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Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks

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CRAFTING A NEW MEANS OF ANALYSIS FOR WRONGFUL DISCHARGE CLAIMS BASED ON PROMISES IN EMPLOYEE HANDBOOKS

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Abstract: Over the past twenty years, the concept of employment at will has been eroded through exceptions permitting employees to sue employers for wrongful discharge under various theories. One such theory, implied-in-fact contract, grants employees the ability to sue based on promises made in employee handbooks. Although forty-seven states allow such claims, their legal analyses have been murky and varied. The reasons for this ambiguity are twofold. First, courts still feel compelled by the looming presence of employment at will to base exceptions on traditional theories of contract law. Second, the role of disclaimers has not been precisely defined. This Comment clarifies implied-in-fact contract analysis and offers a solution to the above problems. It states the test that the courts actually use in employee handbook claims—the reasonable expectations of the employee—and lays out the main factors to be examined in such a test. It then argues that the reasonable expectations test should be adopted free from the confines of traditional theories of law.

"A man is a worker. If he is not that, he is nothing"
Joseph Conrad

In American society, people often define themselves by the jobs they hold. Thirty years ago, employers could fire employees and destroy this identity on a whim, with little worry about legal ramifications. Today, the law affords employees a greater degree of protection. Judges have fashioned the common law suit of wrongful discharge to provide terminated employees with recourse when they are fired under certain circumstances.[1] For example, employers cannot lawfully make promises of job security to employees and then fire them in violation of those promises.[2]

Recently, Washington has experienced a deluge of wrongful discharge claims based upon promises made in employee handbooks.[3] Although the number of claims has rapidly increased, the law governing such claims has not developed as quickly. The legal analysis employed by courts in wrongful discharge claims based on employee handbooks

1. *See, e.g.*, Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 226, 685 P.2d 1081, 1086 (1984).

2. *Id.*

3. This Comment uses Washington to exemplify the unsettled state of law. However, the same problems exist in many jurisdictions. The solutions proposed are in need of adoption across the United States.

remains murky and unsettled. This state of law has produced results lacking uniformity and predictability. This Comment proposes to clarify implied-in-fact contract analysis and guide courts in the future.

Part I of this Comment briefly examines the employment at will background to employee handbook claims. Part II traces the development of employee handbook claims in Washington. Part III scrutinizes the current analyses used in employee handbook claims and discusses the main problems with the present methods. Part IV offers a new method to solve the current problems and clarify the courts' reasoning. Lastly, part V argues that adoption of the proposed solution is both necessary and justified in light of the current status of employment at will and wrongful discharge law.

I. THE DEVELOPMENT AND DISMANTLING OF EMPLOYMENT AT WILL

A. History of the Doctrine

The status of the legal relationship between employer and employee has changed steadily over the past century. During the early nineteenth century, the law presumed annual employment terms.[4] This concept, like much early American law, was borrowed from England and based upon the needs of a mostly agrarian society.[5] Under this system, the law ensured that landowners would not lose farm laborers during the busy harvest season, while also providing laborers with the security of knowing that their jobs would not be in jeopardy during periods of decreased agricultural activity.[6] This system was well adapted to colonial America. As America entered the age of the Industrial Revolution, however, employment relationships changed and the old agrarian system was no longer suited to the needs of a quickly developing country.

Out of this period of rapid change and laissez-faire economics came the concept of employment at will. American professor H.G. Wood first proffered this concept in his treatise published in 1877.[7] Employment at will provides that, absent an express agreement to the contrary,

4. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 120 (1976).

5. *Id.*

6. *Id.* The yearly duration presumption can be traced to the Statute of Laborers, enacted to ensure stability in England during the Middle Ages. *See* Morris D. Forkosch, *A Treatise on Labor Law* 12 (1953); *see also* 1 William Blackstone, *Commentaries* 426.

7. H.G. Wood, *A Treatise on the Law of Master and Servant* (1877).

employment for an indefinite duration is terminable at any time and for any reason by either the employer or the employee.[8] Though commentators have noted that Wood's analysis stated a distinct departure from earlier case law in America,[9] and that the four cases Wood relied upon embraced no such rule,[10] employment at will quickly came to dominate the employer-employee relationship during the late Nineteenth century.[11] At a time of constant development and the creation of new industry, courts believed that employment at will would further economic growth.[12] Employment at will allowed employees to move freely from one job to another during a period when American industry was creating new jobs daily. For the employer, employment at will provided the legal right to terminate the jobs of employees and to replace them with more highly skilled or specialized workers. At the time, employers and employees alike were satisfied.

Over the past twenty years, employment at will has come under a great deal of criticism from both courts and scholars.[13] Employment at will was founded upon the assumption that the employer and employee held equal bargaining positions.[14] In the late twentieth century, this assumption no longer holds true.[15] Increased job specialization, characteristic of twentieth century industry, requires a higher level of

8. *Id.* at 272 (stating 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"). For early examples of American courts applying the employment at will rule, see Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908) and Greer v. Arlington Mills Manufacturing Co., 43 A. 609 (Del. Super. Ct. 1899).

9. Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. Pa. L. Rev. 197, 199 (1990).

10. Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 1.3, at 6 (1984).

11. *See* Pratt, *supra* note 9, at 199.

12. Joseph DeGiuseppe, Jr., *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 Fordham Urb. L.J. 1, 7 (1981).

13. *See, e.g.*, Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 226, 685 P.2d 1081, 1086 (1984); Cleary v. American Airlines, 168 Cal. Rptr. 722, 725 (Ct. App. 1980); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1260, *modified*, 499 A.2d 515 (N.J. 1985); DeGiuseppe, *supra* note 12, at 2; Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1, 5 (1984).

14. Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 Hofstra L. Rev. 365, 368 (1989); *e.g.*, *Thompson*, 102 Wash. 2d at 226, 685 P.2d at 1086.

15. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 Am. Bus. L.J. 467, 470 (1980); Susan F. Marrinan, *Employment at Will: Pandora's Box May Have an Attractive Cover*, 7 Hamline L. Rev. 155, 158–59 (1984).

training and education. This in turn significantly narrows alternative job opportunities.[16]

Despite workers' increased need for job security,[17] employers still retained the power to fire them for any reason, good or bad, or even no reason at all, throughout most of the twentieth century.[18] Prior to the creation of exceptions to employment at will, courts permitted some particularly harsh results. Thirty-year employees were fired days before their pensions vested.[19] Employees were terminated for reporting illegal activities, refusing sexual advances, or reporting for jury duty.[20] Employers were beginning to abuse the system. Having adopted the employment-at-will doctrine, the legal community was slow to correct such abuses. By strictly interpreting employment at will, the courts continued to allow results that were neither fair nor just for wrongfully terminated employees.

B. The Recent Trend Away from Employment at Will

Although employment at will remains the legal cornerstone for workplace relationships, the recent trend has been away from strictly interpreting the doctrine. Some commentators have called for complete abdication of employment at will.[21] Their rationales vary, but typically center on the fact that employees need legal protection to counter the unequal bargaining position that employers hold over employees.[22] Although the concept of employment at will has been eroded considerably, the American legal community has proved reluctant to dismiss it entirely. Instead, both Congress[23] and the judiciary[24] have

16. Pratt, *supra* note 9, at 201.

17. *Id.*; Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1405 (1967).

18. This absolute view of employment at will arguably differs from the rule as originally enunciated by Wood. The Wood rule only provided that employment for an indefinite duration was presumed to be at will, but was potentially rebuttable. Wood, *supra* note 7. This harsher approach that employment at will was the rule rather than a presumption was later developed by American courts. *See, e.g.*, Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908).

19. *See* Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 93 (N.Y. 1983) (Meyer, J., dissenting in part).

20. DeGiuseppe, *supra* note 12, at 9–10; Pratt, *supra* note 9, at 200.

21. Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 Wash. L. Rev. 719 (1991).

22. *See id.* at 720.

23. Examples of legislatively-created exceptions to employment at will include the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994), and the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1994). State

created exceptions to the doctrine in an attempt to alleviate some of its harsh effects.

1. Legislative Enactments

Legislative exceptions were the first to breach the employment-at-will doctrine. These enactments were largely due to a great deal of commentary directed against the doctrine.[25] One of the earliest pieces of legislation was the National Labor Relations Act, which prohibits discriminatory acts committed by employers in an effort to discourage membership in unions.[26] Title VII of the Civil Rights Act of 1964, one of the best known legislative exceptions to employment at will, makes it unlawful to discharge any individual because of that individual's race, color, religion, sex or national origin.[27] The Federal Age Discrimination in Employment Act protects persons between the ages of forty and seventy from discharge because of age.[28] State legislatures joined in the effort to scale back employment at will by extending protection against discrimination in employment to other classes of workers as well.[29]

2. Judicially Created Exceptions—Wrongful Discharge Suits

Legislative bodies are no longer alone in their efforts to level the playing field in the workplace. Over the past twenty years, courts have begun to recognize claims for wrongful discharge brought by discharged employees.[30] These claims, along with legislative enactments, have successfully weakened strict interpretation of the employment-at-will doctrine. Wrongful discharge claims are based on three major theories:

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legislatures have similarly enacted such statutes. *See* Chagares, *supra* note 14, at 368–69. A detailed discussion of such legislatively-created exceptions is beyond the scope of this Comment.

24. *See infra* notes 30–43 and accompanying text.

25. *See, e.g.*, Alfred W. Blumrosen, *United States Report*, 18 Rutgers L. Rev. 428 (1964),Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 Va. L. Rev. 481 (1976).

26. 29 U.S.C. §§ 151–169 (1994).

27. 42 U.S.C. § 2000e-2 (1994).

28. 29 U.S.C. §§ 621–634 (1994).

29. 8A Bureau of Nat'l Affairs, *Fair Empl. Practice. Manual* § 451, at 101–05 (1993). Examples of such further protection include prohibitions of discrimination based on handicapped or marital status. *See, e.g.*, Wash. Rev. Code § 49.60.180(1) (1996).

30. Chagares, *supra* note 14, at 369. *See generally* Sami M. Abbasi et al., *Employment at Will: An Eroding Concept in Employment Relationships*, 38 Lab. L.J. 21 (1987).

public policy, breach of the covenant of good faith and fair dealing, and implied-in-fact contract limitations.

a. Public Policy Exception and Implied Covenant of Good Faith and Fair Dealing

By permitting wrongful discharge claims based on either a public policy exception or a breach of the covenant of good faith and fair dealing,[31] the courts have illustrated their willingness to stray from employment at will under limited circumstances. The public policy exception provides for potential tort liability if employers fire employees for a reason contrary to a clearly defined public policy.[32] *Thompson v. St. Regis Paper Company*[33] was the first case to establish this exception in Washington. Presently, forty-three states permit suits based on the public policy exception.[34]

The implied covenant of good faith and fair dealing, an exception not recognized in Washington, limits an employer's right to discharge an employee when the employer breaches an implied-in-law covenant of good faith and fair dealing in the employment contract.[35] Wrongful discharge claims based on the implied covenant of good faith and fair dealing are not as widely accepted as the public policy exception, but still diminish the strength of employment at will in nine states.[36]

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31. A closer examination of these theories is beyond the scope of this Comment. They are mentioned to illustrate the number of encroachments on the employment-at-will doctrine.

32. The first case in the nation to establish the public policy exception to employment at will was Petermann v. International Brotherhood of Teamsters Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

33. 102 Wash. 2d 219, 226, 685 P.2d 1081, 1086 (1984).

34. Alabama, *see* Williams v. Killough, 474 So. 2d 680 (Ala. 1985), Georgia, *see* Evans v. Bibb Co., 342 S.E.2d 484 (Ga. Ct. App. 1986), Ohio, *see* Phung v. Waste Management, Inc., 491 N.E.2d 1114 (Ohio 1986), and Wyoming, *see* Allen v. Safeway Stores, 699 P.2d 277 (Wyo. 1985), do not recognize claims based on the public policy exception. Delaware, Maine, and Utah are unresolved.

35. *See, e.g.*, Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977). In such cases, general terms in an employment handbook promising fair or good treatment create the alleged obligation.

36. Nine states allow claims based on the implied covenant of good faith and fair dealing. *See* Hoffman-La Roche v. Campbell, 512 So. 2d 725 (Ala. 1987); Mitford v. LASALA, 666 P.2d 1000 (Alaska 1983); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); Cleary v. American Airlines, 168 Cal. Rptr. 722 (Ct. App. 1980); Magnan v. Anaconda Indus., 479 A.2d 781 (Conn. 1984); *Fortune*, 364 N.E.2d at 1251; Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982); K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). Delaware, Iowa, Mississippi, *see* Robinson v. Board of Trustees of E. Cent. Junior College, 477 So. 2d 1352 (Miss. 1985), Oregon, Utah, Vermont, and Wyoming, *see* Rompf v. John

b. *Implied-in-Fact Contract*

The third branch of liability in wrongful discharge claims is the implied-in-fact contract theory of recovery. This exception to employment at will discourages employers from making empty promises to employees.[37] When such empty promises are made, employees may continue to work under expectations of certain conduct on their employers' part, potentially forgoing other job opportunities in reliance on those expectations.[38] Courts allowing implied-in-fact contract claims find that employers should not be allowed to induce workers to remain in their present positions with promises of certain treatment and then break those promises using employment at will as a safety net.[39] This theory of recovery permits promissory terms communicated from employer to employee to alter the at-will status of employment. Such communications may come in the form of pre-employment statements made in negotiations,[40] oral assurances made while employed,[41] or employee handbooks and manuals distributed to employees.[42]

II. IMPLIED-IN-FACT CONTRACT SUITS BASED UPON EMPLOYEE HANDBOOKS IN WASHINGTON

Employee handbooks are the most common source of implied-in-fact contract claims,[43] and also the type of claim that has led to the current confused state of the law. This section summarizes the main Washington

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Q. Hammons Hotels Inc., 685 P.2d 25 (Wyo. 1984), are either unresolved or have not specifically dealt with the issue.

37. Chagares, *supra* note 14, at 372–73.

38. *Id.*

39. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 890 (Mich. 1980); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 229–30, 685 P.2d 1081, 1087–88 (1984) (en banc).

40. *See, e.g.*, Integon Life Ins. v. Vandegrift, 669 S.W.2d 492 (Ark. Ct. App. 1984).

41. *See, e.g.*, Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982) (enforcing generally oral statements to employees they can only be terminated for cause); Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983) (enforcing oral lifetime employment contract); Terrio v. Millinocket Community Hosp., 379 A.2d 135 (Me. 1977) (enforcing oral promise of employment for definite period of time).

42. Chagares, *supra* note 14, at 373; *see, e.g.*, Leikvold v. Valley View Community Hosp., 688 P.2d 170 (Ariz. 1984); Duldulao v. Saint Mary Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987); *Thompson*, 102 Wash. 2d 219, 685 P.2d 1081; Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985).

43. Chagares, *supra* note 14, at 373 n.69.

case in the area and provides an overview of the analysis required by such claims.[44]

A. Thompson v. St. Regis Paper Co.

In *Thompson v. St. Regis Paper Co.*,[45] the Washington Supreme Court first recognized a wrongful discharge claim based upon implied-in-fact contract theory. The facts were typical of implied-in-fact contract claims. During his employment with the St. Regis Paper Company, Thompson was promoted several times and awarded regular bonuses under an incentive plan.[46] After seventeen years, however, Thompson was asked to resign. The only reason Thompson was given in explanation of his termination was that he "had stepped on somebody's toes."[47] In his complaint, Thompson alleged that certain provisions of an employee handbook, together with his good employment record, created an implied contract that he would be terminated only for cause.[48] The court examined two portions of the employee handbook. One provision promised to treat employees in a fair, just, and reasonable manner.[49] The second pertinent section of the employee handbook provided for a probationary period during which employees could be terminated.[50]

The trial court found no implied contract.[51] The court determined that Thompson was terminable at will and dismissed the suit.[52] According to the trial court, the two sections of the employee handbook were insufficient to create an implied contract, and Thompson could be terminated at any time for any reason under traditional employment at will theory.

The Washington Supreme Court granted direct review and reversed the superior court's summary judgment dismissal.[53] In finding that Thompson had a potentially valid claim, the Washington Supreme Court followed other cases recognizing the "employee handbook" exception.

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44. This Comment uses Washington to exemplify the confused state of law regarding implied-in-fact contract claims, but the same problems exist in jurisdictions across the United States.

45. 102 Wash. 2d 219, 685 P.2d 1081.

46. *Id.* at 221, 685 P.2d at 1083.

47. *Id.*

48. *Id.* at 222, 685 P.2d at 1084.

49. *Id.*

50. *Id.*

51. *Id.* at 223, 685 P.2d at 1084.

52. *Id.*

53. *Id.* at 221, 685 P.2d at 1083.

Quoting one of the seminal employee handbook cases, *Toussaint v. Blue Cross and Blue Shield*,[54] the *Thompson* court explained that, "where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. . . . The employer has then created a situation 'instinct with an obligation.'"[55] According to the court, the "situation" created by the employer was an implied-in-fact contract, binding the employer to whatever it promised in the handbook.[56]

B. The Multi-Layered Analytical Framework

The type of claim outlined in *Thompson* seems simple and straightforward at first glance, but such claims are exceedingly complex. This is due in large part to the several layers of legal doctrine that courts must examine in wrongful discharge suits under the implied-in-fact contract theory. The many layers oscillate in their effect: one provides a clear-cut rule in the employer's favor and the next permits the employee's suit. How to reconcile the legal layers is a question that is unanswered.

The first layer in a wrongful discharge analysis involves the employment-at-will doctrine. When a private employer hires an employee in Washington, employment at will forms the legal foundation of the relationship, absent an express agreement to the contrary.[57] Hence, the relationship is terminable at will by either the employer or the employee at any time and for any reason.

The second layer of analysis involves employee handbooks. Under the rule set forth in *Thompson*, if the employer issues an employee handbook with promises of particular treatment in certain situations, those promises become enforceable components of the employment relationship.[58] The employer is no longer protected by the umbrella of employment at will and may be susceptible to a wrongful discharge suit for a termination contrary to promises made in the handbook.

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54. 292 N.W.2d 880 (Mich. 1980).

55. *Thompson*, 102 Wash. 2d at 229–30, 685 P.2d at 1087–88 (quoting *Toussaint*, 292 N.W.2d at 892).

56. *Id.*

57. Roberts v. ARCO, 88 Wash. 2d 887, 894, 568 P.2d 764, 768 (1977); Lasser v. Grunbaum Bros. Furniture Co., 46 Wash. 2d 408, 410, 281 P.2d 832, 833 (1955).

58. *Thompson*, 102 Wash. 2d at 230, 685 P.2d at 1088.

The third layer, also originating in the *Thompson* decision, involves disclaimers. In dicta, the Washington Supreme Court stated that even if an employer issues an employee handbook with promises of specific treatment in specific circumstances, it may avoid an implied-in-fact contract obligation with a disclaimer.[59] The court explained that if the employer sufficiently states its intent not to be bound, courts should interpret otherwise binding provisions in the handbook as general statements of policy rather than promises of specific treatment.[60] The disclaimer tips the scale back in favor of the employer, possibly leaving the employee with no recourse.

Recent cases have created yet a fourth layer that permits employees to bind the employer even if a valid disclaimer exists. Several jurisdictions, including Washington,[61] now permit an employer's inconsistent representations to negate the effect of a disclaimer.[62] Statements that contradict the disclaimer, such as oral assurances or mandatory language in an employee handbook, can invalidate the disclaimer's legal effect. Once the disclaimer is invalidated, provisions of the handbook may once again form the basis of an implied-in-fact contract obligation.[63]

Though *Thompson* and other cases provide a framework for working through an implied-in-fact contract claim, they leave several questions unanswered. For example: What types of statements in an employee handbook will bind an employer? What exactly is a valid disclaimer? What types of subsequent employer conduct will negate a valid disclaimer? These questions are difficult to answer when examined independently. When looked at together, in conjunction with a single claim, they cause utter confusion.

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59. *Id.* at 230–31, 685 P.2d at 1088.

60. *Id.*

61. *See* Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 532, 826 P.2d 664, 674 (1992). There, the court permitted a claim to proceed even though a valid disclaimer existed. The court used statements in a memorandum issued by the employer, subsequent to distribution of the employee handbook, to override the disclaimer. The memorandum listed specific acts of employee conduct that were sufficient cause for discharge without notice and stated that "in all other instances of misconduct, at least one warning, shall be given." *Id.* at 515, 826 P.2d at 666. The employee was fired without warning for a reason not on the list.

62. For examples of courts outside of Washington permitting inconsistent representations to negate disclaimers, see Zaccardi v. Zale Corp., 856 F.2d 1473 (10th Cir. 1988) and Johnson v. NASCA, 802 P.2d 1294 (Okla. 1990).

63. *Swanson*, 118 Wash. 2d at 532, 826 P.2d at 674.

III. PROBLEMS WITH COURTS' ANALYSIS IN WRONGFUL DISCHARGE CLAIMS UNDER IMPLIED-IN-FACT CONTRACT THEORY

A. Forcing Implied-in-Fact Contract Suits into Traditional Legal Theories

Though an overwhelming majority of courts recognize implied-in-fact contract claims,[64] dispute exists among and within jurisdictions as to the appropriate theory for recovery. Judges, attorneys, and commentators rely on two main theories: unilateral contract and equitable principles. Case law contains examples of each theory and reflects the division of opinion.

1. Unilateral Contract

In *Woolley v. Hoffmann-La Roche, Inc.*,[65] the New Jersey Supreme Court relied on unilateral contract theory as the basis for analyzing and permitting a wrongful discharge claim under the implied-in-fact contract theory. The employee, Richard Woolley, had received a personnel policy manual shortly after beginning work for Hoffman-La Roche, Inc.[66] The manual set forth company policy regarding employee termination, listing possible causes for discharge, and detailing the procedure.[67] The employer terminated Woolley without cause and without following the handbook procedures.[68]

Woolley sued Hoffman-La Roche, alleging breach of contract.[69] He argued that the express and implied promises contained in the employee handbook provided grounds for an enforceable contract.[70] The trial court

64. Only six states do not permit implied-in-fact contract suits: Delaware, *see* Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Florida, *see* Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Georgia, *see* Garmon v. Group Health, Inc., 359 S.E.2d 450 (Ga. Ct. App. 1987); Indiana, *see* Shaw v. S.S. Kresge Co., 328 N.E.2d 775 (Ind. Ct. App. 1975); Missouri, *see* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988); and North Carolina, *see* Harris v. Duke Power Co., 356 S.E..2d 357 (N.C. 1987). Three states are either unresolved or have not dealt with the issue: New Hampshire, Rhode Island, *see* Roy v. Woonsocket Inst. for Sav., 525 A.2d 915 (R.I. 1987), and Louisiana.

65. 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985).

66. *Id.* at 1258.

67. *Id.* at 1271–73.

68. *Id.* at 1258.

69. *Id.*

70. *Id.*

granted the defendant's motion for summary judgment and dismissed the complaint, finding that Hoffman-La Roche was not contractually bound by materials in its handbook.[71] The New Jersey Supreme Court reversed. In arriving at its decision, the court found present the elements of offer, acceptance, and consideration.[72] The employee's reasonable expectation of certain behavior on the employer's part was the key element to the court's recognition of an offer of a unilateral contract.[73] The court found acceptance through the employee's performing once on the job.[74] Finally, the court concluded that the employee provided consideration by continuing to work when he was not bound to do so.[75]

Courts and commentators have pointed out several problems that arise when courts attempt to use unilateral contract law as the basis on which to analyze implied-in-fact wrongful discharge claims.[76] In characterizing an employee handbook as a unilateral expression of general company policy and procedure as opposed to binding, contractual language, courts and commentators have noted that the terms are not bargained for by the parties, and no meeting of the minds occurs.[77] Hence, two of the essential elements to a contract are lacking.[78]

Seemingly mindful of its departure from not only employment law but also existing contract law, the *Woolley* court relied heavily on policy considerations such as basic honesty and fairness. Although the court stated these considerations clearly in its opinion, its legal analysis relied on the law of contracts.[79] Regrettably, the court never addressed the missing contract elements of mutuality and bargained for exchange. Thus, the extent to which the decision wholly relies on contract law is unclear.

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71. *Id.*

72. *Id.* at 1264–67.

73. *Id.* at 1265–66.

74. *Id. at* 1267.

75. *Id.*

76. *See* Michael A. Chagares, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 Seton Hall L. Rev 465 (1986); *see also* Johnson v. National Beef Packing Co., 551 P.2d 779, 781–82 (Kan. 1976).

77. *See Johnson*, 551 P.2d at 781–82; Chagares, *supra* note 76.

78. See *Restatement (Second) of Contracts* § 17 (1981) for the requirement of bargained for exchange. Mutuality is a common law requirement developed by the courts. *See* Dawson et al., *Cases and Comment on Contracts* 328 (6th ed. 1993).

79. *Woolley*, 491 A.2d at 1264–67.

2. *Equitable Principles*

Although *Woolley* is the seminal case interpreting implied-in-fact contract wrongful discharge claims under unilateral contract law, *Toussaint v. Blue Cross and Blue Shield*[80] is considered the benchmark for application of the equitable principles doctrine. In *Toussaint*, an employee had been given a personnel policy manual containing a statement that the employer would terminate its employees "for just cause only."[81] After being fired without cause, the former employee brought suit based upon the language contained in the handbook.[82] The Michigan Supreme Court ignored traditional contract requirements such as consideration and bargained-for exchange[83] and instead rested its decision upon general equitable principles. The court stated that the handbook provision must be enforced to avoid an "unfair" result.[84] The court held it would be inequitable to allow an employer to gain from an "orderly, cooperative and loyal work force" and then ignore its promises to those employees.[85] As with the *Woolley* decision, the employee's legitimate expectations were the crux of the analysis.[86] The court found the unfair result would inhere only where an employee had reasonable expectations of certain conduct on the part of the employer.[87]

There are several flaws in an analysis based on whether or not the termination decision is "equitable" or "unfair." An analysis based only on fairness is arbitrary and leaves too much room for argument and manipulation. The uncertainty in claims based on equitable principles leaves attorneys and judges guessing as to how such claims should proceed. This leads to results that lack uniformity and causes confusion as to what the law really is. Some courts have specified that the reasonable expectations of the employee should determine what is fair and equitable.[88] However, determining what constitutes reasonable

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80. 292 N.W.2d 880 (Mich. 1980).

81. The handbook stated that the employer's intention was "to provide for the administration of fair, consistent and reasonable corrective discipline," *id.* at 893, and "to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only," *id.* at 884.

82. *Id.* at 883.

83. Richard Wall, *At Will Employment in Washington: A Review of* Thompson v. St. Regis Paper Co. *and its Progeny*, 14 U. Puget. Sound L. Rev. 71, 82 (1990).

84. *Id.*

85. *Id.*

86. The court stated that it was simply enforcing "an employee's legitimate expectations." *Toussaint*, 292 N.W. 2d at 892.

87. *Id.*

88. *Id.*

expectations is as broad a task as ascertaining what is fair when no further guidance is provided. Whereas analyzing claims under unilateral contract theory is too restraining for implied-in-fact contract claims, using equitable principles as a guide is too loose.

B. Confusion About Which Traditional Legal Theory Applies

Woolley and *Toussaint* are based upon two entirely different theories of law. Yet, courts and commentators have cited the two cases interchangeably, as if standing for the same proposition.[89] In a sense, they do stand for the same thing: that an employee may base a wrongful discharge claim upon representations made in an employee handbook under the implied-in-fact contract theory. However, the means used to arrive at this end are entirely different.

Problems have arisen in the Washington courts' attempts to apply implied-in-fact contract limitations to employment at will relationships. Unlike the *Woolley* decision, few opinions clearly spell out whether the court's analysis is based upon a strict interpretation of contract law or equitable principles. This lack of clarity has led to the intermingling of different theories in many instances.[90] Courts will frequently acknowledge one theory as the rule and then apply another in its analysis.[91] Such ambiguity leaves attorneys and subsequent courts guessing as to which theory governs implied-in-fact contract claims.

Thompson demonstrates the problems that have arisen due to lack of uniformity in this area. The *Thompson* decision was the first decision in Washington to recognize wrongful discharge claims based upon implied-in-fact contract theory.[92] In *Thompson*, the Washington Supreme Court relied heavily on *Toussaint* in carving out the exception to employment at will. Directly quoting from the *Toussaint* opinion, the court stated:

> [W]here an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an

89. Chagares, *supra* note 76, at 477 ("The *Toussaint* decision has been followed by the majority of jurisdictions. New Jersey recently joined these jurisdictions by recognizing the enforceability of promises in policy manuals through its ruling in *Woolley v. Hoffmann-La Roche, Inc.*") (footnotes omitted).

90. *See, e.g.*, Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984). *Thompson* is an excellent example of a case that seems to rely upon both theories in different parts of the opinion. For a more thorough discussion, see *infra* notes 93–99 and accompanying text.

91. *See, e.g.*, *Thompson*, 102 Wash. 2d at 230, 685 P.2d at 1088.

92. *See supra* notes 45–56 and accompanying text.

> orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. . . . The employer has then created a situation '*instinct with an obligation.*'[93]

The *Toussaint* court used the language quoted above to set up the equitable principles theory. After quoting *Toussaint*, however, the Washington Supreme Court proceeded to establish a test for implied-in-fact contract claims more akin to traditional contract law. The *Thompson* test requires "promises of *specific treatment in specific situations.*"[94] In defining this test, the court used the *Restatement (Second) of Contracts*' definition of a promise.[95] The court then went on to further refine its test by virtually quoting the *Restatement*'s requirements for an offer in a unilateral contract.[96] The *Thompson* court used both the *Toussaint* reasoning and the *Restatement (Second) of Contracts*' definitions of promise and offer to create the rule that sets forth the requirements for a valid suit.

In the aftermath of the *Thompson* decision, Washington appellate courts have struggled to determine the appropriate theory in wrongful discharge suits based on the implied-in-fact contract theory. While some courts read *Thompson* as strictly interpreting contract law,[97] other courts feel it incorporates equitable principles.[98] This result has led to inconsistent applications of the *Thompson* test.[99]

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93. *Thompson*, 102 Wash. 2d at 229–30, 685 P.2d at 1087–88.

94. *Id.* at 230, 685 P.2d at 1088.

95 *Id.*; *see Restatement (Second) of Contracts* § 2 (1981) ("[P]romise is a manifestation of intention *to act or refrain from acting in a specified way*, so made as to justify a promise in understanding a commitment has been made.").

96. *Thompson*, 102 Wash. 2d at 230, 685 P.2d at 1088 ("We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.").

97. Drobny v. Boeing Co., 80 Wash. App. 97, 907 P.2d 299 (1995), uses an analysis closely correlated with contract law. "In the absence of a written policy providing promises of specific treatment in specific situations, oral representations by an employee's supervisor are insufficient to establish an enforceable promise." *Id.* at 107, 907 P.2d at 305.

98. Messerly v. Asamera Minerals, (U.S.) Inc., 55 Wash. App. 811, 815, 780 P.2d 1327, 1330 (1989), has an analysis more akin to equitable considerations. The opinion quotes the language from both *Thompson* and *Toussaint* basing enforceability of an implied-in-fact contract on employers creating atmospheres of job security and fair treatment. *Id.* at 815, 780 P.2d at 1330.

99. Winspear v. Boeing Co., 75 Wash. App. 870, 880 P.2d 1010 (1994), uses a strict contractual analysis in an attempt to follow *Thompson*. Payne v. Sunnyside Community Hospital, 78 Wash. App. 34, 894 P.2d 1379 (1995), also follows *Thompson* but draws from it a test more akin to the equitable considerations doctrine. Wall, *supra* note 83, comments on the difficulty of ascertaining which theory *Thompson* uses.

C. *Mishandling Disclaimers*

Wrongful discharge claims based on the implied-in-fact contract theory have been further clouded by the widespread use of disclaimers and the inconsistent treatment that disclaimers have received. *Thompson* stated that employers may avoid legally binding themselves by statements made in employee handbooks through the use of properly worded and conspicuously located disclaimers.[100] This rule prevails in most jurisdictions.[101] Under strict contractual analysis, disclaimers qualify the offer. A valid disclaimer makes it unreasonable for the employee to interpret the handbook as an expression by one party of its assent to certain definite terms. Similarly, disclaimers nullify claims under the equitable considerations theory by removing an employee's legitimate expectations. When expectations are removed, it is not "unfair" to treat language in employee handbooks as non-binding. On the surface, this creates an unambiguous rule. A valid disclaimer destroys the employee's case, whereas the absence of a valid disclaimer binds the employer to its statements. The confusion arises from three main sources: courts (1) finding the same disclaimer to be valid at one point and invalid at another; (2) using disclaimers as the false crux of a more complicated test; and (3) wrongfully concluding its analysis after examining only the disclaimer.

1. *Finding the Same Disclaimer To Be Valid and Invalid—Confusion Caused by Subsequent Inconsistent Conduct*

The transitory nature of findings regarding the validity of disclaimers causes the first area of confusion. In *Swanson v. Liquid Air Corp.*,[102] the Washington Supreme Court stated in dicta that "an employer's inconsistent representations can negate the effect of a disclaimer."[103] This idea was first posited by Michael A. Chagares in a 1989 article quoted directly by the Washington Supreme Court.[104] In this article, Chagares

100. *Thompson*, 102 Wash. 2d at 231, 685 P.2d at 1088. What constitutes such a disclaimer is another area of law to which commentators have devoted much commentary, but is beyond the scope of this Comment.

101. Patricia M. Lenard, *Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution?*, 15 Fordham Urb. L.J. 533, 550 (1986–87).

102. 118 Wash. 2d 512, 826 P.2d 664 (1992).

103. *Id.* at 532, 826 P.2d at 674.

104. *Id.* (quoting Chagares, *supra* note 14, at 365).

explains that oral assurances or other inconsistent language in an employee handbook may invalidate a disclaimer.[105]

> Examples of statements that have overrun disclaimers to the contrary are detailed grievance or disciplinary procedures to be taken before discharge and exclusive lists of reasons for discharge. Moreover, statements espousing job security, permanent, continuous, or future employment, and statements speaking of salary in specific periodic terms, may be found to override disclaimers defining the employment relationship as terminable at the will of either party.[106]

Chagares further explained that contradictory employment practices by the employer can at times override a disclaimer.[107] The main idea behind such thinking is that disclaimers should not be used as a "get out of jail free card" by the employer. Employers should not be permitted to benefit from increased employee satisfaction by making unenforceable promises of better working conditions and then be permitted to fall back on a disclaimer. Washington decisions have overridden disclaimers through oral representations, consistent employer practices, and inconsistent language within the same handbook.[108]

However, Washington appellate court analysis used in overriding disclaimers has been unclear. The main problem is that courts find the same disclaimer valid at one point in time and invalid at another. The *Payne v. Sunnyside Community Hospital*[109] case aptly illustrates this problem. In *Payne*, the employer had distributed an employee handbook that outlined termination procedures.[110] On the first page of the handbook, the employer had inserted a disclaimer.[111] Contrary to the disclaimer, the termination procedures in the handbook contained language indicating that implementation of the termination policy was

105. Chagares, *supra* note 14, at 392.

106. *Id.* at 392–93 (footnotes omitted).

107. *Id.* at 393.

108. *See* Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 532, 826 P.2d 664, 674 (1992) (discussing and approving all three techniques of invalidating disclaimers).

109. 78 Wash. App. 34, 894 P.2d 1379 (1995).

110. *Id.* at 35–37, 894 P.2d at 1380–81.

111. *Id.* at 37, 894 P.2d at 1381 ("Employees have the right to resign the employment at any time, without notice, *for any reason or no reason.* The [employer] retains a similar right to discontinuation of the employment of any employee.").

mandatory.[112] Further, the employee showed that the employer had acted inconsistently with the disclaimer by telling managers that they needed to follow the termination procedures.[113] Despite these inconsistent representations, the trial court found the disclaimer facially sufficient and granted summary judgment to the employer on the employee's wrongful discharge claim.[114]

On appeal, the appellate court reversed. The appellate court found that the disclaimer was facially valid.[115] However, upon further examination, the court found that the subsequent language in the handbook and oral representations by the employer made the disclaimer ambiguous and hence invalid.[116] Thus, the same disclaimer was found explicitly valid and invalid within the same opinion.[117]

Placing contradictory labels on the same disclaimer obviously can lead to some confusion. If a court finds a disclaimer valid, it should remain valid. Subsequent conduct could override a valid disclaimer, but that would not take away from the fact that it is a valid disclaimer. Following *Payne* and current analysis techniques, courts analyze disclaimers in an ongoing fashion, making any findings about the disclaimer temporary and meaningless. This flexibility and uncertainty as to when, if ever, a disclaimer is valid causes some of the confusion in implied-in-fact contract analysis.

2. *Ending Analysis After Examination of Disclaimers*

Much of the remaining confusion based on disclaimers in implied-in-fact contract claims stems from Washington appellate courts' uncertainty as to when analysis should conclude. A very similar case to *Payne* decided by the same district is illustrative. In *Nelson v. Southland Corp.*,[118] the plaintiff, Roxanne Nelson, sued her employer for wrongful discharge. Nelson claimed that the employer was contractually bound to follow a pre-termination progressive counseling system outlined in an

112. The manual preceded the termination procedures with the wording, "the steps to be followed . . . are as follows" and followed it with "all steps . . . will be used." *Id.* at 36, 894 P.2d at 1381.

113. *Id.* at 36–38, 894 P.2d at 1381–82.

114. *Id.*

115. *Id* at 37, 894 P.2d at 1381.

116. *Id.* at 40, 894 P.2d at 1383.

117. *Id.*

118. 78 Wash. App. 25, 894 P.2d 1385 (1995).

employee handbook before the employer could fire her.[119] Further, Nelson alleged that the disclaimers contained in the handbook were negated by subsequent inconsistent practices by the employer.[120] Specifically, Nelson stated that she and other managers had been told that the progressive counseling system must be followed before all terminations.[121] In defense against the suit, the employer relied upon the validity of the disclaimer. The trial court granted the employer's motion for summary judgment, and the appellate court affirmed.[122] The appellate court found the disclaimer valid and seemingly wanted to end its analysis at that point. The court stated without explanation that "Mrs. Nelson could not rely upon the fact [that the employer] used the procedures in other disciplinary proceedings,"[123] as the plaintiff had been permitted to do in *Payne*. The court attempted to simplify analysis by determining the outcome through a facial examination of the disclaimer.

The *Nelson* court seemed to think that it had performed all that was required for the decision by finding a valid disclaimer,[124] but factors external to the disclaimer clearly played a role in the court's decision. Though the court never fully addressed the issue of consistent employer practices, much discussion was directed to the fact that language used in the handbook was phrased in a non-mandatory fashion. By using "may" as opposed to "shall" in conjunction with implementation of the termination procedures, the integrity of the disclaimer remained intact.[125] The court stated that the outcome was determined solely by the disclaimer, but then belied that statement by analyzing potential inconsistencies to the disclaimer.[126] Like many courts, the *Nelson* court was confused as to where analysis should end and attempted to end it prematurely. Another court following the *Nelson* decision could think

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119. *Id.* at 26–27, 894 P.2d at 1385.

120. *Id.* at 27, 894 P.2d at 1385.

121. *Id.* at 29, 894 P.2d at 1387.

122. *Id.* at 26–27, 894 P.2d at 1385.

123. *Id.* at 33–34, 894 P.2d at 1389. *Contra* Payne v. Sunnyside Community Hosp., 78 Wash. App 34, 36–38, 894 P.2d 1379, 1381–82 (1995).

124. This seems especially apparent from the court's discussion at the end of the opinion where it states its conclusions:

> As a matter of law, by including the disclaimers within the very policies and procedures at issue, Southland provided Mrs. Nelson with reasonable notice it did not intend to be bound by them. In addition, the disclaimers were effective as a matter of law. Mrs. Nelson could not rely upon the fact Southland used the procedures in other disciplinary proceedings.

Nelson, 78 Wash. App at 33–34, 894 P.2d at 1389.

125. *Id.* at 27, 33, 894 P.2d at 1386, 1389.

126. *Id.* at 30–33, 894 P.2d at 1387–89.

that analysis should end after examining the disclaimer. This would contradict the rule established by the Washington Supreme Court in the *Swanson* decision that subsequent employer conduct may invalidate the disclaimer.[127]

Simply by examining the *Nelson* and *Payne* decisions, the confusion over implied-in-fact contract wrongful discharge claims becomes apparent. In *Payne*, the court analyzed the disclaimer in an ongoing fashion. The disclaimer was deemed valid by the court at one point, and then invalid the next. In *Nelson*, the same appellate court ended its examination after finding the disclaimer valid, contradicting the *Swanson* decision. The *Nelson* court's efforts to simplify the analysis only clouded it further. Neither *Payne* nor *Nelson* provides an ideal approach to analyzing implied-in-fact contract claims. Because no Washington Supreme Court case has squarely addressed the issue, appellate courts are unsure as to which approach, if either, is appropriate.

D. *Courts Drawing Fine Lines:* Payne *and* Nelson*—Two Cases Decided by One Word.*

The facts of *Payne* and *Nelson* are strikingly similar. Yet, one employee was permitted to sue, while the other employee's claim was dismissed. The only clear difference in the cases is that one employee handbook stated the employer "may" initiate progressive counseling before discharging employees,[128] and the other handbook used the words "will be used" in reference to its termination procedures.[129] Should cases be distinguishable due to the choice of a single word in a complicated document that most employees do not even read? If so, on what basis?

The only consistency in reasoning between the opinions is an identical statement appearing in both *Payne* and *Nelson*: "the crucial question is whether the employee has a reasonable expectation [of non-employment at will]."[130] In both opinions, this statement stands in isolation, surrounded by muddled analysis. No discussion of reasonable expectations takes place elsewhere in either opinion, and neither decision seems based on this factor. The opinions merely mention the proposition in passing and then proceed to ignore it. The court's logic in *Nelson* was

127. Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 532, 826 P.2d 664, 674 (1992).

128. Payne v. Sunnyside Community Hosp., 78 Wash. App. 34, 36, 894 P.2d 1379, 1381 (1995).

129. *Nelson*, 78 Wash. App. at 27, 894 P.2d at 1386.

130. *Payne*, 78 Wash. App. at 42, 894 P.2d at 1384; *Nelson*, 78 Wash. App. at 32, 894 P.2d at 1388.

that the handbook said "may" in reference to the termination procedures, and the disclaimer was therefore unambiguous and valid. In *Payne*, the handbook stated that the termination procedures "will be used," so the disclaimer lacked sufficient clarity and was invalid. Both of these conclusory statements are confusing and neither seem to directly follow any clear line of reasoning. To clarify its analysis, the *Nelson* court need merely have stated that because the handbook used "may," the employee had no reasonable expectation that the procedures would be followed. In *Payne*, on the other hand, the more mandatory language reasonably raised the employee's expectations that the procedures would be followed, justifying a legal claim. However, the *Payne* and *Nelson* court did not use this reasoning—nor has any other court in Washington.

IV. A NEW ANALYSIS

A. The Reasonable Expectations Test

In all wrongful discharge claims based on implied-in-fact contract theory, the employer's liability should turn on whether or not the employee had reasonable expectations of something other than employment at will. Such claims need not rely upon traditional areas of law. Implied-in-fact contract suits never were entirely governed by traditional strictures anyway—courts ignored some of the traditional legal requirements in allowing the claims.[131] Instead, implied-in-fact contract suits have developed their own law and their own test. That test is the reasonable expectations of the employee. Courts should follow this test as the standard in implied-in-fact contract claims and abandon the fiction of applying traditional theories that do not fit.

1. Removing Uncertainty as to Which Traditional Legal Theory Should Govern

By adopting the reasonable expectations test free from traditional restraints, confusion as to which area of law governs the claims is resolved. Courts and commentators have struggled to place wrongful discharge claims into a specific area of the law, such as unilateral contract or equitable principles. Under either traditional theory of law, the ultimate test for the claim can been reduced to whether or not the discharged employees had the reasonable expectation that their status as employees at will had been altered. If reasonable expectations exist under

131. *See supra* notes 76–79 and accompanying text.

contract law, then courts manipulate the reasoning and find that an offer exists. Hence, unilateral contract theory supports a claim if reasonable expectations are found. In the cases applying the equitable considerations doctrine, the employee's reasonable expectation forms the basis for determining whether or not it would be unfair to treat the employee as employed at will. Thus, the theory of law relied upon to support the claim has become meaningless because the case law has developed identical tests in implied-in-fact contract claims regardless of the underlying theoretical legal basis. This uniformity bolsters the contention that a reasonable expectations test should control.

2. *Forcing Claims into a Traditional Area of Law Is No Longer Justified*

The need to rationalize wrongful discharge claims by basing them on a specific area of traditional law is no longer necessary and only clouds the analysis. Nearly every state agrees that wrongful discharge claims based upon an implied-in-fact contract theory should be permitted.[132] Such widespread acceptance obviates courts' need to lean on the crutch of another area of law to permit such claims. By making claims dependent upon another area of law that does not strictly apply, legal reasoning loses its strength. If courts attempt to lean on a strict interpretation of contract law and a unilateral contract theory, the requirements of a bargained-for agreement and mutuality must be circumvented or ignored, as courts have unnecessarily done for many years now. Basing claims on the ambiguous notion of equitable considerations leaves too much room for argument in an area of law that has been distilled to a test of the employee's reasonable expectations.

Courts should not be required to rationalize claims under a traditional area of law, but instead should simply state that such claims will be permitted and that the test under such claims will be the reasonable expectations of the employee. After such a step is taken, courts must refine a reasonable expectations test.

B. *The Five Factors of the Reasonable Expectations Test*

Determining what factors to examine in a reasonable expectations test is the next step in developing a new analysis.[133] Through numerous cases,

132. *See supra* note 64.

133. The question of whether a judge or jury should analyze the following factors and make the ultimate determination, the subject of much debate in this area, is left to other commentaries.

Washington courts have stressed particular indicators of what makes an employee's expectations reasonable. An examination of the cases reveals that courts have found five factors to be the most prominent:[134]

(1) use or non-use of disclaimers;[135]

(2) use of specific rather than general language;[136]

(3) use of mandatory as opposed to optional language;[137]

(4) whether a pattern of practice has developed; and[138]

(5) whether the employer has made oral or written representations inconsistent with employment at will.[139]

Further, as a threshold question, the employee must show awareness of the handbook language at issue.[140]

1. Disclaimers

The use and attributes of a disclaimer play a primary role in determining the employee's expectations. Courts have established extensive case law indicating how a disclaimer should be analyzed, and such precedent should remain the foundation for determining the effect of a disclaimer. However, in implied-in-fact contract suits, the traditional means of analyzing disclaimers—conspicuousness, location, font size, boldness or color of type, and whether or not it was explicitly pointed out to the party[141]—should be cast through the light of how they affect reasonable expectations.

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134. A sixth factor not mentioned here but emphasized in a few stray cases is the employee's subjective belief. *See, e.g.*, Stewart v. Chevron Chem. Co., 111 Wash. 2d 609, 762 P.2d 1143, 1146 (1988).

135. *See* notes 102–117 and accompanying text.

136. *See, e.g., Thompson*, 102 Wash. 2d 219, 685 P.2d 1081 (requiring use of "specific language" directed at "specific circumstances" and comparing to vague representations promising "fair treatment" that have fallen short).

137. *See* Payne v. Sunnyside Community Hosp., 78 Wash. App. 34, 36, 894 P.2d 1379, 1381 (1995). *Contra* Nelson v. Southland Corp., 78 Wash. App. 25, 33, 894 P.2d 1385, 1389 (1995).

138. *See Payne*, 78 Wash. App. at 36, 894 P.2d at 1381.

139. The employers in *Payne, id.* at 35–36, 894 P.2d at 1380, and Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 514, 826 P.2d 664, 665 (1992), both made such representations.

140. *See* Stewart v. Chevron Chem. Co., 111 Wash. 2d 609, 615, 762 P.2d 1143, 1146 (1988) (employee failed to show he was aware of relevant provision in employee handbook). This subjective test differentiates the reasonable expectations test established in this Comment from that set up in the *Restatement (Second) of Contracts* § 211 (1981).

141. *See, e.g.*, Nettles v. Techplan Corp., 704 F. Supp. 95 (D.S.C. 1988) (contrast in type or color not required when disclaimer is contained in separate paragraph on first page of manual); Bailey v. Perkins Restaurants, Inc., 398 N.W.2d 120 (N.D. 1986) (disclaimer language placed inside box

2. Specific vs. General Language

Courts consistently have found the use of specific language in employee handbooks more likely to bind the employer than vague, general terms. In permitting suit to proceed, the *Thompson* court relied upon a promise of "specific treatment in specific situations."[142] Several appellate courts have followed this lead, some calling it "the test."[143] Suits relying on language using vague general terms consistently have failed.[144] Courts have found promises of "good" or "fair" treatment insufficient as the basis of a claim.[145] Typically, the handbook must spell out that when employees are terminated, they will be entitled to certain, exact procedures. Specifically worded language is more likely to raise an employee's expectations. Hence, the more precisely the handbook states when the employee is entitled to certain treatment and what precisely that treatment is, the stronger the case.

3. Mandatory vs. Optional Language

Though somewhat related to language specificity, this factor more narrowly focuses on the verb used in the manual to indicate how the employer will act. From a broad examination, the *Nelson* and *Payne* cases seem quite similar, yet suit was permitted in *Payne* and not in *Nelson*. The court based its decision, at least in part, upon the fact that one handbook used the wording "will follow," and the other used "may use."[146] When optional language such as "may" is employed, the court found that, absent other factors, the footing for an employee's reasonable expectations is shaky at best.

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immediately after introductory section was conspicuous); Chadwick v. Northwest Airlines, Inc., 33 Wash. App. 297, 654 P.2d 1215 (1982) (one who acknowledges understanding of document cannot claim to have been misled thereby).

142. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984).

143. *See, e.g.*, Drobny v. Boeing Co., 80 Wash. App. 97, 101, 907 P.2d 299, 302 (1995).

144. *Id.*; *Thompson*, 102 Wash. 2d at 228, 685 P.2d at 1087 (specifically disallowing wrongful discharge suits in Washington based on implied covenant of good faith and fair dealing). In such cases, terms in an employment handbook promising fair or good treatment create the alleged obligation. The Washington Supreme Court disallowed such claims because it reasoned that the language relied upon by employees in such suits is too general.

145. *See, e.g.*, Nelson v. Southland Corp., 78 Wash. App. 25, 33, 894 P.2d 1385, 1389 (1995).

146. *See* Payne v. Sunnyside Community Hosp., 78 Wash. App. 34, 36, 894 P.2d 1379, 1381 (1995). *Contra Nelson*, 78 Wash. App. at 33, 894 P.2d at 1389.

The *Nelson* decision attempted to capture this factor by claiming that suit will not arise in the absence of "contractual terms."[147] To the court, "may" was not a contractual term. Relying upon whether or not contractual terms are employed makes little sense in a reasonable expectations analysis. The average employee is unaware of the difference between contractual and non-contractual terms. Because typical employees will not be able to differentiate between the two, their reasonable expectations will not be founded upon such categorical determinations. If a factor does not affect reasonable expectations, it should not be incorporated into the test.

Though the concept of contractual terms may be foreign, an employee is capable of distinguishing mandatory from optional language. Mandatory language raises employee expectations that procedures will be followed, making a claim more justified. By using optional language, the employer keeps reasonable expectations uncertain and strengthens its defense against claims.

4. Pattern of Practice

When an employer develops a pattern of practice regarding employee termination, consistently performing certain procedures in certain situations, employees will likely be reasonable in believing that the practice will be applied to them if they are in the same situation. The *Payne* court stressed this factor.[148] The opinion mentioned that the employer subjected all other terminated employees to the procedures outlined in the handbook.[149] Also strongly indicative of a pattern of practice, the employee in *Payne* was a person with managerial responsibilities who had been told that the procedures must be followed in firing all employees and had followed the procedures accordingly when called upon to do so.[150] These two examples illustrate the most common means of establishing a pattern of practice.

In order for this factor to favor the employee, the pattern must be consistent enough that the employee would be reasonable in thinking that the procedure is employed in all cases.[151] If the promised procedure is not employed in all cases, then the cases where the procedure was lacking

147. *Nelson*, 78 Wash. App. at 33, 894 P.2d at 1389.

148. *Payne*, 78 Wash. App. at 37, 894 P.2d at 1381.

149. *Id.*

150. *Id.*

151. *See, e.g.*, Birge v. Fred Meyer, Inc., 73 Wash. App. 895, 872 P.2d 49 (1994).

must fall into clearly identifiable circumstances that consistently exempt the employer.[152] The employee also must establish awareness of the pattern of practice.[153]

5. *Inconsistent Oral or Written Representations*

An employee's reasonable expectations will be affected when the employer makes representations to the employee inconsistent with the notion that they are employed at will, or consistent with the notion that termination procedures will be followed.[154] Examining this factor in a reasonable expectations analysis prevents employers from making empty promises or inducing employees to work under false pretenses, and then using employment at will as an escape hatch for firing the employee.[155]

The *Payne* and *Swanson* cases are illustrative. The *Payne* decision, reversing summary dismissal of the employee's claim, found that the employer's statement to the employee that termination procedures "had to be followed" strongly favored the employee's case.[156] In *Swanson*, the court relied heavily on a written memo given to all employees in allowing the employee's claim.[157] The memo stated that employees could only be terminated without following certain procedures for a few enumerated reasons.[158] When the employee was fired inconsistently with the memo he sued for wrongful discharge. The Washington Supreme Court used the memo as the main factor in its decision to permit the employee's suit.[159]

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152. Probationary employees are often exempt from procedures mandated by employee handbooks. *See, e.g.*, *Payne*, 78 Wash. App. at 38–39, 894 P.2d at 1382; Nelson v. Southland Corp., 78 Wash. App. 25, 28, 894 P.2d 1379, 1386 (1995).

153. Chagares, *supra* note 14, at 393.

154. *See supra* text accompanying note 106; *accord* Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 532, 826 P.2d 664, 674 (1992).

155. *See supra* text accompanying note 106; *accord Swanson*, 118 Wash. 2d at 532, 826 P.2d at 674.

156. *Payne*, 78 Wash. App. at 37, 894 P.2d at 1381.

157. *Swanson*, 118 Wash. 2d at 532, 826 P.2d at 674. In Swanson, the disclaimer and handbook were clear about employment being at will. *Id.* However, a subsequently distributed memo contradicted the handbook. *Id.*

158. *Id.* at 516, 826 P.2d at 666.

159. *Id.* at 532, 826 P.2d at 674.

V. AN ARGUMENT IN FAVOR OF IMPLEMENTING THE REASONABLE EXPECTATIONS TEST

A. Justifying Escape from Employment at Will and Traditional Areas of Law

Instituting a reasonable expectations test that does not rely on a traditional area of law is a major step away from employment at will. Previously, courts permitted escape from the doctrine only when it could be founded on one of the pillars of American jurisprudence. Dispensing with the fiction of basing wrongful discharge suits under the implied-in-fact contract theory on traditional areas of contract law or equity overturns a system that Washington and other state courts have used for many years. Courts do not take such large steps away from precedent lightly. In the present case, it is a step that would be well justified and that should be taken.

The justifications for employment at will no longer exist in present times. Bargaining positions, growth rates, and turnover rates have changed drastically in the one hundred years since Wood first enunciated the theory. Employment at will was implemented as a rule beneficial to both employers and employees. Today, employers hold a much stronger bargaining position in the workplace, and strict adherence to employment at will permits them to abuse that position.[160] The conditions that spurred the creation of the doctrine are simply gone.

Because the conditions supporting an employment at will rule no longer exist, courts and legislatures have created numerous exceptions to the doctrine, weakening the strength of employment at will as a foundation for American employment law. Between the legislative and the judicial diminishing of employment at will, all that is left of the doctrine is the essential core. Though at one time the concept dominated the legal relationship between employer and employee, dissatisfaction with employment at will has led to diminution of the doctrine to the point where it is the exception rather than the rule in the workplace environment.

Although there is much debate over whether or not employment at will should be done away with entirely,[161] virtually all courts agree that wrongful discharge claims based on implied-in-fact contract theory

160. *See supra* notes 19–20 and accompanying text.

161. *See generally* Peck, *supra* note 21.

should be allowed.[162] Because such a clear consensus exists to allow such claims, courts should no longer feel bound to explain the departure from employment at will or justify it by leaning on a traditional theory of law that does not fit. The reasons for allowing implied-in-fact contract claims have been spelled out and almost universally accepted. Employers should not be allowed to promise employees certain treatment, inducing them to work in a more dedicated, loyal and productive fashion, and then use employment at will as a safety net when breaking those promises.[163] The concept that employers should not be permitted to make empty promises to their employees is one that has been widely accepted in the American legal community.[164] Rationalizing allowance of such claims is no longer necessary.

Implied-in-fact contract claims are founded upon such a strong policy and have been so widely accepted that they should now be permitted to stand on their own. Courts permit such treatment for wrongful discharge claims based upon the public policy exception. The public policy exception, which, like implied-in-fact contract claims, is adhered to in almost every state,[165] does not rely on any traditional area of law but is an area of law unto itself. Implied-in-fact contract claims should be treated in the same fashion.

B. Disclaimer Problems Are Solved

By looking at the disclaimer as one factor in the reasonable expectations analysis, the confusion associated with disclaimers no longer exists. Courts' tendencies to identify the same disclaimer as both valid and invalid pose the first problem. This problem is now solved in that disclaimers can be examined, found either valid or invalid, and remain such. An invalid disclaimer strongly indicates that an employer should be bound by later statements. A valid disclaimer favors the employer's case considerably, but may be invalidated by the other factors in the test. This result permits employers to write disclaimers that help keep employment at will intact, but prevents the inequitable result of a disclaimer permitting an employer to make promises to the employee without being bound.

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162. *See supra* note 64.

163. *See supra* notes 37–42 and accompanying text.

164. *See supra* note 64.

165. *See supra* note 34.

The second area of confusion generated by disclaimers involved the courts' preliminary termination of analysis. This area of confusion also disappears by definition under the new test. Courts will no longer attempt to end analysis after examination of the disclaimer. They must continue to determine how the other four factors may have potentially affected the employee's reasonable expectations.

VI. CONCLUSION

The current means of analyzing wrongful discharge suits based on promises in employee handbooks is unsatisfactory. Confusion as to the area of law into which implied-in-fact contract claims should be forced and how to handle disclaimers has led to a cluttered state of law. The reasonable expectations of the employee have lurked underneath courts' analyses, and should now come to the forefront. The reasonable expectations of the employee, judged by the five factors Washington courts have stressed in implied-in-fact contract cases, should form the basis for the court's decision in employee handbook cases. Doctrinal pigeonholing of exceptions to employment at will into traditional concepts of contract law and equity is no longer necessary due to the nearly universally accepted demise of the strict at-will conception of the employment relationship in recent decades. Making the employee's reasonable expectations the ultimate test will lead to tighter, more straight-forward analysis, benefiting both employees and employers with an increase in certainty and predictability of law.