

DISCLAIMERS OF WRONGFUL DISCHARGE LIABILITY: TIME FOR A CRACKDOWN?

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As a leading authority on employee dismissal law observed in 1989, “[t]he most significant employment law development in the last quarter of the 20th century has been the erosion of the employment-at-will rule and the recognition of a family of common law rights protecting individual employees against wrongful dismissal.”¹ But the newly developed common law of wrongful discharge hardly reigns supreme or rests secure. A few states refuse to adopt any of the three major common law exceptions to employment at will: (1) the public policy theory; (2) the implied covenant of good faith and fair dealing; and (3) a set of theories by which employers are rendered liable for express statements about discharge policy.² In addition, some recent cases suggest that courts are scaling back the exceptions in states where they once appeared solidly entrenched.³ Finally, due in part to escalating wrongful discharge recoveries,⁴ a uniform termination act has recently been promulgated,⁵ and

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1. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 397 (1989) (footnote omitted). The employment-at-will rule states that either party to an employment contract for an indefinite time period can terminate the contract at any time and for any reason.

2. See 9A Lab. Rel. Rep. (BNA), Ind. Emp. Rights Manual, at 505:51-52 [hereinafter IERM] (containing a 1992 chart which suggests that as many as five states still resist the three major common-law exceptions to employment at will).

3. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379-80, 389-401 (Cal. 1988) (en banc) (rejecting a public policy exception claim because the policy in question was insufficiently “public,” and holding that breaching the implied covenant of good faith and fair dealing does not give rise to a tort claim); *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 308 (Mich. 1991) (Cavanagh, C.J., dissenting) (asserting that the majority in this case had virtually overruled *Toussaint v. Blue Cross & Blue Shield*, 292 N.W. 2d 880 (Mich. 1980)). For a discussion of the landmark *Toussaint* decision, see *infra* notes 62-64.

4. See, e.g., Jonathan Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMPLOYEE REL. L.J. 387, 392 (1988); *Tell It to the Arbitrator*, BUS. WK., Nov. 4, 1991, at 109.

5. See Uniform Employment-Termination Act (1991), in IERM, *supra* note 2, at 540:21-41 [hereinafter Uniform Act]; see also Randall Samborn, *At-Will Doctrine Under Fire*, NAT'L L.J., Oct. 14, 1991, at 1 (describing the bar's reaction to the Model Act).

one state now regulates the subject by statute.⁶

Getting relatively short shrift amidst this activity, however, is an assault on the common law of wrongful discharge that has been underway since at least the early 1980s. Adopting the time-honored response of business firms confronted with burdensome new judge-made law, today's employers consistently attempt to contract away potential wrongful discharge liability. Although most litigation on these disclaimers or at-will clauses has involved the third set of wrongful discharge theories just noted,⁷ employers have been fairly successful in blocking liability under those theories. In this effort to curtail liability for their own express statements, employers have received assistance from the relatively few writers who have addressed the subject.⁸

Unlike most of the scant commentary on at-will clauses, this Article is not another how-to-do-it piece for eliminating bothersome wrongful dismissal recoveries. Instead, the Article argues that state courts and/or legislatures should impose much stricter tests on disclaimers of wrongful discharge liability. The Article contends that current law on the subject tends to impede rational employee choice in an area where such choice actually can be effective. The Article begins with a brief treatment of employment at will and its modern exceptions. The Article then describes the law regarding disclaimers of wrongful discharge liability. Next, the Article critiques that body of law by examining it within the context set by the policy debate over employment at will. Finally, the Article proposes idealized tests for the enforceability of at-will clauses, and suggests how existing contract doctrine might be used to attack those clauses.

6. See MONT. CODE ANN. §§ 39-2-901 to -914 (1992) (establishing, *inter alia*, a good-cause standard for covered discharges, but limiting damages for violations and permitting arbitration of wrongful discharge claims); see also P.R. LAWS ANN. tit. 29, § 185a (1989) (establishing a good-cause standard, with indemnity for its violation based on the employee's length of service).

7. See generally *infra* notes 51-66, 96-151 and accompanying text.

8. See, e.g., Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 380-99 (1989); John D. Coombe, *Employee Handbooks: Asset or Liability?*, 12 EMPLOYEE REL. L.J. 4, 15-16 (1986); James G. Frierson, *How to Fire Without Getting Burned*, 67 PERSONNEL, Sept. 1990, at 44; Kenneth R. Gilberg, *Employee Terminations: Risky Business*, 32 PERSONNEL ADMINISTRATOR, Mar. 1987, at 40; William H. Holley, Jr. & Roger S. Wolters, *An Employment-at-Will Vulnerability Audit*, 66 PERSONNEL J., Apr. 1987, at 130, 136; Maureen Reidy Witt & Sandra R. Goldman, *Avoiding Liability in Employee Handbooks*, 14 EMPLOYEE REL. L.J. 5, 12-17 (1988); Cynthia Weber Scherb, Note, *The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J. CORP. L. 105, 105 (1986).

I. THE RISE AND DECLINE OF EMPLOYMENT AT WILL

A. *The Rule and its Emergence*

The story of employment at will's development has been told often,⁹ but it deserves a brief restatement. In medieval England, the courts construed an employment contract for an indefinite period as a hiring for a year.¹⁰ Within that period, however, the contract usually could be terminated upon reasonable notice¹¹ or for just cause.¹² Some nineteenth century American courts continued England's one-year rule,¹³ while others read different content into indefinite-term employment contracts.¹⁴ In virtually all these situations, however, the parties were bound in some circumstances or for some period of time.

With the emergence of employment at will toward the end of the nineteenth century, this situation changed dramatically. The following statement from Horace G. Wood's 1877 employment law treatise is generally regarded as the first authoritative statement of the new doctrine:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.¹⁵

Commentators have argued that the cases Wood cited for his employ-

9. See, e.g., Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438-43 (1975); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-47 (1974).

10. E.g., Feinman, *supra* note 9, at 119-21.

11. *Id.* at 121.

12. Mathews, *supra* note 9, at 1439.

13. E.g., *id.*, at 1439 n.20.

14. E.g., Kelly McWilliams, Note, *The Employment Handbook as a Contractual Limitation on the Employment at Will Doctrine*, 31 VILL. L. REV. 335, 338 n.10 (1986) (some courts presumed that employment would continue for time equal to employee's pay period; other courts held that it was a question of fact for the jury). See generally Feinman, *supra* note 9, at 122-24 (providing an overview of the confusion in this area).

15. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877) (footnotes omitted).

ment-at-will rule do not support it,¹⁶ but this hardly matters, because he obviously was in touch with the *zeitgeist*. By the early twentieth century, employment at will had become the general rule throughout the United States.¹⁷

According to one classic statement of the employment-at-will rule, an employer can discharge an indefinite-term employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹⁸ Usually regarded as sufficiently indefinite, and therefore included within the rule, are promises of "steady," "regular," and even "permanent" employment.¹⁹ Of course, as Wood's statement suggests, a discharged at-will employee can recover the reasonable value of the services actually performed.²⁰ Moreover, the statement also demonstrates that employment at will does not prevent the parties from contracting for a fixed employment term. Such agreements can be express, but courts may also use the parties' actions, their statements, and the surrounding circumstances to imply a binding fixed-term contract.²¹

B. *The Retreat from Employment at Will*

Throughout the twentieth century, legislatures and courts have steadily restricted employment at will's scope. Perhaps the most important legislative restriction is federal labor law, which has generated a system of collective bargaining in which most union contracts include just cause discharge provisions that are enforced through arbitration.²² Almost equally significant is the protection against arbitrary dismissal sometimes enjoyed by public employees at the federal, state, and local levels.²³ Also of great importance is state²⁴ and federal²⁵ employment discrimination

16. Shapiro & Tune, *supra* note 9, at 341-42 & n.54.

17. See, e.g., Feinman, *supra* note 9, at 126-27.

18. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

19. E.g., John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 467-68 (1980).

20. If nothing else, this result is justifiable on quasi-contractual grounds. For a discussion of the doctrine of quasi-contract, see, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1.2 (3d ed. 1987).

21. See, e.g., Lary S. Larson, *Why We Should Not Abandon the Presumption that Employment is Terminable At-Will*, 23 IDAHO L. REV. 219, 221-24 (1986-1987).

22. See, e.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482-83, 491-92, 499-508 (1976).

23. See, e.g., *id.* at 497-98; Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1934 (1983).

24. See, e.g., Summers, *supra* note 22, at 492-94.

25. E.g., 29 U.S.C. § 623(a) (1988) (age discrimination); 42 U.S.C. § 2000e-2(a) (1988) (Title

law, which forbids firings based on race, color, national origin, sex, religion, age, disability, and other traits or conditions. Miscellaneous groups such as veterans, debtors, those who take or refuse to take lie detector tests, and those who exercise their rights under various workplace regulations also are protected against discharge in certain situations.²⁶

Furthermore, several common law restrictions on employers' discharge powers have now emerged. Circumstances accompanying certain firings may provoke intentional tort suits.²⁷ In addition, employers whose promises provoke foreseeable reliance may incur promissory estoppel liability.²⁸ Moreover, beginning in the late 1960s and early 1970s, courts have carved out three additional common law exceptions to employment at will. Together, these three claims constitute an emergent, albeit incompletely adopted, common law of unjust dismissal or wrongful discharge.

1. *The Public Policy Exception*

Under the public policy exception to employment at will, discharged employees recover for "dismissals that jeopardize a specific public policy interest of the state."²⁹ Because this exception usually is a tort theory of recovery, it lets plaintiffs recover compensatory and punitive damages.³⁰ Although estimates of the public policy theory's adoption vary, at least forty states have accepted it.³¹

Authorities disagree about the proper sources for the policies on which plaintiffs may base public policy claims. The dominant view is that such

VII's ban on race, color, religion, sex, and national origin discrimination); 42 U.S.C.A. § 12112(a) (West 1992 pamphlet) (prohibiting discrimination on the basis of disability).

26. See, e.g., Summers, *supra* note 22, at 495-97; Mathews, *supra* note 9, at 1446-47; McWilliams, *supra* note 14, at 343. See also 29 U.S.C.A. § 2002 (Supp. 1992) (forbidding certain discharges under the Employee Polygraph Protection Act).

27. See, e.g., McWilliams, *supra* note 14, at 344-45 (discussing claims for intentional interference with contractual relations, defamation, invasion of privacy, misrepresentation, negligence, and intentional infliction of emotional distress).

28. E.g., Blackburn, *supra* note 19, at 470-71 n.11. See generally Cheryl V. Brady, Note, Ravello v. County of Hawaii: *Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163 (1986).

29. Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683, 687 (1990).

30. Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 16 (1984).

31. Compare Perritt, *supra* note 29, at 687 (courts in all but six states recognize the public policy theory) with IERM, *supra* note 2, at 505:51 to :52 (listing eight states that have not clearly adopted the public policy theory).

policies must be based on either constitutions or statutes.³² However, some authorities identify other permissible sources, such as widely accepted ethical values and the common law.³³ Regardless of its nature, the relevant source normally must state the policy clearly.³⁴

Generally, recoveries under the public policy exception involve firings motivated by an employee's: (1) refusal to commit an unlawful act, (2) performance of an important public obligation, or (3) exercise of a legal right or privilege.³⁵ Examples of the first category include discharges based on an employee's refusal to commit perjury, to violate the antitrust laws, or to violate other state or federal regulations.³⁶ Firings based on an employee's performing jury duty, answering a subpoena to testify before a grand jury, or engaging in whistleblowing exemplify the second category.³⁷ The third category encompasses cases where employees are discharged for filing a workers' compensation claim, joining a labor union, or refusing to take an illegal polygraph test.³⁸

2. *The Implied Covenant of Good Faith and Fair Dealing*

Section 205 of the *Restatement of Contracts* declares: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."³⁹ This implied covenant of good faith and fair dealing has become a general rule of contract law with important specific applications.⁴⁰ Despite the covenant's use in some prominent early wrongful discharge decisions,⁴¹ it is not widely adopted in this con-

32. See, e.g., Lopatka, *supra* note 30, at 14-16; McWilliams, *supra* note 14, at 346 & n.49.

33. See, e.g., Lopatka, *supra* note 30, at 13-14 (discussing sources that define public policy in broad ethical terms); Perritt, *supra* note 1, at 398 (public policy should be manifest in a state or federal constitution, statute, or administrative regulation, or in the common law).

34. E.g., Lopatka, *supra* note 30, at 14. In addition, the California Supreme Court has emphasized that the policy must benefit the *public* in general rather than some private interest or interests. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379-80 (Cal. 1988).

35. Lopatka, *supra* note 30, at 6-7; Note, *supra* note 23, at 1932.

36. See, e.g., Lopatka, *supra* note 30, at 7 (see cases cited therein).

37. See, e.g., *id.* at 8-11 & n.40; Note, *supra* note 23, at 1937.

38. See, e.g., Lopatka, *supra* note 30, at 11; Note, *supra* note 23, at 1937.

39. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

40. See generally E. ALLAN FARNSWORTH, CONTRACTS § 7.17, at 526-29 (1982). The covenant is used in insurance contracts. E.g., Lopatka, *supra* note 30, at 23. The covenant also has found recognition in the Uniform Commercial Code. See U.C.C. § 1-203 (1977).

41. See Lopatka, *supra* note 30, at 23-25 (see cases cited therein); Perritt, *supra* note 29, at 694-97 (same).

text.⁴² Today it is doubtful whether more than a dozen states recognize the implied covenant of good faith and fair dealing as a theory of recovery in wrongful discharge cases.⁴³

The states that do embrace the implied covenant of good faith and fair dealing disagree about the protection that it affords discharged employees. A comment to section 205 of the *Restatement* states: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."⁴⁴ In the wrongful discharge context, this comment's two clauses pull in opposite directions. The second clause emphasizes collective norms that are external to the agreement the parties made.⁴⁵ As noted earlier, under an at-will contract an employer may terminate the relationship for a good reason, for no reason, or even for a morally improper reason. Thus, in *Monge v. Beebe Rubber Co.*,⁴⁶ the New Hampshire Supreme Court clearly invoked external norms, and not the parties' actual deal, when it held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."⁴⁷ Under this interpretation of the implied covenant, employees could receive extensive protection against wrongful discharges.

The *Restatement* comment's first clause, on the other hand, emphasizes the parties' "agreed common purpose" and, more importantly, their "justified expectations."⁴⁸ In an at-will employment, the parties' agreed

42. *E.g.*, Perritt, *supra* note 29, at 697 (state supreme courts increasingly have either rejected the covenant or declined to embrace it).

43. *See* IERM, *supra* note 2, at 505:51 to :52 (listing only 13 states that clearly recognize the covenant). *Cf.* Perritt, *supra* note 29, at 690, 699, 702-06 (discussing cases from approximately twelve states that recognize the covenant in some form). In some of these states, the covenant is treated as a tort theory rather than a contract theory. *E.g.*, Lopatka, *supra* note 30, at 25 and sources cited therein.

44. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

45. *See* Perritt, *supra* note 29, at 690-91.

46. 316 A.2d 549 (N.H. 1974).

47. *Id.* at 551.

48. *See also* Lopatka, *supra* note 30, at 23 ("In general, the covenant of good faith and fair dealing is a duty imposed by law that neither party do anything which will injure the right of the other to receive the benefits of the agreement.").

common purpose arguably is that either party can terminate at any time for any reason; in any event, that probably is what each party should justifiably expect. Thus, if each party can terminate at any time, how can a bad faith firing breach the implied covenant of good faith and fair dealing? Some courts have analyzed the covenant in much this fashion.⁴⁹ In these states, the implied covenant provides relatively little protection to discharged employees.⁵⁰

3. *Liability for Statements by Employers*

The third major common law exception to employment at will has various names and employs various rationales. Its bottom line, however, is fairly clear. The exception makes employers liable for breaking promises in: (1) employee handbooks, personnel policies, and benefit plans; (2) verbal or written assurances about job security that were made before, during, or after the hiring; and (3) "statements" implied from business custom and usage.⁵¹ At least thirty-four states have completely or qualifiedly embraced this exception to employment at will.⁵² In these states, the most important sources of liability are statements contained in the employer's handbook or policy manual.

The courts which adopt this exception usually use one of three rationales to justify the liability they impose: (1) an implied contract rationale; (2) unilateral contract theory; or (3) a broad public policy justification. The first often is called the implied-in-fact contract exception to employment at will.⁵³ The implied covenant of good faith and fair dealing is a promise implied by operation of law. But as noted earlier, courts also can imply binding discharge terms from the parties' actions and state-

49. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985). For additional examples, see *infra* notes 85-90 and accompanying text. For additional limitations on the implied covenant of good faith and fair dealing, see *Perritt, supra* note 29, at 702-06.

50. See, e.g., *Wagenseller*, 710 P.2d at 1040 (implied covenant protects employee from a discharge based on employer's desire to avoid paying benefits the employee has already earned; covenant also obligates employer to provide suitable working conditions and to compensate an employee for work performed). See also *infra* notes 85-90 and accompanying text (detailing the ease with which employers disclaim the covenant under this reading).

51. See *Lopatka, supra* note 30, at 19.

52. See *IERM, supra* note 2, at 505:51 to :52. But see *Perritt, supra* note 29, at 686 (courts in virtually every state have adopted the implied-in-fact contract theory).

53. This theory is discussed in *Larson, supra* note 21, at 229-30; *Lopatka, supra* note 30, at 17; *Perritt, supra* note 1, at 398. Cases utilizing this theory include: *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 383-88 (Cal. 1988); *Morriss v. Coleman Co.*, 738 P.2d 841, 848-49 (Kan. 1987).

ments and the surrounding circumstances.⁵⁴ Such binding promises generally are called implied-in-fact (as opposed to implied-in-law) contract terms.⁵⁵ Courts implying such promises to bind an employer naturally consider the employer's express statements, the definiteness and timing of such statements, and the parties to whom they were made.⁵⁶ But the courts also may consider other factors, such as the employer's personnel practices, industry practices, business customs, the nature of the job, the employee's length of service, and whether the employer consistently has kept its past promises.⁵⁷

The second rationale, unilateral contract theory, probably is limited to promises in employer handbooks, policy manuals, and similar documents. Nonetheless, of the three rationales employed to bind employers to their statements, courts use this rationale most frequently.⁵⁸ The rationale's central idea is to construe a handbook promise as an offer for a unilateral contract. An employee can accept this offer by beginning or continuing to perform the services the offer contemplates; if the employee has no preexisting legal duty to provide those services, the employee's service furnishes consideration for the employer's promise.⁵⁹ Courts frequently state that for this liability to exist, a definite or certain promise from the employer must exist.⁶⁰ Sometimes courts also require that the employer communicate the promise to the employee in such a manner that the employee is aware of it and/or has reason to believe that the employer intends a binding promise.⁶¹

Third, courts occasionally use notions of desirable public policy to make employers' statements binding. In the best example, *Toussaint v. Blue Cross & Blue Shield*,⁶² the Michigan Supreme Court declared that

54. See *supra* note 21 and accompanying text.

55. See, e.g., *Wagenseller*, 710 P.2d at 1036.

56. See *Larson*, *supra* note 21, at 230-31.

57. See, e.g., *Foley*, 765 P.2d at 387; *Larson*, *supra* note 21, at 230-31.

58. Cases adopting this rationale include: *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 733-35 (Ala. 1987); *Watson v. Idaho Falls Consol. Hosps.*, 720 P.2d 632, 635-36 (Idaho 1986); *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318-19 (Ill. 1987); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 882-83 (Minn. 1986); *Cook v. Heck's, Inc.*, 342 S.E.2d 453, 458-60 (W. Va. 1986). See generally Michael A. Chagares, Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465, 477-89 (1986).

59. See, e.g., *Duldulao*, 505 N.E.2d at 318.

60. E.g., *Hoffman-La Roche*, 512 So. 2d at 734, 735.

61. E.g., *Duldulao*, 505 N.E.2d at 318.

62. 292 N.W.2d 880 (Mich. 1980). See also *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087-88 (Wash. 1984). Cf. *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1062-63 (Wyo. 1986)

where an employer establishes personnel policies or practices:

[T]he employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. . . . It is enough [for liability] that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."⁶³

For these reasons, the court held "that employer statements of policy . . . 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."⁶⁴

II. DISCLAIMING WRONGFUL DISCHARGE LIABILITY

The rapid proliferation of common law wrongful discharge recoveries during the 1970s and 1980s naturally led outside observers to urge employers to implement preventative measures. These included avoiding actionable terminations, establishing better progressive discipline and internal grievance procedures, expunging unnecessary promises from documents distributed to employees, and many others.⁶⁵ Among these other measures was a traditional business response to burdensome common law liability rules: the disclaimer. Like twentieth century sellers and manufacturers confronted with increased warranty recoveries for defective goods,⁶⁶ employers increasingly have attempted to contract away unjust dismissal liability in advance. Litigation on the enforceability of such disclaimers or at-will clauses began at least as early as 1980.⁶⁷ Courts have considered the issue many times during the 1980s and 1990s,

(consideration for employer's promise is the orderly, cooperative, and loyal work force that it evokes). However, *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268 (Mich. 1991), may have undermined *Toussaint*. See *id.* at 289 (Cavanagh, C.J., dissenting) (majority opinion virtually overrules *Toussaint*).

63. 292 N.W.2d at 892.

64. *Id.* Earlier, the court stated that "the parties' minds need not meet," and that it did not matter if "the employee knows nothing of the particulars of the employer's policies and practices." *Id.*

65. See, e.g., Frierson, *supra* note 8; Gilberg, *supra* note 8.

66. Cf. LAWRENCE VOLD, *HANDBOOK OF THE LAW OF SALES* 444-47 (2d ed. 1959) (describing pre-UCC law of warranty disclaimers).

67. See, e.g., *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980).

and their decisions often have assisted employers who are intent upon avoiding wrongful discharge liability.

A. *How Employers Try to Disclaim*

In the cases involving disclaimers of wrongful discharge liability, the defendant employers formulated, located, validated, positioned, and packaged the disclaimers in various ways. Regarding formulation, the disclaimer is usually stated in one or more of three ways.⁶⁸ Probably the most common is a statement that either party can terminate the relationship at any time.⁶⁹ On occasion the term "at-will" is used.⁷⁰ Statements that an employee manual or other document does not create a contract also appear frequently.⁷¹

As for location, employers' disclaimers tend to appear in one or more of a few sites.⁷² Perhaps the most common is an employee manual or handbook.⁷³ Sometimes employers attempt to validate such disclaimers by inserting them on a "tear-out page" or "sign-off sheet" that employees are requested or required to sign and return to their employers.⁷⁴ Other

68. In addition, an employer may use language limiting subordinates' authority to make binding promises of all kinds. An example of this is language stating that no managers, except certain identified parties, may hire employees for a definite period of time, or make any agreement contrary to that stated in the relevant writing. See HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 8.8, at 164-66 (3d ed. 1992).

69. *E.g.*, *Shaver v. F.W. Woolworth Co.*, 669 F. Supp. 243, 246 (E.D. Wis. 1986), *aff'd*, 840 F.2d 1361 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988); *Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517, 1519 (D. Colo. 1987). Some disclaimers address only the employer's right to terminate the employee. *E.g.*, *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987).

70. *E.g.*, *Lee v. Sperry Corp.*, 678 F. Supp. 1415, 1418 (D. Minn. 1987).

71. *E.g.*, *Butler v. Westinghouse Elec. Corp.*, 690 F. Supp. 424, 428-29 (D. Md. 1987).

72. The generalizations in this paragraph are based upon a review of published court decisions involving disclaimers. These cases can be compared with a recent survey of St. Louis-area human resource managers and their firms' employment application forms. Of the 131 forms reviewed, 79 (60%) contained a statement attempting to make the employment relationship at-will. A follow-up telephone survey of 36 human resources managers whose firms used such application-form disclaimers disclosed that 22 (61%) of the firms also included a disclaimer in their employee handbook or company policies/procedures manual. An additional follow-up survey of 24 managers whose firms did *not* include a disclaimer in their employment applications revealed that eight (33%) *did* place a disclaimer in their handbook or manual. See Raymond L. Hilgert, *Employers Protected by At-Will Statements*, 36 HR MAG., Mar. 1981, at 57, 59-60. This author's review of the cases differs from the study by suggesting that handbook disclaimers are more common than disclaimers in employment applications.

73. *E.g.*, *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 787-88 (Md. Ct. Spec. App. 1986), *cert. denied*, 523 A.2d 1013 (Md. 1987); *Bailey v. Perkins Restaurants, Inc.*, 398 N.W.2d 120, 121 (N.D. 1986).

74. *E.g.*, *Pratt v. Brown Mach. Co.*, 855 F.2d 1225, 1228 (6th Cir. 1988).

employers may require employees to sign a separate document containing a disclaimer—most often, a written agreement⁷⁵ or an employment application.⁷⁶ In some situations, employers have used several disclaimers, each in a separate document.⁷⁷ Only rarely, however, are disclaimers accompanied by a separate oral explanation of their meaning and effect.⁷⁸

Disclaimers contained in an employee manual or handbook may appear at other positions besides a tear-out page or sign-off sheet. Most commonly, employers place the disclaimers near the front⁷⁹ or the rear⁸⁰ of the manual. Sometimes, though, employers attempt to bury them in the manual.⁸¹ Finally, disclaimers in employee manuals differ considerably in the conspicuousness with which they are packaged. This is true regardless of their location in the manual or handbook.

B. Disclaiming Liability under the Public Policy Exception and the Implied Covenant of Good Faith and Fair Dealing

Research does not reveal any decisions denying recovery under the public policy theory because the employer had disclaimed liability for wrongful discharge. To date, apparently, no case exists where the defendant even made that argument or the court even discussed the possibility.⁸² Thus, although it seems that no court has squarely so held,

75. *E.g.*, *Evans v. Geriatrics, Inc.*, 1 Ind. Empl. Rights Cas. (BNA) 762, 763 & n.1 (D. Colo. 1986).

76. *E.g.*, *Therrien v. United Air Lines, Inc.*, 670 F. Supp. 1517, 1519 (D. Colo. 1987).

77. *E.g.*, *Dell v. Montgomery Ward & Co.*, 811 F.2d 970, 972-73 (6th Cir. 1987) (disclaimer located in disciplinary manual, policy manual, and separate sign-off sheet); *Therrien*, 670 F. Supp. at 1519, 1523 (disclaimer appeared in three signed employment applications and one additional document).

78. For a case containing an explanation, see *Messerly v. Asamera Minerals, (U.S.) Inc.*, 780 P.2d 1327 (Wash. Ct. App. 1989). In *Messerly*, the defendant employer supplemented its handbook disclaimer with an employee meeting at which it distributed the handbook and explained its provisions. *Id.* at 1329.

79. *E.g.*, *Nettles v. Techplan Corp.*, 704 F. Supp. 95, 96 (D.S.C. 1988) (disclaimer located in second numbered paragraph of manual's first page).

80. *E.g.*, *Davis v. Connecticut Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1280 (M.D. Tenn. 1990) (disclaimer located on last page of a 52-page handbook), *aff'd*, 937 F.2d 611 (9th Cir. 1991).

81. *E.g.*, *Long v. Tazewell/Pekin Consol. Communication Ctr.*, 574 N.E.2d 1191, 1194 (Ill. App. Ct. 1991) (disclaimer "hidden within the text describing the duties of the telecommunicator"). See also *Brossard v. IBM Corp.*, 5 Ind. Empl. Rights Cas. (BNA) 575, 576 (D. Or. 1990) (disclaimers located on various pages of a voluminous manual).

82. Public policy cases that also involve another exception to employment at will have examined a disclaimer's impact on the alternative theory, without raising the disclaimer issue when considering the plaintiff's public policy claim. See, e.g., *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1475-77 (10th Cir. 1988). Some cases did so even though: (1) the employee plaintiff apparently had a

employers almost certainly cannot disclaim liability for discharges that are actionable under the public policy exception. This result is unsurprising for two reasons. First, the public policy exception normally is a tort theory, and tort liability generally is more difficult to disclaim than contract liability.⁸³ Second, public policy cases usually involve intentional employer behavior. Courts routinely strike down contract clauses that attempt to relieve parties of intentional tort liability, justifying this practice on public policy grounds.⁸⁴

However, courts sometimes allow disclaimers to negate recovery under the implied covenant of good faith and fair dealing.⁸⁵ These cases involve the weak formulation of the implied covenant discussed earlier.⁸⁶ Such courts have stated that the covenant only protects the parties' reasonable expectations under the contract, and that in an at-will arrangement a reasonable employee would expect that she could be fired at any time and for any reason.⁸⁷ Where the employer has used an enforceable disclaimer, the courts expressly or impliedly add, the relationship *is* at-will.⁸⁸ This reasoning, however, is unlikely to find favor in those few states that put some teeth in the implied covenant of good faith and fair dealing, because those states interpret it to include community standards external to the deal that the parties made.⁸⁹ In such states, courts occa-

valid public policy claim, and (2) the disclaimer blocked liability under the other theory. *See, e.g., Pratt v. Brown Mach. Co.*, 855 F.2d 1225, 1232-38 (6th Cir. 1988). If courts fail to consider a disclaimer's application to public policy claims in these situations, it is unclear when they would ever consider them.

83. *See, e.g., Chagares, supra* note 8, at 376 n.97 (disclaimers are unlikely to be enforced in public policy cases because it is a tort theory); *Lopatka, supra* note 30, at 16-17 (same).

84. *E.g., FARNSWORTH, supra* note 40, § 5.2, at 333.

85. *See, e.g., Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 215 (7th Cir. 1986); *Nettles v. Techplan Corp.*, 704 F. Supp. 95, 98 (D.S.C. 1988); *Butler v. Westinghouse Elec. Corp.*, 690 F. Supp. 424, 429 (D. Md. 1987). In some of these decisions, courts found the disclaimer effective even though the implied covenant was regarded as a tort theory. *See Maxwell v. Sisters of Charity*, 645 F. Supp. 937, 939 (D. Mont. 1986); *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 231 Cal. Rptr. 820, 831 (Cal. Ct. App. 1986); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1089 (Miss. 1987).

86. *See supra* notes 48-50 and accompanying text.

87. *E.g., Slivinsky v. Watkins-Johnson Co.*, 270 Cal. Rptr. 585, 589 (Cal. Ct. App. 1990). *See also Schumer v. Hughes Aircraft Co.*, 4 Ind. Empl. Rights Cas. (BNA) 1755, 1760 (C.D. Cal. 1989) (implied covenant only protects parties' rights to receive benefits of an agreement; in an at-will relationship "there is no agreement to terminate only for good cause"); *Maxwell*, 645 F. Supp. at 939 (good cause was not required in order to terminate or not renew employment contract).

88. *E.g., Slivinsky*, 270 Cal. Rptr. at 589 ("Here the parties agreed that their relationship was terminable at will.").

89. *See supra* notes 44-47 and accompanying text.

sionally allow the implied covenant to override an express disclaimer.⁹⁰

C. *Claims Based on an Employer's Statements*

As noted, decisions allowing a disclaimer to knock out the implied covenant of good faith and fair dealing assume that the disclaimer made the employment terminable at will. Most of the litigation on this question, however, involves the third theory of common law wrongful discharge recovery, in which employee plaintiffs argue that their discharges violate statements made by their employers. Several leading cases that allow such recoveries also say that employers can avoid liability by using a properly constructed, stated, and positioned disclaimer.⁹¹ This raises the question, what are the requirements for a viable disclaimer?

1. *Counsel from the Commentators*

Writers who advise employers on how to ensure that their disclaimers will be enforced typically urge an elaborate series of procedures. For example, these writers normally recommend the placement of a broadly worded, yet clear and nontechnical, disclaimer at the front and/or rear of an employee handbook or manual; its conspicuous appearance in capitals, boldface, or a contrasting color; the insertion of similarly stated and packaged disclaimers in other relevant policy statements distributed to employees (including benefits statements); *and* a requirement that employees sign an employment application, handbook tear-off sheet, or other document containing both a disclaimer and an acknowledgement that they understand its impact.⁹² Commentators also suggest that because a disclaimer may not negate specific or strongly worded promises, employers should phrase their promises in such a way as to minimize

90. See *Seubert v. McKesson Corp.*, 273 Cal. Rptr. 296, 299-300 (Cal. Ct. App. 1990) (disclaimer on signed application form does not defeat a claim based on the implied covenant of good faith and fair dealing); *Stark v. Circle K Corp.*, 751 P.2d 162, 166 (Mont. 1988) (implied covenant of good faith and fair dealing not subject to contractual waiver). For a discussion of the breadth of California's implied covenant and Montana's pre-statutory covenant, see, e.g., *Perritt*, *supra* note 29, at 690, 699, 700-02. Nonetheless, both California and Montana courts have allowed disclaimers to override the implied covenant. See *supra* notes 85, 87-88.

91. See, e.g., *Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984); *Tousaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 890-91 (Mich. 1980); *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985).

92. See *Chagares*, *supra* note 8, at 380-91; *Witt & Goldman*, *supra* note 8, at 12-15. See also *Lopatka*, *supra* note 30, at 29 & n.152 (emphasizing that requiring employees to sign a disclaimer is the preferred method and that it should be part of the offer of employment, and suggesting a signed handbook tear-off sheet as an alternative).

conflict with the disclaimer.⁹³ Finally, one commentator urges that when employers change existing handbooks or other policy statements to include a disclaimer, or when employers require that their employees sign a disclaimer after commencement of the employment, employers should create consideration for the rights the employees relinquish by providing the employees with a return benefit.⁹⁴

2. *The Factors Courts Consider*

Employers who follow all of these suggestions almost certainly will escape wrongful discharge liability for their statements. But many, if not most, courts allow employers to disclaim wrongful discharge liability with much less effort. That is, the standards for successfully disclaiming wrongful discharge liability often are fairly relaxed. Apparently this is true regardless of the rationale (implied-in-fact contract theory, unilateral contract analysis, or public policy justification) for binding employers to their statements. Although the courts' divergent approaches and the many fact patterns they confront preclude clear rules, certain factors go some way toward determining whether an employer can successfully disclaim.

Use of a Signed Writing. By far the best predictor of a disclaimer's success is whether the employer used a signed writing to state and validate the disclaimer.⁹⁵ With only a few exceptions,⁹⁶ employers who required their employees to sign a writing containing a disclaimer have avoided liability for their statements about discharge policies and proce-

93. See Chagares, *supra* note 8, at 392-94. See also Lopatka, *supra* note 30, at 27-28. Examples of specific or strongly worded policies that could override a waiver of liability for wrongful discharge include a detailed grievance or disciplinary procedure that must precede discharge, an exclusive list of reasons for discharge, statements that the employer must have good cause to discharge, and assertions that the employment is to be "permanent" or that the employee is to have "tenure." See also *infra* notes 131-39 and accompanying text.

94. Lopatka, *supra* note 30, at 29-30 (suggesting an increase in severance pay or a minimum notice period before discharge). See also *infra* notes 140-51 and accompanying text. Of course, because courts generally do not inquire into the adequacy of consideration, the value of this benefit need not equal the value of the rights relinquished.

95. Actually, merely *requiring* that employees sign the statement may suffice. See *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 277-78 (Mich. 1991) (where employee was aware of a disclaimer on a policy manual sign-off sheet, her refusal to sign the sheet does not prevent the disclaimer from being effective).

96. See, e.g., *Pagdilao v. Maui Intercont. Hotel*, 703 F. Supp. 863, 867 (D. Haw. 1988) (refusing to hold that a disclaimer on a signed application form categorically precludes an implied-in-fact contract claim, largely because court was unsure how the Hawaii Supreme Court would address the issue).

dures. Regardless of whether the disclaimer appeared on a signed job application,⁹⁷ a written employment contract,⁹⁸ or a signed acknowledgment or tear-off sheet in an employee handbook,⁹⁹ the employers were not liable. Needless to say, employers also escape liability when they use more than one signed writing,¹⁰⁰ or use a signed writing in combination with some other type of disclaimer.¹⁰¹

The Conspicuousness of the Disclaimer. The cases involving a signed writing almost never consider the disclaimer's conspicuousness within that writing.¹⁰² This factor, however, assumes importance for disclaimers that appear in an employee handbook or manual. Inquiries about conspicuousness typically involve factors such as the disclaimer's typeface, its color, and its location within the document.¹⁰³

Courts vary considerably in approaching the conspicuousness issue. Some courts do not require—even verbally—that disclaimers be conspicuous in order to be enforceable.¹⁰⁴ For example, in *Brossard v. IBM Corp.*,¹⁰⁵ the employee plaintiff alleged that his firing breached his supervisors' promises that he would be retained if he continued to perform his

97. *E.g.*, Reid v. Sears, Roebuck & Co., 790 F.2d 453, 456, 460-62 (6th Cir. 1986); Forbes v. Hotel Inter-Continental Maui, 2 Ind. Empl. Rights Cas. (BNA) 833, 838 (D. Haw. 1987); Shaver v. F.W. Woolworth Co., 669 F. Supp. 243, 245-46 (E.D. Wis. 1986), *aff'd*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

98. *E.g.*, Nora v. Carrier Corp., 861 F.2d 457, 459-60 (6th Cir. 1988); Crain v. Burroughs Corp., 560 F. Supp. 849, 852 (C.D. Cal. 1983).

99. *E.g.*, Chesnick v. St. Mary of Nazareth Hosp., 570 N.E.2d 545, 546, 547-49 (Ill. App. Ct. 1991); Scholz v. Montgomery Ward & Co., 468 N.W.2d 845, 846, 848-49 (Mich. 1991).

100. *See, e.g.*, Therrien v. United Air Lines, Inc., 670 F. Supp. 1517, 1519, 1523 (D. Colo. 1987) (disclaimer appeared in four signed statements, at least three of them in employment applications).

101. *E.g.*, Otis v. Zayre Corp., 703 F. Supp. 634, 635-36 (W.D. Mich. 1988) (disclaimer contained in a signed application and in a personnel manual), *aff'd*, 884 F.2d 580 (6th Cir. 1989); Arnold v. Diet Ctr., Inc., 746 P.2d 1040, 1041, 1043-44 (Idaho 1987) (employer read disclaimer aloud to plaintiff before he signed it).

102. This is probably due to the general contract rule that one who signs a writing is bound by it even though he did not read or understand its terms. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 9-42.

103. *E.g.*, Nettles v. Techplan Corp., 704 F. Supp. 95, 98 (D.S.C. 1988) (listing factors involved in conspicuousness determination). A related issue is the effect of the employee plaintiff's knowledge of the disclaimer. *Compare, e.g.*, Arellano v. Amax Coal Co., 6 Ind. Empl. Rights Cas. (BNA) 1399, 1402-03 (D. Wyo. 1991) (inconspicuous disclaimer not enforced even though employee plaintiff read it) with Audette v. Northeast State Bank, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989) (arguably inconspicuous disclaimer enforced because plaintiff failed to claim that she lacked notice of it).

104. *See, e.g.*, Vollrath v. Georgia-Pacific Corp., 899 F.2d 533, 534, 535-36 (6th Cir.), *cert. denied*, 111 S. Ct. 345 (1990); Morgan v. Harris Trust & Sav. Bank, 867 F.2d 1023, 1029 (7th Cir. 1989); Bedow v. Valley Nat'l Bank, 5 Ind. Empl. Rights Cas. (BNA) 1678, 1679-80 (D. Ariz. 1988).

105. 5 Ind. Empl. Rights Cas. (BNA) 575, 575-77 (D. Or. 1990).

job properly. Relying on a somewhat inexplicit disclaimer¹⁰⁶ buried in IBM's employee handbook, the court granted IBM's motion for summary judgment. The court did not discuss the disclaimer's location or its apparent presentation in regular roman typeface, and did not impose a conspicuousness requirement on the disclaimer.¹⁰⁷

Other courts suggest that the disclaimer must be conspicuous, but are lenient in interpreting and enforcing this requirement.¹⁰⁸ In perhaps the best example, *Goos v. National Association of Realtors*,¹⁰⁹ the United States District Court for the District of Columbia rejected a wrongful discharge claim based on statements in the defendant's employee manual. Due to disclaimers that were located in the fifth paragraph of the manual's first page and the second paragraph of its section on termination policy, the court concluded that the employment relation was at will.¹¹⁰ It stated that "[a]lthough these [disclaimers] are not in bold type, outlined in red, or made the subject of a so-called 'sign off sheet,' this [c]ourt, like others, finds it 'difficult to imagine what more the defendant might have done to make it crystal clear [that] . . . employees are employees 'at will' who may be discharged with or without cause.'" ¹¹¹

Still other courts, however, impose more or less meaningful conspicuousness requirements. Nonetheless, some of these courts have found disclaimers sufficiently conspicuous to block a wrongful discharge claim. For example, disclaimers meeting these courts' requirements included: a boxed-off disclaimer with a capitalized heading that appeared at the top of a handbook's second page;¹¹² a disclaimer that appeared in a policy manual's introductory paragraphs with its key language in capital letters;¹¹³ a disclaimer labelled "IMPORTANT" via a centered heading

106. See *id.* at 575. The explicitness of disclaimers as a factor affecting their enforceability is discussed *infra* at notes 120-31 and accompanying text.

107. See *id.* at 575-77.

108. See, e.g., *Thomas v. Garrett Corp.*, 744 F. Supp. 199, 201 (D. Ariz. 1989) (disclaimer in ordinary typeface prefaced with a boldfaced heading "Employment Policies" held sufficiently conspicuous), *aff'd*, 904 F.2d 41 (9th Cir. 1990); *Prezzy v. Food Lion, Inc.*, 4 Ind. Empl. Rights Cas. (BNA) 996, 997 (D.S.C. 1989) (disclaimer that did not contrast with the rest of the employee manual in either size or color found sufficiently conspicuous because it appeared in a separate paragraph on the first page after the table of contents); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 787-88, 793 (Md. Ct. Spec. App. 1986) (finding that disclaimer apparently unaccompanied by anything to make it stand out was "conspicuous").

109. 715 F. Supp. 2 (D.D.C. 1989).

110. *Id.* at 4-5.

111. *Id.* (quoting *Dell v. Montgomery Ward & Co.*, 811 F.2d 970, 974 (6th Cir. 1987)).

112. *Bailey v. Perkins Restaurants, Inc.*, 398 N.W.2d 120, 121, 122-23 (N.D. 1986).

113. *Chambers v. Valley Nat'l Bank*, 3 Ind. Empl. Rights Cas. (BNA) 1476, 1478 (D. Ariz.

and placed on the first page of a handbook;¹¹⁴ a boldfaced disclaimer appearing at the front of the manual;¹¹⁵ and a handbook containing three separate disclaimers, one of which was at the beginning of the manual and one of which was in capitals at the end of the manual.¹¹⁶

Occasionally, however, courts deem a disclaimer inconspicuous and therefore refuse to enforce it. In *Davis v. Connecticut General Life Insurance Co.*,¹¹⁷ the court held that two handbook disclaimers did not automatically prevent the handbook from becoming part of the employment contract.¹¹⁸ The court so held because: (1) the disclaimers appeared on the last page of a fifty-two page handbook; (2) they were not highlighted or distinguished from the text in any way; (3) they appeared to be printed in a smaller typeface than the rest of the handbook; and (4) they were not preceded by a heading.¹¹⁹

The Disclaimer's Explicitness. Another factor that may determine a disclaimer's effect is the clarity, directness, and specificity with which it conveys its message. Here, as with the issue of a disclaimer's conspicuousness, the cases take strikingly different approaches.

Despite fairly emphatic language, some courts are predisposed to find a disclaimer fuzzy or abstruse. In *Haselrig v. Public Storage, Inc.*,¹²⁰ the court considered two separate handbook disclaimer provisions. The first provided: "The relationship between you and [the employer] is predicated on an at will basis. That is to say that either the Employee or the Company may terminate their [sic] employment at their discretion."¹²¹ The second disclaimer stated: "It should be understood that employment and compensation can be terminated, with or without cause and with or

1988). The key words in the disclaimer were: "DO NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT." *Id.*

114. *Ferrera v. A.C. Nielsen*, 799 P.2d 458, 461 (Colo. Ct. App. 1990).

115. *Butler v. Westinghouse Elec. Corp.*, 690 F. Supp. 424, 429 (D. Md. 1987).

116. *Johnson v. First Carolina Fin. Corp.*, 409 S.E.2d 804, 805-06 (S.C. Ct. App. 1991).

117. 743 F. Supp. 1273 (M.D. Tenn. 1990). *See also* *Arellano v. Amax Coal Co.*, 6 Ind. Empl. Rights Cas. (BNA) 1399, 1402 (D. Wyo. 1991) (finding handbook disclaimer inconspicuous and unenforceable as a matter of law where it appeared in middle of a letter on page five of handbook; it was not underlined, highlighted, or set off; and it was in the same size print as other portions of the handbook).

118. *Davis*, 743 F. Supp. at 1279-80. However, the employee lost because the handbook's statements on which he based his claim were too vague. *See id.* at 1280-81.

119. *Id.* at 1280.

120. 585 A.2d 294 (Md. Ct. Spec. App. 1991). Other examples include *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989); *Long v. Tazewell/Pekin Consol. Communication Ctr.*, 574 N.E.2d 1191, 1193-94 (Ill. App. Ct. 1991).

121. *Haselrig*, 585 A.2d at 300.

without notice at any time, at the option of the Company or the Employee."¹²² The *Haselrig* court found the first provision neither sufficiently clear nor unequivocal because: (1) it stated that the employment was "predicated on" an at-will basis rather than saying that it "is" an at-will relationship, and (2) it was simply "a declaration" of the employment relationship rather than an attempt to limit it.¹²³ As for the second provision, the court admitted that it "comes closer to being a disclaimer,"¹²⁴ but its placement at the end of a handbook section dealing with probationary employees raised a question of whether it was intended to apply only to such employees.¹²⁵

On the other hand, courts sometimes give effect to fairly nebulous disclaimer language. For example, in *Claiborne v. Frito-Lay, Inc.*,¹²⁶ the employee plaintiff based her claim on statements in the employee handbook. The preface to the handbook stated that the "employment relationship is one of free will."¹²⁷ Section 17 of the handbook, entitled "Working Together," added that: "Agreement with the outlined company standards of performance and conduct is your decision. The free will nature of our employment relationship provides you the option to voluntarily resign your employment should you determine that . . . [the company's] important standards are in excess of the commitment you are willing to make."¹²⁸ Construing the preface and section 17 together, the court declared that the employment relationship was at will.¹²⁹ It conceded that "the defendant's handbook is not a model of draftsmanship . . .," and that it contained many "omissions and ambiguities."¹³⁰ But "these defects indicate that a contractual relation was not being defined by the company, as more careful wording would have been used in such a case."¹³¹

The Definiteness of the Defendant's Promise. Ordinarily a disclaimer is

122. *Id.*

123. *Id.* at 300-01.

124. *Id.* at 301.

125. *Id.*

126. 718 F. Supp. 1319 (E.D. Tenn. 1989). Other possible examples include *Ferrera v. A.C. Nielsen*, 799 P.2d 458, 461 (Colo. Ct. App. 1990); *Eldridge v. Evangelical Lutheran Good Samaritan Soc'y*, 417 N.W.2d 797, 800 (N.D. 1987).

127. 718 F. Supp. at 1321.

128. *Id.*

129. *Id.* The court bolstered this contention by observing that the handbook also gave the company the right to change its provisions as necessary.

130. *Id.*

131. *Id.* at 1321-22.

separable from the legal claim it attempts to negate. For instance, an exculpatory clause in a contract is separate from the tort liability it is designed to prevent. Similarly, a boilerplate disclaimer of the implied warranties of merchantability and fitness for a particular purpose in contracts for the sale of goods is separate from those warranties.¹³² In the employee discharge context, however, the statement on which the plaintiff bases his claim and the disclaimer by which the employer attempts to block that claim often are contained in the same document. Therefore, when construing the employment agreement, the promise and the disclaimer language must be read together, with each playing a role in determining the other's meaning.¹³³

The more emphatic and definite the employer defendant's promise, therefore, the better the employee's chances of overcoming disclaimer language in the same document. In *Zaccardi v. Zale Corp.*,¹³⁴ for example, the Tenth Circuit reversed a summary judgment in favor of the employer. The court stated that "[a] contractual disclaimer does not automatically negate a document's contractual status and must be read by reference to the parties' norms of conduct and expectations founded upon them."¹³⁵ The employee plaintiff relied on certain policy manual provisions which stated that "[n]o employee who has been employed for ten (10) years or longer is to be terminated from the company without the approval of senior corporate management," and that supervisors "must provide senior corporate management with certain specified information" before a firing could occur.¹³⁶ In addition, the court considered the fact that several of the defendant's executives stated in their depositions that they considered the manual a guide for employer-employee relations.

On the other hand, where the relevant handbook language is equivocal, general, and scant, a fired employee's possibility of overcoming a

132. For the UCC's treatment of implied warranties and disclaimers of those warranties, see U.C.C. §§ 2-314, 2-315, 2-316(2),(3) (1977).

133. See RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) (a writing should be interpreted as a whole and all writings that are part of the same transaction should be construed together); *Id.* § 202(5) (wherever reasonable, manifestations of parties' intentions should be interpreted in a manner consistent with each other). As the Restatement's drafters stated, "[m]eaning is inevitably dependent on context." *Id.* § 202(5) cmt. d.

134. 856 F.2d 1473 (10th Cir. 1988). See also *Perman v. ArcVentures, Inc.*, 554 N.E.2d 982, 987 (Ill. Ct. App. 1990) (mandatory, unequivocal policy manual statements created enforceable contract rights despite disclaimer).

135. 856 F.2d at 1476-77 (quotations deleted).

136. *Id.* at 1477.

disclaimer declines considerably. For instance, in *Sullivan v. Snap-On Tools Corp.*,¹³⁷ the employee plaintiff alleged that he was fired in violation of the just-cause termination required by his employee handbook. Since the handbook lacked an explicit just-cause provision, the plaintiff based his claim on the handbook's progressive discipline language and its noninclusive list of eighteen infractions that would result in discipline. The court characterized these provisions in the following fashion:

[T]he handbook lists infractions which may subject an employee to discipline, but the list is not all inclusive. There is no description of the discipline that may be administered for a specific enumerated offense. Glaringly absent is any enumeration of the grounds for dismissal with cause and there is no mention of termination with cause. Furthermore, these provisions place no substantive limits on Snap-On's discretion. The handbook specifically provides only that the steps will be followed "whenever possible."¹³⁸

Immediately thereafter, the *Sullivan* court observed that Snap-On's handbook contained an express at-will clause. Thus, because "[a]n employer's promise to discharge an employee only for just cause should be explicit and unambiguous, and such an intent should be clearly expressed," and because the handbook clearly stated that employees were terminable at will, the court granted Snap-On's motion for summary judgment.¹³⁹

Modification of a Handbook to Include a Disclaimer. Sometimes the handbooks to which employers add disclaimers originally contained legally binding statements. In such situations, the new manual and its disclaimer constitute an attempt to modify the previous employment contract. Courts considering the effectiveness of these handbook modifications ordinarily do not emphasize the factors previously discussed, but focus on other issues instead. Such courts differ widely in their approaches to modified handbooks.

Some courts give employers a virtually unfettered ability to add disclaimers to their manuals. In *Bedow v. Valley National Bank*,¹⁴⁰ the defendant tried to enforce a handbook disclaimer that first appeared in

137. 708 F. Supp. 750 (E.D. Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir. 1990). See also *Elsley v. Burger King Corp.*, 917 F.2d 256, 259-60 (6th Cir. 1990) (policy manual statement that job security is an important company concern was undermined by subsequent statement that each employee must earn this security by contributing to the company; therefore, statement was too weak to withstand a disclaimer in the manual).

138. 708 F. Supp. at 753.

139. *Id.*

140. 5 Ind. Empl. Rights Cas. (BNA) 1678 (D. Ariz. 1988).

1985, while the plaintiff argued that she had relied on an earlier manual. The court agreed with the "defendant's proposition that as a matter of basic contract law, each successive version of defendant's personnel policy manual modifie[d] and supersede[d] prior issued versions."¹⁴¹ The only apparent legal rationale for this position, one reminiscent of the unilateral contract analysis discussed earlier,¹⁴² was a brief suggestion that an employee's continued employment after issuance of the modified handbook is sufficient consideration to enforce the new term.¹⁴³

Other courts, however, impose at least some restrictions on employers' efforts to modify their earlier manuals by including disclaimers. Although they disagree about who must provide it, courts frequently indicate that consideration must support such modifications.¹⁴⁴ Moreover, courts state that an employer must give an employee reasonable notice of the modification,¹⁴⁵ that the employee must assent to the modification,¹⁴⁶ or that the employee must be aware of it and understand its terms.¹⁴⁷

*Thompson v. Kings Entertainment Co.*¹⁴⁸ exemplifies most of these requirements. In *Thompson*, the court concluded that employers should not be able to unilaterally negate their expressly stated policies simply by issuing a new handbook with a disclaimer; instead, the employer should meet "the elements of contract modification."¹⁴⁹ Specifically, an em-

141. *Id.* at 1680.

142. *See supra* notes 58-61 and accompanying text.

143. 5 Ind. Empl. Rights Cas. (BNA) at 1680.

144. Several courts have stated that a handbook modification that makes the employment relationship at will must be supported by consideration, but courts disagree about which party must provide it. *Compare, e.g.,* *Toth v. Square D Co.*, 712 F. Supp. 1231, 1236 (D.S.C. 1989) (employee must receive consideration to support modification) and Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 221 (1990) (same) with *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 240 (4th Cir. 1991) (employee's continued employment sufficient consideration to support modification) and *Bedow*, 5 Ind. Empl. Rights Cas. at 1680 (same).

Fairness would appear to require that an employee receive something in exchange for the rights relinquished through a new disclaimer; therefore, the first view appears more sound. To conceptualize this, view the employee as promising to waive the rights extinguished by the disclaimer. To provide a quid pro quo, the employer should furnish additional consideration for that promise to waive. *See Towns v. Emory Air Freight, Inc.*, 3 Ind. Empl. Rights Cas. (BNA) 911, 914 n.3 (S.D. Ohio 1988) (finding waiver of implied contract rights signed by plaintiff null and void because plaintiff did not receive consideration for waiver).

145. *E.g., In re Certified Question*, 443 N.W.2d 112, 113, 120-21 (Mich. 1989). However, it appears unlikely that employers must expressly reserve the right to disclaim. *Id.* at 113.

146. *See Toth*, 712 F. Supp. at 1235-36.

147. *Thompson v. Kings Entertainment Co.*, 653 F. Supp. 871, 876 (E.D. Va. 1987).

148. 653 F. Supp. 871 (E.D. Va. 1987).

149. *Id.* at 875.

ployer must demonstrate that the employee plaintiff "was aware of the [new h]andbook, that he understood that its terms governed his employment, and that he worked according to those terms."¹⁵⁰ Under this test, the court denied Kings Entertainment's motion for summary judgment because Kings failed to show that after receiving the new handbook, the employee continued to work with the understanding that this handbook governed his employment. If this requirement was met whenever an employee continues to work with knowledge of the new terms, the court concluded, an employee effectively would have to take affirmative steps to reject those terms. This would contradict the general contract rule that silence does not constitute an acceptance. However, the court did not specify what behavior on the employee's part would create the needed understanding. Finally, the court required that the new handbook contain "additional benefits for an employee sufficient to provide consideration for any alleged modification of the employment contract,"¹⁵¹ but it did not elaborate on this requirement.

III. WHEN SHOULD DISCLAIMERS OF WRONGFUL DISCHARGE LIABILITY BE ENFORCED?

A. *The Irrelevance of Precedent*

Those who survey the history of common law wrongful discharge liability will note the limited role that existing law, especially existing contract doctrine, has played in the evolution of that liability. As noted earlier, for example, the cases Wood cited for his initial formulation of the employment-at-will rule probably did not support it.¹⁵² Also, one contract law rationale adduced in the rule's favor apparently fails to justify it.¹⁵³ Despite substantive differences, modern courts resemble their predecessors in their disregard for extant doctrine. Precedent hardly

150. *Id.* at 876.

151. *Id.* at 875 n.7.

152. *See supra* note 16 and accompanying text.

153. This is the doctrine of mutuality of obligation. Under this doctrine, if one party to a bilateral contract is not bound by the contract, then neither party is bound. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 4-12(c)(2). Thus, "it has been reasoned that if the employee can quit his job at will, then so, too, must the employer have the right to terminate the relationship for any or no reason." Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967) (refusing, however, to endorse this view). Unless the employment-at-will rule is assumed, however, why is this statement's premise true? Absent an at-will relationship, why can employees quit without liability? For a similar problem at the ethical level, see *infra* note 160.

compelled the three major common law exceptions to employment at will. Like Wood's rule itself, today's common law of wrongful discharge is not the product of *stare decisis*.

Nowhere is the courts' lack of concern with relevant legal doctrine more apparent than in the disclaimer cases discussed in the previous section. Perhaps the best example is the scant attention those cases accord the various escape doctrines through which substantively onerous terms or procedural irregularities justify a party's release from contract liability.¹⁵⁴ Also, courts considering at-will clauses generally ignore the law regarding such analogous contract terms as exculpatory clauses, product liability disclaimers, and disclaimers of the implied warranty of habitability in the sale of new homes.¹⁵⁵ But the most glaring example is the courts' failure to consider attempted disclaimers of express warranty liability in sale-of-goods cases.¹⁵⁶ Like employers who make assertions about job security while insisting that the relationship is at will, sellers of goods sometimes try to take away with one hand what they have promised with the other. In part for this reason, disclaimers of express warranty liability generally are not enforced.¹⁵⁷

B. *Objections to Enforcing At-Will Clauses*

Because courts have not been overly preoccupied with strictly legal

154. Such issues rarely are raised in the disclaimer of wrongful discharge liability context. *See, e.g.,* *Anders v. Mobil Chem. Co.*, 559 N.E.2d 1119, 1123-25 (Ill. App. Ct. 1990) (rejecting unconscionability and public policy challenges to a disclaimer); *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 794 (Md. Ct. Spec. App. 1986) (rejecting claim that disclaimer was inequitable). *See infra* notes 217-42 and accompanying text (discussing two such escape doctrines).

155. *See, e.g.,* FARNSWORTH, *supra* note 40, § 5.2, at 333-35 (exculpatory clauses); Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199 (1985) (discussing disclaimers of the implied warranties of merchantability and fitness for a particular purpose in sale-of-goods cases); Frona M. Powell, *Disclaimers of Implied Warranty in the Sale of New Homes*, 34 VILL. L. REV. 1123 (1989).

156. Such disclaimers are governed by U.C.C. § 2-316(1), which states:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-316(1) (1977).

Comment 1 to § 2-316 provides: "[i]t seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty." U.C.C. § 2-316, official cmt. 1 (1987).

157. *See* JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 12-2 to 12-4 (3d ed. 1988).

concerns when they formulate wrongful discharge rules, it is apparent that public policy notions have been the dominant influence on their decisions. If so, it seems both permissible and useful to employ such notions to determine how courts should treat disclaimers of wrongful discharge liability. Such disclaimers are contract terms which state that employees relinquish certain common-law recoveries for wrongful discharge. Some business ethicists, however, maintain that employees cannot rightly contract away their job rights.¹⁵⁸ In addition, the legal and ethical literature on employment at will contains several important objections to free bargaining over dismissal rules. These objections are that: (1) it is irrational for an employee to agree to be employed at will; (2) employers' superior bargaining power enables them to dictate the discharge terms they desire; (3) employers typically state and package at-will clauses in such a way that employees cannot readily understand them; (4) even when adequate disclaimer disclosure is made, employees' personal deficiencies render them incapable of effectively protecting their interests when contracting over dismissal terms; and (5) transaction costs and related problems render it impossible for employers to offer employees a real choice regarding discharge terms. In this subsection, the Article will evaluate the current law on at-will clauses by considering each of these objections. This consideration leads to the recommendations that the Article develops in the following section.

1. *The Rationality of At-Will Employment*

The first objection to enforcing disclaimers of wrongful discharge liability is that, given a real choice, no employee in his or her right mind would agree to employment at will. For example, according to the business ethicist Patricia Werhane, "it is hard to imagine that rational people would agree in advance to being fired arbitrarily in an employment contract."¹⁵⁹ However, there is at least one reason why employees may pre-

158. *E.g.*, Joseph R. Des Jardins & John J. McCall, *A Defense of Employee Rights*, 4 J. BUS. ETHICS 367, 369 (1985).

159. PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 91 (1985). Although the author did not elaborate on this point, she may have effectively argued that employee job rights are by their nature inalienable. Among the many connotations of the term inalienability is the notion that certain rights should not be relinquished, even if such relinquishment is made knowingly and voluntarily. *See, e.g.*, Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFFAIRS 93, 112-13 (1978). Also, one criterion used to identify whether a right is inalienable is the irrationality of one's yielding the right. *See, e.g.*, A. John Simmons, *Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFFAIRS 175, 201-04 (1983) (developing this criterion, but not necessarily adopting it). However, the text surrounding Werhane's remark suggests

fer an at-will arrangement:¹⁶⁰ to obtain a better compensation package. Giving employees legal protection against wrongful discharge creates costs and inefficiencies for employers.¹⁶¹ The expense associated with wrongful discharge litigation is an obvious example.¹⁶² The possibility of litigation and its related expense may dissuade employers from dis-

that she might not object to an employee's alienation of his job security rights, if it is done voluntarily and knowingly.

160. According to Richard Epstein, employment at will may be justified as the outcome of a rational bargaining process through which employer and employee gain certain powers over, and immunities from, each other. For example, the ability to arbitrarily terminate the employment relationship can provide both the employer and the employee a method of controlling each other's misbehavior. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 963-67 (1984). First, the threat of a swift and summary discharge may deter potential malingering by employees, and the fear of losing valuable employees may discourage an employer from mistreating its work force. Second, by agreeing to allow either party to terminate the employment contract for any reason, both employer and employee maximize their own flexibility and freedom of action. Employers can pursue new lines of business without hinderance from workers they no longer need, and workers can quit with impunity when better opportunities appear. See *id.* at 968-69.

In the disclaimer context, however, Epstein's arguments appear inapplicable. The reason is that Epstein is arguing for the rationality of employment at will in the abstract, while disclaimers operate against the backdrop of existing common law rules. Although common law in most states limits an employer's power to arbitrarily terminate its employees, employees do not face similar restrictions when they arbitrarily quit. Thus, employees *already* can control employer misbehavior with an explicit or implicit threat to quit, and they *already* have the option to move freely to pursue better opportunities. Why then would a rational employee yield her common law rights in exchange to obtain powers she already possesses?

It is arguable that this initial asymmetry of rights between employer and employee is unjustified. See *supra* note 153. This issue also arises within the ethical debate over the at-will rule. Compare WERHANE, *supra* note 159, at 151 (arguing for the asymmetry) and Joseph Des Jardins, *Fairness and Employment-at-Will*, 16 J. SOC. PHIL. 31, 35-37 (1985) (same) with Richard A. Posner, *Hegel and Employment at Will: A Comment*, 10 CARDOZO L. REV. 1625, 1630-31 (1989) (attacking the asymmetry).

161. A recent study by the RAND Institute for Civil Justice concluded that such costs are significant; however, the study used circuitous reasoning. First, the study found that after states adopt pro-employee common-law rules, aggregate employment drops substantially (from two to five percent). See JAMES N. DERTOUZOS & LYNN A. KAROLY, *LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY* 46-61, 62 (1992). The study inferred from this that employers must have incurred significant expenses due to human-resource practices instituted in response to the changed legal situation. *Id.* at 63. In theory, these expenses made labor less desirable in comparison with other factors of production. However, the study also found that litigation expenses associated with increased common law job protection are not excessive. See *id.* at 35-36 and *infra* note 162. The authors surmised that personnel managers may be reacting to perceived, rather than actual, risks. *Id.* at 64.

162. *E.g.*, Posner, *supra* note 160, at 1633. However, the RAND Study maintains that such costs are not excessive. DERTOUZOS & KAROLY, *supra* note 161, at 35-36. The study estimated that in 1987 in California, the average litigation-related cost per at-will employee (including awards or settlements and other related legal expenses) was \$10. The "expected legal cost" of terminating that employee was \$100. *Id.*

missing troublesome or marginally competent employees, with a resulting decline in workplace discipline and efficiency and consequent monetary losses.¹⁶³ In an effort to avoid this problem, employers should also expend more resources in searching for suitable employees and in evaluating the people they plan to hire.¹⁶⁴

These costs eventually will be borne by *someone*—the employer, employees (in the form of lower wages or benefits), and/or consumers (to the extent that employers can pass on the costs).¹⁶⁵ When the costs are incurred by either the employer or the employee, the affected party may have an incentive to eliminate the costs by contract. In the former case, employers may attempt to prevent these costs by offering employees better compensation in exchange for an at-will relationship. In the latter case, employees might accept a lower level of job security in exchange for higher wages or benefits. As Ian Maitland has observed, “[p]resumably, if the price is right, some workers will be willing to accept the greater insecurity of [employment at will]. . . . Likewise, some employers may value more highly the unrestricted freedom to hire and fire . . . and may be willing to pay higher wages for that flexibility.”¹⁶⁶ Besides higher wages and benefits, another reason that employees might accept at-will employment is their perception that rational employers have few incentives to fire productive workers.¹⁶⁷ Yet another, paradoxically, is that employees might thereby maximize their likelihood of staying employed.¹⁶⁸

2. *Employer Bargaining Power Regarding Discharge Terms*

In the preceding discussion, the objective was to determine how rational employees might behave, and the bargaining process sketched was a hypothetical one.¹⁶⁹ Nonetheless, some real-world employees might rationally conclude that accepting at-will employment is justifiable.

163. *E.g.*, Posner, *supra* note 160, at 1633.

164. *E.g.*, *id.* at 1634.

165. *See, e.g.*, Jeffrey L. Harrison, *The “New” Terminable-at-Will Employment Contract: An Interest and Cost-Incidence Analysis*, 69 IOWA L. REV. 327, 335-36, 342-44, 356 (1984); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1829 & n.77 (1980).

166. Ian Maitland, *Rights in the Workplace: A Nozickian Argument*, 8 J. BUS. ETHICS 951, 952 (1989). *See also* Posner, *supra* note 160, at 1629, 1634.

167. *E.g.*, Maitland, *supra* note 166, at 953.

168. *See supra* note 161 (discussing an empirical study that shows a correlation between strict wrongful discharge rules and a decline in aggregate employment).

169. Actual bargaining between employer and employee over discharge terms is unlikely. None-

Although he admits that employment at will is not for everyone,¹⁷⁰ Richard Epstein goes further by arguing from at-will employment's pervasiveness over time to the conclusion that it is in the interest of most employees. As Epstein asserts, "[i]t is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers."¹⁷¹

Epstein's argument presents several difficulties. First, its premise is dubious. Given the prevalence of just-cause provisions in both public employment and in union contracts, and the many modern legal protections against wrongful termination, it is questionable whether at-will relationships still dominate the employment landscape. Epstein appears to argue that if at-will employment is so onerous, worker discontent would long ago have forced its demise at the hand of courts and legislatures. To some extent, however, that is exactly what has happened. In addition, earlier portions of this Article suggest another set of reasons for believing that many employees do not desire employment at will.¹⁷² If employees are relatively unconcerned about job security, why do so many firms load their handbooks with promises on the subject? Moreover, why do firms sometimes package their at-will clauses so deceptively?

Despite these objections to Epstein's position, employment at will did dominate private-sector nonunion employment before the 1960s. Why was at-will employment then so pervasive if many employees wanted more job security? Employment at will's critics can easily offer an explanation: its pervasiveness resulted from the superior bargaining power employers held. Indeed, this is the most common basis for attacking the employment-at-will doctrine.¹⁷³ Since employers invariably dominate

theless, properly functioning employment markets can approximate the results that free and equal bargaining would produce. See *infra* notes 200-04 and accompanying text.

170. "The contract at will is not ideal for every employment relation. No court or legislature should ever command its use." Epstein, *supra* note 160, at 951.

171. *Id.* at 955. See also Maitland, *supra* note 166, at 953.

172. Some more or less anecdotal evidence suggests the same. See Raymond L. Hilgert, *How At-Will Statements Hurt Employers*, 67 PERSONNEL J. 75 (1988). Hilgert reported on his unscientific, informal survey of 60 business students. When asked whether they would sign a job application containing an at-will statement, 80% of the students responded that they would if it was necessary to obtain a job. In addition, all 60 stated that they would prefer employment with a firm that did not require them to sign such a statement. Finally, some students regarded an employer's imposition of at-will terms as insensitive, demeaning, and domineering. Professor Hilgert's survey is merely suggestive, however, since, *inter alia*, he failed to ask the students whether they would sign an at-will statement in exchange for higher wages.

173. See, e.g., WERHANE, *supra* note 159, at 91-92; Blades, *supra* note 153, at 1404-07; Des

the employment bargaining process, critics suggest, it is silly to discuss what bargain a hypothetical rational employee might make and dangerous to allow employees to actually contract on discharge policy. In the latter event, critics would say, employees will "choose" employment at will precisely because they have little real choice. Since employers dominate the bargaining process, employees also are unlikely to get any extra compensation when they contract for at-will employment.

Unless one asserts that at-will clauses always are in employees' best interests, courts presumably should not enforce them when their acceptance results from the employer's superior bargaining power. But how often is this the case? The phrase "superior bargaining power" covers two situations that often coexist, but that are distinguishable.¹⁷⁴ The first involves coercion or something similar to it—specifically, the ability to get a knowing but reluctant employee to accept a disadvantageous term. The second involves employees' unknowing acquiescence to prepackaged contract terms. This subsection considers this first sense of the phrase "unequal bargaining power" and the following subsection considers the second. Here, the Article concludes that, at least as far as discharge terms are concerned, superior bargaining power of the first sort does not typify the employment relation.

Except in the rarest of situations, employers cannot force people to accept employment. Business firms do not draft their employees; nor can they stop current or prospective employees from taking a walk if they dislike the firm's employment terms. This is true even when the employer is a large company. Indeed, despite apparent statements to the contrary,¹⁷⁵ superior bargaining power cannot inhere in superior size alone—in bigness *itself*, abstracted from any tangible edge it might provide. However, size may correlate with the market power necessary to make an employer a monopsonist (a monopoly or oligopoly purchaser of labor). A monopsony position should give an employer a bargaining edge,¹⁷⁶ but it is unclear how often such positions actually exist.¹⁷⁷ Are

Jardins & McCall, *supra* note 158, at 369-72; David R. Hiley, *Employee Rights and the Doctrine of At-Will Employment*, 4 BUS. & PROF. ETHICS J. 1, 2, 4-6 (1985); Tompkins, *supra* note 4, at 388.

174. See FARNSWORTH, *supra* note 40, § 4.26, at 294-95 (distinguishing between bargaining power due to one party's creating the document used and bargaining power due to a superior position).

175. See, e.g., Blades, *supra* note 153, at 1404-05.

176. See, e.g., Harrison, *supra* note 165, at 351-53.

177. Labor market economists seem to agree that monopsony is not widespread in modern employment markets. E.g., BELTON M. FLEISHER & THOMAS J. KNIESNER, LABOR ECONOMICS:

employers frequently monopoly or oligopoly purchasers of labor? In the latter case, can they collude effectively with other employers and thereby make any agreement stick? In these cases, how often do barriers to market entry prevent competing purchasers of labor from making an appearance? It appears that opponents of employment at will do not discuss such questions.

Even if an employer or group of employers have a monopsony position within a particular territory, presumably that position only would afford them superior bargaining power if employees in that territory are constrained from moving or working outside the territory. One example of such a constraint is the situation where employees have high costs of relocation.¹⁷⁸ Can that example validly be generalized to include other factors that tend to bind people to a particular locale? Examples of such factors might include family ties, one's roots in an area, and one's preference for a region. But while such reasons may give employers a bargaining edge, it is uncertain whether employees who accept an at-will clause for these reasons are actually "coerced." Also, the third-party effects of courts' refusal to enforce an at-will clause in such cases are troubling. Such a refusal would mean that the affected employees retain some legal protection against wrongful discharge. However, this protection generates costs that may be borne by employees (in the form of lower wages or benefits), by employers (or their shareholders), or by consumers of the employer's products or services (if the employer can pass on the costs).¹⁷⁹ In the first instance, employees are paying for their ties, roots, or preferences. But in the second and third situations, third parties effectively are subsidizing those attachments. Why should they be required to do so?¹⁸⁰

Other alleged sources of employers' superior bargaining power have little correlation with the employer's size. Commentators often note that

THEORY, EVIDENCE, AND POLICY 213 (3d ed. 1970) ("we feel confident that monopsony is not widespread today"); DANIEL S. HAMERMESH & ALBERT REES, *THE ECONOMICS OF WORK AND PAY* 121 (3d ed. 1984) ("[t]here is some reason to think that the monopsony case has been given more attention in textbooks and the economics literature than its actual importance would warrant"); SAUL D. HOFFMAN, *LABOR MARKET ECONOMICS* 49 (1986) (unclear "whether monopsony today is common enough to constitute a serious problem").

178. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 300 (3d ed. 1986).

179. See *supra* notes 161-65 and accompanying text.

180. The argument may also apply to another of Posner's possible sources of monopsony power: employee ignorance of alternative terms. POSNER, *supra* note 178, at 300. Should third parties, such as consumers or the employer's shareholders, be made to subsidize employees for their ignorance? Or should third parties subsidize employees only when such ignorance is beyond those employees' control?

employer bargaining power increases in times of high unemployment, without noting that it presumably declines when unemployment drops.¹⁸¹ Similarly, some have argued that because America does not have a full-employment economy, it is “meaningless to maintain that an employee, who has no alternative employment available, has the freedom to leave his job.”¹⁸² But these commentators do not tell us how often employees are without alternative employment. Finally, some opponents of employment at will maintain that today’s increased specialization of labor binds employees to a particular employer and thus increases the employer’s power over them.¹⁸³ Clearly, however, this is a two-edged sword. “[P]recisely because this [specialized] employee is more productive than a new replacement would be, he can threaten the employer with quitting. . . . It is a game of chicken, likely to end in a stand-off.”¹⁸⁴

3. *Inadequate Disclosure of the Employer’s Terms*

The preceding summary suggests that while employers and employees do not always bargain on equal terms, employment relations do not display pervasive inequalities. Therefore, while courts should selectively invalidate at-will agreements when they are the product of superior employer bargaining power, nothing justifies a blanket refusal to enforce at-will agreements. However, attitudes on the bargaining power issue are so strongly entrenched that the preceding arguments are unlikely to convince those who view employees as victims of employer coercion. One likely reason for this is that such people tend to focus on the interactions between employer and employee, while their opponents emphasize the systemic—largely market—factors that make employers offer certain employment terms. The former group sometimes appears to embrace the following rule: if individual employees cannot meaningfully bargain with their employer, the employer has superior bargaining power.¹⁸⁵ This proposition loses its persuasiveness when one realizes that if inflexibility

181. *E.g.*, Des Jardins & McCall, *supra* note 158, at 370.

182. Ellen Rust Peirce, et al., *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1, 38-39 (1982-1983).

183. *E.g.*, Blades, *supra* note 153, at 1405.

184. POSNER, *supra* note 160, at 1632.

185. Consider, for example, Peter Linzer’s response to Richard Epstein’s claim that employees should be able to extract extra compensation from employers who require them to sign a yellow-dog contract. “One visualizes the pre-New Deal job applicant saying, ‘What will you give me for the yellow dog clause?’ One suspects that the answer would have been ‘I’ll give you a job.’” Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 414 (1986). However, while pre-New Deal employers may have had

on terms is a signal of superior bargaining power, all are exploited by grocery stores, restaurants, and innumerable other such establishments. As will be demonstrated later, moreover, firms often have innocent reasons for refusing to bargain on standard-form terms.¹⁸⁶ As will also be shown, an individual firm's refusal to bargain does not prevent *other employers* from offering different terms. Indeed, competition among employers for employees may force employers to offer employees nonexploitive terms of employment.¹⁸⁷

For competition to function, however, employees must be aware of the relevant terms of employment. As earlier portions of the Article clearly indicate, this often is *not* the case for disclaimers of wrongful discharge liability. Some disclaimers are poorly positioned, inconspicuous, and/or imprecisely stated.¹⁸⁸ In these cases, employees are unlikely to understand or appreciate the disclaimer. The same unawareness or misunderstanding is likely to occur when courts allow employers to change their discharge policies by adding a disclaimer to their handbooks without providing their employees adequate notice.¹⁸⁹ But the most egregious example occurs when an employer makes an express promise regarding its discharge policy, and the promise is accompanied by a conflicting disclaimer.¹⁹⁰ As a result, employees may reasonably rely on handbook "promises" that are negated by the disclaimer. In such instances, it is probable that employers intentionally make promises concerning their discharge policies to create favorable attitudes among their employees, and use disclaimers to avoid fulfilling those promises.¹⁹¹

the power to take this approach, Linzer does not explain why. Specifically, he does not examine the options available to the hypothetical job applicant.

186. See *infra* notes 200-03 and accompanying text.

187. See *infra* note 204 and accompanying text.

188. See *supra* notes 81, 102-11, 126-31, 140-43 and accompanying text.

189. See *supra* notes 140-43 and accompanying text.

190. Because most litigation over the third exception to employment at will involves promises in handbooks, and because many disclaimers are located in handbooks, this situation is common. For specific examples, see *supra* notes 132-39 and accompanying text. On the egregiousness of such situations, see, e.g., *Small v. Springs Indus.*, 357 S.E.2d 452, 454 (S.C. 1988) ("strong equitable and policy reasons militat[e] against allowing employers to promulgate . . . potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice").

191. For example, one writer observes that an employee handbook can be an effective management tool by: (1) building a favorable image of the firm in the employees' eyes, (2) communicating the employer's attitudes and expectations about the employment relationship, (3) setting forth specific work rules, (4) stating the employer's dispute-resolution procedures, and (5) serving as a symbol of stability and security for employees. See Coombe, *supra* note 8, at 10-13.

Regarding the fifth function, the handbook represents "the employer's good will" and its "desire

4. *Employee Capacity to Utilize Enhanced Disclosure*

In theory, affording employees greater knowledge of their employers' discharge terms will cure the ills described earlier. In pursuit of this goal, the Article's next section proposes stringent disclosure, conspicuousness, and authentication standards for the enforceability of at-will clauses. But even if such disclosure occurs, would employees effectively utilize it? In this context, three problems exist.

First, many employees may not actually read their handbooks¹⁹² or devote serious attention to disclaimers on employment applications. If this is the case, would this Article's recommended super-disclosure of such terms alleviate the problem? In some cases super-disclosure probably would raise an employee's awareness of his firm's discharge policy. In others, it might not, but the failure is unimportant. Certainly some employees' unwillingness to read a suitably communicated at-will clause does not justify an across-the-board refusal to enforce such terms. How can such employees' inattention justify denying an at-will relationship to another employee who knowingly and voluntarily chooses it? Another reason why employees who fail to read a suitably communicated at-will clause should not be able to avoid its effect is that otherwise they would have an incentive to claim ignorance of known terms.

A second argument for individual incapacity asserts that in many "standard-form" contexts such as insurance contracts, disclaimers of implied warranties, and credit card contracts, the complexity of the contract's subject matter and/or the relevant law justify imposing

to provide a pleasant, safe, and rewarding work place"; therefore, it is "the equivalent of the union contract in a nonunion setting." *Id.* at 13. Although handbook promises may not be legally enforceable, employers who breach them risk losing credibility with their employees. Thus, "employers should include in the employee handbook only those provisions that they are willing to live with." *Id.*

The next page, however, states that to minimize wrongful discharge liability, employers should eliminate troublesome expressions such as "permanent employment," "discharge for cause," and "job security" from their handbooks. *Id.* at 14. "Instead, the employer should either list specifically the events that will result in discharge or state that it reserves the right to discharge at any time for any reason." *Id.* Moreover, employers are advised to consider inserting a disclaimer in the handbook, and then give rudimentary instructions on the subject. *See id.* at 15-16.

Apparently, the effective "union contract" created by the handbook is not intended to be binding. Similarly, it appears that there are *no* handbook provisions with which an employer should be willing to live. But until employees learn otherwise, the handbook may cause them to believe in the employer's good will, to feel secure about their job, and thereby benefit the employer.

192. *Cf.* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1179 n.22 (1983) (author's informal, long-term survey of lawyers and law professors illustrates that few actually read standard-form contracts such as bank-card agreements).

standardized terms because only the most attentive, informed, and hard-working consumers could possibly understand, digest, and assimilate the relevant information.¹⁹³ However, employment at will is a subject that almost anyone can grasp. Certainly Epstein was right when he said that “[w]ith employment contracts . . . we are dealing with the routine stuff of ordinary life. . . . An employee who knows that he can quit at will understands what it means to be fired at will, even though he may not like it after the fact.”¹⁹⁴

Finally, even if discharge terms are properly communicated to an employee, he is aware of those terms, and he understands the terms’ meaning, does the employee really grasp the likelihood and the consequences of being fired when he commences his employment with an employer? As one author has argued:

Employees may for a variety of reasons misperceive their best interests at the outset of the employment relationship. For example, employees may tend to discount substantially the risk of wrongful discharge, and as a result systematically undervalue job security. . . . Either a false sense of security or a failure to realize the risks involved may therefore lead employees to seek wage increases rather than forgo some immediate benefits in return for an appropriate level of job protection.¹⁹⁵

Although this argument has appeal, specific evidence for such employee misperceptions is not overwhelming.¹⁹⁶ In particular, it is unclear *how often* employees underestimate the odds of being fired, and by *how much*. Even if significant misjudgments are common, it does not follow that the law should try to dictate a preferred discharge term. As argued at length earlier, there is no single discharge policy to which rational minds ineluctably must assent.¹⁹⁷ When deciding whether to accept an at-will clause, a rational employee presumably would multiply the magnitude of a firing’s disutility by its probability. That disutility almost certainly will vary from person to person. The probability in question cannot be quantified with any degree of certainty, but it is likely to be relatively low for

193. See, e.g., Phillips, *supra* note 155, at 243 (arguing that freedom of contract cannot justify the enforcement of implied warranty disclaimers because consumers cannot understand their meaning or legal significance).

194. Epstein, *supra* note 160, at 954-55.

195. Note, *supra* note 165, at 1831-32.

196. See *id.* at 1831 & nn.82-84 (highlighting studies supporting the author’s position, suggesting that employee misperceptions can result from the common propensity not to contemplate disaster, noting that employees lack information regarding the employer’s past discharge practices, and observing that employers prefer to mislead employees on this score).

197. See generally *supra* notes 159-72 and accompanying text.

productive employees.¹⁹⁸ In addition, some people value present gain (the superior compensation package that should result from an at-will relationship) more than the reduction of a longer-term risk (being arbitrarily fired) that more favorable discharge terms would afford them. Again, there is no “right” discharge policy that will suit everyone.¹⁹⁹

5. *Transaction Costs and Disincentives to Bargain*

As suggested at various points above, full disclosure of employers’ discharge terms provides potential benefits for employees who are aware of those terms and who act on that awareness. Assuming relatively equal bargaining power, they may be able to obtain the package of dismissal and compensation terms that best suits them. It initially appears, however, that transaction costs may prevent employers and employees from reaching agreement on optimum terms. As one scholar concluded: “[t]he problem is not whether the parties have the capacity to use the market system as a medium for the expression of their preferences as in the instance of unequal bargaining power, but rather, whether there are cost barriers to the transaction itself.”²⁰⁰ Such barriers—the costs of individualized bargaining regarding the level of compensation and job security—include the administrative and record-keeping expenses incurred by a large employer that negotiates with many employees.²⁰¹ Such costs might defeat mutually beneficial agreements. For example, “[t]he employer may not value complete discharge discretion as much as the employee values job security. This right [to job security] will not be transferred, however, if the costs of actually negotiating the transfer are so great that they offset any advantage gained by the exchange.”²⁰²

Therefore, employers are unlikely to make individualized deals with their employees on job security. Another related set of obstacles to individualized transactions are the well-known factors that impel firms to use standardized forms. For instance, standardization of forms helps organizations function more effectively by: (1) allowing easier communication

198. In this connection, two recent authors have calculated yearly probabilities of .000154, .005768, and .002083 for various kinds of wrongful discharges. See Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1106-07 (1989).

199. However, one may reach a different conclusion if the issue is the compulsory provision of medical insurance or old-age security.

200. Harrison, *supra* note 165, at 356.

201. Note, *supra* note 165, at 1830.

202. Harrison, *supra* note 165, at 356.

and coordination among departments; (2) enabling top managers to impose optimum policies throughout the firm; and (3) controlling subordinates who may wish to depart from those policies by entering into their own deals with third parties.²⁰³ Employee-by-employee bargaining over discharge terms could defeat these goals.

Thus, greater disclosure of dismissal terms might benefit employees relatively little because employers often have disincentives to offer employees a choice. However, while the need for standardized discharge terms may prevent *one employer* from bargaining on such terms, it does not preclude other employers from offering *different* discharge terms and from competing on common terms such as salary. As Maitland argued:

If employers were generally to heed business ethicists and to institute workplace due process in cases of dismissals—and to take the increased costs or reduced efficiency out of workers' paychecks—then they would expose themselves to the pirating of their workers by other (less scrupulous?) employers who would give workers what they wanted instead of respecting their rights.

If, on the other hand, many of the workers not currently protected against unfair dismissal would in fact prefer guarantees of workplace due process—and would be willing to pay for it—then such guarantees would be an effective recruiting tool for an entrepreneurial employer. That is, employers are driven by their own self-interest to offer a package of benefits and rights that will attract and retain employees.²⁰⁴

Would employers actually behave in this manner? Because employees differ in how they value job security relative to other elements in the rights/benefits package, they should demand different packages. However, employers appear to be inclined to disclaim discharge liability whenever possible, so perhaps they would not respond to the segment of the work force that seeks job security. However, since employers often make promises about job security, they clearly have an interest in this segment. Under the stricter conspicuousness/disclosure requirements advocated in the next section, such firms no longer could promise job protection while successfully disclaiming it. Thus, employers would be forced to choose between people who more strongly value job security and people who more strongly value other employment terms such as a better compensation package. Absent collusion, some employers should

203. See Rakoff, *supra* note 192, at 1222-23. See also RESTATEMENT (SECOND) OF CONTRACTS § 211 cmts. a, b (1981).

204. Maitland, *supra* note 166, at 952-53.

tailor their rights/benefits packages toward particular segments of the labor force. Moreover, under most circumstances, collusive agreements among employers appear very difficult to create and maintain. The reasons collusion among employers is difficult include the number of relevant employers, the difficulties their numbers pose for forming and enforcing an agreement on the terms offered to employees, and employers' incentive to cheat on a collusive agreement.

C. A Summary

When, if ever, should employees be allowed to contract away their common-law protections against wrongful discharge, thus assuming an at-will status? Because employees have good reasons to accept employment at will, an agreement to that effect hardly is irrational. But while it is doubtful that employers normally can coerce people to accept an at-will employment relationship, the manner in which many employers package disclaimers creates equal doubt that employees genuinely assent to them. This objection would be irrelevant where employment at will is so obviously beneficial that no employee could rationally contract otherwise. However, this clearly is not the case. Because people bring different values, interests, and expectations to the employment relationship, no single discharge policy can satisfy all employees. Thus, the law of wrongful discharge liability should promote informed and rational choices by individual employees. Neither the incapacities of some employees nor the practicalities that dissuade employers from individualized bargaining are serious obstacles to such a policy.

IV. GETTING FROM HERE TO THERE

Judged by the previous section's standards, much of the current law on disclaimers of wrongful discharge liability is deficient. Too often, courts have enforced disclaimers that were poorly equipped to communicate their message or that were overshadowed by conflicting promises of job security. Indeed, some disclaimers may have been designed to defeat knowing and rational employment decisions by employees. But while misleading employment manuals and poorly packaged disclaimers are objectionable, manuals and disclaimers that clearly and conspicuously convey their message can promote informed, rational employee decisions. Thus, the law governing disclaimers of wrongful discharge liability should mandate the feasible steps needed to maximize employees' awareness and understanding of their employers' discharge terms.

To that end, this section first suggests some ideal rules to govern the enforceability of at-will clauses—rules which attempt to maximize employee awareness and understanding of their employers' discharge terms. The section then explores contract law's resources for attacking disclaimers of wrongful discharge liability. Because almost all litigation on such clauses involves express or implied-in-fact employer promises, the section's recommendations are limited to cases involving those bases of common-law wrongful discharge liability.²⁰⁵

A. *The Ideal Legal Treatment of At-Will Clauses*

To further employees' knowledge and appreciation of at-will clauses, this Article offers the following suggested rules for their enforceability. These rules are general guidelines that do not attempt to cover every contingency. But they attempt to outline the form that detailed disclaimer rules should take to maximize employee comprehension and assent. Although these standards may go further than any court or legislature is likely to step, they present each with a suitable target.

The suggested disclaimer rules are as follows:

1. *Disclaimers of wrongful discharge liability whose acceptance results from an employer's superior bargaining power should not be enforced.* Here, the reference is to forms of bargaining power that do not involve the disclaimer's statement, packaging and placement. Superior employer

205. It may be useful to consider whether those recommendations—and the previous section's conclusions—should apply to disclaimers of liability under the public policy exception and the implied covenant of good faith and fair dealing. As discussed earlier, employers almost certainly cannot disclaim wrongful discharge liability in the former case. *See supra* notes 82-84 and accompanying text. This section should not disturb that view. The freedom-of-contract rationale that underlies permissible disclaimers is only one public policy. Public policy exception recoveries should be limited to cases involving the most important policies—policies that should override freedom of contract.

The implied covenant of good faith and fair dealing is a more difficult matter. In states that follow the weak version of the covenant, courts routinely enforce at-will clauses. *See supra* notes 48-50, 85-88 and accompanying text. However, in the few states where the covenant provides significant substantive protection, most cases considering attempts to disclaim have disallowed the disclaimer. *See supra* notes 44-47, 89-90 and accompanying text. In the "weak covenant" states, at-will clauses that meet the tests outlined in this Article should be enforced. Such a clause would express the parties' intent to make the relationship at-will, and this version of the covenant only protects their agreed common purpose and justified expectations under the contract. In the few states which have established a strong form of the covenant, at-will clauses that meet this Article's test probably should not be enforced. This assumes that under the strong version of the covenant, recovery would be limited to cases involving serious violations of community moral standards. As with the public policy exception, the policies reflected by such recoveries would be strong enough to override liberty of contract.

power in this sense should be the exception rather than the rule.²⁰⁶ But where such superiority exists and enables an employer to impose a disclaimer, the disclaimer should not be enforced. If such power exists, it should most often result from an employer's monopsony position.

2. *To effectively disclaim wrongful discharge liability, employers must: (a) use a separate writing, (b) that plainly and conspicuously states that the employment relationship can be terminated for any reason by either party, and (c) that is signed and acknowledged by the employee.* The term "must" clearly mandates that a separate writing is the exclusive means of disclaiming wrongful discharge liability. The term "separate writing" excludes disclaimers contained in handbooks or manuals, tear-off sheets within these manuals, benefit statements, job applications, and similar documents. The goal of this rule is to increase the likelihood that current or potential employees will focus attention on the disclaimer.

To enhance employees' comprehension of the disclaimer's meaning and consequences, its language should err on the side of bluntness and colloquialism. Thus, since statements such as "This employment is at will" or "This employment is not a contract" may be subject to misinterpretation, they are inadequate. However, statements such as "Either party can terminate this employment without legal liability at any time and for any reason" will suffice. But language that even the most unsophisticated can understand is preferable—for example: "We can fire you at any time and for any reason; likewise, you can quit at any time and for any reason."

Naturally, employers also must ensure that the writing's key disclaimer terms are conspicuous. Thus, the disclaimer's crucial language must appear in boldface, capital letters, or ink that contrasts with the remainder of the writing.

For evidentiary reasons, and to further focus attention on the disclaimer, the employee must sign and attest to the disclaimer. To guarantee that the employee will be cognizant of the disclaimer, a separate signed acknowledgement ("I have read and fully understand the terms of this document") should appear in the separate writing. After signing the writing, an employee would normally be bound to the disclaimer and could not argue that she did not read or understand it.²⁰⁷

3. *Even if an employer satisfies the above requirements, a disclaimer is*

206. See *supra* notes 173-87 and accompanying text.

207. E.g., CALAMARI & PERILLO, *supra* note 20, § 9-42.

ineffective if the employer makes and breaches a statement regarding discharge policy that: (a) conflicts with the disclaimer, (b) would create liability under existing law if considered in isolation from the disclaimer, and (c) appears in a writing that represents a centrally-dictated organizational policy. This rule addresses concerns that arise in connection with promises of job security or discharge procedures in employee handbooks and benefit plans. If an employer makes and subsequently defaults on such a promise, and if that breach would create liability under state law if no disclaimer were present, the disclaimer is unenforceable. This requirement will prevent employers from reaping the benefits of such promises without becoming legally bound to them.

This rule would apply even if the handbook or benefit plan itself is replete with at-will statements. As this Article has discussed, courts face significant problems when conflicting statements regarding discharge policy appear within a single document. These concerns include the disclaimer's location, conspicuousness, and explicitness, as well as the explicitness of the promise that it is attempting to negate.²⁰⁸ Employees who make a conscientious effort to read an employee manual or benefit plan face the same problems and are often less equipped to handle them than the courts. Under the rule proposed here, courts are spared the burden of construing such documents, and employees are not penalized for failing to understand them. Instead, employers are bound by the promises they make, if actionable in isolation from any at-will statements in the handbook, manual, or benefit statement. Thus, employers are encouraged to make only the promises they expect to fulfill.

Since this third rule seems to impose liability on employers for actionable express and implied-in-fact promises whether they disclaim or not, one might wonder why employers would even attempt to disclaim. However, the rule only affects statements contained in a writing that articulates centrally-dictated organizational policies. As this Article has shown, under the third exception to employment at will employers may be liable for promises expressly made in or derived from: (1) employee manuals or handbooks; (2) written benefit plans; (3) separate written assurances about job security; (4) oral assurances to the same effect; and (5) business custom and usage as determined by the firm's personnel practices, industry practices, longstanding customs, the nature of the job, the employee's length of service, and the employer's past adherence to its

208. See generally *supra* notes 102-39 and accompanying text.

promises.²⁰⁹ This Article's suggested rule would prevent a disclaimer from operating in the first and second cases, and occasionally in the third.²¹⁰ However, it would allow a properly constructed disclaimer to block recovery in the fourth and fifth situations.

Employers' need to regularize and control their discharge policies justifies this disparate treatment of different promises.²¹¹ Promises of the third, fourth, and fifth type may be inconsistent with standardized firm policy. Despite company rules to the contrary, for example, a personnel officer might say whatever she thinks is necessary to convince an impressive job applicant to accept an offer of employment. Even though actual (express or implied) authority would not exist in such a case, the personnel officer could bind the firm if she has apparent authority. Organizations cannot effectively control all such aberrant behavior. Thus, if employers are held liable in these cases, they will be unable to standardize their discharge policies and to reap the benefits of such standardization. Although this favoritism toward employer interests would result in an injustice to some employee plaintiffs in situations of the latter three kinds, these types of promises are also the cases where one's reliance on the promise is least justifiable. Promises of the first and second types, on the other hand, are controlled by top management since those statements reside in official company documents. Thus, employers should have no difficulty stating consistent policies, and there is no reason to protect employers who send out these types of conflicting signals.

4. *The preceding two rules apply when an employer tries to disclaim liability based on an earlier promise.* This rule limits employers' ability to standardize their discharge policies when they attempt to amend those policies to make the relationship at will. Suppose that the XYZ Corporation's employee handbook promises to discharge employees only for good cause. Now suppose that XYZ wishes to transform all its workers into employees dischargeable at will. Although a few courts allow employers to change the relationship with virtual impunity, most now hold that such a modification requires some combination of the following: (1) consideration; (2) notice to the affected employee; and (3) the employee's assent to the change, or at least his awareness and understanding

209. See *supra* notes 54-57 and accompanying text.

210. Where separate written assurances are at issue, much would depend on their source and the employee's level in the employer's hierarchy.

211. See *supra* notes 200-03 and accompanying text.

of the change.²¹² Under the Article's second proposed rule, however, XYZ must have its existing employees sign a valid written disclaimer. Those employees who refuse to sign the disclaimer would still have a legally protected right to be terminated only for good cause. Under the third rule, employers also would have to edit their handbooks to remove all promises about discharge policy that conflict with the new disclaimer.

Because some employees probably will refuse to sign the new disclaimer, this fourth rule compromises the Article's previous emphasis on standardization. But that concern is overridden by the employer's previous promise to discharge only for good cause and by the moral claims that employee reliance on such a promise generates. In addition, employers may have more leverage over current employees than potential new hires. Thus, employers should be released from their earlier promises only when an employee clearly assents to the change, and the second disclaimer rule provides for such assent. Employers who desperately need an across-the-board at-will policy might consider raising their employees' compensation package in order to induce them to accept the new disclaimer.²¹³

B. *The Resources of General Contract Law*

Due to their aggressiveness, this Article's four suggested rules are less a blueprint for legislative or judicial action than a target at which legislatures and courts should aim. As section II of the Article indicates, courts apparently have no interest in hitting this target. Nor have state legislatures addressed the enforceability of at-will clauses. However, the 1991 version of the Uniform Employment-Termination Act does address the subject. After establishing a general good cause standard for covered terminations,²¹⁴ the Act allows employer and employee to waive that requirement by express written agreement, if the employer promises that

212. See *supra* notes 140-51 and accompanying text.

213. A recent version of the Model Uniform Employment-Termination Act has taken a roughly analogous approach. See Uniform Act, *supra* note 5, § 4(c), quoted in *infra* note 215.

214. Uniform Act, *supra* note 5, § 3(a). Good cause discharges include those caused by an employee's theft, assault, fighting, destruction of property, use or possession of drugs or alcohol, insubordination, excessive absenteeism or tardiness, incompetence, low productivity, inadequate performance, and neglect of duty. *Id.* § 1(4) cmt. Good cause discharges also include good faith terminations based on reasonable economic grounds. *Id.* § 1(4)(ii); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 511 (1989). Finally, employers must communicate substantive standards to employees. These standards must be applied equally and accompanied by procedural safeguards. *E.g.*, Summers, *supra* note 22, at 502-04.

upon termination it will provide the employee severance payments in amounts based on the employee's length of service.²¹⁵ Except for a statement that it does not countenance contracts of adhesion,²¹⁶ however, the Act provides no requirements for permissible written agreements. Thus, if the cases in this Article are an indication of how courts will perform under a future uniform act, the Act's disclaimer provision may enable employers to escape significant dollar payments to discharged junior employees.

In any event, for now the courts must generate changes in wrongful discharge law. Assuming that the courts are willing, what legal means are available to implement rules approximating those that this Article suggests? The general common law of contract is an obvious possibility. In the past, courts generally have ignored contract law when considering the enforceability of disclaimers; however, nothing precludes them from using it. Although contract law may not support as ambitious a program as the one this Article advocates, it helps curb the worst abuses described earlier.

1. *Rules of Contract Interpretation*

Occasionally, general rules of contract interpretation may enable employee plaintiffs to overcome written disclaimers. First, courts should attempt to read the parties' employment agreement as a whole, so that its various statements are consistent.²¹⁷ Thus, a disclaimer may fail if it is more vaguely or less strongly worded than an employer's conflicting promises regarding discharge policy.²¹⁸ Even where the disclaimer is

215. The Uniform Act provides that:

By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than the willful misconduct of the employee, the employer will provide severance pay in an amount equal to at least one month's pay for each period of employment totaling one year, of employment, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay in effect immediately before the termination.

Uniform Act, *supra* note 5, § 4(c).

The comment to § 4 suggests that, as a practical matter, employers will most often use disclaimers for management personnel, key professionals, and others not subject to periodic layoff. This is because under the Act, workers who are laid off for more than two months can treat the layoff as a "termination," and thus trigger the disclaimer provision's severance pay requirement. *See id.* §§ 1(8)(ii), 4(b); *see also* § 4 cmt.

216. *Id.* § 4 cmt.

217. RESTATEMENT (SECOND) OF CONTRACTS §§ 202(2), 202(5) (1981).

218. *See supra* notes 120-39 and accompanying text.

precise and emphatic, employer and employee may still attach different meanings to agreements that combine conflicting promises and disclaimers. In these cases, the *Restatement of Contracts* states that courts should interpret the agreement in accordance with the *employee's* understanding if either: (1) the employee was unaware of the employer's interpretation, but the employer knew of the employee's reading; or (2) the employee lacked reason to know of the employer's reading, but the employer had reason to know of the employee's interpretation.²¹⁹ Because in some of these situations employers may be intentionally trying to mislead their employees,²²⁰ this rule of construction may apply fairly often. Finally, a general rule of contract construction states that courts should prefer the interpretation of an agreement which works against the party who drafted it—here, the employer.²²¹

2. *Nonbinding Terms in Offers*

In some cases, a disclaimer can be regarded as part of an offer to contract; examples include disclaimers in employment applications or actual contracts of employment. However, an offeree who accepts a written offer is not invariably bound to all the terms that it contains. Instead, an offeree is bound only if he should have reasonably understood that the relevant term was part of the offer.²²² Thus, fine-print or deceptively positioned offer provisions often are not considered part of the contract.²²³ Therefore, the courts' unwillingness to consider the conspicuousness of disclaimer terms in signed employment applications or employment contracts is dubious.²²⁴

3. *Unconscionability*

In language closely resembling the unconscionability provision in Arti-

219. RESTATEMENT (SECOND) OF CONTRACTS § 201(2) (1981). *Cf. id.* § 211(2) (standardized agreements should treat similarly those who are similarly situated without regard to their knowledge or understanding of the agreement's standard terms). Elaborating on § 211(2), the Restatement's drafters stated: "courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." *Id.* § 211 cmt. e.

220. *See supra* note 191.

221. *Id.* § 206; FARNSWORTH, *supra* note 40, at 298.

222. *E.g.*, FARNSWORTH, *supra* note 40, § 4.26.

223. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 9-43(a).

224. On this unwillingness, see *supra* note 102 and accompanying text. A possible reason for the courts' unwillingness is the general rule that one who signs a writing is bound to its terms even if the party did not read or understand the writing. *See* CALAMARI & PERILLO, *supra* note 20, §§ 9-41 to 9-43(a).

cle 2 of the Uniform Commercial Code,²²⁵ section 208 of the *Restatement of Contracts* provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.²²⁶

As Professors Calamari and Perillo have observed, unconscionability "has entered the general law of contracts."²²⁷ Thus, a court that finds an at-will clause unconscionable could refuse to enforce it, or could modify it to avoid an unconscionable result.

The dominant mode of unconscionability analysis tells courts to examine the agreement and the allegedly offending term for both procedural and substantive unconscionability.²²⁸ Courts consider the following three general factors when determining procedural unconscionability: (1) the parties and their traits; (2) the way the ostensibly blame-worthy party has stated and packaged the allegedly offending terms; and (3) that party's power and its tactics. Under the first factor, courts have been sympathetic to especially ignorant, unsophisticated, and susceptible parties.²²⁹ Some employees may qualify under this category. Regarding the second factor, courts often are suspicious of contract terms stated in small print or in unintelligible language, or contract language buried within the agreement.²³⁰

Third, superior bargaining power—the absence of meaningful choice—is a relevant consideration to courts addressing unconscionability cases.²³¹ Although it is doubtful whether employers normally can force employees to accept undesirable terms,²³² this no doubt happens in some cases. More importantly, the manner in which many employers package at-will clauses gives them a practical edge over employees.²³³ Regarding employer tactics in unconscionability cases, courts will attack

225. U.C.C. § 2-302(1) (1977).

226. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

227. CALAMARI & PERILLO, *supra* note 20, § 9-39.

228. *See, e.g.*, WHITE & SUMMERS, *supra* note 157, §§ 4-2 to 4-8.

229. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 9-40; WHITE & SUMMERS, *supra* note 157, § 4-3.

230. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 9-40; FARNSWORTH, *supra* note 40, § 4.28.

231. *E.g.*, CALAMARI & PERILLO, *supra* note 20, § 9-40; FARNSWORTH, *supra* note 40, § 4.28.

232. *See supra* notes 173-87 and accompanying text.

233. *See supra* notes 102-16, 126-31, 188-91 and accompanying text.

“sharp practices” and guile.²³⁴ Employers who promise job security with one hand, while disclaiming it with the other, arguably are guilty of both. Finally, encompassing all these factors is an issue which is central to this Article: employees’ genuinely knowing and voluntary subjective assent to the challenged term, as opposed to an objective meeting of the minds.²³⁵

Thus, cases regarding disclaimers of wrongful discharge liability often present procedural issues. When procedural problems are abundant or severe, they may justify a conclusion of procedural unconscionability. However, a finding of procedural unconscionability would not alone suffice to render a contract term unconscionable.²³⁶ Unless a contract’s substantive terms are also unjust, why should courts worry about unfairness in the bargaining process? However, if a high degree of procedural unconscionability is present, courts sometimes require only a slight amount of substantive unconscionability.²³⁷

As this Article’s preceding section explains, objections to disclaimers of wrongful discharge liability are largely procedural. And at first glance it appears ridiculous to describe at-will clauses as substantively unconscionable. After all, they merely make the employment relationship at-will, and since when is employment at will unconscionable? In fact, some employees may rationally regard an at-will term as *beneficial*. However, disclaimers of wrongful discharge liability are not beneficial to all employees. Thus, at-will clauses appear substantively conscionable in some cases (roughly, when the discharged employee received a quid pro quo for the at-will clause), but they appear substantively unconscionable in other cases (roughly, when the employee received no extra benefit for the disclaimer and was terminated in violation of an express promise). Only rarely would additional compensation for a disclaimer result from an explicit deal. Therefore, courts probably lack the resources to reliably distinguish these two situations.

Given all these difficulties, the best course is for courts to declare disclaimers of wrongful discharge liability unconscionable whenever a rea-

234. *E.g.*, FARNSWORTH, *supra* note 40, § 4.28; WHITE & SUMMERS, *supra* note 157, at 187-88.

235. CALAMARI & PERILLO, *supra* note 20, § 9-40.

236. *E.g.*, WHITE & SUMMERS, *supra* note 157, § 4-7 (most courts require a certain level of procedural unconscionability and a certain amount of substantive unconscionability).

237. “[A] contract that is one hundred pounds substantively unconscionable may require only two pounds of procedural unconscionability to render it unenforceable and vice versa.” *Id.* at 200. *See also* FARNSWORTH, *supra* note 40, at 315.

sonably significant degree of procedural unconscionability exists.²³⁸ The most obvious examples include situations in which the employer packaged the disclaimer so as to make its detection and comprehension difficult and/or in which the employer's promises regarding termination procedures or job security would cause a reasonable employee to disregard the disclaimer.²³⁹ Where such procedural defects exist, it is unlikely that the affected employee derived any benefit from the disclaimer.

Under this rule, nonetheless, a court may sometimes find a disclaimer of discharge liability unconscionable even though the employee plaintiff received a quid pro quo by accepting it. Thus, this proposed rule can contradict the general rule that at least *some* substantive unconscionability must exist for an overall finding of unconscionability. But this is hardly unprecedented. For example, courts have often invalidated disclaimers of the Uniform Commercial Code's implied warranties of merchantability and fitness for a particular purpose on unconscionability grounds.²⁴⁰ They have done so even when some buyers probably obtained a better deal due to the disclaimer. All other things being equal, products accompanied by an implied warranty disclaimer should cost less than products sold without a disclaimer.²⁴¹ Although courts cannot reliably determine when buyers have benefitted from an implied warranty disclaimer, they have still declared such disclaimers unconscionable. Procedural concerns often dominate these decisions.²⁴²

V. CONCLUSION

In several ways, this Article conflicts with dominant judicial and scholarly approaches to employment at will and at-will clauses. For example, the Article proposes much stricter scrutiny of such clauses than courts now practice. Thus, the Article is not another "how-to" piece designed to help employers evade express promises they made their employees. Instead, it attempts to identify and develop legal rules that

238. "[Certain] terms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (1981).

239. The latter situation resembles that where a seller of goods attempts to disclaim an express warranty. Here, the disclaimer typically fails. *See supra* notes 156-57 and accompanying text.

240. *See, e.g.*, Phillips, *supra* note 155, at 223-36.

241. *See, e.g.*, Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1057-58 (1977).

242. *See* Phillips, *supra* note 155, at 229-30.

would maximize employees' ability to choose the most suitable discharge terms.

The Article also differs from most evaluative scholarly commentary on employment at will.²⁴³ Most of this commentary is dominated by two divergent views about employees. Each suffers from excessive confidence about the termination policy that rational employees would choose, and from an overeagerness to read that choice into the common law of wrongful discharge. Under one view, most employees desire the higher pay employment at will presumably affords them; to such people, a disclaimer of wrongful discharge liability is an opportunity, not an imposition. Under the other view, most employees value job security above all other things, and would not willingly accept a disclaimer.

In contrast, this Article proposes what apparently are radical positions within the policy debate over employment at will. It maintains that because employees might legitimately differ on the subject, there is no "right" discharge policy. Whatever may be true about disclaimers in other areas of the law, termination rules are one subject on which people have the ability and the power to make their own choices. Existing law governing at-will clauses, however, hinders employees from making those choices. Thus, courts or legislatures should reshape that law to crack down on disclaimers of wrongful discharge liability.

243. However, one recent author has made recommendations that somewhat resemble those offered here. See Comment, Peter S. Partee, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 689 (1991). Partee recommends that courts abandon employment at will and instead establish a rebuttable presumption that employees can be fired only for just cause. *Id.* at 709. An employer could rebut the presumption by proving that it lacks monopoly (i.e., monopsony) power, and that it made an at-will agreement with the plaintiff employee. *Id.*