractual rights upon employees by the personnel manual.²¹¹

c. Facts of *Abel*

The plaintiff in *Abel v. Auglaize County Highway Department*,²¹² claimed that his discharge deprived him of his constitutional rights under the First, Fifth, and Fourteenth Amendments.²¹³ His Ohio state tort claims alleged wrongful discharge in violation of public policy and intentional infliction of emotional distress.²¹⁴ He also brought suit for breach of implied contract, fraudulent misrepresentation, and defamation.²¹⁵ The defendants moved for summary judgment on all claims.²¹⁶

The plaintiff, Abel, injured his hip while working for the defendant and began receiving worker's compensation benefits.²¹⁷ He subsequently began to "double dip" in the program, receiving both worker's compensation payments and sick and vacation pay from the company.²¹⁸ Such "double-dipping" constituted a felony and Abel was presented with the choice, by his supervisor, of either leaving work voluntarily or proceeding with the disciplinary proceedings in criminal court.²¹⁹ Under pressure, Abel resigned, but later alleged that his resignation was not voluntary and that he had been deprived of certain federal constitutional rights.²²⁰ He further alleged the state law tort and contract claims described above.

Abel claimed that the combination of his signing a statement of receipt of the company's personnel manual and the manual's detailed

210. *Id.*

211. *Id.* at 274.

212. 276 F. Supp. 2d 724 (N.D. Ohio 2003).

213. *Id.* at 731.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 730.

218. *Id.*

219. *Id.*

220. *Id.* at 730-31.

language regarding procedures for discipline created an implicit contractual relationship, which the defendants breached by forcing him to resign.²²¹ The manual contained a disclaimer in Section Three that stated “nothing herein is intended to, nor shall it be construed or interpreted, so as to create contractual or vested rights for employees regarding the employment benefits, policies, procedures or any other provisions of this manual. Nothing herein shall be construed as creating an obligation on the party of the County Engineer to employ the employee for a particular length of time.”²²²

The court held that summary judgment was appropriate for the federal constitutional claims since Abel could not establish a violation of any known constitutional right.²²³ The court further granted summary judgment for the defendants on all of the tort and contract claims brought under Ohio law.²²⁴

d. Court’s Decision and Reasoning on the Breach of Contract Issue in *Abel*

The court rather quickly dismissed the plaintiff’s breach of implied contract claim by focusing on the objective manifestation of intent (or lack thereof) of the employer.²²⁵ The court stated, “the language of the disclaimer, which is clear and unambiguous, precludes a finding that the terms of the Manual create something other than an at-will relationship. Its presence obviates any manifestation of Defendants’ intent to be contractually bound”²²⁶ There was no discussion of the manual as a whole or the potential effect that the combination of the disclaimer and the specific progressive discipline policies could have on employees’ beliefs about job security.

e. Comparison of *Ferguson* and *Abel*

i. Similarities

The plaintiffs in both *Ferguson* and *Abel* based their claims of an

221. *Id.* at 741.

222. *Id.* at 742.

223. *Id.* at 739.

224. *Id.* at 740-44.

225. *Id.* at 742.

226. *Id.*

implied contract on the progressive discipline procedures outlined in the personnel manuals given to them by their employers.²²⁷ Both plaintiffs were fired for alleged wrongdoing at work,²²⁸ although perhaps Ferguson was a more sympathetic plaintiff than Abel, who had actually engaged in felonious behavior. Similarly, both plaintiffs signed an acknowledgement of receipt of their respective manuals.²²⁹ Also, the one disclaimer in *Abel* was in the middle of the manual.²³⁰ While the disclaimer in *Ferguson* was in the beginning of the book,²³¹ the court seemed to use this fact to favor the plaintiff, although most courts will find that such placement increases the disclaimers' effectiveness. Therefore, the courts' opposing decisions probably were not based on the employees' behavior leading to termination, the number of disclaimers, the prominence of the disclaimers, nor on the awareness of the employees as to the manual and its policies.

ii. Differences

Potentially, the most important difference between the two cases was the wording of the two disclaimers. The court in *Ferguson* found that the disclaimer did not clearly state what the *Woolley* court required of a valid disclaimer, that the employer does not promise anything in the manual, and that regardless of what the manual says or provides, the employer promises nothing.²³² The disclaimer in *Abel* basically made these representations and included the statement that the employer was not bound to employ the employee for a particular length of time.²³³ Thus, the differences in the clarity with which the two employers stated their negation of intent to be contractually bound seems to contribute to the opposing outcomes.

Additionally, the structure of the reasoning of each court differs markedly from the other. The *Ferguson* court begins, as did to court in *Dillon*, by stating that many courts now find implied contracts based on employee handbooks and personnel manuals because courts are reluctant to allow management to reap the benefits of employee loyalty such

227. *Ferguson v. Host Int'l, Inc.*, 757 N.E.2d 267, 269-71 (Mass. App. Ct. 2001); *Abel*, 276 F. Supp. 2d at 741-42.

228. *Ferguson*, 757 N.E.2d at 268; *Abel*, 276 F. Supp. 2d at 730.

229. *Ferguson*, 757 N.E.2d at 269; *Abel*, 276 F. Supp. 2d at 741.

230. *Abel*, 276 F. Supp. 2d at 742.

231. *Ferguson*, 757 N.E.2d at 269.

232. *Id.* at 272.

233. *Abel*, 276 F. Supp. 2d at 742.

manuals can garner without also shouldering the obligations created by the manuals.²³⁴ The *Abel* court, on the other hand, starts its discussion of the implied contract issue by focusing on the effect of the disclaimer and the fact that “[i]ts presence obviates any manifestation of Defendants’ intent to be contractually bound”²³⁵ Therefore, the dichotomy between focus on the reasonable expectation of employees when reading a manual and the objective intent of employers in including a disclaimer seems to run through these two cases, as it did through *Dillon* and *Byrd*. That is, courts that find that the disclaimer is ineffective, like *Dillon* and *Ferguson*, seem to focus on the reasonable expectation of employees in reading a manual that contains both a disclaimer and seemingly binding employer policies; however, courts that find the disclaimer effective in negating any contractual rights contained in the manual, like *Byrd* and *Abel*, tend to concentrate on the objective intent of the employer in including the disclaimer.

2. *Austin v. Howards University* and *Bickley v. FMC Technologies, Inc.*

a. Facts of *Austin*

In *Austin v. Howard University*,²³⁶ the plaintiff, Austin, who worked in the Medical Records Department at Howard University, became engaged in a verbal altercation with his co-worker and was subsequently terminated.²³⁷ He sued his employer, alleging age discrimination, violation of the District of Columbia Human Rights Act,²³⁸ breach of contract, and self-defamation.²³⁹ Plaintiff then voluntarily dismissed with prejudice all claims but those for breach of contract and self-defamation.²⁴⁰

In his breach of contract claim, Austin alleged that the Howard University Handbook he received constituted an employment contract and that his termination was not in compliance with its terms.²⁴¹ The

234. *Ferguson*, 757 N.E.2d at 272 (citing *O’Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843, 843 (Mass. 1996)).

235. *Abel*, 276 F. Supp. 2d at 742.

236. 267 F. Supp. 2d 22 (D.D.C. 2003).

237. *Id.* at 23.

238. D.C. CODE §§ 2-1401.01 to .05 (2001).

239. *Austin*, 267 F. Supp. 2d at 24.

240. *Id.*

241. *Id.* at 25.

introduction to the employee handbook included a statement that the handbook is “intended to promote a better understanding of what staff employees can expect from the University and what the University can expect from them in return. . . . This document is not to be construed as a contract.”²⁴² The handbook itself also included procedures for termination of an employee.²⁴³ Termination of an employee because of unsatisfactory work performance was allowed only after the employee failed to make sufficient improvement thirty days after being given written notice of their unsatisfactory performance.²⁴⁴ Termination for conduct incompatible with the welfare of the university could proceed only if the conduct was substantiated by the employee’s supervisor and the employee was given an opportunity to refute the charges and could not do successfully do so.²⁴⁵

Austin was fired for unsatisfactory work performance, but was not accorded the thirty days to improve, as stated in the handbook.²⁴⁶ The court noted that “the record does not indicate that plaintiff received a written warning from his supervisor, enjoyed a period of time during which he could improve his performance, knew about the disciplinary charges lodged against him prior to receipt of his termination letter, or definitively demonstrated that he had an opportunity to refute those charges.”²⁴⁷ Therefore, the court had to decide whether the employment handbook could be found to constitute an implied employment contract and, thus, whether the defendant potentially could have breached this contract by not following the termination procedures outlined in the handbook.²⁴⁸ The court found that there were material issues of fact as to whether the handbook constituted an implied contract and, thus, summary judgment on the breach of contract claim was not appropriate.²⁴⁹

b. Court’s Decision and Reasoning on the Breach of Contract Issue in
Austin

In holding that it is “unclear whether the Handbook’s purported

242. *Id.* at 26.

243. *Id.* at 27.

244. *Id.*

245. *Id.*

246. *Id.* at 28.

247. *Id.*

248. *Id.* at 28-29.

249. *Id.* at 29.

contractual disclaimer, when considered in conjunction with the entire Handbook, effectively relieves defendant of any obligations to its employees pursuant to the provisions of its Handbook,” the court noted that the handbook provisions appeared to be mandatory and such mandatory terms may effectively reverse the presumption of employment at will.²⁵⁰ “In effect, promises meeting this test reverse the normal presumption: *to make them unenforceable at law, a manual purporting to restrict the grounds for termination must contain language clearly reserving the employer’s right to terminate at will.*”²⁵¹ Moreover, the court noted that the handbook appears to send mixed signals to employees, directing that it is not to be construed as a contract, while simultaneously including apparently mandatory provisions establishing the preconditions to the termination of an employee.²⁵² The court concluded that this left open material questions of fact as to whether the disclaimer, when considered with the rest of the handbook, relieved the employer of the obligations to employees that are set forth in the handbook.²⁵³

c. Facts of *Bickley*

The plaintiff in *Bickley v. FMC Technologies, Inc.*,²⁵⁴ brought suit against his former employer alleging claims under the Family and Medical Leave Act,²⁵⁵ and state common law claims under Ohio law of malicious prosecution, abuse of process, breach of implied contract, and public policy wrongful discharge.²⁵⁶ The court ordered summary judgment to be entered for defendant on all claims.²⁵⁷

The plaintiff, Bickley, began working as a welder for the defendant in 1995.²⁵⁸ In 1997, Bickley was absent for work for several weeks because of a kidney aneurysm.²⁵⁹ In 1999, he began to experience the same symptoms he had had during his previous illness and told his

250. *Id.* at 28 (citing *Strass v. Kaiser Found. Health Plan of Mid-Atlantic*, 744 A.2d 1000, 1014 (D.C. 2000)).

251. *Id.* at 26 (citing *Sisco v. GSA Nat’l Capital Fed. Credit Union*, 689 A.2d 52, 55 (D.C. 1997)).

252. *Id.* at 28.

253. *Id.* at 28-29.

254. 282 F. Supp. 2d 631 (N.D. Ohio 2003).

255. 29 U.S.C. §§ 2601-54 (2000).

256. *Bickley*, 282 F. Supp. 2d at 635.

257. *Id.* at 644.

258. *Id.* at 635.

259. *Id.*

supervisor that he had to leave work early because of these symptoms.²⁶⁰ He saw his doctor the following day and she scheduled tests for the next day.²⁶¹ Bickley then informed his supervisor that he would not be returning to work until the doctor determined what was causing the pain.²⁶² After about a week of testing, Bickley's doctor determined that he had a kidney infection and gave him a note stating that he had been under her care for the previous week and could now return to work.²⁶³

Upon his return to work with the note, Bickley discovered that his timecard had been marked "unexcused" during his absence.²⁶⁴ When he approached his supervisor about this he was told, "that's what you get when you go over somebody's head."²⁶⁵ A few days later a bomb threat against Bickley's employer was received by police and traced to Bickley.²⁶⁶ He was subsequently arrested and charged, but was later acquitted by a jury.²⁶⁷ Before his acquittal, Bickley's employment was terminated.²⁶⁸

Bickley claimed that his termination violated his implied employment contract, which was created by the employee handbook given to him by the defendant.²⁶⁹ The handbook included a progressive discipline policy which was not followed in the plaintiff's termination.²⁷⁰ The handbook also contained a disclaimer that stated, "Nothing in this folder is to be construed as constituting the terms of an employment contract."²⁷¹ Additionally, the plaintiff's employment application provided that "employment is at-will and can be terminated by either party with or without notice, at any time for any reasons or no reason."²⁷² The court held that these two disclaimers precluded the plaintiff from claiming that he had an implied employment contract with the defendant.²⁷³

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 635.

264. *Id.* at 636.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 641.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

d. Court's Decision and Reasoning on the Breach of Contract Issue in
Bickley

The court in *Bickley* quickly dismissed the plaintiff's breach of contract claim by pointing to the existence of the disclaimer in the handbook and the one contained in the plaintiff's employment application.²⁷⁴ The court noted that "even if defendant progressively disciplined three other employees, as plaintiff argues, this alone cannot create the existence of an implied contract—especially with the express contractual disclaimer and reservation of rights in the employee handbook."²⁷⁵ The court went on to support its conclusion with a quote from the Ohio Supreme Court, which held that "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook."²⁷⁶

e. Comparison of *Austin* and *Bickley*

i. Similarities

As with many of the implied employment contract cases, the plaintiffs in *Austin* and *Bickley* founded their claims of breach of implied contract on the progressive discipline provisions of their employers' employee handbooks.²⁷⁷ Both handbooks seemed to send mixed signals to the employees by disclaiming any intent to form an employment contract while at the same time setting forth disciplinary procedures to be followed before an employee is terminated. Neither plaintiff was accorded the procedures set forth in the manual before his respective termination.²⁷⁸ In *Bickley*, in particular, this procedure may have made a difference because the plaintiff was accused of wrongdoing for which he was later acquitted by a jury. Therefore, if he had been afforded some process before termination, he may have been able to rectify the situation and demonstrate his innocence and his deservedness of continued employment.

274. *Id.*

275. *Id.*

276. *Id.* (quoting *Wing v. Anchor Media, Ltd. of Texas*, 570 N.E.2d 1095, 1098 (Ohio 1991)).

277. *Austin v. Howard Univ.*, 267 F. Supp. 2d 22, 26-27 (D.D.C. 2003); *Bickley*, 282 F. Supp. 2d at 641.

278. *Austin*, 267 F. Supp. 2d at 24, 27; *Bickley*, 282 F. Supp. 2d at 636, 641.

ii. Differences

Although both handbooks contained a disclaimer of any intent to form a contract on the part of the employer, in *Bickley* the plaintiff's employment application also contained such a disclaimer.²⁷⁹ This added layer of protection for the employer certainly bolstered the *Bickley* court's decision to find that the disclaimer was sufficient to preserve the employee's at-will status. This additional disclaimer was not present in *Austin*. Also, while each handbook had a relatively conspicuous disclaimer, the *Austin* disclaimer included provisions about the handbook's intended use as setting forth what the employer could expect from the employee and vice versa.²⁸⁰ This language is seemingly crucial in allowing the court to focus on the reasonable expectations that the employee would have after reading the handbook. Such a focus is conducive to a court's finding for the plaintiff that the disclaimer is or at least *may* not be effective in preserving employment at will. The court is then free to look at the mixed signals that the handbook sends to employees and to interpret them in a way very favorable to the employee.

Thus, it seems that when a court focuses on the reasonable expectations of an employee in a handbook disclaimer case involving at least some type of mixed signals, the court often finds in favor of the plaintiff. This logically follows from the focus on employee expectations because when mixed messages are being sent by a handbook, the employee cannot possibly have clear expectations that he can be fired for any reason. Alternatively, when a court, such as the *Bickley* court finds for the defendant in a mixed message disclaimer case, the court seems to solely focus on the language of the disclaimer in isolation from the rest of the handbook and how the disclaimer language obviously and clearly reflects the intent of the employer not to be bound by the handbook terms. For example, the *Bickley* court quickly dismissed the plaintiff's allegation of breach of implied contract by stating that "even if defendant progressively disciplined three other employees . . . this alone cannot create the existence of an implied contract—especially with the express contractual disclaimer and reservation of rights in the employee handbook."²⁸¹ The court did not even mention that plaintiff is not solely relying on the employer's past

279. *Bickley*, 282 F. Supp. 2d at 641.

280. *Austin*, 267 F. Supp. 2d at 26.

281. *Bickley*, 282 F. Supp. 2d at 641.

practices of progressive discipline, but is also combining this with the written policy of discipline set forth in the employee handbook. Instead of focusing on the disclaimer in conjunction with the progressive discipline policy and analyzing this as a mixed signals case, the court instead concentrated solely on the language of the disclaimer and proclaimed that it was clear in its purpose to free the employer from any contractual obligations that may have arisen from the handbook.²⁸² This dichotomy of analyses by courts seems to hold constant in many of the disclaimer cases that reach opposite conclusions.

3. *Strass v. Kaiser Foundation Health Plan of Mid-Atlantic and Acevedo v. Ledgecrest Health Care*

a. Facts of *Strass*

In *Strass v. Kaiser Foundation Health Plan of Mid-Atlantic*,²⁸³ the plaintiff, Strass, sued her former employer, claiming breach of contract and wrongful termination of employment.²⁸⁴ A jury found in favor of Strass on both claims, but the trial court overturned the verdict, finding that there was insufficient evidence for a jury to conclude that there was an express or implied agreement between the plaintiff and the defendant.²⁸⁵ Strass appealed, arguing that the evidence and the law support the jury's verdict on both claims.²⁸⁶

Kaiser Foundation hired Strass as Director of Public Affairs in April 1988.²⁸⁷ In 1991, Strass began experiencing health problems and was ultimately diagnosed with hypertension, which her doctor attributed to her stress at work.²⁸⁸ She informed her supervisor of her diagnosis and was later told that perhaps the job situation was not a proper fit.²⁸⁹ They tried to fashion a solution to the problem which would allow Strass to continue working for Kaiser, but no such compromise could be reached.²⁹⁰ In February 1992, Kaiser fired Strass.²⁹¹

282. *See id.* at 641-42.

283. 744 A.2d 1000 (D.C. 2000).

284. *Id.* at 1003.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 1004.

291. *Id.*

At the time Strass's employment was terminated, the defendant had in effect a progressive discipline policy, which provided for specific steps to be followed prior to termination.²⁹² The policy was laid out in the defendant's personnel policy manual.²⁹³ This manual also contained a disclaimer which indicated that the manual was not a contract.²⁹⁴ The disclaimer, located in the introduction to the manual read: "This Personnel Policy Manual is designed to provide each employee with a clear set of guidelines for situations which develop in the workplace. This manual is not a contract, but rather a statement of intention of the Kaiser-Georgetown Community Health Plan, Inc., in matters covered by the policies contained herein."²⁹⁵ However, other language in the manual was mandatory and set forth various conditions of employment.²⁹⁶ Strass claimed that the terms of the policy manual constituted an implied contract and that Kaiser breached this contract by failing to follow the steps laid out in the progressive discipline section of the manual before terminating her employment.²⁹⁷

b. Court's Decision and Reasoning on the Breach of Contract Issue in
Strass

The D.C. Court of Appeals reversed the trial court and found that there was sufficient evidence for a jury to find that the terms of the personnel manual constituted an implied contract between Strass and her former employer.²⁹⁸ In reaching this conclusion, the court noted that although the manual contained a disclaimer, "[n]ot in every case will a contractual disclaimer clause be adequate to relieve an employer of obligations specified in its regulations."²⁹⁹ The court found that in this case, the disclaimer was ambiguous because in the very sentence where the defendant stated that the manual it not a contract, it also declared that this is a statement of intention on matters covered in the policy.³⁰⁰ Further, the court found that much of the language used throughout the manual was mandatory.³⁰¹ The court also noted that "[t]he section on

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 1012.

296. *Id.*

297. *Id.* at 1010.

298. *Id.* at 1003.

299. *Id.* at 1012 (citing *Greene v. Howard Univ.*, 412 F.2d 1128, 1135 (D.C. Cir. 1969)).

300. *Id.* at 1013-14.

301. *Id.* at 1012.

progressive discipline contains language which tends to support that Kaiser intended, and the employee could reasonably expect, that application of this policy was required before termination.”³⁰² In conclusion, the court assessed the entirety of the manual and found that:

It is difficult to comprehend how the non-contractual qualifier in the beginning of the Manual can be viewed reasonably to abrogate what clearly appear to be obligations of the employer and employee of this type. By adopting written policies for consistent application to the terms of employment, “the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.”³⁰³

The court, in holding that a jury could reasonably find that the manual constituted an implied contract, construed the manual as a whole and looked to the effect of the whole on the reasonable expectations of the employee.³⁰⁴ This is consistent with the pattern seen in other cases where the court found for the plaintiff. Additionally, in this case, unlike in many of the cases finding the disclaimer to be ineffective, the court also assessed the intent of the employer.³⁰⁵ However, the court related this intent to the employee and seemingly projected improper motives onto the employer. The court found that the employer gained the loyalty of employees by promulgating rules that were to be applied consistently and thus, having gained this advantage, could not then disclaim intent to be bound by the manual.³⁰⁶

c. Facts of *Acevedo*

The plaintiffs in *Acevedo v. Ledgecrest Health Care*,³⁰⁷ sued their former employer for breach of implied contract and negligent infliction of emotional distress stemming from their termination of employment.³⁰⁸ The defendant moved for summary judgment on all counts.³⁰⁹

302. *Id.* at 1013.

303. *Id.* (quoting *Sisco v. GSA Nat'l Capital Fed. Credit Union*, 689 A.2d 52, 57 (D.C. 1997) (citation omitted)).

304. *Id.* at 1013-14.

305. *Id.* at 1013.

306. *See id.* at 1012-14.

307. No. CV00509027, 2001 Conn. Super. LEXIS 3001 (Conn. Super. Ct. Oct. 18, 2001).

308. *Id.* at *1-2.

309. *Id.* at *2.

The plaintiffs worked as certified nursing assistants for the defendant.³¹⁰ During their ten minute break, they went to the post office and returned later than expected.³¹¹ They had checked out their time cards to make sure that they were not paid for the extra time they were at the post office, but before they could tell their supervisor about the incident, she confronted them.³¹² The plaintiffs were told to go home and not to return to work until they met with another supervisor.³¹³ At this meeting, the plaintiffs were fired.³¹⁴

The defendant had in place at the time of the plaintiffs' employment an employee handbook that contained a disclaimer in the section entitled "About This Handbook."³¹⁵ The disclaimer stated that "neither the contents of this handbook nor any other communications . . . create any type of employment contract. These policies are general guidelines only. . . . Employment with this company is on an at-will basis, which means that the employment relationship may be terminated at any time by you or the company for any reason not expressly prohibited by law."³¹⁶ The court found that this disclaimer was sufficient to negate any intent by the employer to create a contract and, thus, held that plaintiffs' breach of contract claims must fail.³¹⁷

d. Court's Decision and Reasoning on the Breach of Contract Issue in
Acevedo

The court in *Acevedo* began its discussion of the breach of contract claims by emphasizing that although an employee handbook may in certain circumstances be held to constitute an implied contract, employers can protect themselves against such claims by including prominent disclaimers in the manuals.³¹⁸ The court emphasized that "[t]he intention of the parties manifested by their words and acts is essential to determine whether a contract was entered into and what its terms were."³¹⁹ The court then analyzed only the disclaimer section of

310. *Id.* at *1.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at *5-6.

316. *Id.* at *6.

317. *Id.*

318. *Id.* at *4 (quoting *Gaudio v. Griffin Health Servs. Corp.*, 733 A.2d 197, 206 (Conn. 1999) (citations omitted)).

319. *Id.* at *4 (quoting *Finley v. Aetna Life & Cas. Co.*, 520 A.2d 208, 213 (Conn. 1987)).

the handbook, finding that “[t]he language of the defendant’s employee handbook is clear and unambiguous. No reasonable jury could conclude that the defendant in the present case intended to enter into a contractual relationship based on the terms of its employee handbook.”³²⁰ Therefore, the court found that summary judgment for the defendant was appropriate on the breach of contract claims.³²¹

e. Comparison of *Strass* and *Acevedo*

i. Similarities

The plaintiffs in both *Strass* and *Acevedo* based their breach of contract claims on the terms of employee handbooks or manuals distributed to them at the time they were hired.³²² Both manuals contained a disclaimer of intent by the employer to enter into a contract based on the terms in the manual.³²³ Both sets of plaintiffs believed that they were protected by the terms contained in the manual, but only one court affirmed these expectations.

ii. Differences

The differing approaches of the courts in *Strass* and *Acevedo* is probably the most striking difference between the two cases. While the *Strass* court, in finding for the plaintiff, looks to the reasonable expectations of the employee as shaped by the contents of the manual,³²⁴ the *Acevedo* court seems to focus only on the objective manifestation of intent of the employer.³²⁵

This pattern has been typical of the dichotomy between courts who find the disclaimer to be ineffective and those who uphold the disclaimers. The *Strass* and *Acevedo* courts also differed in another important way which has been evident in the other opinions discussed above. The *Strass* court, in defining and analyzing the reasonable

(citations omitted)).

320. *Id.* at *6.

321. *Id.*

322. *Strass v. Kaiser Found. Health Plan of Mid-Atlantic*, 744 A.2d 1000, 1010 (D.C. 2000); *Acevedo*, 2001 Conn. Super. LEXIS 3001, at *4-6.

323. *Strass*, 744 A.2d at 1012; *Acevedo*, 2001 Conn. Super. LEXIS 3001, at *6.

324. *Strass*, 744 A.2d at 1013.

325. *Acevedo*, 2001 Conn. Super. LEXIS 3001, at *6.

expectations of the employee, looked at the manual in its entirety.³²⁶ It compared the terms of the disclaimer with the other language used throughout the manual to determine what, if any, job protections an employee could reasonably expect.³²⁷ The *Acevedo* court did not do this. That court, instead, focused solely on the disclaimer, neglecting even to mention on what portions of the employee manual the plaintiffs based their breach of contract claims.³²⁸ The *Acevedo* court concentrated so intensely on the intent of the employer as reflected by the disclaimer that it did not even bother to analyze the remainder of the manual to determine what effects that may have had on the objective manifestation of intent of either party.

Furthermore, while the *Strass* court focused mainly on the expectations of the employee, the court did go on to analyze the intent of the employer.³²⁹ However, the court only did so to further cement the case against the employer by imparting malevolent motives on the employer and painting the picture of a self-interested and perhaps exploitative defendant.³³⁰ The court focused on employer intent in order to find that the employer had benefited from worker loyalty induced by the manual and, thus, could not then disclaim only obligations under the manual.³³¹ The *Strass* and *Acevedo* cases, unlike some of the other opinions examined above, did examine *both* employer intent and employee expectations, but used each in somewhat unconventional ways which served only to buttress the court's slant for either party.

V. THE CURRENT DEBATE OVER EMPLOYMENT AT WILL

It is interesting to note that at the same time that courts, like those described above, are struggling with issues surrounding employment at will, many legal scholars are also debating the issue. Below I present the basic arguments for and against preserving an employment-at-will regime and then look at the influence that current studies about employee knowledge and expectations may have on this debate and future court opinions.

326. *Strass*, 744 A.2d at 1013-14.

327. *Id.* at 1012-14.

328. *Acevedo*, 2001 Conn. Super. LEXIS 3001, at *6.

329. *Strass*, 744 A.2d at 1012-13.

330. *See id.* at 1013.

331. *See id.* at 1012-14.

A. The Case for Employment At Will

Many scholars have argued that employment at will should be preserved and that the current exceptions that are eroding the doctrine are wrong from both a doctrinal and policy perspective. Chief among the proponents of employment at will is Richard Epstein, a law professor at the University of Chicago. Epstein argues that the erosion of employment at will by courts violates basic contract doctrine about how courts should interpret contracts and fundamentally disrespects the will of the parties.³³² Although he does not argue for the enforcement of a contract at will in all instances, he does insist that there are two ways in which it should be respected: (1) it should be respected as an open option that the parties have a right to adopt, and (2) it should be respected as a rule of construction when there are gaps in contractual language, i.e., employment at will should be presumed when there are no terms in a contract as to duration or grounds for termination.³³³

Epstein goes on to enumerate the reasons contract at will should be preserved. He first emphasizes the importance of respect for freedom of contract as an element of individual liberty and also notes that employment at will can work to the mutual benefit of the employee and the employer.³³⁴ He believes employment at will can be mutually beneficial because it decreases employers' monitoring costs by allowing the employer to use the real threat of termination to ensure employee productivity, while at the same time allowing employees to quit at any time if they feel they are being exploited by their employers.³³⁵ Underlying both of these perceived benefits of employment at will is Epstein's assumption that employers and employees have equal knowledge and bargaining power:

With employment contracts we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache. Instead we are dealing with the routine stuff of ordinary life; people who are competent enough to marry, vote, and pray are not unable to protect themselves in their day-to-day business transactions. . . . Nor is there any reason to believe that such contracts are marred by misapprehensions, since employers and employees know the footing on which they have contracted: the phrase "at will" is two words long

332. Richard A. Epstein, *In Defense of Contract at Will*, U. CHI. L. REV. 947, 951 (1984).

333. *Id.*

334. *Id.* at 953-55.

335. *Id.* at 965.

and has the convenient virtue of meaning just what it says, no more and no less.³³⁶

While Epstein's arguments for preserving employment at will seem plausible if these underlying assumptions are true, many scholars have debated the merits of the employment at will system by calling these assumptions into question.

B. The Case Against Employment At Will

The attacks against the employment-at-will regime seem to center on two major questions about Richard Epstein's beliefs. Many scholars, such as Lawrence Blades, have criticized Epstein's supposition that employees and employers mutually benefit from the employment-at-will regime. Others, like Pauline Kim, have questioned the reasonableness of Epstein's assumptions about the relative knowledge of employers and employees.

1. Critique of the Mutuality of Benefit

Lawrence Blades points to the immobility of the employee as a major source of bargaining power for the employer: "the freedom of the individual is threatened whenever he becomes dependent upon a private entity possessing greater power than himself. Foremost among the relationships of which this generality is true is that of employer and employee."³³⁷

He believes that the disproportionately large share of dependence in the employment relationship flows from the employee to the employer.³³⁸ The reason for this, Blades points out, is the inability of the employee to easily move from job to job.³³⁹ He notes that employee immobility renders employees particularly vulnerable to employer exploitation and that employment at will, rather than mitigating the prospects of employer exploitation, as Epstein posits, actually increases this possibility.³⁴⁰ He states, "It is the fear of being discharged which above all else renders the great majority of employees vulnerable to

336. *Id.* at 954, 955.

337. Blades, *supra* note 10, at 1404.

338. *Id.* at 1406.

339. *Id.* at 1405.

340. *Id.*

employer coercion.”³⁴¹ Furthermore, Blades rejects the argument that employers’ concerns for their reputations will be sufficient to quell their exploitation of employees.³⁴² Blades notes that reputation worries are not enough deterrence, particularly in times of abundant labor supply or when dealing with an employer who can use pressure to silence employees and, thus, ensure that his coercive nature never mars his reputation.³⁴³ While Blades questions the potential benefits that Epstein claims flow to the employee from the employment-at-will regime, others have criticized Epstein’s assumption that employees are fully aware of what such an employment arrangement entails.

2. Critique of Employees’ Understanding of Terms: Employee Over-optimism

In his article, *What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, Jesse Rudy writes, “The reasoning of the traditional economic defense of the at-will rule relies on the assumption that employees know the law. Epstein stated this clearly [However,] [e]mpirical evidence on the subject strongly suggests that employees do not understand the at-will employment term and its application.”³⁴⁴

Much of this empirical evidence of which Rudy speaks has come from the studies of Pauline Kim. Her research has centered on employee over-optimism and its effects on employees’ understanding of their legal rights within the employment relationship. In 1997, Kim conducted a survey of 330 workers in the St. Louis metropolitan area.³⁴⁵ She presented the workers with questions and scenarios to test both their knowledge of the legal rules governing the employment relationship and their attitudes towards and experiences with employers that may influence this knowledge.³⁴⁶ Her results were staggering:

341. *Id.* at 1406.

342. *Id.* at 1412-13.

343. *Id.*

344. Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 310-11 (2002). See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002) (noting that employees believe they enjoy just cause protection when they are actually at will employees).

345. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997).

346. *Id.* at 129.

respondents overwhelmingly misunderst[ood] the background legal rules governing the employment relationship. More specifically, they consistently *overestimate[d]* the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have. For example, although the common law rule clearly permits an employer to terminate an at-will employee out of personal dislike, so long as no discriminatory motive is involved, an overwhelming majority of the respondents—89%—erroneously believe[d] that the law forbids such discharge. . . . The results similarly indicate[d] that workers are misinformed about the legal effect of employer statements regarding job security. In short, this study raise[d] serious doubts about whether workers have the most basic information necessary for understanding the terms on which they have contracted.³⁴⁷

In a more recent study, Pauline Kim surveyed workers in New York and California to try to determine whether her previous findings in Missouri were correct.³⁴⁸ Kim's findings in New York and California confirmed her data from Missouri.³⁴⁹ While she again found that "workers do not understand the default presumption [of employment at will], but erroneously believe that the law affords them protection akin to a just cause contract . . . ,"³⁵⁰ she also made even more disturbing discoveries about worker misunderstandings. She noticed that:

These errors [in employees' assumptions about job security], however, were not randomly distributed; rather, respondents consistently *overestimated* employees' legal rights, believing that the law affords protections akin to a just cause contract, when, in fact, a worker can be dismissed at will. Moreover, the patterns of responses to individual questions were nearly identical across the three sample groups, although Missouri, California, and New York have widely varying state law doctrines regarding when the at-will presumption may be avoided. Even more surprising, virtually none of the factors that would be predicted, under a rational actor model, to influence workers' legal knowledge proved significant. Based on the results of a multivariate regression analysis, factors such as past union representation, prior responsibility for hiring and firing other employees, the experience of being fired, and general workforce

347. *Id.* at 110-11.

348. Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 447 (1999).

349. *Id.*

350. *Id.*

experience did not appear to influence the level of a respondent's legal knowledge The results of this study strongly suggest that workers' beliefs about the law are not only systematically erroneous, but also resistant to change.³⁵¹

These findings have staggering implications for both contract law and employment law. As Kim notes, according to her study, "silence in the face of a presumption of at-will employment says little about employees' preferences if they are wholly unaware of the default rule."³⁵² Moreover, if employees really do overestimate their baseline protections under employment at will, then the question becomes how courts should interpret employment contracts in the face of a possible lack of meaningful assent to the contract terms.

VI. IMPLICATIONS OF WORKER OVER-OPTIMISM ON COURT DECISIONS INVOLVING EMPLOYEE HANDBOOKS

As illustrated by many of the matched cases above, courts, in interpreting employment agreements, generally either focus on the expectation of employees or the intent of employers. Kim's findings of pervasive and consistent employee over-optimism would certainly seem to complicate the courts' interpretive tasks in these cases. For, if the court's job in the handbook cases is to determine whether the employer intended to form a contract by the handbook and whether the employee could reasonably have believed this was the intent of the employer, then much depends on the basic knowledge possessed by each party.

In particular, if employees are unaware that when an employment contract is silent on the terms such as duration of employment or grounds for termination, employment at will prevails, then how can a court know what the employee reasonably expected when it accepted the handbook? Many courts would answer that a prominent and unambiguous disclaimer of intent to contract is sufficient to negate any implied contract. However, if Kim's findings are correct, and employees do not even understand what the term employment at will means, then any disclaimer of intent to waive employment at will could never be sufficient to accomplish the task which courts have attributed to it—alerting workers to the fact that they can be fired for any reason, at any time.

Furthermore, even if an employer were to replace the words

351. *Id.* at 451-52.

352. Kim, *supra* note 348, at 147.

“employment at will” in a disclaimer with an explanation of what the term means, according to Kim’s studies, this may not be enough. For, if, as she found, employees are really resistant to change on their overestimation of legal protection of job security, then even a disclaimer to this effect may not impact their expectations.

The result is a paradox of sorts. For, how do courts interpret the intent of “reasonable” parties to a contract when certain parties continuously and systematically act irrationally? Although the law of contract allows a defense for incompetence, it is not clear that it would ultimately benefit employees as a class to be termed incompetent for the purposes of contract formation.

VII. SUGGESTIONS FOR FURTHER RESEARCH

Therefore, it seems clear that more research must be done on precisely what thought processes employees use when trying to understand their legal rights in an employment relationship. Particular emphasis should be placed on trying to discover more effective ways to alert employees to their true rights, or lack thereof, under an employment-at-will regime.

Additionally, if these thought processes confirm what Kim has found, courts concentrating on employee expectations will have to define “reasonable expectations” perhaps as relative to the average employee. This definition must then account for the misapprehensions that employees hold about their legal rights. However, these courts must not define “reasonable” too loosely for fear of making it nearly impossible for employers and employees to reach mutually beneficial employment agreements. On the other hand, courts that focus on employer intent may have to refine their analyses to take into consideration the apparent lack of effect that even very clear employer intent may have on the average overly optimistic employee. It is not exactly clear how contract law, which emphasizes respect for the will of the individual parties, can effectively account for pervasive irrationality by one party, but further thought must be given to the issue if employment agreements and relationships are to be truly reflective of the will of the parties.

CONCLUSION

This Article has reviewed the traditional presumption in American law that employment for an unspecified term is at-will. Through a series

of matched cases, I have shown the differing importance that courts place either on the expectation of employees in entering an employment relationship or the intent of the employer to undertake certain obligations within the relationship. Specifically, these cases illustrate that these differing emphases can, in some situations, account for the differing outcomes of seemingly similar cases.

With this observation in mind, I discussed current developments in the debate over the value of employment at will. Of particular importance are two studies by Pauline Kim that document that consistent over-optimism that employees exhibit with regard to their job security and legal rights within the employment relationship. I then discussed the disturbing and confusing implications these findings have on courts who are trying to interpret the effect of an employee handbook containing a disclaimer. While the true enormity of legal implications stemming from Kim's studies is currently unclear, it seems obvious that these findings should definitely make their way to the courts and influence some very basic concepts often found in contract law, such as "reasonableness" and mutual assent. What the exact extent of this influence should be is uncertain at this time, but it is clear that courts will have to strike a balance—according the findings their proper weight, while at the same time retaining the fundamental notion of contract law—respect for the individual will.

APPENDIX A

Case	Where was the disclaimer (i.e., in employee handbook/personnel manual, a separate acknowledgement form or both)	How many disclaimers were there?	Did the employee have to sign/acknowledge the form containing the disclaimer(s)?	Was/were the disclaimer(s) prominent?
<i>Dillon</i>	Handbook	1	No	Yes
<i>Byrd</i>	Handbook	2	No	Yes
<i>McDonald</i>	Application and Handbook	2	Yes	Yes
<i>Hoff</i>	Both	2	Yes	No
<i>Jones</i>	Manual	1	No	Yes
<i>Trabing</i>	Employment Agreement and Handbook	2	Yes	Yes, in the agreement, but not in the handbook
<i>Ferguson</i>	Manual	1	No	No
<i>Abel</i>	Manual	1	Yes	Not clear
<i>Austin</i>	Handbook	1	No	Yes
<i>Bickley</i>	Application and Handbook	2	No	Yes
<i>Strass</i>	Manual	1	No	Yes
<i>Acevedo</i>	Handbook	1	No	Yes

APPENDIX B

Case	Disclaimer Language
<i>Dillon</i>	“The policies and procedures contained in this manual constitute guidelines only. They do not constitute part of an employment contract, nor are they intended to make any commitment to any employee concerning how individual employment action can, should, or will be handled. Champion Jogbra offers no employment contracts nor does it guarantee any minimum length of employment. Champion Jogbra reserves the right to terminate any employee at any time ‘at will,’ with or without cause.” 819 A.2d 703, 705 (Vt. 2002).

<i>Byrd</i>	<p>“This handbook is not and should not be construed as a contract for employment, as you have the right to terminate the employment relationship at the Imperial Palace of Mississippi for any reason, with or without cause. Therefore, the Imperial Palace of Mississippi reserves the same right. . . . All employees of the Imperial Palace of Mississippi are at-will employees. Employment at-will simply means the traditional relationship between employer and employee, so that the relationship is for no fixed period of time and may be terminated by either party unilaterally for any reason, or for no reason, with or without cause. This Employee Handbook is not an express or implied contract of employment, but rather an overview of working rules and benefits at our company. No employee in any supervisory capacity has the authority to enter into any type of contract of employment, or make any agreement or promise of continued employment with any employee, or in any way modify the at-will relationship. Your status as an employee at-will shall continue even after your completion of your introductory period.” 807 So. 2d 433, 434 (Miss. 2001).</p>
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<i>McDonald</i>	<p>On Employment Application: “I agree that any offer of employment, and acceptance thereof, does not constitute a binding contract of any length, and that such employment is terminable at the will of either party, subject to appropriate state and/or federal law.” 820 P.2d 986, 988 (Wyo. 1991).</p> <p>In Handbook: “This handbook is intended to be used as a guide for our nonexempt mine technicians and salaried support personnel, to help you understand and explain to you Mobil’s policies and procedures. It is not a comprehensive policies and procedures manual, nor an employment contract. More detailed policies and procedures are maintained by the Employee Relations supervisor and your supervisor. While we intend to continue policies, benefits and rules contained in this handbook, changes or improvements may be made from time to time by the company. If you have any questions, please feel free to discuss them with your supervisor, a member our Employee Relations staff, and/or any member of Caballo Rojo’s Management. We urge you to read your handbook carefully and keep it in a safe and readily available place for future reference. Sections will be revised as conditions affecting your employment or benefits change.” 820 P.2d 986, 989 (Wyo. 1991).</p>
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<i>Hoff</i>	In the acknowledgement form: “I, Kenneth L. Hoff, understand that the City of Casper-Natrona County Health Department Personnel Rules and Regulations is <i>NOT</i> a contract of employment, but is intended to give guidance and to establish fair and consistent personnel practices affecting employees.” 33 P.3d 99, 103 (Wyo. 2001). The exact disclaimer language contained in the employee handbook is not given.
<i>Jones</i>	“The purpose of this manual is to provide information to all Society [LHHS] employees. It is not a contract of employment nor is it incorporated in any contract of employment between the Society and any employee.” 779 P.2d 783, 787 (Alaska 1989).
<i>Trabing</i>	In Employment Agreement: “Kinko’s and the co-worker understand that the co-worker is employed at will, which means that the co-worker or Kinko’s may terminate the employment at any time, with or without cause and with or without advance notice.” 57 P.3d 1248, 1251 (Wyo. 2002). The specific disclaimer language in the handbook is not quoted in the court’s opinion.

<i>Ferguson</i>	“The contents of this handbook are presented as a matter of information only and are not intended to create, nor are they to be construed to constitute, a contract, expressed or implied, between the Marriott Corporation and Host/Travel Plazas or any of its employees. . . . Host/Travel Plazas reserves its rights to modify, change, disregard, suspend or cancel at any time without written or verbal notice all or any party of the handbook’s contents as circumstances may require.” 757 N.E.2d 267, 269-70 n.4, n.5 (Mass. App. Ct. 2001).
<i>Abel</i>	“The policies and procedures established and set forth in this manual provide guidelines for the County Engineer, Supervisors, and employees during the course of their employment with the Auglaize County Engineer’s Department. However, nothing herein is intended to, nor shall it be construed or interpreted, so as to create contractual or vested rights for employees regarding employment benefits, policies, procedures or any other provisions of this manual. Nothing herein shall be construed as creating an obligation on the party of the County Engineer to employ the employee for a particular length of time.” 276 F. Supp. 2d 724, 742 (N.D. Ohio 2003).

<i>Austin</i>	“This Handbook for Howard University staff employees . . . is a policy statement intended to promote a better understanding of what staff employees can expect from the University and what the University can expect from them in return. The provisions delineated in this Handbook are not applicable to employees who are covered by the Collective Bargaining contracts, unless they are incorporated by reference in the respective contracts. This Handbook supercedes [sic] all previous Howard University Employee Handbooks for non-faculty staff and is subject to revision(s) as needed. <i>This document is not intended to be construed as a contract.</i> ” 267 F. Supp. 2d 22, 26 (D.C. Dist. Ct. 2003).
<i>Bickley</i>	On the Employment Application: “[E]mployment is at-will and can be terminated by either party with or without notice, at any time for any reasons or no reason.” 282 F. Supp. 2d 631, 641 (N.D. Ohio 2003). In the Handbook: “Nothing in this folder is to be construed as constituting the terms of an employment contract.” 282 F. Supp. 2d 631, 641 (N.D. Ohio 2003).

<i>Strass</i>	“This Personnel Policy Manual is designed to provide each employee with a clear set of guidelines for situations which develop in the workplace. This manual is not a contract, but rather a statement of intention of the Kaiser-Georgetown Community Health Plan, Inc., in matters covered by the policies contained herein.” 744 A.2d 1000, 1012 (D.C. 2000).
<i>Acevedo</i>	“[N]either the contents of this handbook nor any other communications . . . create any type of employment contract. These policies are general guidelines only. . . . Employment with this company is on an at-will basis, which means that the employment relationship may be terminated at any time by you or the company for any reason not expressly prohibited by law.” No. CV00509027, 2001 Conn. Super. LEXIS 3001, at *6 (Conn. Super. Ct. Oct. 18, 2001).