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EMPLOYMENT LAW

I. COURT BROADENS EMPLOYER-EMPLOYEE HANDBOOK LAW

In *King v. PYA/Monarch, Inc.*[1] the South Carolina Supreme Court revisited the South Carolina law governing employer-employee handbooks as implied employment contracts. First, the court held that an unpublished policy manual intended for use by supervisors may form an implied employment contract if the employee is told of the manual's existence and is given oral assurances of employment.[2] Second, an employer may unilaterally modify an implied employment contract if the affected employee receives actual notice of the modification.[3] Third, the court held that an employment contract was subject to oral modification by the parties although the contract contained a "no oral modification" clause.[4]

Merritt King was a sales representative at PYA until 1990, when he was discharged for poor performance. At the start of his employment in 1983, King received oral assurances of employment security and was required to sign the company's published Rules and Regulations. This document allegedly established a three-strike rule for employee termination.

The Rules and Regulations detailed a three-strike process that could be used to terminate a PYA employee. This process required that any verbal or written reprimand given to an employee be included in a personnel file of the employee and that "an accumulation of three or more reprimands may be considered cause for termination of employment." The Rules and Regulations also indicated that disciplinary action would be taken in accordance with company policy. The only established company policy contained in the record was the "Branch Operating Manual" used by supervisors. This manual emphasized the need for written records of employee disciplinary problems and for such records to be placed in the employee's personnel file. The policy manual provided a form to be used to notify employees when they received a reprimand. The reprimand form contained four boxes, representing three reprimands and final termination.[5]

The trial court referred the case to a master-in-equity, who determined that: (1) PYA's Rules and Regulations and the unpublished policy manual could form the basis for an implied employment contract at the time of King's hire; (2) the attempted 1989 modification of this employment contract was void for lack of consideration and had been entered into under duress; (3) even if

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1. ___ S.C. ___, 453 S.E.2d 885 (1995).
2. *Id.* at ___, 453 S.E.2d at 888.
3. *Id.* at ___, 453 S.E.2d at 888-89.
4. *Id.* at ___, ___, 453 S.E.2d at 887, 889.
5. *Id.* at ___, 453 S.E.2d at 886.

the 1989 employment contract were valid, the written and oral actions of the employer modified it by reinstituting the three-strike rule; and (4) PYA breached its employment contract with King by failing to give him three written warnings and by failing to place any warnings in his personnel file.[6] King was awarded damages and severance pay. PYA appealed.

The supreme court first considered whether the Rules and Regulations promulgated by the company and the unpublished policy manual could create an enforceable employment contract between King and PYA.[7] The court, applying the rule previously expressed in *Small v. Springs Industries, Inc.*,[8] affirmed the trial court's holding that PYA had formed such a contract with King when it voluntarily chose to "(1) publish the Rules and Regulations and (2) orally assure King that their provisions would be followed in compliance with the Manual . . . ."[9]

The court's reasoning on this issue followed the unilateral contract analysis applied in South Carolina and other jurisdictions.[10] The typical unilateral analysis provides that one party makes an offer, which invites acceptance by the offeree solely by performance.[11] When the offeree accepts by performance, the offeror is then bound to perform.[12] Under this analysis, the handbook constitutes the specific offer by the employer and the employee's continued work provides the acceptance and consideration. The consideration provided by the offeror is the benefit of having effective company policies and regulations.[13] The court's use of this analytic framework comports with *Small* and is consistent with other jurisdictions,[14] where it is well-settled that

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6. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 887.

7. *Id.* at ___, 453 S.E.2d at 888.

8. 292 S.C. 481, 357 S.E.2d 452 (1987). In *Small* the supreme court held that an employer could alter the at-will status of the employee relationship through handbooks, bulletins, oral assurances, and similar materials. *See id.* at 486, 357 S.E.2d at 455. The court also held that the decision as to whether or not the doctrine is applicable to a handbook should be left to a jury. *Id.*

9. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888.

10. *See* Leahy v. Starflo Corp., ___S.C.___, 431 S.E.2d 567 (1993); Miller v. Schmid Lab., Inc., 307 S.C. 140, 414 S.E.2d 126 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-will Doctrine*, 139 U. PA. L. REV. 197, 210 (1990). For a thorough review of case law on handbook employment contract cases, see Theresa L. Kruk, Annotation, *Right to Discharge Allegedly "At-Will" Employee As Affected by Employer's Promulgation of Employment Policies as To Discharge*, 33 A.L.R.4TH 120 (1984).

11. Pratt, *supra* note 10, at 210.

12. *Id.*

13. *Id.* at 210-11.

14. *See* Steven M. Wynkoop & Elizabeth S. Moise, *Employee Handbooks in South Carolina: The Employers' Dilemma*, 42 S.C. L. REV. 323 (1991).

an employee may be entitled to certain rights and privileges under the provisions in an employee handbook.[15]

PYA raised two arguments in opposition to the implied employment contract: (1) the documents relied on by the respondent, including an unpublished policy manual, published Rules and Regulations, and disputed testimony of oral assurances were insufficient to form an employment contract, and (2) the language used by the employer in the unpublished policy manual was not specific or explicitly mandatory and could not create binding terms on either party.[16] The court rejected both arguments.

The court, citing *Leahy v. Starflo Corp.*,[17] rejected PYA's first argument because King was aware of the three-strike rule and the unpublished policy manual.[18] Once PYA committed itself to its three-strike rule by oral assurances and written publication in the Rules and Regulations, it could not deviate "from these assurances at its own pleasure."[19] The court refused to let PYA escape liability under the guise that the policy manual was a mere discretionary management tool not intended for King's reliance.[20]

This line of reasoning is consistent with cases in other jurisdictions which have held that the subjective intent of the offeror is not controlling. Under a unilateral contract analysis, the existence and content of an offer is generally determined by an objective test.[21] Other courts have rejected the argument that policies announced by employers may be ignored simply because such policies are unpublished or of a discretionary nature.[22] The South Carolina Supreme Court has joined these courts by rejecting PYA's argument that its unpublished manual should be viewed as a supervisory tool, not an offer to contract.

The court's reasoning could leave employers, large and small, scrambling to protect themselves from the apparently expanding scope of the employee handbook doctrine. The manual the court relied upon was never intended for PYA's employees. Accordingly, the court's decision may have expanded the handbook doctrine beyond the policy-driven beginnings of *Small.*

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15. *Id.*; *see* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980). *Toussaint* is generally recognized as the first case to consider the employee handbook as a unilateral contract. Wynkoop & Moise, *supra* note 14.

16. Brief of Appellant at 21-33.

17. ___ S.C. ___, 431 S.E.2d 567 (1993).

18. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888.

19. *Id.* at ___, 453 S.E.2d at 888.

20. *Id.* at ___, 453 S.E.2d at 888.

21. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, (Minn. 1983). This often-cited opinion found that "[w]hether 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." *Id.* at 626; Wynkoop & Moise, *supra* note 14.

22. Pratt, *supra* note 10, at 211.

The *Small* court focused on the employer's voluntary decision to publish its handbook and bulletin.[23] The combination of voluntary publication and oral assurances drove the court to hold that "the provisions of those publications . . . [raised] 'strong equitable and social policy reasons [for] militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice.'"[24] The *Small* court cited liberally from cases that emphasized the voluntary publication of rules as the offer to form a unilateral contract, yet the *King* court declined to limit the implied employment contract to published representations.[25]

In *Pine River State Bank v. Mettille*,[26] a leading case on employee handbooks, the Supreme Court of Minnesota recognized that there should be a limit to the employee's rights under an implied employment contract.[27] Under *Pine River's* reasoning, employees in King's position should not be able to create employment contracts based on managers-only supervisory manuals. The *Pine River* court indicated that an offer stemming from an employee handbook must be definite and communicated to the employee to be valid.[28] The objective manifestations of the parties clearly control and actual intent to form a contract is not required. If a reasonable person would conclude that an offer was intended, then the contract is valid.[29] While King may have subjectively believed that such a rule was in place, inquiry should have focused on the reasonableness of his belief.

Although the policy manual was not distributed to employees, the court was persuaded by King's testimony that he was told of its existence and that the company followed the three-strike rule. The court held that a reasonable person would have seen the unpublished manual as an offer to change the at-will status.[30] This expansive reading stretches objective manifestation beyond

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23. Small v. Springs Indus., Inc., 292 S.C. 481, 485, 357 S.E.2d 452, 454 (1989).

24. *Id.* (quoting Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 83 (N.C. Ct. App. 1985), *cert. denied*, 341 S.E.2d 39 (N.C. 1986)).

25. *Id.* (citing Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 900 (Mich. 1980) and *Walker*, 335 S.E.2d at 83).

26. 333 N.W.2d 622 (Minn. 1983).

27. *Id.*

28. *Id.* at 626.

29. *See id.*; *see also* Thomas R. Haggard, *Employment Handbooks- Still Evolving in South Carolina Law*, S.C. LAW., Sept./Oct. 1993 at 23, 24 (stating that, "[i]n other jurisdictions, the courts have frequently held that this objective manifestation of intent is lacking if the handbook was never distributed to the plaintiff or if the plaintiff was unaware of the term in question when the alleged acceptance occurred").

30. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888.

the limits recognized by other jurisdictions[31] and moves the court toward an analysis that is subjective in nature.

The court also dismissed PYA's argument that the manual's language was purely discretionary and not enforceable.[32] In *Small* the court indicated that if an employer wishes to issue policies, manuals or bulletins as purely advisory statements while continuing an employment-at-will status, the employer is free to do so.[33] Despite this language, the *King* court dismissed petitioner's arguments, creating real questions for employers and their counsel.

The three-strike rule in the Rules and Regulations included specific discretionary language. The rules provided that at the discretion of the supervisor, warnings may be issued by managers. Additionally, they provided that "one serious violation of a Company rule, or an accumulation of three or more reprimands *may* be considered cause for termination of employment."[34] Although the language might be viewed as ambiguous, the court placed little emphasis on this discretionary language.[35]

Despite the discretionary language in the rules, the court focused on mandatory language found in the unpublished policy manual. The court's reliance on this language is questionable because the cited mandatory language refers to the policy manual in general, not the specific rules and regulations.[36] Some of the manual's policies may have been mandatory, but the provisions concerning termination were apparently intended as supervisory guidance. The employer couched the three-strike rule in discretionary terms and likely never meant the rule to be mandatory on the supervisor or the employee. Thus, the court's application of mandatory policy manual language to the three-strike system may have been misplaced.[37]

Courts in several other states have adopted a more moderate position than that of South Carolina and require explicit, mandatory language to fulfill the requirement of a firm offer.[38] In *Duldulao v. Saint Mary of Nazareth*

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31. *See* Cederstrand v. Lutheran Bhd., 117 N.W.2d 213, 222 (Minn. 1962) (holding that a control copy of the personnel policy that contained a just-cause provision was not binding on the employer because the employee version of the personnel policy did not include the same just-cause provision, which was ruled to be merely a policy guide for supervisors); *see also* Spero v. Lockwood, Inc., 721 P.2d 174, 175 (Idaho 1986) (refusing to apply a policy manual against an employer when the contents of the manual were never communicated to the employee and the evidence adduced that the employee never read or relied on the terms of the manual).

32. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888.

33. Small v. Springs Indus., Inc., 292 S.C. 486, 484, 357 S.E.2d 451, 455 (1987).

34. Brief of Appellant at 25.

35. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 885.

36. *Id.* at ___, 453 S.E.2d at 888.

37. Brief of Appellant at 22-25.

38. *See* Gaines v. Wilmington Trust Co., No. CIV.A. 90C-MR-135, 1991 WL 113613 (Del. Super. Ct. June 3, 1991); Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987); Yow v. Alexander County Dep't of Social Servs. 319 S.E.2d 626 (N.C. Ct. App.), *cert.*

Hospital Center[39] the Illinois Supreme Court rejected the narrow approach by requiring a firm offer in specific, mandatory language from the employer. The manual at issue in *Duldulao* contained contractually binding language that clearly stated that "permanent employees" are never dismissed without prior written admonitions, and "'that three warning notices are required before an employee is dismissed.'"[40] In *Frank v. South Suburban Hospital Foundation*[41] the Appellate Court of Illinois applied this standard to language strikingly similar to that at issue in *PYA/Monarch.* The court read the language concerning discipline procedures as discretionary because the policies at issue described conduct that "may subject" an employee to discipline.[42] The handbook could not constitute a contractual offer because there was "no promise to follow a course of progressive discipline in every situation prior to termination."[43]

The Illinois courts have held that an employment handbook that creates a progressive and immediate termination right in the employer cannot establish a contractually-enforceable right and alter an employee's at-will status.[44] The position taken in Illinois is that handbooks that allow termination on the first serious infraction do not constitute a binding promise to always use progressive discipline and, thus, do not successfully alter the relationship.[45] PYA's manual fits within this framework.[46]

Courts in North Carolina and Delaware also give greater effect to discretionary terms than South Carolina. In *Yow v. Alexander County Department of Social Services*[47] the North Carolina Court of Appeals rejected an employee's claim that handbook warnings created an enforceable contract right. The court held, "the warning sequence is discretionary. 'An employee . . . may be warned, reprimanded, suspended or dismissed . . . The degree and kind of action to be taken will be based upon the [supervisor's] sound and considered judgement . . . .'"[48] In *Gaines v. Wilmington Trust Company*[49]

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denied, 323 S.E.2d 927 (N.C. 1984).

39. 505 N.E.2d 314, 318 (Ill. 1987) (setting out a three-part test requiring the language of a policy statement by an employer contain a promise clear enough that an employee would reasonably believe that an offer had been made).

40. *Id.* at 318.

41. 628 N.E.2d 953 (Ill. App. Ct. 1993).

42. *Id.* at 957.

43. *Id.*

44. Shepley v. E.I. DuPont De Nemours & Co., 722 F. Supp. 506 (D. Ill. 1989); Semerau v. Schiller Park, 569 N.E.2d 183 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 135 (Ill. 1991).

45. *Frank*, 628 N.E.2d at 958.

46. The manual stated: "[a]t the discretion of the warehouse managers, one serious violation of Company rule, or an accumulation of three or more reprimands may be considered cause for termination of employment." *See* Brief of Appellant at 25.

47. 319 S.E.2d 626 (N.C. Ct. App.), *cert. denied*, 323 S.E.2d 927 (N.C. 1984).

48. *Id.* at 631 (quoting the employee handbook and citing Sumler v. City of Winston-Salem,

the Delaware Superior Court applied the well-settled Delaware rule that an employee handbook will not alter the at-will status of the employee "unless there is clear language placing express limits on the employer's right to discharge."[50] According to the Delaware courts, requiring clear, mandatory language is an effective means of balancing the competing needs of the employer and the employee.[51]

The South Carolina Supreme Court next considered whether PYA successfully modified the implied employment contract by a 1989 employment agreement signed by King purporting to reestablish his at-will status. In 1989 King and other sales representatives were asked to sign an agreement that created a new commission schedule and established that commission sales representatives were to be at-will employees. The agreement, allegedly signed under duress and without additional consideration, provided for no oral modifications once the agreement was executed.[52]

The court indicated that the employer's actions operated as a unilateral modification of an employment contract by a subsequent handbook, similar to the situation in *Fleming v. Borden, Inc.*[53] King argued that the modification of the 1983 employment contract by the 1989 contract was ineffectual based on traditional "mutuality of obligation" contract principles.[54] The court dismissed this bilateral contract approach in favor of the unilateral analysis it applied in *Fleming* and ruled in favor of PYA on this issue.[55]

In *Fleming* the court considered how an implied employment contract based on handbooks may be modified. To be effective under the *Small* unilateral contract approach, the court determined that an employer is free to unilaterally modify the contract if the employee receives actual notice of the intended modification.[56] The *PYA/Monarch* court then determined that the 1989 contract was the equivalent of a subsequent handbook modification, and because King had notice when he signed the "contract," it effectively eliminated the implied employment contract of 1983.[57]

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448 F. Supp. 519, 529 (M.D.N.C. 1978) (holding that the word "may" implies discretionary action)); *see also* Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 83-84 (N.C. Ct. App. 1985) (holding that the policies in the manual and the rules of conduct were not all-inclusive and that the described employee conduct "may result" in the listed disciplinary procedures), *cert. denied*, 341 S.E.2d 39 (N.C. 1986).

49. No. CIV.A. 90C-MR-135, 1991 WL 113613 (Del. Super. Ct. June 3, 1991).

50. *Id.* at *2 (citing Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982)).

51. *Id.*

52. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 887.

53. ___ S.C. ___, 450 S.E.2d 589 (1994).

54. Brief of Respondent at 20-21.

55. *See PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888-89.

56. *Fleming*, ___ S.C. at ___, 450 S.E.2d at 595-96.

57. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 888-89.

Many courts have recognized the need to allow employers the concession that once bound by the handbook, they are free to unilaterally modify the agreement with a subsequent handbook.[58] These courts have reasoned that if an employer's handbook may unilaterally bind the employer, they may unilaterally modify that same relationship under the same contract principles that created the relationship.[59]

Scholars have also argued that business and economic policy require that employers be able to control contractual liabilities.[60] As one commentator explained, "To hold that handbooks contain immutable rights would mean that policies 'could never be changed short of successful renegotiations with each employee who worked while the policy was in effect.'"[61] The *Fleming* doctrine, by providing such protection for employers, places South Carolina among those states willing to recognize the right of the employer to unilaterally modify the contract. This position is also logically consistent with its unilateral contract approach to handbook law.[62] However, to protect its position, the employer must ensure that the employee receives actual notice. The court made clear that as long as the employer can ensure that the employee read and understood the modification, the employer should remain protected until it does something further to alter the contract.[63] This employer protection is limited, however, because the issue is one of fact for the jury and the burden is on the employer to show actual notice.[64]

Finally, the court held that a "no oral modification clause" inserted in the 1989 employment agreement was ineffective as a means of preventing oral modification.[65] In May of 1990, a PYA supervisor gave King a "First Warning" on a form from the unpublished policy manual. Contemporaneously, King was orally assured that this was the first of three warnings he would receive prior to termination.[66] Because of those events, the supreme court affirmed the Master's ruling that PYA modified the 1989 employment agreement through their acts and oral assurances.

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58. Pratt, *supra* note 10, at 218-19.

59. *Id.* at 218.

60. *Id.* at 219.

61. *Id.* (citing Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 119 (Mich. 1989)).

62. *See* Pratt, *supra* note 10, at 213 & n.128; Gaglidari v. Denny's Restaurants, Inc., 815 P.2d 1362, 1367 (Wash. 1991); *see also Bankey*, 443 N.W.2d at 120 (holding that an employer's unilateral change in policy will not be effective until affected employees receive reasonable notice of the change).

63. *See* Fleming v. Borden, Inc., ___ S.C. ___, ___, 450 S.E.2d 589, 595-96 (1994); Haggard, *supra* note 29, at 24.

64. *Fleming*, ___ S.C. at ___, 450 S.E.2d at 595-96. For a discussion of arguments against allowing the employer a right to unilaterally modify the employment contract based on traditional contract principles, see Pratt, *supra* note 10, at 219-24.

65. *PYA/Monarch, Inc.*, ___ S.C. at ___, 453 S.E.2d at 889.

66. *Id.* at ___, 453 S.E.2d at 889.

In reaching its conclusion, the court applied, for the first time in an employment contract setting, the general rule that "a written contract may be modified by oral agreement even when the contract expressly states all changes must be in writing."[67] The court reasoned that because conditions in an employment contract can be waived, it was proper to apply the general rule that "no oral modification" clauses can be orally waived to an employment context.[68] Employment conditions had been legitimately waived by employers in employment contracts by (1) their actions,[69] (2) entering an agreement with a union,[70] and (3) establishing a sexual harassment policy.[71]

The general rule espoused by the court is consistent with jurisdictions that allow oral modifications of integrated employment contracts[72] and with the pro-employee approach that the court has taken in other employee handbook cases. However, this rule raises issues for employers and their attorneys in the context of oral modifications to written, fully integrated employment contracts. Other courts have refused to expand the doctrine by holding attempts at oral modification ineffective.[73] Economically, the latter position may be better because it allows employers to control contractual liabilities. If any company supervisor can modify a clear, unequivocal contract or handbook disclaiming the contractual relationship, the employer will have to expend additional resources to train its managers in the intricacies of oral modification and waiver. This added cost burden will likely continue to put pressure on employers already in the state and curtail economic development efforts to attract new industry to this state.[74]

The effect *King* will have on future wrongful termination cases remains to be seen. However, by arguably taking an expansive view of the scope of the employee handbook doctrine, the court may have further encroached on an employer's ability to discharge allegedly "at will" employees.

D. Jay Davis, Jr.

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67. *Id.* at ___, 453 S.E.2d at 889.

68. *Id.* at ___, 453 S.E.2d at 889.

69. Leahy v. Starflo Corp., ___ S.C. ___, ___, 431 S.E.2d 567, 569 (1993).

70. Johnson v. American Ry. Express Co., 163 S.C. 191, 161 S.E. 473 (1931).

71. Bookman v. Shakespeare Co., ___S.C. ___, 442 S.E.2d 183 (Ct. App. 1994), *cert. denied*, (July 14, 1994).

72. *See* Uebelacker v. Cincom Sys., Inc., 549 N.E.2d 1210, 1217 (Ohio Ct. App. 1988); *cf.* Clement v. Farmers Ins. Exch., 766 P.2d 768, 771 (Idaho 1988) (holding that subjective beliefs by an employee that he could not be fired except for cause were directly contrary to written terms and did not provide adequate foundation for oral modification of an earlier written contract).

73. *See* Goodyear Publishing Co. v. Mundell, 427 N.Y.S.2d 242, 243 (App. Div. 1980); *see also* Eluschuk v. Chemical Eng'rs Termite Control, Inc., 54 Cal. Rptr. 711, 715 (Ct. App. 1966) (allowing oral modifications of written, fully integrated contracts when there is execution of the modification).

74. *See* Haggard, *supra* note 29, at 28.

II. PROHIBITION OF DISCRIMINATION AGAINST SATURDAY WORSHIPPERS DOES NOT APPLY TO TEXTILE MANUFACTURERS

The South Carolina Supreme Court held in *Holley v. Mount Vernon Mills, Inc.*[1] that sections 53-1-110[2] and 53-1-150[3] of the South Carolina Code do not prohibit a textile manufacturer from discriminating against persons who worship on Saturday. Because neither party raised the issue of the constitutionality of the statutes, the court expressed no opinion on whether these Sunday Blue Laws violate the Establishment Clause of the federal and South Carolina constitutions and resolved the case as a simple matter of statutory interpretation.[4]

Plaintiff Jimmy Holley (Holley) was employed by Defendant Mount Vernon Mills, Inc. (Mount Vernon), a textile plant which operates seven days a week using a rotation method for selecting employees to work weekends. In 1989, Holley converted to the Seventh-Day Adventist faith, which has a Saturday Sabbath. Consequently, Holley refused to work on his scheduled Saturday rotations. After several months of unexcused Saturday absences, Mount Vernon terminated Holley's employment.[5]

Holley brought an action against Mount Vernon, alleging that section 53-1-150[6] of the South Carolina Code prohibits, *inter alia*, employers from discriminating against people who worship on Saturday. Mount Vernon claimed it was exempt from section 53-1-150 pursuant to section 53-1-110,[7]

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1. ___ S.C. ___, 440 S.E.2d 373 (1994).

2. S.C. CODE ANN. § 53-1-110 (Law. Co-op. 1992) (exempting the manufacture and finishing of textile products from compliance with Sunday Blue Laws).

3. S.C. CODE ANN. § 53-1-150 (Law. Co-op. 1992) (prohibiting, *inter alia*, discrimination against persons who worship on Saturday).

4. *Holley*, ___ S.C. at ___, 440 S.E.2d at 374-75.

5. *Id.* at ___, 440 S.E.2d at 374.

6. S.C. CODE ANN. § 53-1-150(c) (Law. Co-op. 1992). This section provides:

> Any employee of any business which operates on Sunday under the provisions of this section has the option of refusing to work in accordance with provisions of § 53-1-100 of the 1976 Code. Any employer who dismisses or demotes an employee because he is a conscientious objector to Sunday work is subject to a civil penalty of triple the damages found . . . . No proprietor of a retail establishment who is opposed to working on Sunday may be forced by his lessor or franchisor to open his establishment on Sunday *nor may there be discrimination against persons whose regular day of worship is Saturday.*

Id. (emphasis added).

7. S.C. CODE ANN. § 53-1-110 (Law. Co-op. 1992). This section provides:

> Notwithstanding any other provision of law, the manufacture and finishing of textile products shall be exempt from the provisions of Chapter 1, Title 53, as amended. *Provided, however,* that no person shall be required to work on Sunday who is conscientiously opposed to Sunday work. If any person refuses to work on Sunday because of conscientious or physical objections, he shall not jeopardize his seniority

which exempts certain textile plants from the provisions of Chapter 1, Title 53. The trial judge granted Mount Vernon's motion for summary judgment, finding that Mount Vernon was exempt from section 53-1-150 and, furthermore, that section 53-1-110 does not prohibit discrimination against persons who worship on Saturday. Holley appealed.[8]

On appeal, the South Carolina Supreme Court was presented with a narrow question of statutory interpretation. Holley contended that sections 53-1-150 and 53-1-110 should be read together as prohibiting Mount Vernon from discriminating against employees who worship on Saturday.[9] Holley conceded that the plain meaning of each section was easy to determine if read alone.[10] However, Holley contended that an ambiguity arises when the sections are read together. Holley further argued that because section 53-1-150, prohibiting discrimination against persons who worship on Saturday, was enacted after section 53-1-110 and is located after section 53-1-110 in the code, section 53-1-150 should control.[11]

In rejecting Holley's argument, the court held that section 53-1-110 clearly and unambiguously exempts textile manufacturers and finishers, such as Mount Vernon, from all provisions of Chapter 1 of Title 53.[12] Consequently, the supreme court affirmed the trial court's ruling that section 53-1-150 did not prohibit Mount Vernon from discriminating against employees such as Holley who worship on Saturday. In addition, the court affirmed that section 53-1-110 does not prohibit textile plants from discriminating against a person who worships on Saturday because no language in that section specifically addresses people who worship on Saturday.[13]

While the *Holley* opinion does not reach constitutional issues, it is interesting to speculate on the possible consequences that may have arisen had the parties chosen to raise such issues.[14] The United States Supreme Court has determined that a statute violates the Establishment Clause if its primary

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rights by such refusal or be discriminated against in any manner.

Id.

8. *Holley*, ___ S.C. at ___, 440 S.E.2d at 374.

9. *Id.* at ___, 440 S.E.2d at 374.

10. Brief of Appellant at 6.

11. *Id.* (citing Feldman v. South Carolina Tax Comm'n, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943) for the proposition that when there is a clearly irreconcilable conflict in provisions of a statute, "the last in time or order of arrangement prevails").

12. *Holley*, ___ S.C. at ___, 440 S.E.2d at 374-75 (citing Medlock v. 1985 Ford F-150 Pick Up, 308 S.C. 68, 417 S.E.2d 85 (1992), for the rule of statutory interpretation that when a statute is clear and unambiguous, its terms must be given their literal meaning).

13. *Id.* at ___, 440 S.E.2d at 374. Those who worship on Sunday are provided with an exception. *Id.* at ___, 440 S.E.2d at 374; *see* S.C. CODE ANN. § 53-1-110 (Law. Co-op. 1992).

14. The supreme court did order the parties to file supplemental briefs, and ordered the Office of the Attorney General to file an amicus brief, on the issue of whether the Sunday Blue Laws violate the Establishment Clause of the federal or state constitutions.

effect is to promote or support a religion or if it fosters excessive governmental entanglement with religion.[15] By protecting individuals from working on Saturday because it is their "day of worship," section 53-1-150(c) arguably promotes and advances a religion that observes its Sabbath on Saturday.[16] This open question notwithstanding, *Holley v. Vernon Mills, Inc.* makes clear that, as a matter of statutory interpretation, textile manufacturers may fire an employee because of that employee's religious opposition to working on Saturdays.

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15. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1970), *reh'g denied*, 404 U.S. 876 (1971).

16. Supplemental Brief of Respondent at 10-15; *see also* Estate of Thorton v. Caldor, 472 U.S. 703 (1983) (holding that a Connecticut statute which provided Sabbath observers with an absolute right not to work on their chosen Sabbath violated the Establishment Clause); *cf.* Commonwealth v. Arlan's Dep't Store, 357 S.W.2d 708 (Ky. 1962); Opinion of the Justices, 229 A.2d 188 (N.Y. Sup. Ct. 1967) (both upholding exemptions for Saturday Sabbath observers).