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Conner v. City of Forest Acres: The End of the At-Will Employment Era?

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CONNER V. CITY OF FOREST ACRES: THE END OF THE AT-WILL EMPLOYMENT ERA?

I. INTRODUCTION

In *Conner v. City of Forest Acres*[1] the South Carolina Supreme Court interpreted an employee handbook so as to create a jury question whether or not the handbook invalidated the at-will employment relationship between Conner and her employer.[2] Alone, this is not an unusual result for a wrongful termination lawsuit. Since *Small v. Springs Industries., Inc.*[3] South Carolina has recognized the proposition that an employer cannot use an employee handbook to make promises to the employee while still maintaining that the handbook does not constitute a contract.[4] Thus, courts often allow employees to sue for breach of an employment contract even when the employer states that the relationship was at-will.[5]

However, *Conner* appears to go beyond this exception to the at-will employment relationship, as the City of Forest Acres specifically drafted its employee handbook to avoid the unintended effect of creating an employment contract.[6] Following the suggestion of the court in *Small*,[7] the drafter articulated a disclaimer in bold, straightforward language that the handbook was meant to be merely a guideline and not a contract.[8] The court noted the following disclaimers within the handbook:

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1. 348 S.C. 454, 560 S.E.2d 606 (2002).
2. *Id.* at 464, 560 S.E.2d at 611.
3. 292 S.C. 481, 357 S.E.2d 452 (1987).
4. *Id.* at 485, 357 S.E.2d at 454.
5. *See* Fleming v. Borden, Inc., 316 S.C. 452, 463, 450 S.E.2d 589, 595 (1994) (holding that an employee handbook may alter at-will employment); *Small*, 292 S.C. at 485, 357 S.E.2d at 454 (allowing a cause of action for wrongful termination when an employee handbook enumerated offenses that would lead to immediate firing).
6. *See Conner*, 348 S.C. at 458, 560 S.E.2d at 608 ("MANY OF THE POLICIES CONTAINED IN THIS HANDBOOK ARE BASED ON LEGAL PROVISIONS, INTERPRETATIONS OF LAW, AND EMPLOYEE RELATIONS PRINCIPLES, ALL OF WHICH ARE SUBJECT TO CHANGE.").
7. 392 S.C. at 485, 357 S.E.2d at 455 (suggesting that an employer can maintain the at-will relationship by merely adding a conspicuous disclaimer to the handbook).
8. *Conner*, 348 S.C. at 458, 560 S.E.2d at 608.

> During her employment, Conner received two employee handbooks. After receiving each one, Conner signed an acknowledgment form. The 1993 acknowledgment stated . . . "I further understand that nothing in these policies and procedures creates a contract of employment for any term, that I am an employee at-will and nothing herein limits the City of Forest Acres's rights for dismissal."
>
> On page 1 of the handbook . . . there is the following language: . . . "THIS HANDBOOK IS CONSIDERED TO BE A GUIDELINE . . . . THE HANDBOOK DOES NOT CONSTITUTE A CONTRACT OF EMPLOYMENT FOR ANY TERM. NOTHING IN THIS HANDBOOK SHALL BE CONSTRUED TO CONSTITUTE A CONTRACT. . . . NOTHING HEREIN LIMITS THE CITY'S RIGHTS TO TERMINATE EMPLOYMENT. ALL EMPLOYEES OF THE CITY ARE AT-WILL EMPLOYEES. . . ."
> This same language appears on the last page of the handbook .
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> . . . .
>
> . . . Additionally, he [sic] handbook states the following: . . . "NO REQUIREMENT EXISTS FOR DISCIPLINE TO BE PROGRESSIVE. FIRST VIOLATIONS CAN RESULT IN IMMEDIATE DISMISSAL WITHOUT REPRIMAND OR SUSPENSION."[9]

The court did not suggest that the language of the actual disclaimers was ambiguous or difficult for the employee to understand. Instead, the court looked to the section of the handbook that listed the procedures for discipline and found them contrary to the spirit of an at-will employment relationship.[10] Although the handbook indicated that discipline need not be progressive, the court understood this section to create a promise on behalf of the defendant.[11] Specifically, the court relied upon the language of the discipline section that stated violations "will be disciplined."[12] Thus, the court held that summary judgment was not proper because more than one inference could be drawn as to

9. *Id.* at 458-59, 560 S.E.2d at 608.
10. *Id.* at 464, 560 S.E.2d at 611.
11. *Id.* at 464 n.4, 560 S.E.2d at 611 n.4.
12. *Id.*

whether or not the handbook altered the at-will employment relationship.[13]

Understandably, the result in *Conner* has created some consternation within the employment law bar. If the clear language of this handbook could create a contract, then so would most, if not all, employee handbooks.

This Note focuses on the erosion of the at-will employment doctrine and the possible ramifications of the *Conner* decision. Part II provides an in-depth discussion of the decision in *Conner*, exploring the history of the at-will doctrine as well as the authorities used by the court to reach its decision. Part III describes the potential impact of the *Conner* decision by analyzing how the decision has further eroded the at-will doctrine. Part IV suggests some practical drafting changes of employee handbooks that will lessen an employer's potential exposure to breach of contract suits by its at-will employees. These drafting suggestions include changing all mandatory words and eliminating broad policy statements. Finally, Part V suggests an alternative to at-will employment that might provide South Carolina employers with greater protection than the at-will doctrine in light of *Conner* and other cases that have eroded the at-will doctrine.

II. EROSION OF THE AT-WILL DOCTRINE AND THE DECISION IN *CONNER V. CITY OF FOREST ACRES*

A. The History and Evolution of the At-Will Doctrine

The common law rule of at-will employment states that employment for an indefinite term is terminable by either the employee or the employer for any reason.[14] "The employment-at-will doctrine is premised on a theoretical equality of rights. Both employer and employee have the right to terminate the employment relationship at any time and for any reason."[15] Accordingly, under the traditional rule, an employer did not incur liability for the wrongful discharge of an at-will employee.[16] This rule further dictated that a contract of employment for a term of years, which is not supported by

13. *Id.* at 464, 560 S.E.2d at 611.

14. *See, e.g.*, Hudson v. Zenith Engraving Co., Inc., 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) (citation omitted) (agreeing that employment for an indefinite term is considered at-will employment).

15. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 329 (1991-92).

16. *See, e.g., Hudson*, 273 S.C. at 769, 259 S.E.2d at 813 (stating that employment remains at-will when not supported by independent consideration).

consideration beyond the obligation to work in exchange for wages, is still "terminable at the will of either party."[17] Over the years, courts have carved out exceptions to the at-will doctrine, and notably, one of the most common exceptions is the employee handbook.[18]

South Carolina recognized this exception in *Small v. Springs Industries, Inc.*[19] In *Small* the employer issued an employee handbook that set forth a four-step process for discipline.[20] The handbook went on to state that certain offenses, such as fighting and drunkenness, were excepted from this four-step process and were grounds for immediate termination.[21] Through this provision, it was argued that the handbook implied that the lesser offenses would not result in immediate termination.[22]

The court stated that "[i]t is patently unjust to allow an employer to couch a handbook, bulletin, or other 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."[23] Therefore, the court held that a jury should decide whether or not the handbook created an employment contract.[24] To support its decision, the court stated that "South Carolina [is] a progressive state which wishes to see that both employer[s] and employee[s] are treated fairly."[25] Importantly, the court noted that an employer could effectively maintain the at-will relationship while using handbooks or bulletins if the employer inserted a conspicuous disclaimer into the document.[26] However, future case law has proven that the mere insertion of a disclaimer is ineffective.

After *Small*, courts refined the handbook exception by testing the conspicuousness of the disclaimer. For example, in *Johnson v. First Carolina Financial Corp.*[27] the court of appeals found that there was no genuine issue of fact regarding the conspicuousness of the disclaimer, and therefore, the employer was entitled to summary

17. *Id.* at 768, 259 S.E.2d at 813.

18. Befort, *supra* note 15, at 327.

19. 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987) (holding that a jury can consider a handbook, along with other materials, to decide whether the employer altered the at-will employment relationship).

20. *Id.* at 483, 357 S.E.2d at 453.

21. *Id.*

22. *Id.*

23. *Id.* at 485, 357 S.E.2d at 455.

24. *Id.* at 486, 357 S.E.2d at 455.

25. *Small*, 292 S.C. at 486, 357 S.E.2d at 455.

26. *Id.* at 485, 357 S.E.2d at 455.

27. 305 S.C. 556, 409 S.E.2d 804 (Ct. App. 1991).

judgment.[28] Implicitly, *Johnson* suggested that the conspicuousness of a disclaimer is a factual question.

In *Fleming v. Borden, Inc.*[29] the South Carolina Supreme Court further explored the effect of disclaimers in employee handbooks. In this wrongful termination suit, a jury had found for the defendant, and the plaintiff appealed, in part, on the grounds that the disclaimer used in the handbook was ineffective as a matter of law.[30] To address the plaintiff's contention that a judge should have decided the disclaimer issue, the court cited to Stephen F. Befort's article, *Employee Handbooks and the Legal Effect of Disclaimers*,[31] in support of the notion that the jury should determine the factual question of whether a disclaimer is conspicuous.[32] Befort suggests, "[A] handbook that contains both promissory language and a disclaimer should be viewed as inherently ambiguous. . . . As with any question of fact, this is primarily a matter for the jury to decide."[33]

By endorsing the Befort article, this dictum from the *Fleming* opinion actually expands the handbook exception. Prior to *Fleming*, a handbook could contain promises while maintaining the at-will relationship if it included a conspicuous disclaimer.[34] It did not matter if the language of the disclaimer and the language of the promises were in conflict. As long as a jury determined that the disclaimer was conspicuous or the court determined that the disclaimer was conspicuous as a matter of law, the handbook was viewed as merely advisory.[35] However, the Befort article suggests that employers should be bound by their promises, in spite of the disclaimers, if the promises

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28. *Id.* at 560, 409 S.E.2d at 806.

29. 316 S.C. 452, 450 S.E.2d 589 (1994).

30. *Id.* at 454, 460, 450 S.E.2d at 591, 594.

31. Befort, *supra* note 15.

32. *Fleming*, 315 S.C. at 464, 450 S.E.2d at 596.

33. Befort, *supra* note 15, at 376.

34. *See* Small v. Springs Indus., Inc., 292 S.C. 481, 484, 357 S.E.2d 452, 455 (1987) ("If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them . . . he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document."); *cf.* Jones v. Gen. Elec. Co., 331 S.C. 351, 364-65, 503 S.E.2d 173, 180-81 (Ct. App. 1988) (finding a disclaimer inconspicuous when it was located on the last page of the handbook and when it was not capitalized, bolded, or set apart with a distinctive border or contrasting color).

35. *See* Johnson v. First Carolina Fin. Corp., 305 S.C. 556, 560, 409 S.E.2d 804, 806 (Ct. App. 1991) (upholding summary judgment in favor of employer when conspicuousness of the disclaimer was indisputable); Marr v. City of Columbia, 307 S.C. 545, 547, 416 S.E.2d 615, 616 (1992) (upholding summary judgment in favor of employer when disclaimer was placed in large letters on the front cover of the handbook and also in large, bold type on a separate page).

are such that they conflict with an at-will relationship.[36] The article essentially proposes a new test for evaluating disclaimers. The test involves comparing the disclaimer language with the promissory language of the handbook.[37] Befort is careful to limit this proposal to situations in which the promise is "sufficiently objective and specific to lead employees reasonably to believe that the employer will abide by the expressed representation."[38] Ultimately, from *Hudson v. Zenith Engraving Co., Inc.*[39] to *Fleming*, South Carolina jurisprudence has etched out a significant exception to the at-will employment doctrine.

B. The Decision in Conner v. City of Forest Acres

Evelyn Conner was a police dispatcher with the City of Forest Acres for nearly a decade beginning in July 1984.[40] From November 1992 until her eventual termination in October 1993, Conner was reprimanded for various reasons, such as dress code violations, tardiness, poor work performance, and "abusive language."[41] After an "unsatisfactory" evaluation in July 1993, Conner was placed on probation.[42] Ultimately, the city terminated her employment.[43] The grievance process did not yield favorable results for her, so she sued the city for, inter alia, breach of contract.[44] Significantly, she relied on the city's employee handbook as grounds for altering the at-will employment relationship.[45]

The defendant moved for summary judgment on the grounds that "no contract was created by the handbook because: (1) the procedures in the employee handbook did not alter Conner's at-will status, (2) the disclaimers in the handbook were conspicuous and therefore effective, and (3) Conner signed acknowledgments of her at-will status."[46] The trial court agreed and granted the defendant's motion, but the court of

36. *See* Befort, *supra* note 15, at 375.
37. *Id.* at 374-75.
38. *Id.* at 374.
39. 273 S.C. 766, 259 S.E.2d 812 (1979).
40. Conner v. City of Forest Acres, 348 S.C. 454, 457, 560 S.E.2d 606, 607 (2002).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 460, 560 S.E.2d at 609.
45. *See id.* at 458-59, 560 S.E.2d at 608-09.
46. *Conner*, 348 S.C. at 462-63, 560 S.E.2d at 610.

appeals reversed.[47] Ultimately, the supreme court affirmed the court of appeals so that the issue is now open to a jury determination.[48]

Applying *Fleming*,[49] the supreme court held that summary judgment was inappropriate because the handbook contained both disclaimers and promises.[50] It clearly endorsed the Befort article proposition, quoted in the *Fleming* opinion, that "credible promises . . . should be enforced" and that the handbook should be evaluated in its entirety to ascertain whether those promises are credible.[51] The supreme court approved of the Befort article, as cited in *Fleming*, for the proposition that the disclaimer is only one factor to consider when conducting this evaluation.[52] Thus, the conspicuousness of the disclaimer is to be evaluated in the context of the handbook as a whole. Evaluations of whether the font is large enough, the typeface is bold enough, and the wording is clear enough are no longer dispositive.[53]

In other words, prior to *Conner*, the test for determining if an employee handbook altered the at-will relationship related only to conspicuousness.[54] Whether it was decided by a judge as a matter of law or by a jury as a matter of fact, the employment at-will relationship survived if a disclaimer was found conspicuous.[55] After *Conner* the test for determining if a handbook alters the at-will relationship only uses conspicuousness as one factor.[56] First, one must determine if the handbook contains a promise. If it does, then a jury decides whether there is a contract based on the totality of the circumstances, including the conspicuousness of the disclaimer.

In a footnote, the supreme court pointed to three statements in the city's handbook that contained mandatory language and then used

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47. *Id.* at 457, 560 S.E.2d at 607.

48. *Id.*

49. 316 S.C. 452, 450 S.E.2d 589 (1994).

50. *Conner*, 348 S.C. at 463, 348 S.E.2d at 611.

51. *Id.* (quoting *Fleming*, 316 S.C. at 464, 450 S.E.2d at 596). The *Fleming* court quoted Befort, *supra* note 15, at 375-76.

52. *Id.* This language was cited by the court of appeals subsequent to *Fleming* but prior to *Conner* in *Abraham v. Palmetto Unified Sch. Dist. No. 1*, 343 S.C. 37, 45

those statements to illustrate how the manual is promissory in nature.[57] The court wrote, "[F]or example, the handbook states that: (1) violations of the Code of Conduct 'will be disciplined,' (2) 'discipline shall be of an increasingly progressive nature,' and (3) 'all employees shall be treated fairly and consistently in all matters related to their employment.'"[58] The court held that "[this] language in the handbook is mandatory in nature and therefore a genuine issue of material fact exists as to whether Conner's at-will status was modified."[59] In so holding, the court suggests that any handbook that contains mandatory words must be litigated beyond a motion for summary judgment.

III. *CONNER V. CITY OF FOREST ACRES* AND ITS RAMIFICATIONS ON THE USE OF EMPLOYEE HANDBOOKS IN SOUTH CAROLINA.

A. The Effect of Conner *on an Employer's Reliance Upon Disclaimers to Preserve the At-Will Relationship*

The *Conner* court's clearest message is that employers cannot rely solely on a well-written disclaimer to preserve their ability to terminate employees at will. "[T]he disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys credible promises that should be enforced."[60] However, under the *Conner* opinion, this "one" factor is really not a factor at all. If the rest of the handbook contains no language that could lead to an inference of a promise, then the disclaimer is unnecessary. This point is best illustrated by looking to the provisions of the *Conner* defendant's handbook, which the court relied upon to find promissory statements.

The court points to the words "shall" and "will" without looking at the context in which those words are used.[61] It fails to fully follow its own maxim that the handbook should be read as a whole to determine whether the disclaimer is conspicuous as a matter of law.[62] In reality, the word "shall" is used in a broad policy statement, which reads, "It is the policy of the City of Forest Acres that all employees *shall* be treated fairly and consistently in all matters related to their employment."[63] This statement is simply an expression of the employer's goals. To infer that this creates a promise is contrary to its

57. *Conner*, 348 S.C. at 464 n.4, 560 S.E.2d at 611 n.4.
58. *Id.* (emphasis omitted).
59. *Id.* at 464, 560 S.E.2d at 611 (citation omitted).
60. *Id.* at 463, 560 S.E.2d at 611 (citation omitted).
61. *Id.* at 459, 560 S.E.2d at 608-09.
62. *See id.* at 463, 560 S.E.2d at 611.
63. *Conner*, 348 S.C. at 459, 560 S.E.2d at 609 (emphasis added).

context. Similarly, the word "will" is used as a warning that the city will discipline offenders of the code of conduct.[64] This sentence does not promise any benefits to the employee, so a departure from the assertions would not harm the employee.

The other mandatory statement relied on by the court was that "'discipline *shall be* of an increasingly progressive nature.'"[65] However, the court omitted a key word in that sentence: "*Ordinarily*, discipline shall be of an increasingly progressive nature."[66] The word "ordinarily" means that progressive discipline may not be afforded in every circumstance. Moreover, this "mandatory" sentence is immediately followed with the bold typed statement that "NO REQUIREMENT EXISTS FOR DISCIPLINE TO BE PROGRESSIVE."[67] By editing the statement down to just its mandatory "shall," the court misses the point of evaluating the language of the handbook as a whole.

The initial principle behind finding a contract in an employee handbook was that it would be unfair for the employer to receive the benefit of improved employee attitudes and improved quality of work, while treating their own promises as illusory.[68] However, in *Conner* there is no perceptible benefit to the employer. The employee signed a statement acknowledging that she was an at-will employee.[69] This is not a situation in which an employer tried to lead the employee into believing one thing while really intending the opposite to be true. Regardless of how the court reached its decision, *Conner* severely limits the right of an employer to rely on a disclaimer, despite its conspicuousness, in order to maintain the ability to terminate employees without cause.

B. *What* Conner *Means for Employee Handbooks in South Carolina*

After *Conner* a handbook may limit the employer's rights even if the employee clearly understands he or she can be terminated at will. This situation will arise when there is some handbook or bulletin containing language that can be construed as promissory, and handbook sections providing for progressive discipline may well fall within this category.

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64. *Id* at 459, 560 S.E.2d at 608.
65. *Id.* at 464 n.4, 560 S.E.2d at 611 n.4.
66. *Id.* at 459, 560 S.E.2d at 608 (emphasis added).
67. *Id.*
68. Small v. Springs Indus., Inc., 292 S.C. 481, 485, 357 S.E.2d 452, 454 (1987).
69. *Conner*, 348 S.C. at 458, 560 S.E.2d at 608.

If the Befort article provides a guideline for South Carolina employers, then a three-part test should be used to determine whether the employer ought to be bound by the terms of the handbook. First, the handbook must contain a "specific promise."[70] Befort suggests that "[n]ot every handbook term rises to this level. A muddled or vague statement of general policy does not."[71] It is important to note that *Conner* construed a general policy statement to create promissory language. Thus, this prong of the test is difficult to define in South Carolina.

The second element of the Befort test looks at "reasonable employee expectations."[72] Befort suggests that this reliance refers to objective group expectations and not the expectations of the individual.[73] Therefore, it is not necessary for a plaintiff to prove that he or she specifically relied on the promissory language of the handbook.[74] In light of this prong, an employer might use it as a defense. For example, in *Conner* the employees signed forms acknowledging that they were at-will employees and that the employer had a right to terminate accordingly.[75] As a result of these acknowledgments, it would be unusual for any employee to rely on the alleged promises of the city's handbook. However, the question of reliance is factual in nature and, thereby, will be left to a jury's determination.[76]

Finally, the Befort test requires that there be a "substantial benefit to the employer."[77] Presumably, the employer would benefit if the promissory language fosters good will among the employees. Befort states "[t]o a great extent, these three factors describe a single phenomenon. The promise is enforceable because of the resulting benefit to the employer. The element of reasonable expectation acts as the conduit from promise to benefit."[78] If the handbook, in spite of a disclaimer, possesses these three elements, then the promise should be enforced, and ordinarily, these elements will be determined by a jury.[79]

According to the article, a court should remove the question from the jury only when "the handbook statements, when read with the

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70. Befort, *supra* note 15, at 374.
71. *Id.*
72. *Id.* at 374-75.
73. *Id.* at 375.
74. *Id.*
75. Conner v. City of Forest Acres, 348 S.C. 454, 458, 560 S.E.2d 606, 608 (2002).
76. *See* Befort, *supra* note 15, at 374-75.
77. *Id.* at 375.
78. *Id.*
79. *Id.* at 376.

disclaimer, could not possibly be interpreted in a promissory manner."[80] *Conner* interprets this to mean that, if any questionable handbook statements exist, the disclaimer is only relevant for a jury's factual determination of the issue.[81] On the other hand, Befort and *Fleming*[82] both acknowledge that there are circumstances that call for summary judgment.[83] As an example of such a circumstance, *Fleming* points to *Johnson v. First Carolina Financial Corp.*,[84] in which the disclaimer was printed on the first and last pages of the handbook in bold, enlarged type font.[85] The *Fleming* opinion stated that summary judgment was not proper in the case because "the disclaimer was not as conspicuous as the disclaimer in *Johnson*."[86] Through this analysis, the supreme court clearly suggested that there are disclaimers worthy of summary judgment.

In *Johnson* the court of appeals granted summary judgment because the disclaimer was conspicuous and because the employee acknowledged that he was not hired for a specified term.[87] However, after *Conner* the court would not reach the same conclusion today. Like Johnson, Conner signed an acknowledgment of her at-will status, and the disclaimer used by the City of Forest Acres was at least comparable to the one used in *Johnson*.[88] An employer in South Carolina is more likely to find himself in front of a jury seeking a determination that the relationship remains at-will because *Conner* permits the most tenuous of mandatory language to create a promise.

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80. *Id.* at 377. Similar language is also cited in *Fleming v. Borden, Inc.*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994).

81. *See* Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002).

82. 316 S.C. at 452, 450 S.E.2d at 589.

83. *Id.* at 464, 450 S.E.2d at 596; Befort, *supra* note 15, at 377.

84. 305 S.C. 556, 409 S.E.2d 804 (Ct. App. 1991).

85. *Fleming*, 316 S.C. at 464, 560 S.E.2d at 596.

86. *Id.* at 465, 560 S.E.2d at 597.

87. 305 S.C. at 560, 409 S.E.2d at 806.

88. The handbook used by First Carolina Financial Corp. contained three disclaimers, one of which was in large, bold type. *Id.* at 557-58, 409 S.E.2d at 805. The handbook used by the City of Forest Acres contained at least four disclaimers, including the signed acknowledgment. Conner v. City of Forest Acres, 348 S.C. 454, 458-59, 560 S.E.2d 606, 608-09 (2002). The disclaimers in both handbooks consisted of substantially similar language and large, bold font size. *See Johnson*, 305 S.C. at 557-58, 409 S.E.2d at 805; *Conner*, 348 S.C. at 458-59, 560 S.E.2d at 608-09.

IV. PRESERVING BOTH AT-WILL EMPLOYMENT AND EMPLOYEE HANDBOOKS AFTER *CONNER V. CITY OF FOREST ACRES*

Conner's impact on employers is significant. In response, the South Carolina General Assembly is debating the passage of an at-will employment statute. As of the date of this writing, House Bill 3448 is awaiting debate in the Senate.[89] Currently, the bill reads:

> It is the public policy of this State that:
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> (1) The employment-at-will doctrine applies to the relationship between an employee and an employer.
> (2) As used in this chapter, the term "employment-at-will doctrine" is specifically defined as the right of an employee or an employer to terminate the employment relationship with or without notice to the other and with or without cause, except as provided in item (4). If an employee or an employer terminates an employment relationship under the employment-at-will doctrine, then neither party will be liable to the other for any claim for wrongful termination based on breach of contract, breach of the implied covenant of good faith and fair dealing, or any other claim in which an express or implied contract is alleged.
> (3) No handbook, policy, procedure, or other document issued by an employer or its agent may form an express or implied contract of employment, except as described in item (4).
> (4) An employee and an employer may enter into a contract of employment to which item (2) does not apply if:
> (a) the contract is in writing;
> (b) the contract is signed by the employee and an authorized agent of the employer; and
> (c) the contract expressly provides that the parties intend to alter their at-will employment relationship.
> (5) This section applies to both public and private employment. However, nothing in this section shall

89. *See* H.R. 3448, 115th Gen. Assem. (S.C. 2003).

> be construed to affect the rights of employees and employers as defined by a collective bargaining agreement or the constitutional or statutory rights of public employees under applicable grievance procedures.
> (6) Nothing in this section shall be construed to allow an employer to terminate an employee in violation of public policy.[90]

The proposed legislation soundly overrules *Conner*. As written, it also overrules *Small v. Springs Industries, Inc.*[91] and wholly eliminates the handbook exception to at-will employment in South Carolina. While a few states have passed some legislation creating a strong preference for at-will employment, if passed, South Carolina will be the first state to employ such far-reaching legislation.[92]

Because the proposed legislation removes the handbook as an issue for consideration, the following suggestions for South Carolina employers retain only partial significance. If this legislation passes, it will apply to employment relationships created subsequent to its passage.[93] Therefore, employees who are currently employed under either an express or implied contract would remain subject to the *Conner* holding. The recommendations that follow are intended to provide practical suggestions to employers who wish to utilize an employee handbook without fearing the unintended effect of creating a contract.

A. Drafting Proposals Intended to Maintain the At-Will Relationship

At first blush, an employer might think that the best response to *Conner* is to cease using handbooks. Although the court has arguably taken the employee handbook exception to a new level, it is not necessarily fatal to the use of handbooks. This is fortunate for both

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90. *Id.*

91. 292 S.C. 481, 357 S.E. 2d 452 (1987).

92. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1501 (West 2003) (requiring a writing in order to alter the at-will presumption but also expressly permitting a handbook to suffice as that writing); N.D. CENT. CODE § 34-03-01 (2001) (defining all employment as at-will, unless for a specified term, but appearing not to require any specific type of proof of that term).

93. The Contracts Clause of the U.S. Constitution generally prevents states from passing laws which retroactively apply to contractual obligations. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . make any . . . Law impairing the Obligation of Contracts . . . .").

employers and employees because employee handbooks serve a vital function in the workplace. They provide guidelines so that employees have advance notice about what is expected from them, which serves to benefit the employee.

Another role of the employee handbook is purely tactical. By setting forth procedures for discipline, the employer informs supervisors and managers of a non-discriminatory method of discipline. The goal is to prevent supervisors and managers from acting in violation of various anti-discrimination laws.[94] Ultimately, this benefits the employer by preventing conduct that leads to expensive lawsuits.

South Carolina employers should now be especially cautious in drafting handbook sections pertaining to progressive discipline and to discipline generally. Anyone charged with the responsibility of drafting a handbook should avoid mandatory words such as "will" and "shall." Because these are the words seized upon by the court as mandatory, employers should simply remove them. This is an effortless, mechanical drafting change. However, more is required than a mechanical drafting change in order to ensure that a handbook will not create a contractual obligation. The *Conner* court suggested that the handbook, in its entirety, determines whether the employer has made a promise that conflicts with the disclaimers.[95] Thus, all handbooks should be drafted and edited to create a consistent message, in addition to eliminating "shalls" and "wills" from the text.

Further, employers should be careful to avoid making any statements that imply that a certain disciplinary process can be expected. An employer that wants to include a non-exclusive list of terminable offenses should list them and then state, "any other conduct that the company, in its sole discretion, deems worthy of disciplinary action up to and including discharge."[96] This type of general statement reminds employees that any conduct the employer disapproves of may be grounds for termination, which largely reiterates the at-will doctrine.

Perhaps more importantly, employers would be wise to leave overly broad or gratuitous policy statements out of their employee handbooks altogether. The policy statement in *Conner* stated, "It is the

94. *See The Art of Firing–Part I*, S.C. EMP. L. LETTER (McNair Law Firm, P.A., Columbia, S.C.), Sept. 1998, at 5, 6 (listing the "written record" as an advantage that is useful in preventing and defending a lawsuit arising from termination of employment).

95. *Conner*, 348 S.C. at 464, 560 S.E.2d at 611.

96. *Does the At-Will Doctrine Survive?*, S.C. EMP. L. LETTER (McNair Law Firm, P.A., Columbia, S.C.), March 2002, at 1, 3.

policy of the City of Forest Acres that all employees shall be treated fairly and consistently in all matters related to their employment."[97] While some policy statements, such as equal employment opportunity statements, serve important purposes, the only benefit that grows from this statement in *Conner* is a sense of good will. Because good will is a benefit to the employer, it can be used as evidence that the at-will policy is not fair to the employee. The policy statement was a key factor in the court's decision that a jury should determine whether or not the handbook created a contract. Although it seems to be a stretch to say that an employer's goals are always promises, there is no good reason for including this type of policy statement when it can destroy the at-will employment relationship that the employer has worked to retain.

B. Avoiding a Jury Determination of the Rights and Obligations Between Employers and Employees

Conner is the culmination of a judicial trend towards narrowing the at-will doctrine.[98] In light of this apparent judicial preference, an employer might want to consider bypassing the issue altogether and using an arbitration clause in the employee handbook to serve this objective. An employer could choose to grant its employees contractual employment—as opposed to at-will—in exchange for an agreement requiring contract disputes to be arbitrated.

Under this proposal, the employer knows ahead of time that employees are not terminable without cause. It is always advantageous to know what to expect instead of waiting until after an employee takes a complaint to court. Also, the employer is then free to define which actions are cause for termination. An advantage to this approach is that an arbitrator, not a jury, will decide the fate of the employee's complaint, and it is reasonable to believe that jurors are more sympathetic to employees.

However, there are some disadvantages to such arrangements. An arbitration clause in an employment contract might encourage more litigation because employees are guaranteed a forum for their complaints. Increased expenses will accompany this increase in litigation. Therefore, alternatively, an employer could maintain the at-will employment relationship while also requiring the employee to sign a separate arbitration contract. This approach is illustrated in

97. *Conner*, 348 S.C. at 459, 560 S.E.2d at 609.
98. *See supra* Part II.

Towles v. United Healthcare Corp.,[99] in which the handbook stated, "[T]he provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment . . . ."[100] In *Towles* the court of appeals agreed to compel arbitration of the plaintiff's various complaints[101] and noted that there is a strong public policy favoring arbitration.[102] Therefore, although Towels argued that he was unaware of the arbitration agreement, the court enforced it because he signed an acknowledgment of the clause.[103]

Under this proposal, an employer still retains the right to terminate an employee for any reason. The key difference is that the legal forum is chosen in advance for the unfortunate circumstances that may require it. Certainly, arbitration is not a perfect answer to all employment matters; however, it is an option for some employers who have a need for highly defined handbooks that might already alter the at-will relationship.

V. CONCLUSION

Although South Carolina theoretically acknowledges the at-will employment doctrine, recent case law suggests that this doctrine is less effective when an employer uses an employee handbook. This is certainly true after *Conner v. City of Forest Acres*.[104] While this decision is not fatal to the use of employee handbooks in at-will arrangements, it does demand greater scrutiny of handbook language.

This Note has given a brief history of the at-will doctrine, as well as its erosion. Further, this Note has attempted to analyze *Conner* in light of the precedent that created it. The *Conner* decision clearly reveals that any combination of disclaimers and mandatory language is subject to a jury determination. Finally, this Note has suggested a few options for employers who wish to continue using handbooks while still trying to maintain a traditional at-will employment.

In light of South Carolina's case law, an employer is more likely to convince a judge that summary judgment is appropriate in a wrongful termination suit if he eliminates mandatory words and promissory statements. Alternatively, an employer can opt-out of the at-will employment dilemma and create a binding arbitration contract.

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99. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).
100. *Id.* at 33-34, 524 S.E.2d at 842.
101. *Id.* at 41, 524 S.E. 2d at 846.
102. *Id.* at 37, 524 S.E.2d at 844.
103. *Id.* at 39, 524 S.E. 2d at 845.
104. 348 S.C. 454, 560 S.E.2d 606 (2002).

Regardless of how employers choose to frame their relationships with employees, it is critical that all employers be aware of the implications of the *Conner* decision.

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