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Steven M. Wynkoop
Greenville, Columbia, SC

Elizabeth S. Moise
Greenville, Columbia, SC

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EMPLOYEE HANDBOOKS IN SOUTH CAROLINA: THE EMPLOYERS’ DILEMMA

STEVEN M. WYNKOOP*
ELIZABETH SCOTT MOISE**

INTRODUCTION***

The employment-at-will doctrine, which creates the presumption that employment is terminable at the option of either the employer or employee, developed in the United States at the end of the nineteenth century.1 This doctrine originally was adopted to protect employees, who previously stood to forfeit all wages, including those for time actually worked, if they failed to work the entire time for which they were hired.2 Until recently, South Carolina followed this general rule;3 in absence of a written contract provision to the contrary, employees could be terminated at any time for any reason or for no reason.4 Courts

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* Associate, Ogletree, Deakins, Nash, Smoak & Stewart, Greenville, South Carolina. B.A. 1981, Clemson University; J.D. 1984, University of South Carolina School of Law.

** Associate, Nelson, Mullins, Riley & Scarborough, Columbia, South Carolina. B.A. 1975, University of South Carolina; J.D. 1989, University of South Carolina School of Law.

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1. See Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege, 21 Idaho L. Rev. 201, 202 (1985). The employment-at-will doctrine was a departure from earlier Anglo-Saxon law. From the fourteenth to mid-eighteenth century, servants were hired by the year and could not be discharged except for reasonable cause. See id. at 203.

2. See Larson, Why We Should Not Abandon the Presumption that Employment is Terminable At-Will, 23 Idaho L. Rev. 219, 227 (1986-1987).


4. See, e.g., Witte v. Brasington, 125 F. Supp. 784 (E.D.S.C. 1952); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981). In Witte the South Carolina District Court stated that when the employment contract did not specify a definite period, the contract was terminable at will by either party. 125 F. Supp. at 786. This rule applied even if the contract expressly provided for employment "permanently" or "so long as the employee's services shall be properly performed." See Orsini, 219 S.C. at 277, 64 S.E.2d at 879; see also Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979) (obligation of service to be performed does not change employee's at-will status).

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carved out one exception: if the employee gave independent consideration in addition to the performance of services, employment could be terminated only for cause.\(^5\)

In 1987 the South Carolina Supreme Court modified the employment-at-will doctrine by holding that promissory language found in employee manuals or handbooks issued by employers to their employees may obligate employers to act according to those promises.\(^6\) Under this exception, if the employee can satisfy the contractual requirements of offer, acceptance, and consideration, the employer's unilateral pronouncements of personnel policies become binding and modify the terms and conditions of employment.

In addition, one South Carolina District Court judge indicated that an employer may not later modify the contract created by a manual by issuing a revised handbook deleting the discharge provisions unless it shows that the revised handbook also satisfies all requirements of a valid contract.\(^7\) Under that concept, an employer may be required to provide additional consideration to support the modification beyond the employee's returning to work after the employer issues the modified handbook.\(^8\) This portion of the court's decision appears to be an aberration, and it is contrary to subsequent Fourth Circuit law.

As a consequence of the change of law in this area, employers and employees in South Carolina cannot be sure how courts will consider

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5. See Witte, 125 F. Supp. at 786; Orsini, 219 S.C. at 276, 64 S.E.2d at 879. In Orsini the plaintiff asserted that he had given additional consideration because he and his wife moved from Atlanta to Columbia, thereby giving up their jobs, school, church friends, and social affiliation. Id. at 275-76, 64 S.E.2d at 879-80. The court rejected this argument and held that no additional consideration had been given. Id.; see also Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955) (employee's forbearance from pursuing workers' compensation claim was not sufficient consideration to create a contract for permanent employment).

In both Orsini and Witte, the contracts provided for a percentage basis of compensation. Both courts rejected the plaintiff's allegation that this constituted additional compensation:

[The general rule] is followed notwithstanding [that] the contract of employment provides for . . . payment based on a percent of the profits of the business in which the services are being rendered, or for transfer to the employee of specified property or an interest therein if profits in a certain amount are realized.

Witte, 125 F. Supp. at 787; see also Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936) (although the plaintiff gave up plan to engage in the same business as independent dealer and sold his property as a result, he did not give additional consideration).


8. Id. at 1236.
handbooks they adopt. They are not alone, however, as courts throughout the country have faced this issue in recent years, and widely different decisions and reasoning have emerged. A brief look at some of the more influential decisions helps one to understand more clearly how and why the present dilemma arose and what the future may bring in this area.

Currently, the majority of state courts have recognized that an employee may be entitled to certain rights and privileges as a result of certain provisions found in employee handbooks or policies distributed by an employer to its employees. Such decisions, which are becoming increasingly prevalent, represent another means by which courts, as well as legislatures, are attempting to circumvent the long-standing employment-at-will doctrine.

Employers are finding it difficult to understand how courts have taken basic principles of contract law and applied them to employee handbooks, thereby creating a viable exception to the employment-at-will doctrine. Even more confusing is how courts have used disclaimers included in employee handbooks to limit the extent to which handbooks may be interpreted as terms of an employment agreement. Additionally, the manner and method in which the courts determine damages in such cases raise interesting problems that warrant evaluation. This Article will present an overview of the law in employee handbook cases, discuss the issues raised by employer modifications and disclaimers to the handbooks, and discuss damages in such cases.

II. EMPLOYEE HANDBOOKS

The essential elements of a valid contract include offer, acceptance, and bargained-for consideration. Many courts have found that statements of an employer's policies given to employees in an employee handbook create binding unilateral contracts.

_Toussaint v. Blue Cross & Blue Shield_ is generally acknowledged as the first case to recognize a cause of action for violation of a company handbook. In this case the Michigan Supreme Court held that:

(1) [A] provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite," and

(2) [S]uch a provision may become a part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.¹⁰

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10. Id. at 598, 292 N.W.2d at 885.
In *Toussaint* employees inquired about job security when the company hired them. In response, the company told the employees that their jobs were secure as long as they performed well. These oral assurances, according to the court, were reaffirmed by statements in the policy manual indicating that employees would be discharged only for cause. The Michigan Supreme Court, finding that these statements amounted to unilateral contracts, stated that the "just cause" provision of the employee handbook "can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, . . . although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring."\(^{11}\) Under the rule expressed in *Toussaint*, when an employer has provided in its employee handbook that employees are to be terminated only for cause, the employer's decision to terminate the employee for poor performance is subject to judicial review: "The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work."\(^ {12}\)

*Jones v. Central Peninsula General Hospital*\(^ {13}\) is one of the few cases that closely follows *Toussaint*. In *Jones* the plaintiff, an at-will employee, did not receive an employee handbook until several years after the time she was hired. This initial handbook was revised, and the plaintiff received a new handbook several years later which provided that employees would be terminated only for good cause.\(^ {14}\) The Alaska Supreme Court, relying on *Toussaint*, held that employee policy manuals may modify employment-at-will agreements and whether such a manual has modified an at-will employment agreement is a case-by-case question of fact for the jury.\(^ {15}\)

Several courts have criticized *Toussaint* for abandoning traditional contract principles in favor of advancing social policy, thus allowing judicial discretion to be substituted for business discretion when making employment personnel decisions. In *Müller v. Stromberg Carlson Corp.*\(^ {16}\) a Florida appellate court refused to adopt the theory that policy statements by an employer can give rise to an enforceable

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11. *Id.* at 614-15, 292 N.W.2d at 892.
12. *Id.* at 621, 292 N.W.2d at 895.
14. *Id.* at 784-85.
15. *Id.* at 787; see also Gladden v. Arkansas Children's Hosp., 292 Ark. 130, 728 S.W.2d 501 (1987) (recognizing that a hospital manual altered the terms of a nurse's employment and set forth explicit grounds for termination and provided a procedure for termination).
contract without the parties’ explicit mutual agreement. The Muller court sharply criticized Toussaint and stated:

We would have serious reservations as to the advisability of relaxing the requirements of definiteness in employment contracts considering the concomitant uncertainty which would result in employer-employee relationships. A basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships.

In Hoffman-La Roche, Inc. v. Campbell the Alabama Supreme Court in a well-reasoned opinion refused to follow Toussaint. The court noted its reluctance to abandon traditional contract principles and, instead, utilized traditional principles of contract law to formulate guidelines to determine when language in a handbook is sufficient to constitute an offer to create a binding unilateral contract:

First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by issuance of the handbook. . . . Third, the employee must have accepted the offer by retaining employment after he has become generally aware of the offer. His actual performance supplies the necessary consideration.

In Spero v. Lockwood, Inc. the Idaho Supreme Court refused to enforce policy statements in an employee personnel manual that the employer distributed to its employees several years after the plaintiff was hired. The court noted that the manual was never communicated to the plaintiff, that sufficient evidence did not exist to show the plaintiff ever relied on or read the terms of the manual, and that it appeared from the evidence that the plaintiff obtained the manual fortuitously.

In Johnson v. McDonnell Douglas Corp. the Missouri Supreme Court also relied upon traditional contract elements of offer, acceptance, and consideration to hold that the provisions of an employee handbook do not give rise to a contract. The court stated that in this

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17. Id. at 270.
18. Id.
19. 512 So. 2d 725 (Ala. 1987).
20. Id. at 731 n.2.
21. “Whether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration.” Id. at 731 (quoting Pine River State Bank v. Mettille, 333 N.W.2d 622, 625 (Minn. 1983)).
22. Id. at 735.
24. Id. at 75, 721 P.2d at 175.
25. 745 S.W.2d 661 (Mo. 1988).
situation, none of the traditional elements of a contract were present: The employer published its personnel manual for informational purposes only and not as a contractual offer to its employees. The court also noted the general nature of the language in the handbook and that the employer had reserved the right to change the provisions of the handbook.\(^{26}\)

Georgia courts also have refused to recognize a cause of action for violation of an employee handbook. In Lane v. K-Mart Corp.,\(^{27}\) relying on the traditional employment-at-will doctrine, the Georgia Court of Appeals held that in the absence of a definite period of employment in the manual, employment is terminable at the will of either party for any reason or no reason at all.\(^{28}\)

*Pine River State Bank v. Mettille*\(^{29}\) is one of the most frequently cited opinions used to resolve the legal issues presented by employee handbooks. In this case, the defendant filed a counterclaim against the plaintiff bank that had sued the defendant, a former employee, for failure to pay off two bank loans.\(^{30}\) The handbook at issue called for a progressive disciplinary policy consisting of reprimands for the first and second offenses and discharge or suspension for the third offense. The handbook also contained a provision about job security that, in general terms, noted the security of jobs in the banking industry.\(^{31}\) The bank terminated the defendant without following the progressive discharge procedure, however.\(^{32}\) The Minnesota Supreme Court carefully analyzed the elements of the unilateral contract:

Generally speaking, a promise of employment on particular terms of unspecified duration, if in [the] form [of] an offer, and if accepted by the employee, may create a binding unilateral contract. The offer

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26. *Id.* at 662; *see also* Heideck v. Kent Gen. Hosp., 446 A.2d 1095, 1097 (Del. 1982) (employer manual that did not grant to any employee a specific term of employment was a unilateral statement of the employer's policies for the benefit of its employees and did not alter the employee's at-will status); McConnel v. Eastern Air Lines, Inc., 499 So. 2d 68, 69 (Fla. Dist. Ct. App. 1988) ("Unilateral policy statements cannot, without more, give rise to enforceable contract rights.").


28. *Id.* at 113-14, 378 S.E.2d at 137.

29. 333 N.W.2d 622 (Minn. 1983).

30. *Id.* at 625.

31. *Id.* at 625-26. The portion of Pine River State Bank's handbook entitled *Job Security* included the following language:

Employment in the banking industry is very stable. It does not fluctuate up and down sharply in good times and bad, as do many other types of employment. We have no seasonal layoffs and we never hire a lot of people when business is booming only to release them when things are not as active.

32. *Id.* at 626 n.2.
must be definite in form and must be communicated to the offeree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions. An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer.33

The court then held that provisions in an employee handbook may become enforceable only if they meet the requirements of a unilateral contract.34 The court determined that the employer communicated to its employees a progressive disciplinary procedure which established a specific three-step procedure for terminations. Furthermore, the court found that the defendant's continued performance of his job constituted acceptance of this offer.35 The court noted, however, that the job security provision of the handbook was "no more than a general statement of policy."36

In Duldulao v. Saint Mary of Nazareth Hospital Center37 the Illinois Supreme Court addressed for the first time the issue of whether the provisions of an employee handbook could form the basis of a contract between an employer and employee.38 The Illinois Supreme Court, following the reasoning in Pine River, held that if the traditional requirements for contract formation are present, employee handbooks or other policy statements could create enforceable contract rights. The court held that:

First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work constitutes consideration for the promises

33. Id. at 626 (citations omitted).
34. Id. at 627.
35. Id. at 630. The court concluded that a more stable and productive work force constituted the consideration which the bank received. Id.
36. Id.; see also Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 857 (Minn. 1986) (employee handbook that provides for discharge for serious offenses but fails to provide detailed or definite disciplinary procedures does not contain sufficiently definite terms to create a binding unilateral contract); Kulkay v. Allied Cent. Stores, Inc., 398 N.W.2d 673, 676 (Minn. Ct. App. 1986) (employee hired for indefinite term may maintain action of breach of contract if the policy provisions in an employee handbook are not followed, provided the offer is sufficiently definite in form and more than an employer's general statement of policy).
37. 115 Ill. 2d 482, 505 N.E.2d 314 (1987).
38. Id. at 498, 505 N.E.2d at 317.
contained in the statement, and under traditional principles a valid contract is formed.¹⁹

In Continental Air Lines, Inc. v. Keenan⁴⁰ the Colorado Supreme Court set forth similar guidelines to determine when a handbook can create an enforceable contractual obligation. The court held that an employee initially hired as an employee-at-will may be able to enforce the provisions of an employee handbook under general contract principles. If the employee can demonstrate that the company's employee manual constituted an offer on behalf of the employer to the employee and can establish that the employee's initial or continued employment constituted acceptance of and consideration for the offer, then the handbook justifiably may give rise to contractual rights.⁴¹

The court also held that an employee could enforce the provisions of an employee handbook under a promissory estoppel theory. Specifically, if the employee "can demonstrate that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures," then a cause of action may lie.⁴²

Similarly, the Ohio Supreme Court relied upon promissory estoppel principles in Mers v. Dispatch Printing Co.⁴³ In Mers the plaintiff contended that he was discharged without good cause, in violation of the provisions in the defendant's employee handbook and contrary to the oral representations made to the plaintiff by the defendant's agents.⁴⁴ The court held that the facts and circumstances "including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact" may be considered by the trier of fact in order to determine the explicit and implicit terms of the agreement between the parties.⁴⁵

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³⁹. Id. at 490, 505 N.E.2d at 318.
⁴⁰. 731 P.2d 708 (Colo. 1987).
⁴¹. Id. at 711.
⁴². Id. at 712; see also Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 105, 483 N.E.2d 150, 155 (1985) ("Where appropriate, the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements.").
⁴³. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).
⁴⁴. Id. at 101, 483 N.E.2d at 152.
⁴⁵. Id. at 104, 483 N.E.2d at 154; see also Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984) (en banc) ("Whether any particular personnel manual modifies any particular employment-at-will relationship and becomes part of the particular employment contract is a question of fact. Evidence relevant to this factual decision includes the language used in the personnel manual as well as the
The Washington Supreme Court has held that if an employer creates an "atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship."\(^{46}\)

III. Modifications and Disclaimers

Many jurisdictions have, in one form or another, recognized that provisions in employee handbooks may become legally binding. Whether an employer can unilaterally modify the handbook to provide for employment-at-will, however, remains unclear. One of the most intriguing decisions on this subject is a South Carolina District Court opinion, \textit{Toth v. Square D Co.}\(^{47}\) In \textit{Toth} several laid-off employees brought a breach of contract action against the employer alleging that the employer had failed to follow the terms of its employee handbook in administering the layoffs. The employer moved for summary judgment against the plaintiffs discharged after July 1, 1986, the date on which the employer added the following revision to its handbook: "This booklet is not intended to create any contractual rights in favor of the employee or Company. The Company reserves the right to change the terms of this booklet at any time."\(^{48}\)

All of the laid-off employees admitted that they received a revised handbook and signed an acknowledgment evidencing their receipt of the revision.\(^{49}\) Nevertheless, the court held that a unilateral contract based on an employee handbook must be comprised of the essential elements of any contract, including mutual assent to be bound, which is usually demonstrated by an offer and acceptance of that offer in exchange for valuable consideration.\(^{50}\) The court first stated that the

\begin{itemize}
  \item employer's course of conduct . . . .
\end{itemize}

46. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984) (en banc) (emphasis in original) (language in an employer's policy and procedural guide that reflects that employees would be treated fairly, establishes employer evaluation procedures, and states promotions would come from within the company, does not establish an implied contract that employee would be terminated only for cause). \textit{Id.} at 224, 685 P.2d at 1085.


49. \textit{Id.} The acknowledgement stated: "This will acknowledge receipt of Square D's Employee Handbook as revised on July 1, 1986. I recognize it is my responsibility to read the handbook and understand the policies and procedures set forth in it." \textit{Id.} (quoting from Square D Company's handbook, \textit{Salaried Employee Handbook}).

50. \textit{Id.} at 1235. The court strictly adhered to traditionally recognized principles of
plaintiffs had not received any new consideration in return for the modification of the employee handbook. The court further held that whether the plaintiffs accepted the terms of the handbook by continuing to work for the employer after receiving the disclaimer was a question of fact for the jury to decide.51

Prior to Toth, the South Carolina Supreme Court in Small v. Springs Industries, Inc. (Springs I),52 had recognized that provisions in an employee handbook could create enforceable contract rights. In Springs I the court held that a handbook created a unilateral contract and that an employer’s promise or offer constituted an employment agreement. The court further stated that an employee’s “action or forbearance in reliance on [the employer’s] promise was sufficient consideration to make the promise legally binding,” noting that under South Carolina law, at-will employment constitutes sufficient consideration to support an employment contract.53 Following the reasoning in Springs I, when an employer modifies its handbook to provide for employment-at-will, subsequent job performance by the employee will serve as sufficient consideration to support the contract modification.54 Accordingly, the Toth court’s determination that a jury should decide whether an employee’s continued work performance is valid consideration for the modification appears inconsistent with the Springs I holding.55

Conkwright v. Westinghouse Electric Corp.,56 is a recent decision of the Fourth Circuit Court of Appeals, which, contrary to Toth, holds that an employee’s continued work after the modification of an em-

contract formation in order to prevent unilateral modifications of employment contracts. The court felt that such modifications would enable employers to circumvent the safeguards established by the South Carolina Supreme Court in Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). 712 F. Supp. at 1235. 51. Toth, 712 F. Supp. at 1236. 52. 292 S.C. 481, 357 S.E.2d 452 (1987). 53. Id. at 484, 357 S.E.2d at 454. 54. The Springs I court stated: If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document. Id. at 485, 357 S.E.2d at 455 (emphasis added). 55. See Allan v. Sunbelt Coca-Cola Bottling Co., 4 I.E.R. (BNA) 1453, 1457 (S.C. Ct. C.P. 1989) (employee’s returning to work after the inclusion of disclaimers in an employee handbook to ensure employment-at-will constitutes sufficient consideration and acceptance of the modification of existing policies); see also Blankenship v. South Carolina Elec. & Gas Co., 5 I.E.R. (BNA) 930, 933 (S.C. Ct. C.P. 1990) (employee continuing to work after handbook had been modified to include a random drug testing policy is sufficient consideration to enforce the modification of existing policies). 56. 933 F.2d 231 (4th Cir. 1991).
ployee handbook is sufficient consideration to enforce an employee handbook issued after hire. In this case, the plaintiff filed suit against the employer for breach of an implied at-will contract, basing his claim upon Westinghouse's employee handbook that was in effect at the time the plaintiff began working there. After the plaintiff was hired, Westinghouse amended the handbook to state expressly that the handbook shall not be construed by employees to constitute the terms of a contract. The plaintiff contended that since the disclaimer was added to the manual after he was hired, it did not apply to him.

The Fourth Circuit held that the plaintiff's continuing to work after the modification of the handbook constituted sufficient consideration to enforce the disclaimer. In so holding, the Fourth Circuit explained that:

This view comports with the expectations of employees and employers. All employees expect to be covered by the personnel policies of the company in existence at the time of their current work, not when they were hired 20 years ago. Moreover, an employer expects to treat all its employees according to the same basic benefit rules, and not apply a hodgepodge of rules based on the starting date of the employee.

Jones v. Central Peninsula General Hospital, like Toth, is one of the few cases in which the court found that a subsequent modification to an employee handbook may be ineffective. In Jones the employer initially hired the plaintiff in 1971 as a registered nurse. Several years later, the employer distributed a personnel manual that provided termination for cause and a grievance procedure. In 1978 the employer issued a second manual that exempted supervisory employees from the grievance procedure, but provided that nonprobationary employees would be terminated only for cause. The second manual also included a disclaimer stating that the manual was not a contract of employment between the employee and employer. The court held that the one-sentence disclaimer followed by eighty-five pages of policies and regulations "does not unambiguously and conspicuously inform the employee that the manual is not part of the employee's contract of employment." The court also noted that the disclaimer did not

57. Id. at 240.
58. Id.
60. Id. at 784-85.
61. Id. at 787.
62. Id. at 788. The disclaimer in the 1978 manual stated: "The 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 [employer] and any
specifically notify the employee that his or her employment was terminable at will "with or without reason." 63 Thus, according to the court, the manual "creates the impression, contrary to the 'disclaimer,' that employees are to be provided with certain job protections." 64

A more conventional approach as to whether a disclaimer sufficiently nullifies the provisions in an employee handbook was set out in *Chambers v. Valley National Bank.* 65 In *Chambers* the plaintiff was hired in 1971, and in 1984, the Arizona Supreme Court first recognized a handbook exception to the employment-at-will doctrine. 66 Following the court's decision, the defendant bank added a disclaimer to its handbook. 67 The court characterized the disclaimer as a modification of a unilateral contract and implied that the plaintiff's continued employment was sufficient consideration to make the modification enforceable. 68 The court also noted that it would be unreasonable for the plaintiff to rely on the handbook granting employment that was not terminable at will. 69

The Michigan Supreme Court followed the logic of *Chambers* in

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63. Id. at 788.
64. Id.; see also *Towns v. Emery Air Freight, Inc.*, 3 L.E.R. (BNA) 911, 914 n.3 (S.D. Ohio 1988) (waiver signed by employee several months after he started work for employer is void because no evidence exists that plaintiff received additional consideration for signing the waiver). But see *Uebelacker v. Cincom Sys.*, 48 Ohio App. 3d 268, 272, 549 N.E.2d 1210, 1216 (1988) (Under Ohio law, an employee handbook will alter an at-will employment relationship only if the employer and employee have agreed to create a contract from the writing. A disclaimer stating that the provisions of a handbook are not intended to create a contract is sufficient evidence to show no mutual assent between the parties).

If an employer issues a personnel policy manual or handbook upon which its employees may reasonably rely, the employer may not treat the contents of these documents as illusory, because the employer's representations in the personnel manual then become terms of the employment contract and limit the employer's ability to discharge the employee.

721 F. Supp. at 1130.

67. The relevant portions of the disclaimer provided: "[T]he contents of this handbook DO NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT. Nothing contained in this handbook should be construed as a guarantee of continued employment, but rather, employment with the Bank is on an 'at will' basis." *Chambers*, 721 F. Supp. at 1131 (emphasis in original).
68. Id. at 1131-32.
69. Id. at 1131; see also *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 734 (Ala. 1987) ("[I]f the employer does not wish the policies contained in an employee handbook to be construed as an offer for a unilateral contract, he is free to so state in the handbook.")
Bankey v. Storer Broadcasting Co. (In re Certified Question). In Bankey the court addressed the issue of "whether a written discharge-for-cause policy may be modified by the employer without explicit reservation at the outset of the right to do so." Instead of relying on a unilateral contract theory, the court analyzed the issue by focusing on the benefits that accrue to an employer when desirable personnel policies are established. The court held that it would be unreasonable, if not illogical, to require an employer to renegotiate with each of its employees every time it desired to change one of its policies. The court also noted that prohibiting an employer from unilaterally modifying the provisions of its employee handbook would cause many employers to "be tied to anachronistic policies in perpetuity merely because they did not have the foresight to anticipate the court's Toussaint decision by expressly reserving at the outset the right to make policy changes."

A renegotiation requirement, moreover, would have a negative effect on the uniformity of employer policies. The court ultimately held that the only requirement for the revocation of a discharge-for-cause policy to become legally effective, is that "reasonable notice of the change must be uniformly given to affected employees."

In Nork v. Fetter Printing Co. the Kentucky Court of Appeals decided three closely related handbook cases. One of the plaintiffs, Scheurich, began work with defendant Cross Motors in 1973. In 1983 Scheurich received a personnel manual which contained a disclaimer on the last page indicating that the manual was not to be construed as a contract of employment between the employer and employee. Scheurich argued that the contract disclaimer should be nullified and

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71. Id. at 449, 443 N.W.2d at 117. The court quoted dictum from Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 618, 292 N.W.2d 880, 894-95 (1980), that may be interpreted to require the employer to reserve the right to modify its handbook in advance. Bankey, 439 Mich. at 445, 443 N.W. 2d at 115.
72. 439 Mich. at 456, 443 N.W.2d at 120. Although the Michigan Supreme Court concluded that an employer need not reserve the right in advance to modify its handbook, it cautioned against changes made in bad faith. Moreover, the court continued, "[f]airness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight." Id. at 457, 443 N.W.2d at 120.
73. Although an employer may negotiate individually with an employee over the terms and conditions of employment, an employer may run afoul of section 8(a)(2) of the National Labor Relations Act if the employer attempts to negotiate with employers as a group.
75. 738 S.W.2d 824 (Ky. Ct. App. 1987).
that the manual should be given contract status. The court enforced the disclaimer, however, and dismissed the plaintiff's complaint. Criticizing the plaintiff's argument, the court stated: "If appellant's reasoning is thought through to its logical conclusion, virtually every policy and procedural manual would create a contract of employment; those without a disclaimer would because they would have no disclaimers, and those with disclaimers would because the disclaimers would be nullities."

In Therrien v. United Air Lines, Inc. a Colorado federal district court, applying Colorado law, addressed the issue of whether a contract disclaimer can nullify the provisions of an employee handbook under the doctrine of implied contract and promissory estoppel. The court noted that to prevail under the implied contract theory, the plaintiff must show mutual assent to be bound. To prevail on the promissory estoppel theory, the plaintiff must show that he reasonably relied on the promises contained in the handbook. Because the handbook contained a provision stating that the plaintiff's employment was at-will, the court concluded that the plaintiff could not seriously contend that he relied on the provisions of the handbook, nor could he show mutual assent to be bound.

IV. DAMAGES

Currently, only a few courts have specifically addressed the types of damages employees may recover when employers violate the provisions of an employee handbook. In Small v. Springs Industries, Inc. (Springs II) the employer terminated the plaintiff without regard to the termination procedures set forth in the company handbook. Initially, the South Carolina Supreme Court reviewed the issue of whether South Carolina law allowed an employee to recover for violations of the provisions in a company handbook. After the supreme court ruled that South Carolina recognized such a cause of action, the

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76. Id. at 825-26.
77. Id. at 827.
79. Id. at 1520-21.
80. Id. at 1521.
81. Id. at 1522-23. To statements made by plaintiff that he believed he had an employment agreement, the court held that "[w]hile . . . subjective feelings might have some significance in other areas of the law, it is elementary under the universally accepted objective theory that they are irrelevant in contract." Id. at 1523.
83. Springs I, 292 S.C. at 481-86, 357 S.E.2d at 452-55.
84. Id. at 486, 357 S.E.2d at 455. ("[A] jury can consider an employee handbook, along with other evidence, in deciding whether the employer and employee had a limit-
court remanded the case on the issue of damages.\textsuperscript{85}

After the remand, the employer made an unconditional offer to reinstate the plaintiff to her original position,\textsuperscript{86} but Small refused this offer because she believed that the employer eventually would find some way to terminate her.\textsuperscript{87} The defendant argued that the plaintiff's damages should stop accruing once the employer presents an unconditional offer of reinstatement.\textsuperscript{88} The South Carolina Supreme Court disagreed, however, and held that the issue of the reasonableness of the offer of reinstatement was a question of fact that should be decided by the jury.\textsuperscript{89} The court held that the amount of back pay and front pay to which the plaintiff was entitled as a result of the alleged breach of the handbook provisions was within the sound discretion of the jury. Thus, the court affirmed the jury's award of $100,000 in damages to the plaintiff.\textsuperscript{90}

In \textit{Pine River State Bank v. Mettille}\textsuperscript{91} the Minnesota Supreme Court faced a similar issue. In \textit{Pine River} the jury found that the employer discharged the plaintiff in violation of a progressive disciplinary procedure found in defendant's employee handbook.\textsuperscript{92} The jury awarded damages of lost wages up to the trial date. The defendant argued that the plaintiff should not be entitled to such an award for damages because the employer would have discharged the plaintiff anyway in due course. Nevertheless, the court, following traditional contract principles and quoting prior Minnesota precedent, stated that "[t]he measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms."\textsuperscript{93} The court then held that the evidence supported the damages award.\textsuperscript{94}

Other courts resolve damages issues in handbook cases with prin-

\textsuperscript{85} \textit{Id.} at 487, 387 S.E.2d at 455-56 (trial court jury award of $300,000 found "shockingly disproportionate to the injuries").

\textsuperscript{86} \textit{Springs II}, 300 S.C. at 482, 388 S.E.2d at 810.

\textsuperscript{87} \textit{See id.} at 487-88, 388 S.E.2d at 812.

\textsuperscript{88} \textit{Id.} at 488, 388 S.E.2d at 811.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{See id.} at 488, 388 S.E.2d at 812. \textit{But see} Wallace v. Milliken & Co., 300 S.C. 553, 389 S.E.2d 448, 449-50 (Ct. App. 1980) (South Carolina Court of Appeals, in a retaliatory discharge case, held that lost wages and reinstatement are equitable in nature and should be determined by the court, not the jury).

\textsuperscript{91} 333 N.W.2d 622 (Minn. 1983).

\textsuperscript{92} \textit{Id.} at 624.

\textsuperscript{93} \textit{Id.} at 632 (quoting Zeller v. Prior Lake Pub. Schools, 259 Minn. 487, 493, 108 N.W.2d 602, 606 (1961)).

\textsuperscript{94} \textit{Id.}
ciples of equity. One case that demonstrates this approach is *Stafford v. Electronic Data Systems.* 95 The *Stafford* court, in determining whether damages should be decided by the court or the jury, initially ruled that reinstatement as a satisfactory solution to a conflict between an employee and employer is an equitable remedy to be decided by the court, not by the jury. 96 The court then addressed the issue of whether the availability and the amount of front pay in a handbook case are exclusively within the province of the court, rather than the jury. After examining a recent Sixth Circuit case in which the court allowed a determination of front pay to be made by the jury, 97 the court held that in the Sixth Circuit "the issue of front pay still rests within 'the sound discretion of the trial court.'" 98 In support of its holding, the court noted that "it is well-settled law that 'front pay' is only to be awarded in lieu of reinstatement where reinstatement is impracticable or inadequate." 99 The court also stated that "the remedy of reinstatement is . . . equitable in nature." 100 The court concluded:

[I]t only makes sense that if reinstatement is a remedy clearly equitable in nature, then its substitute—where that remedy is impracticable—is likewise equitable in nature. And, if reinstatement is within the province of the court, then its substitute—front pay—is within the province of the court, as well. 101

The *Stafford* court relied heavily on the Second Circuit's reasoning in *Dominic v. Consolidated Edison Co.* 102 to substantiate its conclusion. 103 In *Dominic* the court held that an award of front pay was equitable relief and, therefore, was within the court's province. 104 The

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96. Id. at 665; see also Davis v. Combustion Eng’g, Inc., 742 F.2d 916, 922 n.5 (6th Cir. 1984) (Sixth Circuit did not address the issue of whether the judge or jury determines reinstatement because the parties to the litigation agreed that the court decides if reinstatement is appropriate); Loeb v. Textron, Inc., 600 F.2d 1003, 1022-23 (1st Cir. 1979) (district court decides whether to grant or deny reinstatement to a prevailing plaintiff).

97. The case evaluated by the *Stafford* court was Fite v. First Tennessee Prod. Credit Ass’n, 861 F.2d 884 (6th Cir. 1988). *Stafford,* 741 F. Supp. at 665-66.

98. 741 F. Supp. at 666.

99. Id.; see Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1448-49 (11th Cir.), cert. denied, 474 U.S. 1005 (1985); see also Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) ("Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay.").

100. 741 F. Supp. at 666 (citations omitted).

101. Id.

102. 822 F.2d 1249 (2d Cir. 1987).


104. *Dominic,* 822 F.2d at 1257.
court explained:

There is much overlap between the facts relevant to whether an award of front pay is appropriate and those relevant to the size of the award. For example, both questions turn in part on the ease with which the employee will be able to find other employment. To divide the fact-finding responsibilities in such circumstances would be anomalous and would risk inconsistent decisions. A jury might conclude that the employee would never find other work and award a large sum in front pay, while the judge found that he or she would find work immediately and that no award was appropriate. Or, the judge might find front pay appropriate, but the jury might award only a nominal sum based on its belief that the employee could secure immediate employment.106

The Stafford court also relied on Chace v. Champion Spark Plug Co.,106 in which the District Court of Maryland refused to submit the issue of front pay to the jury in an age discrimination case. The Chace court reasoned:

This Court is of the view that if the jury is given the issue, it will be called upon to define a frozen image from fluid circumstances. Rather than being given the task of performing equity based on all the circumstances, the jury would be handed the task of computing mechanically a front pay number without the flexibility required by other factors which would necessarily have to be considered. For example, the appropriate number of years to be considered in computing front pay could only be answered after reaching a full understanding of the reasons why front pay might be allowed as a substitute for reinstatement. If the Court were to attempt to instruct the jury on all equitable factors to be considered, it would be doing no less than delegating its responsibilities to the jury who are ill equipped to give effect to equitable relief.107

Aggrieved parties in a breach of contract case are entitled to be placed in the position that they would have been in had the breach not occurred.108 Factors relevant to making such a determination include the length of time the employee otherwise would have remained employed with the company and whether the employee reasonably could have expected increases in wages and benefits had the breach not occurred. The length of time required for the employee to obtain alternative, comparable employment and whether the discharged employee

105. Id.
107. Id. at 871.
exercised reasonable diligence to find comparable employment are other factors that courts may use to evaluate the mitigation of front pay awards. Consequently, because of the uncertainty and speculative nature of future damages, front pay determinations necessarily are based on nothing more than educated assumptions. For this reason, future damage awards often have been criticized.109

The court, not the jury, is best suited to grapple with the complex issues involved with the determination of an award of front pay. If front pay awards were left to the jury's discretion, the speculative nature of such damages might allow the aggrieved party to collect a windfall, instead of returning them to the position in which they would have been had the breach not occurred.110 Accordingly, the court, not the jury, should determine the appropriateness and amount of front pay in a breach of handbook case.

V. Conclusion

In an effort to clarify and disseminate company policy to their workers, employers began issuing employee handbooks; they were unaware that issuance of the handbooks could create an employment contract. Despite initial confusion caused by an abrupt reversal of state public policy, the supreme court's decision to hold employers to policies and promises made in employee handbooks was in accordance with the majority of courts across the country. Today, the majority view is that employees have a right to rely on promises made by management, who, in turn, should not be allowed to ignore such promises.111 South Carolina courts have allowed employers the means to issue general statements of policy without being bound by them or altering the employees' employment-at-will status. The supreme court in Springs I stated that in order to accomplish this, an employer may merely insert "a conspicuous disclaimer or provision into the written document."112 This is a fair rule. The employer may issue nonbinding handbooks, but the employee will not rely upon their contents if sufficiently forewarned by an effective disclaimer.

110. Small v. Springs Indus., Inc., 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987) (case remanded on the issue of damages because jury's award of $300,000 was more than the present value of the actual compensation plaintiff could have received for her reasonable working life).
111. As stated by the South Carolina Supreme Court: "It is patently unjust to allow an employer to couch a handbook, bulletin, or similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of general policy' whenever it works to his disadvantage." Id. at 485, 357 S.E.2d at 455.
112. Id.
If South Carolina decisions were limited to Springs I, the law in this state would be clear. In order to determine if the handbook constitutes a binding unilateral contract, the parties would apply basic contract principles of offer, acceptance, and consideration. If the court found that a valid contract existed, the parties would then determine whether the employer had effectively disclaimed or modified the original contract.

This rational approach is muddied, however, by the Toth decision. Toth follows the basic contract principles above, but may be read to imply that an employer's promise to continue to employ and pay wages, after an employee has accepted the modified contract, will not constitute new consideration to support a modification. Hopefully, the court's language that the employer "has not designated to the Court any new consideration the plaintiffs received in return for the modification" means only that the defendant did not meet the necessary burden of proof.

If the court, in fact, believes that the employer's promise to continue employing and paying wages is insufficient consideration, employers may find themselves in a situation in which they may never modify existing handbooks. Employers would discontinue issuing oral or written guidelines, handbooks, or bulletins in all situations, knowing that they would be bound virtually forever by their terms. The result would be detrimental to employers and workers alike because of the difficulty in achieving consistent treatment regarding employee personnel decisions, the potential for increased litigation, the potential for abuse, and decreased employee morale.

Moreover, if continued employment and wages are not considered adequate consideration for the modification, the Toth decision would directly contradict Springs I. In Springs I the company issued a handbook to the plaintiff five years after she began work. Nevertheless, the court found that when the company issued the handbook to the plaintiff, the company "altered," or modified, the employee's previous employment-at-will status. The court found that Springs' offer or promise to continue employing the plaintiff in return for certain benefits and wages was sufficient consideration to support the modification.

113. See Toth v. Square D Co., 712 F. Supp. 1231, 1236 (D.S.C. 1989). The court noted in a footnote that the defendant-employer's Human Resources Manager testified in a deposition that the plaintiff received no additional consideration. Id. at 1236 n.7. The footnote does not disclose whether the manager's deposition was received into evidence, nor does it reveal the manager's qualifications and basis for drawing such a legal conclusion. See id.

114. See Springs I, 292 S.C. at 484, 357 S.E.2d at 454.

115. Id. at 484-85, 357 S.E.2d at 454.
Another problem raised by *Springs I*, but not addressed by *Toth*,116 is what constitutes "a conspicuous disclaimer or provision"117 that would effectively render handbook provisions purely advisory statements. This issue was addressed, however, by the South Carolina District Court in *Nettles v. Techplan, Corp.*118 In this case the plaintiff, after being terminated in June 1987, filed suit against his employer for, among other causes of action, breach of contract for failing to follow the terms of its personnel manual. The manual contained the following disclaimer: "This Personnel Policy and Practices Manual does not constitute an employment agreement or contract of employment. Within applicable state and federal laws, both you, the employee, and [the employer] each have the right to terminate your employment at any time for any reason."119

The defendants contended the disclaimer was sufficiently conspicuous to defeat any claim the plaintiff brought based on the manual. The disclaimer was located in the second numbered paragraph of the first page and was of the same color and print size as the rest of the manual.120

The court looked for guidance to the Uniform Commercial Code, which also mandates that the disclaimer be conspicuous.121 South Carolina Code section 36-1-201(10) states that for a contractual clause to be conspicuous, it must be written so that "a reasonable person against

116. The disclaimer in *Toth* merely stated, "This booklet is not intended to create any contractual rights in favor of the employee or Company. The Company reserves the right to change the terms of this booklet at any time." *Toth*, 712 F. Supp. at 1234. The court did not reach the issue of whether the disclaimer was "conspicuous" so as to bring the employees' attention to the provision.

117. The *Springs I* opinion stated:

If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with the desire to continue under the employment at will policy, he is certainly free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document.

292 S.C. at 485, 357 S.E.2d at 455.


119. Id. at 96.

120. Id. at 97.

121. See South Carolina's version of the Uniform Commercial Code, which states: "[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude the implied warranty of merchantability or fitness for a particular purpose must be specific, and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller.

whom it is to operate ought to have noticed it.”

The court in *Nettles* noted that South Carolina courts addressing the issue of “conspicuous” under the purview of the U.C.C. consider three factors to determine whether a disclaimer is conspicuous: (1) the type setting of the disclaimer; (2) the color of the print of the disclaimer; and (3) the location of the disclaimer. The determination of whether a clause is conspicuous or not is made by the court.

The *Nettles* court ultimately held that the disclaimer contained in the defendant’s personnel manual located in a separate paragraph on the first page was sufficiently conspicuous “such that a reasonable person against whom it is to operate should have noticed it.”

A final area of uncertainty in breach of handbook cases concerns future damages. It is clear that any award of front pay would be in lieu of an award of reinstatement. The remedy of reinstatement is equitable in nature, and therefore, it follows that the substitute for reinstatement, front pay, should also be an equitable remedy to be determined by the court. From a practical standpoint, due to the speculative nature of claims for front pay and the many complex issues involved in determining the appropriateness and amount of front pay, the court, not the jury, should decide the appropriateness and amount of front pay.

Employers should carefully consider their policies before promulgating handbooks or other policy guides for employees to follow and rely upon. Otherwise, the employers’ reasons to issue these policy guides—increased morale, employer compassion, and understanding between the parties—are rendered meaningless. On the other hand, if employers, due to unforeseen changes and circumstances, wish to modify their handbooks, they should be allowed to do so if they follow certain guidelines. The employer must make the employees aware of the changes and allow them to decide whether or not to continue work-

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122. Id. § 36-1-201(10); see also Nettles, 704 F. Supp. at 97.
124. Id. at 97; see also S.C. Code Ann. § 36-1-201(10) (Law. Co-op. 1976).
125. 704 F. Supp. at 98; see also Prezzy v. Food Lion, Inc., 4 I.E.R. (BNA) 996 (D.S.C. 1989) (disclaimer appearing as a separate paragraph on an introductory page is sufficiently conspicuous to bar plaintiff’s breach of contract cause of action against employer, even though disclaimer was the same type as remainder of handbook). For decisions analyzing the effectiveness of a disclaimer in a buyer-seller context, see Investor Premium Corp. v. Burroughs Corp., 389 F. Supp. 39 (D.S.C. 1974) (disclaimer placed in a separate paragraph and set out in all capital letters was effective) and Cooley v. Salopian Indus., Ltd., 383 F. Supp. 1114 (D.S.C. 1974) (disclaimer buried in the text of a lengthy paragraph and not contrasting in type or color did not meet the requirements of this section).
126. In *Toth* all plaintiffs admitted that they received the revised handbook containing the disclaimer and that they signed an acknowledgement of its receipt, stating...
ing after the changes are made.

If an employer wishes to disclaim any portion of the handbook, however, it should bring the disclaimer to the employees' attention both orally, when issuing the handbook, and in writing, by conspicuously including a disclaimer following the Uniform Commercial Code guidelines. As South Carolina law now stands, both employers and employees will lose until the courts or legislature clearly define what is required to disclaim or modify an employee handbook. Until that time, employers issue handbooks at their own risk, never sure of the outcome if they later attempt to disclaim any portion of the contents.