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UTILIZATION OF THE DISCLAIMER AS AN EFFECTIVE MEANS TO DEFINE THE EMPLOYMENT RELATIONSHIP

Michael A. Chagares*

I. INTRODUCTION

The law pertaining to the relationship between the employer and employee has changed markedly over the past fifteen years. Courts, as well as legislatures, have become increasingly more receptive to claims by terminated employees that they have been wrongfully discharged. With these employees advancing a number of theories in support of their claims, employers not only defend their actions but also attempt to avoid future disputes. A frequent allegation associated with wrongful termination actions is that employees were deprived of something, such as employment for a specific period, which was a term of the relationship. This Article examines the evolution of the law governing the duration of the employment relationship and suggests that employers should use disclaimers as a means to define the terms of the relationship between themselves and their employees. In addition, this Article proposes a number of

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2. See generally Abbasi, Hollman & Murrey, Employment at Will: An Eroding Concept in Employment Relationships, 38 LAB. L.J. 21 (1987) (examining recent judicial and legislative restrictions on the employment at will doctrine). As a result, there has been a substantial increase in the number of wrongful discharge actions. Id. at 21; see also A. Hill, supra note 1, at 9-10 (stating that "[m]ore often now than ever before, these discharged at-will employees are taking their claims to court" and providing a graph illustrating the sharp increase in wrongful discharge litigation beginning in 1982).

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II. EVOLUTION OF THE EMPLOYMENT AT WILL RULE

During the United States' early nationhood, the country generally followed the established English presumption that the employment relationship consisted of one year employment periods. In 1877, however, an American legal theorist, H.G. Wood, published a treatise which altered the way both American employers and employees viewed the employment relationship. Wood argued that there was a presumption that no duration existed for the employment relationship. The rule Wood advocated soon became known as the "employment at will" rule. Under the rule, either the employee or employer could end the employment relationship whenever he chose to do so. The employment at will rule gained acceptance in the United States since it was consistent with the then-popular idea of "freedom of contract." After the advent of Wood's treatise, courts began to utilize the employment at will rule. One court defined the rule in the follow-
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will rule gained recognition by the United States Supreme Court in Adair v. United States, 208 U.S. 161 (1908). The Court noted that:

it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.

Id. at 174-75. The Supreme Court also recognized the validity of the at-will doctrine in Copp edge v. Kansas, 236 U.S. 1 (1915), where it held that a statute which restricts employer's hiring and firing decisions is unconstitutional. See id. at 26.


12. See Abbasi, Hollman & Murrey, supra note 2, at 23 (stating that “[c]ourts embraced, repeated, and were adamant in their application of the employment-at-will rule in the early part of this century” and that the consequences of the at-will doctrine were often “harsh and unhumanitarian”); see, e.g., Bell v. Faulkner, 75 S.W.2d 612, 613 (Mo. Ct. App. 1934) (holding that a laborer could be discharged at any time without liability on the part of the employer where the laborer was allegedly discharged because he refused to vote for certain candidates in a city election); Bird v. J.L. Prescott Co., 89 N.J.L. 591, 593, 99 A. 380, 381 (1916) (finding that a corporation could legally discharge an employee where the corporation succeeded a co-partnership which had offered the employee a job for life to induce the employee, who had been injured on the job, to forbear bringing a lawsuit); Martin v. New York Life Ins. Co., 148 N.Y. 117, 120-21, 42 N.E. 416, 417 (1895) (finding employment at will although the plaintiff-employee had understood his position to be a yearly contract which had been renewed for the past eight years).

13. See infra notes 14-16 and accompanying text (listing reasons why the courts disapproved alterations); see also H. Perritt, supra note 6, at 10 (stating that “many American jurisdictions came, in time, to treat the presumption of an employment at will as precluding enforcement of an informal employment contract in most cases.”).


15. See, e.g., Meadows v. Radio Indus., 222 F.2d 347 (7th Cir. 1955); Schoen v. Caterpillar Tractor Co., 103 Ill. App. 2d 197, 243 N.E.2d 31 (1968); Price v. Western Loan & Sav. Co., 35 Utah 379, 100 P. 677 (1909). Mutuality of obligation indicates “‘that both parties are bound or neither [is] bound,’” Meadows, 222 F.2d at 348 (quoting Farmer’s Educ. & Coop. Union v. Langlois, 258 Ill. App. 522, 534 (1930)), and if “‘a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other.’”
Within the last fifteen years, numerous courts and commentators have argued that the employment at will rule has a harsh impact on the employee. These authorities have contended that the reasons for adopting the rule during the industrial revolution are not justified today, since the employer and employee held equal bargaining positions during the early part of the century while today the employer has the more favorable bargaining position. As a result of this perceived inequality, employees, as well as courts and legislatures, have begun to find ways to modify the application of the employment at will rule in certain circumstances.

Various legislative bodies have sought to give the employee greater protection against the sometimes harsh effects of the employment at will rule. For instance, in 1964, Congress enacted Title VII of the Civil Rights Act, which protects employees from discharge by reason of “race, color, religion, sex, or national origin . . .”

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18. See, e.g., Cleary, 111 Cal. App. 3d at 449, 168 Cal. Rptr. at 725; Woolley, 99 N.J. at 291-92, 491 A.2d at 1261-62; Thompson, 102 Wash. 2d at 226, 685 P.2d at 1086; Blades, supra note 17, at 1418-19; DeGiuseppe, supra note 17, at 16; Lopatka, supra note 17, at 5; see also Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66, 417 A.2d 505, 509 (1980) (stating that “[t]he twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule . . . Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.”).

19. See Blackburn, supra note 9, at 470; Blades, supra note 17, passim; Lopatka, supra note 17, at 5; Marrinan, Employment at-Will: Pandora’s Box May Have an Attractive Cover, 7 HAMLIN L. REV. 155, 158-59 (1984).

20. See infra notes 21-94 and accompanying text (discussing ways to limit the impact of the employment at will rule in certain situations).


Additionally, Congress has enacted legislation protecting specific groups of people, such as the Age Discrimination in Employment Act, the Fair Labor Standards Act and the Occupational Safety and Health Act. State legislatures have similarly enacted such statutes.

The judiciary has also played a significant role in limiting the impact of the employment at will rule. Over the past fifteen years courts have been more willing to examine the claims of employees disgruntled over their termination. Courts have recognized three major theories in allowing recovery for “wrongful” termination: the public policy exception, breach of the covenant of good faith and fair dealing and the implied-in-fact contract limitation.

A. Public Policy Exception

Courts adopting the public policy exception to the employment at will rule allow a remedy for a termination when an employee is fired for acting in a way that is consistent with some recognized public policy. In *Petermann v. International Brotherhood of Teamsters*, the California district court became the forerunner in recognizing the public policy exception. In *Petermann*, the plaintiff was employed by the defendant union as a business agent. Upon being subpoenaed to testify before a committee of the California legislature, the employee was allegedly instructed by his superior to make false statements. The employee disregarded this command, and testified truthfully. The employee was discharged the day after his testimony, and subsequently brought an action seeking damages for

26. See W. HOLLOWAY & M. LEECH, supra note 4, at 430-62 (listing state statutory limitations on the employment at will rule).
27. See supra note 2 and accompanying text.
28. See infra notes 31-49 and accompanying text.
29. See infra notes 50-62 and accompanying text.
30. See infra notes 63-94 and accompanying text.
32. Id. at 187, 344 P.2d at 26.
33. Id.
34. Id.
35. Id.
his alleged wrongful discharge.36

Upon reviewing the facts in Petermann, the court initially noted that the plaintiff was an at-will employee and could normally be terminated for any reason.37 The court acknowledged, however, that public policy considerations could limit an employer's right to fire.38 To support its recognition of a non-statutory exception to the employment at will rule, the court reasoned that "[t]o hold otherwise would be without reason and contrary to the spirit of the law."39 The court, turning to the facts before it, sustained the plaintiff's action for wrongful discharge, positing that if it acted otherwise, the court would be allowing an employee's employment to be conditioned upon the perpetration of a felonious act.40 Such a situation, the court noted, would "serve to contaminate the honest administration of public affairs."41

The public policy exception appears to be the most recognized limitation to the employment at will rule.42 Courts have varied, however, as to the sources of public policy for this exception. Some have found that public policy flows only from statutes and constitutions,43 while others have found that sources of public policy might also include administrative rules, decisions or regulations44 and judicial decisions.45 One court even recognized that "public policy concerns what is right and just and what affects the citizens of the State collectively."46 The public policy exception is successfully utilized, for

36. Id. The plaintiff sought two forms of relief. The first was declaratory, stating that he was wrongfully discharged. The second was for payment of his accrued wages. Id.
37. Id. at 188, 344 P.2d at 27. The plaintiff was an employee at will since his employment contract did not specify any term. Id.
38. Id. The court conceded, though, that "'[t]he term 'public policy' is inherently not subject to precise definition.'" Id. (quoting Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)).
39. Id. at 189, 344 P.2d at 27.
40. Id.
41. Id.
42. Forty-three states have recognized the public policy exception. See infra p. 399 app. at 405 (listing state-by-state recognition of limitations and exceptions to the rule).
44. See, e.g., Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).
46. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878
example, when employees are fired for "whistleblowing" on their employer's illegal actions, for failing to commit illegal acts, and for exercising their statutory rights.

B. Implied Covenant of Good Faith and Fair Dealing

Another limitation to the employment at will rule occurs when courts find that an employer, through its termination of an employee, has breached an implied-in-law covenant of good faith and fair dealing in the employment contract. In Fortune v. National Cash Register Co., for instance, the plaintiff was an employee of the National Cash Register Company for nearly twenty-five years. The plaintiff was employed under a "salesman's contract," which granted him a fixed weekly salary plus a bonus based upon a percentage of sales occurring within the employee's assigned territory. The contract, however, was terminable at-will. In November 1968, the plaintiff was instrumental in the sale of five million dollars of cash registers, which produced commissions worth over $92,000. Before the plaintiff could collect his full commission, however, he was terminated.

Subsequently, the employee instituted a suit alleging that he


51. Id. at 100, 364 N.E.2d at 1254.

52. Id. at 97-98, 364 N.E.2d at 1253. The bonus was to be computed as a percentage of the price of products sold within the territories assigned to the employee, whether or not the sale was made by him. Id.

53. Id. at 97, 364 N.E.2d at 1253. The contract was terminable at-will upon written notice by either the employer or employee. Id.

54. Id. at 99, 364 N.E.2d at 1254.

55. Id. at 100, 364 N.E.2d at 1254.
was terminated in bad faith, which constituted a breach of his employment contract. The Supreme Judicial Court of Massachusetts, in holding for the plaintiff, found that although the plaintiff was an employee at will, the employer breached an "implied covenant of good faith and fair dealing" by terminating him. Noting the existence of this covenant in other contracts, the court perceived no reason why the covenant should not be implied in employment contracts. The court reasoned that implication of this covenant was consistent with the general policy "that parties to contracts and commercial transactions must act in good faith toward one another." The implied covenant of good faith and fair dealing is the least recognized limitation to the employment at will rule. One reason for this lack of recognition is that the scope of the covenant is incapable of precise definition. In addition, courts are in conflict as to whether a breach of this implied duty sounds in tort or contract law.

C. Implied-in-Fact Contract Limitation

The final theory courts have utilized in allowing relief for employees claiming wrongful discharge is the implied-in-fact contract limitation. Courts adopting this limitation have allowed various promissory terms communicated between the parties to supplement and alter the at-will employment contract. These terms are gener-
ally representations of either job security or procedures to be taken before termination. Communications modifying the at-will term have included oral assurances, pre-employment statements and employee policy manuals.

Courts that enforce these communications do so in one of two ways: through equitable principles or through traditional contract analysis. The former approach was utilized by the Michigan Su-

65. See, e.g., Ohanian v. Avis Rent A Car Sys., 779 F.2d 101 (2d Cir. 1985) (involving an oral lifetime employment contract); Eales v. Tanana Valley Medical-Surgical Group, 663 P.2d 958 (Alaska 1983) (involving an offer of a job that could last until plaintiff reached retirement age).


70. See, e.g., Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Kinoshita v. Canadian Pac. Airlines, 724 P.2d 1480 (Haw. 1986); Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo. Ct. App. 1983); see also infra notes 72-82 (discussing the use of equitable principles in Toussaint v. Blue Cross & Blue Shield). A number of courts have held that employer communications may be enforceable using the doctrine of promissory estoppel. See, e.g., Continental Air Lines v. Keenan, 731 P.2d 708 (Colo. 1987) (en banc); Moore v. Illinois Bell Tel. Co., 135 Ill. App. 3d 781, 508 N.E.2d 519 (1987); Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985). To be successful under this doctrine, it must be shown that "the employer should reasonably have expected the employee to consider [the communication] as a commitment from the employer to follow [its terms], that the employee reasonably relied on [the terms] to his detriment and that injustice can be avoided only by enforcement of [the terms]." Continental, 731 P.2d at 712.

71. See, e.g., Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 ( Ala. 1987); Pine River State Bank v. Mettllle, 333 N.W.2d 622 (Minn. 1983); Johnston v. Panhandle Cooper. Ass'n, 225 Neb. 732, 408 N.W.2d 261 (1987); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, modified, 101 N.J. 10, 499 A.2d 515 (1985); see also infra notes 83-94 (discussing the court's use of contract principles in Woolley v. Hoffman-La Roche, Inc.). This author has previously argued that a unilateral contract analysis should be the chief approach courts utilize when enforcing employer promises. See Comment, Limiting the Employment-at-
The U.S. Supreme Court in *Toussaint v. Blue Cross & Blue Shield*. In that case, the plaintiff, Charles Toussaint, was employed by Blue Cross in a management position. Upon commencing work, the plaintiff received a personnel policy manual from his employer. Within the manual was a statement that the employer would terminate its employees "for just cause only." After working for the employer for five years, Toussaint was fired, without cause. Subsequently, he instituted an action against Blue Cross alleging wrongful termination. The basis of the plaintiff's position was that, although no express contract was executed, the personnel policy manual communicated an enforceable provision of termination only for just cause.

Although the Michigan Supreme Court acknowledged prior law that strictly adhered to the employment at will rule, it adopted the plaintiff's theory and held that he stated a viable cause of action. In recognizing that an employer's statements of job security could effectively limit the at-will status of an employee, the court opined that it was simply enforcing "an employee's legitimate expectations." To support its holding, the court noted that the effect of an employer's promulgation of a policy manual was its "secure[ing] an orderly, cooperative and loyal work force." Thus, the court was

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similarly obliged to construe the policy manual to the employee's benefit. 82

In Woolley v. Hoffman-La Roche, Inc., 83 the New Jersey Supreme Court also recognized the implied-in-fact contract limitation to the employment at will rule, but utilized a traditional contract analysis as the basis for the limitation. In 1969, Richard Woolley was hired by Hoffman-La Roche in its engineering department. 84 Shortly after the employee began work, he received from the company a personnel policy manual 85 which set forth certain termination procedures and outlined possible causes for termination. 86 After numerous promotions, Woolley was terminated without cause. 87

The employee subsequently instituted an action claiming that the employer breached the employment contract because it had not fired the employee for one of the delineated causes, nor had it followed its termination procedures as set forth in the manual. 88 The Woolley court, utilizing unilateral contract principles, found that the plaintiff had stated a cause of action. 89 First, the court examined the facts to find that the policy manual created an offer to enter into a unilateral contract. 90 To support its finding, the court noted the circumstances in the work forum and the manual itself, which had "all of the appearances of corporate legitimacy." 91 Since a collective bargaining agreement did not exist at the employer's plant and the promises in the manual were specific, the court found that the employee could reasonably believe that the manual was intended to be an offer of the terms of his employment. 92 In addition, the court found that the employee accepted the offer by his continued work for the defendant. 93 Finally, the court concluded that the employee's performance of his job, when he was not bound to continue, constituted valid consideration. 94

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82. See id.
84. 99 N.J. at 286, 491 A.2d at 1258.
85. Id.
86. Id. at 310-13, 491 A.2d at 1271-73.
87. See id. at 286, 491 A.2d at 1258.
88. Id. at 286-87, 491 A.2d at 1258.
89. See id. at 297-305, 491 A.2d at 1264-69.
90. See id. at 298-300, 491 A.2d at 1264-66.
91. Id. at 299, 491 A.2d at 1265.
92. See id. at 298-300, 491 A.2d at 1265-66.
93. See id. at 302, 491 A.2d at 1267.
94. See id.

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III. EMPLOYER USE OF DISCLAIMERS

A disclaimer is a denial or disavowal of certain specified conditions.\textsuperscript{95} In the employment context, the disclaimer may be used to assist in defining the terms of the relationship between the employee and employer and, therefore, to avoid post-employment conflicts between the parties.\textsuperscript{96} Although disclaimers may have significant consequences in wrongful discharge actions based upon the public policy or implied covenant of good faith and fair dealing theories,\textsuperscript{97} the remainder of this Article deals with conflicts pertaining to the implied-in-fact contract limitation.

With the movement of the courts toward enforcing many types of promissory communications between the employer and employee, it is necessary to consider why an employer would wish to describe the circumstances surrounding employment and thereby risk liability. The answer, in brief, is that such descriptions, couched in promissory or more commonly non-promissory terms, are invaluable to the maintenance of employment relations.\textsuperscript{98} Published employee manuals or handbooks written in non-promissory language, for in-

\textsuperscript{95} See Webster's Third New International Dictionary 645 (1986).

\textsuperscript{96} See infra notes 105-11 and accompanying text (discussing the usefulness of disclaimers in the employment context).

\textsuperscript{97} An argument in favor of the effectiveness of disclaimers in precluding the implied covenant of good faith and fair dealing is that parties should have the opportunity to contract as to the exact terms of the employment relationship. See Lopatka, supra note 17, at 26. Whereas some may argue that a disclaimer of this covenant is unconscionable, courts have been firm in ruling that the disclaimer, as used in the employment relation, is not unconscionable. See infra notes 112-24 and accompanying text. Hence, there has been support for the notion that the implied covenant of good faith and fair dealing may be disclaimed, at least where the covenant's purported breach is viewed as contract-based. See, e.g., Hughlett v. Sperry Corp., 650 F. Supp. 312, 315 (D. Minn. 1986); Maxwell v. Sisters of Charity, 645 F. Supp. 937, 939 (D. Mont. 1986); Crain v. Burroughs Corp., 560 F. Supp. 849, 852-53 (C.D. Cal. 1983); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1078-79 (W.D. Mich. 1982); P. Weiner, S. Bompey & M. Brittain, Wrongful Discharge Claims: A Preventive Approach 96 (1986); Note, Advice to California Employees: An Overview of Wrongful Discharge Law and How to Avoid Potential Liability, 13 Pepperdine L. Rev. 185, 195 (1985) (authored by Teresa Howell Sharp).

The effect of disclaimers on tort-based wrongful discharge actions based upon public policy and implied covenant of good faith and fair dealing theories may be weaker, as courts are less likely to enforce disclaimers when they involve tort obligations. See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1843 n.151 (1980). But see Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1089 (Miss. 1987) (suggesting that a disclaimer is likely to be effective regarding tort-based claim for breach of implied covenant of good faith and fair dealing).

\textsuperscript{98} See infra notes 99-104 and accompanying text (discussing the impact of disclaimers on the employment relationship).
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stance, are of substantial benefit to the employer. A reason for the great value of these non-promissory communications is that they are excellent informational tools. They can delineate appropriate and inappropriate conduct in the workplace, explain the structure of the employer’s operations and present the philosophy of the business. As a result, these communications can assist in lessening the perception of arbitrariness and aid in preserving more order and stability in the employment relation. Employee manuals or handbooks written in non-promissory language are additionally useful in building a favorable image for the employer. Indeed, courts have recognized the benefits not only to the employer, but also to the employee, in promulgating these types of communications, and have been adamant in encouraging their use.

The disclaimer is useful in the employment context since it permits employers choosing to promulgate statements pertaining to the employment relation, as well as those who do not so choose, to identify what has not been promised as a term of the relation. The forerunners in sanctioning the utilization of such disclaimers were the Toussaint and Woolley courts. The Toussaint court suggested that a disclaimer may be used which, for example, “explicitly provides that the employee serves at the pleasure or at the will of the

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99. In addition, employers choosing to publish materials containing promissory terms are relieved of executing separate, individual contracts for each employee which contain those terms. See Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983). See generally RESTATEMENT (SECOND) OF CONTRACTS § 211 comment a (1977) (discussing utility of standarized agreements).

100. This is especially important for large employers who presumably have a lesser amount of close contact with their employees. See Decker, Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware!, 5 J.L. & COM. 207, 210 (1985).


102. See Nork v. Fetter Printing Co., 738 S.W.2d 824, 827 (Ky. Ct. App. 1987) (finding that policy and procedure manuals can “remove an element of arbitrariness from employment relationships and thereby improve the entire atmosphere of the workplace.”).

103. See Coombe, supra note 101, at 10-11.

104. See, e.g., Fink v. Revco Discount Drug Centers, Inc., 666 F. Supp. 1325, 1328 (W.D. Mo. 1987) (finding that “there can be little doubt that the attempt to regularize personnel practices through the use of such handbooks is commendable.”); Nork, 738 S.W.2d at 827 (stating that “[p]olicy and procedure manuals are to be commended.”); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 309, 491 A.2d 1257, 1271 (stating that “[s]uch manuals can be very helpful tools in labor relations, helpful to both employer and employees . . . .”), modified, 101 N.J. 10, 499 A.2d 515 (1985).

105. Indeed, this is important since “employment settings are rife with potentially actionable ‘promises.’” Lopatka, supra note 17, at 17.
employer or as long as his services are satisfactory to the employer"106 or which makes known "that personnel policies are subject to unilateral changes by the employer."107 Disclaimers may be used successfully in jurisdictions, such as that in Toussaint, which enforce employer statements through equitable principles, since the employee would have no legitimate expectation of that which is disclaimed by the employer.108 The Woolley court posited that "a clear and prominent disclaimer"109 may be used which indicates "that there is no promise of any kind by the employer contained in [its statements] . . . ."110 Accordingly, in jurisdictions such as that in Woolley, which enforce employer statements through traditional contract principles, a disclaimer will evince an employer's intent not to be bound and, thus, will render that which is disclaimed incapable of constituting an offer of contractual terms which may be accepted.111

An issue which should be addressed regarding the utilization of disclaimers, however, is whether they should be of force at all in the employment context. This inquiry is raised as a result of arguments that disclaimers defining the employment relationship as being terminable at-will may constitute contracts of adhesion and may be unconscionable.112 Courts, though, have rejected such arguments.113

107. Id. at 619, 292 N.W.2d at 895.
110. 99 N.J. at 309, 491 A.2d at 1271.
Adhesion contracts are normally standardized contracts wherein a party may not obtain what he seeks unless he assents to the terms advanced by the party preparing the documents.114 Although a disclaimer of, for instance, a definite term of employment115 may be standardized, it should not be considered a contract of adhesion since it is not an exercise of contractual power to provide an unbargained-for benefit to the employer, but rather it is a delineation of that which the law would presume if it were left unstated—that the employment relationship is terminable at will.116

Even if the disclaimer were to be considered a contract of adhesion, it would still have force unless other factors were present to render it invalid.117 For example, an adhesion contract found to be unconscionable is generally unenforceable.118 A contract or term is unconscionable if it is “unreasonably favorable to [one] party”119

by Patricia M. Lenard); see also Finkin, The Bureaucratization of Work: Employer Policies and Contract Law, 1986 Wis. L. Rev. 733, 750 (asserting that “[b]ecause employees may be expected as a practical matter to rely upon the employer’s assurances despite the disclaimer, judicial deference to the disclaimer comes close to deference to a fraud.”).


115. Disclaimers of notice or procedures to be taken before termination of the employment relationship are other pertinent examples.

116. One commentator has noted that contracts of adhesion are exemplified by a party using its power to deviate from generally accepted standards, as opposed to its defining those standards. See Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1182 (1983).

117. See Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 819-20, 623 P.2d 165, 172, 171 Cal. Rptr. 604, 611 (1981) (asserting that “a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise.” (footnotes and citations omitted)); cf. Castiglione, 69 Md. App. at 341, 517 A.2d at 794 (stating that disclaimers are enforceable “in the absence of fraud, mistake or oppression”).

118. Not all contracts of adhesion, however, are unenforceable. See RESTATEMENT (Second) of CONTRACTS § 208 comment a, reporter’s note (1977) (discussing factors which are relevant in determining unconscionability).

and "so unfair that enforcement should be withheld." Unconscionable terms may be terms which state that a contractual relationship will be subject to rules contrary to those imposed by legal implication. A disclaimer such as the one previously mentioned does not favor either party and is certainly fair since it explicates what the law presumes. In sum, utilization of disclaimers is a legitimate and suggested means in which to define the terms of the employment relationship.

IV. EFFECTIVE UTILIZATION OF DISCLAIMERS IN THE EMPLOYMENT CONTEXT

A. Wording and Presentation of the Disclaimer

Employers must be sensitive to both the content of disclaimers and the appearance of disclaimers within communications to their employees. Both considerations are crucial to ensure the effectiveness of disclaimers. The general rule regarding content and appearance is that disclaimers must be clear as well as conspicuous.


121. See S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1763A, at 215 (3d ed. 1972) (defining unconscionable clauses as those "altering the fundamental duties imposed by legal implication on the drafting party by the transaction, i.e. the attempt to disclaim warranties . . ."). Examples of contract clauses which have been held to be unconscionable include clauses forcing a party to submit to the jurisdiction of a distant state if a suit is instituted, see, e.g., Paragon Homes, Inc. v. Carter, 56 Misc. 2d 463, 288 N.Y.S.2d 817 (Sup. Ct.), aff'd mem., 30 A.D.2d 1052, 295 N.Y.S.2d 606 (1968), and unreasonably small liquidated damage clauses, see Varner v. B.L. Lanier Fruit Co., 370 So. 2d 61 (Fla. Dist. Ct. App. 1979).

122. See supra text accompanying notes 106-07, 110.


124. Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 341, 517 A.2d 786, 794 (1986) (rejecting claim that enforcement of disclaimer is inequitable), cert. denied, 309 Md. 325, 523 A.2d 1013 (1987). Even in cases where the disclaimers are found to be unfair, they have still been enforced. See, e.g., White v. Picker Int'l, No. 49770 (Ohio Ct. App. Dec. 5, 1985) (LEXIS, Ohio library, App file) (enforcing disclaimer of benefits although it was found to be unfair); Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955) (same). The circumstances in which disclaimers will have no force will be examined throughout the remainder of this Article.


http://scholarlycommons.law.hofstra.edu/hlr/vol17/iss2/3
1. Wording Must be Clear.—The disclaimer must be clear in stating what is not intended as a term of the employment relationship. To avoid ambiguity, a number of guidelines should be followed in drafting a disclaimer. For example, a disclaimer should be clear regarding the person or persons to whom it is intended to apply. In addition, a disclaimer should be drafted to reserve the right of the employer to modify it or other communications which might be considered to be part of the employment contract. Some courts have viewed this reservation alone as being sufficient to defeat a wrongful discharge claim based upon an implied contract theory. Finally, the disclaimer should not contain harsh language or confusing legalese. Disclaimers drafted using either of these types of terms are certain to cause negative reactions among those covered by such disclaimers and, therefore, will work to retard employment relations.

(1984) (en banc); see also infra notes 126-45 and accompanying text (discussing the clear wording requirement for a valid disclaimer); infra notes 146-69 and accompanying text (discussing the conspicuous presentation requirement for a valid disclaimer).

126. A reason for this emphasis on clarity is that courts generally construe an ambiguous contract against the drafter. See infra notes 205-07 and accompanying text (discussing contract interpretation in the employment context).

127. See Sadler v. Basin Elec. Power Coop., 409 N.W.2d 87, 89 (N.D. 1987) (precluding summary judgment in favor of employer where issue of material fact existed as to which employees were covered by disclaimer); see also infra notes 172-76 and accompanying text (discussing the use of an acknowledgment to ensure employees are aware of the disclaimer).

128. For examples of reservation clauses, see Leahy v. Federal Express Corp., 609 F. Supp. 668, 672 (E.D.N.Y. 1985) (quoting from employment application which provided that “all terms and conditions of my employment, except to the extent covered specifically by this contract or any other valid contract . . . shall be determined and governed by Company's Policies and Procedures Manual, as same may be amended from time to time hereafter . . . ”); Simonson v. Meader Distrib. Co., 413 N.W.2d 146, 147 (Minn. Ct. App. 1987) (quoting employer's policy manual which provided that “[m]anagement reserves the right to make any changes at any time by adding to, deleting, or changing any existing policy.”); Roy v. Woonsocket Inst. for Sav., 525 A.2d 915, 918 n.3 (R.I. 1987) (quoting the bank's employee handbook which provided that “the programs and policies described here are subject to change at the discretion of the Bank.”).


130. In confirming the at-will status of the employee, for example, the employer may want to mention the rights of both parties. For examples of this type of drafting, see Dell v. Montgomery Ward & Co., 811 F.2d 970, 972 (6th Cir. 1987) (quoting employer's discipline reference guide which provided employment “‘may be terminated at any time either by the employee or the Company . . . ’”); Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 329, 517 A.2d 786, 788 (1986) (quoting hospital's employee handbook which provided that...
Employers have chosen to utilize disclaimers containing clauses which specifically disavow the existence of employer statements as constituting part of the employment contract. 131 Where courts have found such disclaimer clauses to be clear, they have held these clauses effective to preclude employee claims based, for example, upon alleged promises made in employee handbooks. 132 In Castiglione v. Johns Hopkins Hospital, 133 an employee handbook contained a disclaimer which stated “this handbook does not constitute an express or implied contract.” 134 The Court of Special Appeals of Maryland found that this statement was sufficiently clear to negate an employee’s claim to pre-termination procedures based upon the handbook. 135

Employers have also chosen to utilize disclaimers containing clauses which confirm the terminable at-will status of the em-

131. For examples of such disclaimers, see infra note 132.

132. See, e.g., Dell v. Montgomery Ward & Co., 811 F.2d 970, 973 (6th Cir. 1987) (quoting the employer’s Human Resources Policy Manual which provided that “[t]hese procedures should not be interpreted as constituting an employment contract . . . .” (emphasis omitted)); McCluskey v. Unicare Health Facility, Inc., 484 So. 2d 398, 400 (Ala. 1986) (quoting the employee handbook which provided that “[t]his Handbook and the policies contained herein do not in any way constitute, and should not be construed as a contract of employment between the employer and the employee, or a promise of employment.”); Arnold v. Diet Center, Inc., 113 Idaho 581, 582 n.1, 746 P.2d 1040, 1041 n.1 (Ct. App. 1987) (quoting the employee handbook which provided that “[t]his Handbook is not an employment contract, and an employee can be terminated at any time.”); Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 329, 517 A.2d 786, 788 (1986) (quoting the employee handbook which provided that “this handbook does not constitute an express or implied contract.”), cert. denied, 309 Md. 325, 523 A.2d 1013 (1987).


134. 69 Md. App. at 329, 517 A.2d at 788 (quoting the hospital’s employee handbook).

135. Id. at 340-41, 517 A.2d at 793-94. Other courts have made suggestions regarding the language employers may utilize in disavowing the existence of employer statements as being part of the employment contract. See, e.g., Kulkay v. Allied Cent. Stores, Inc., 398 N.W.2d 573, 578 (Minn. Ct. App. 1986) (suggesting that the employer “could have indicated in the written personnel policy that its provisions did not constitute an offer of an employment contract or otherwise stated that the status of at-will employees.”); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984) (en banc) (stating that employers “can specifically state in a conspicuous manner that nothing contained [in the employment manual] is intended to be part of the employment relationship and are simply general statements of company policy.”).
One case that illustrates the importance of clarity in this type of disclaimer clause is *Morris v. Chem-Lawn Corp.* In *Morris*, an employment agreement was signed by the employee which provided that "'[t]he Employee's employment with the Company may be terminated by either party at any time.'" Following the employee's discharge, she instituted a wrongful discharge action alleging that her employment could only be terminated for good cause. In support of her claim, the employee stated that she was told by another employee that she would continue to have her job as long as she executed her duties satisfactorily. The district court, in examining the aforementioned clause, noted that the clause did not
state whether good cause was necessary to terminate the employee. As a result of this lack of clarity, the court found that the disclaimer could not preclude the existence of an issue of fact as to whether the employee was properly discharged without cause.

Employers wishing to confirm the terminable at-will status of their employees should include three components within their disclaimer: (1) that the employment relationship is terminable at the will of either party, (2) that it is terminable with or without cause, and (3) that it is terminable without prior notice. For example, one court held that a disclaimer which provided that "employment and compensation can be terminated with or without cause, and with or without notice, at any time," was sufficiently clear to preclude the employees' claim that their employment would be terminable only for good cause.

2. Presentation Must be Conspicuous.—Disclaimers, as a result of their great importance, must be displayed prominently in communications to employees in order to be effective. A conspicuous disclaimer is one presented so that a reasonable person against whom it would operate would notice it. Hence, a disclaimer must be separated from or contrasted with the balance of an employer's communication. Such a separation may be achieved, for example, by using different type for the disclaimer, such as bold, capitals or italics, by underlining the disclaimer, or by printing or outlining...

141. Id.
142. Id.
143. However, as is demonstrated by the quoted disclaimers in the previously cited cases, some courts have found disclaimer clauses with less than these three components to be clear and effective. See supra notes 135-37.
145. Id. at 461.
147. See U.C.C. § 1-201(10) (1978). The issue of whether a disclaimer is conspicuous may be treated as a question of law. See Jimenez, 690 F. Supp. at 980.
148. See Jimenez, 690 F. Supp. at 980 (finding a disclaimer is ineffective where it is not separated or set off in any way to attract attention); Belfatto v. Robert Bosch Corp., No. 86-C-6632 (N.D. Ill. Apr. 15, 1987) (finding a disclaimer is not conspicuous where it is in same type as other parts of employee handbook and appears at the very end of a twelve page handbook).
149. See Perry v. Sears, Roebuck & Co., 508 So. 2d 1086 (Miss. 1987).
the disclaimer in a contrasting color. The employer included in its published standard operating procedures (SOPs) a disclaimer stating that the procedures did not constitute part of the contract of employment. Following the employee's termination, he commenced a suit asserting that the SOPs created implied contract rights. The district court posited at the outset that a disclaimer must be conspicuous to be effective. Examining the disclaimer in Jimenez, the court observed that the disclaimer was not set off in such a way as to attract attention to it. The court noted specifically that "[n]othing [was] capitalized that would give notice of a disclaimer. The type size equal[led] that of [any] other provision on the same page. No border set[ed] the disclaimer apart from any other paragraph on the page." As a result, the court held that the disclaimer was not conspicuous and, therefore, not effective, and granted summary judgment that implied contract rights were created by the SOPs.

Employers issuing multipage communications must not only present their disclaimers in a conspicuous manner among other statements on a page, but must also display their disclaimers on a page which is prominent within the communication as a whole. Courts have held that disclaimers were effective when they have appeared on the front page, the inside of the cover page, the second page, and on the inside of the cover page. The employer may unquestionably present its disclaimer in more than one place within a multipage communication. See Morgan v. Harris Trust & Sav. Bank, 867 F.2d 1023, 1029 (7th Cir. 1989) (employer presented three disclaimers in three different places within the employee manual). Utilization of additional disclaimers may be wise when they are presented in sections within the communication that deal specifically with the matter being disclaimed. See, e.g., Arnold v. Diet Center, Inc., 113 Idaho 581, 746 P.2d 1040 (Ct. App. 1987); Moore v. Illinois Bell Tel. Co., 155 Ill. App. 3d 781, 508 N.E.2d 519, appeal denied, 113 Ill. Dec. 303, 515 N.E.2d 112 (1987); Taylor v. Systems Research Laboratories, Inc., 1988 Ohio App. LEXIS 2328.

152. See Kari, 79 Mich. App. at 93, 261 N.W.2d at 222 (outlining the disclaimer in red); see also Jimenez, 690 F. Supp. at 680 (indicating that a border could set a disclaimer apart from other paragraphs).
154. Id. at 980.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. The employer may unquestionably present its disclaimer in more than one place within a multipage communication. See Morgan v. Harris Trust & Sav. Bank, 867 F.2d 1023, 1029 (7th Cir. 1989) (employer presented three disclaimers in three different places within the employee manual). Utilization of additional disclaimers may be wise when they are presented in sections within the communication that deal specifically with the matter being disclaimed. See, e.g., McCluskey v. Unicare Health Facility, Inc., 484 So. 2d 398 (Ala. 1986).
or the last page of a multipage communication, as well as in the preface or introduction of such a communication. In Bailey v. Perkins Restaurants, Inc., the employer presented a disclaimer on the second page of its employee handbook which appeared as follows:

**DISCLAIMER**

This Employee Handbook has been drafted as a guideline for our employees. It shall not be construed to form a contract between the Company and its employees. Rather, it describes the Company's general philosophy concerning policies and procedures.

The Supreme Court of North Dakota found that this disclaimer was conspicuous and, therefore, effective in precluding employees' claims that they had a contractual right to have the employer follow its "Progressive Discipline Policy" contained in the handbook prior to their discharge.

**B. Documents in Which to Place the Disclaimer**

The disclaimer should be sufficiently communicated to the employees to ensure its effectiveness. It may appear in any written statement given to the employees or may even be communicated verbally. Perhaps the most common place that the disclaimer may be utilized is in the employee handbook. Whereas placement of the disclaimer in this type of employer statement is encouraged, the em-

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167. 398 N.W.2d 120 (N.D. 1986).
168. Id. at 121.
169. Id. at 123.
Employer should have the employees receiving the handbook execute an acknowledgment, as an additional safeguard. This will help ensure that the employee is aware of what is being disclaimed in the relationship and will greatly assist the employer in the event of post-employment wrongful discharge litigation. The acknowledgment should contain two components: first, that the employer statement has been received by the employee and, second, that the employee is aware of what is being disclaimed. Regarding the second element, the disclaimer may even be repeated in the acknowledgment. The acknowledgment should state that the employer statement was read and understood, and should be signed by the employee. It must be emphasized, however, that a new acknowledgment should be executed each time a term or condition of employment is either changed or instituted.

One option is to place the acknowledgment directly in the employer statement. For instance, in *Eldridge v. Evangelical Lutheran Good Samaritan Society*, the employer chose to distribute a "Personnel Policy Handbook." At the end of the Handbook, the following appeared:

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172. See *Dell*, 811 F.2d at 973-74; *McCluskey v. Unicare Health Facility, Inc.*, 484 So. 2d 398, 400 (Ala. 1986).

173. See *Morriss v. Coleman Co.*, 241 Kan. 501, 511, 738 P.2d 841, 849 (1987) (finding that a disclaimer contained in personnel policy manual may not be effective where it had "not been established that the disclaimer was brought to the personal attention of [the] employees . . .").

174. See *id*.

175. For an example of such an acknowledgment, see *infra* text accompanying note 180.

176. See *infra* notes 232-55 and accompanying text (discussing assent to new or changed employee statements).


178. 417 N.W.2d 797 (N.D. 1987).

179. *Id.* at 798.

180. *Id.* at 800 n.3 (emphasis in original).
A CLOSING STATEMENT

The contents of this Handbook are presented for your information. While we fully intend to continue offering the benefits and policies as written, The Ev. Lutheran Good Samaritan Society reserves the right to change or revoke them, permanently or temporarily, if it is in the best interest of the Society to do so. No policy, benefit, or procedure implies or may be construed to imply this Handbook to be an employment contract for any period of time.

ACKNOWLEDGEMENT

I have read the Personnel Policies Handbook and understand the material contained therein.

I agree to all the conditions set forth in the Handbook.

Date Signature of Employee

The employee in Eldridge was terminated and later instituted an action against the employer contending that the Handbook was a contract which guaranteed her a right to progressive disciplinary procedures before her discharge. The Supreme Court of North Dakota rejected the employee's argument since the disclaimer appearing above the employee's signature in the acknowledgment within the Handbook operated to affirm the at-will status of the relationship and held that the employer was not bound to adhere to various disciplinary procedures outlined in the Handbook.

A preferred alternative for the placement of the acknowledgment, however, is on a sheet which may be executed and then separated from the employer's statement. The advantage to this approach is in recordkeeping for the employer. The executed acknowledgment or "sign-off sheet" may be placed in a personnel file for the employee with the assurance that the employee is aware of what is disclaimed in the employment relationship. The Sixth Circuit was presented with a case involving such an acknowledgment in Dell

181. Id. at 798; see also id. at 798 n.2 (reproducing the progressive disciplinary procedures).
182. Id. at 800.
183. See Pratt v. Brown Mach. Co., 855 F.2d 1225, 1233 (6th Cir. 1988) (approving a "tear-out page" in the employer's handbook which confirms the at-will relationship and that employees may be fired without cause); Dell v. Montgomery Ward & Co., 811 F.2d 970, 973-74 (6th Cir. 1987) (permitting employer to have employees execute a "sign-off" sheet which confirms the at-will relationship and that employees may be fired without cause).
v. Montgomery Ward & Co. In Dell, the employee was given a copy of the employer’s Progressive Discipline Reference Guide (PDRG) which enunciated procedures that should be taken before discharging or disciplining an employee. After the PDRG was distributed, the employee, Dell, was fired without being afforded any pre-termination procedural protections. Subsequently, Dell instituted an action against the employer, Montgomery Ward, claiming that the procedures stated in the PDRG had given him a legitimate expectation that he would be terminated only for just cause, and that the employer breached its contract by firing him without cause. Dell, as well as the other persons in the employ of Montgomery Ward, however, had executed a sign-off sheet, acknowledging that:

I have read and fully understand the rules governing my employment with Montgomery Ward. I agree that, I will conform to these rules and regulations and, further understand and agree that my employment is for no definite period and may, regardless of the time and manner of payment of my wages and salary, be terminated at any time by Montgomery Ward or me, with or without cause, and without any previous notice. Further, I understand that no Organization Manager or Representative of Montgomery Ward other than the President, Chief Executive Officer or Executive Vice President of Human Resources has authority to enter into an agreement for employment for any specified period of time or to make any agreement contrary to the foregoing.

The court held that Dell had not been wrongfully terminated. Noting that it would be “difficult to imagine what more the defendant might have done to make it crystal clear to Dell,” the court concluded that “[t]he unequivocal language in the ‘sign off sheet’ in this case, which stated that the employees could be discharged ‘with or without cause and without any previous notice,’ means what it says and is binding upon the parties.”

Employers choosing not to promulgate materials such as employment manuals must find other ways to communicate their dis-

184. 811 F.2d 970 (6th Cir. 1987).
185. Id. at 972.
186. Id.
187. Id.
188. Id. at 973. Although the PDRG as well as the employer’s Human Resources Policy Manual contained similar disclaimers, Dell claimed that the employer gave the employees “conflicting signals” which effectively negated these disclaimers. Id.
189. See id. at 974.
190. Id.
claimers. One alternative is to have the employees execute separate employment agreements. These agreements need only communicate the disclaimer. Such a document thus operates as an acknowledgment of the disclaimer and may be drafted much like the acknowledgment spoken of previously.

Employers often require prospective employees to fill out applications before an employment relationship is commenced. Many employers have taken the opportunity to place a disclaimer in the application form. If the employer utilizes an application form, it is suggested that a disclaimer be included in it. Such a placement is significant for at least two reasons. First, from the standpoint of fairness, it is forthright to apprise the employee of the nature of the relationship in which he may soon be involved. Second, such a form, with its attendant disclaimers, may later be considered to be part of the employee's contract of employment. These two reasons for placing disclaimers in application forms were recognized by the Sixth Circuit in Reid v. Sears, Roebuck & Co. In Reid, the plain-


195. 790 F.2d 453 (6th Cir. 1986).
EMPLOYMENT DISCLAIMERS

The employees claimed they were terminated without good cause, and subsequent to their discharge, instituted suits alleging wrongful discharge. The basis of their claims was that they had legitimate expectations of "just cause" terminations as a result of assurances from low level superiors and an employee handbook which listed a number of reasons for termination. The district court granted summary judgment motions made by the employers against each of the plaintiffs, and the Sixth Circuit affirmed. In its analysis, the Sixth Circuit posited that the previously quoted language in each employee's application was unequivocal. The court further posited that "since the acknowledgement should be obtained from prospective employees, Sears properly included this provision of employment in the application form rather than in some documents to be signed by the employee after he or she was hired." The court concluded by holding that the terms of the application, which were acknowledged as the conditions of employment with the employer, subsequently became terms of the employment relationship.

196. Id. at 456.
197. Id. at 455-56. The employer claimed that the employees had violated company policy, but the employees argued that they were fired for improper reasons, such as the implementation of a policy of replacing higher paid full-time employees with lower paid part-time employees. See id. at 458.
198. Id. at 455.
199. Id. at 456-57. The plaintiffs claimed that the listing of reasons for termination created an expectation that an employee could only be fired for one of those reasons or other good cause. Id. at 457. The court, however, rejected this argument. See id. at 460.
200. Id. at 455.
201. Id. at 462.
202. Id. at 461.
203. Id.
204. See id. at 462. The court further stated that "having obtained such an acknowledgment from each of the plaintiffs when they were prospective employees, Sears had done all
C. The Disclaimer and Other Contradictory Employer Statements

The use of the disclaimer is an effective means of defining the terms of the employment relationship. Other employer statements that contradict the disclaimer, however, may act to negate and override the disclaimer. Such a result may occur since the terms of the employment relationship that are inconsistent, and thus ambiguous, become subject to interpretation as questions of law or questions of fact. Furthermore, a presumption exists that ambiguous contract terms will be resolved against the party choosing the words of the contract.

Communications containing statements that have overcome disclaimers have included employee policy manuals and oral assurances. Examples of statements that have overrun disclaimers to the contrary are detailed grievance or disciplinary procedures to be taken before discharge and exclusive lists of reasons for discharge. Moreover, statements espousing job security, permanent, that was required to create contracts for employment at will."

205. See Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480, 1485 (E.D. Mich. 1983) (noting that disclaimers are effective "if not contradicted by other statements . . . ."). But see Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344, 346 (E.D. Mich. 1980) (finding that where an application contained a disclaimer, "there [was] no way that the plaintiff could reasonably have had a legitimate expectation of a right to" that which was disclaimed).

206. The general rule is that construction of a contract will be a question of law; however, if extrinsic evidence is introduced, then it is a question of fact. J. Calamari & J. Perillo, supra note 120, § 3-14, at 174.

207. Restatement (Second) of Contracts § 206 (1981); A. Corbin, Contracts § 559, at 262 (1960).


continuous, or future employment, and statements speaking of salary in specific periodic terms, may be found to override disclaimers defining the employment relationship as terminable at the will of either party. In addition, disclaimers may be overcome by contradictory employment practices.

Although it has been stated that "the Lord gave, and the Lord hath taken away," the employer should not expect equivalent freedom when extending promises and then attempting to use a disclaimer to disavow them. Hence, the prudent employer should avoid such contradictions in communications to its employees. Employers should review communications given to employees with a sensitivity to this consideration. In addition, the disclaimer should include a clause which limits the scope of persons who have the authority to alter the terms of the disclaimer. This practice is consonant with traditional agency law precepts. Indeed, the Restatement (Second) of Agency states that "[i]f a person dealing with an agent has notice that the agent's authority is created or described in a writing which is intended for his inspection, he is affected by limitations upon the authority contained in the writing . . . ." It may be surmised, therefore, that if the scope of persons who may modify the terms of a disclaimer is limited, statements made by other persons contrary to a disclaimer will have no effect. The district court ap-


213. See, e.g., Loffa v. Intel Corp., 153 Ariz. 539, 544, 738 P.2d 1146, 1151 (Ct. App. 1987); see also Wagensonner v. Scottsdale Memorial Hosp., 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985) (finding that "[t]he employer's course of conduct" may provide evidence of modification of an at-will agreement). But see MacDougal v. Sears, Roebuck & Co., 624 F. Supp. 756, 759 (E.D. Tenn. 1985) (holding that "[e]ven where part of the manual may be considered to give rise to a definitive guarantee based on past practices of the company, a manual will not necessarily be treated as a contract if specific language within the manual disclaims certain guarantees.").


215. See supra notes 208-12 and accompanying text (detailing situations where courts have allowed an employer's promise to override a disclaimer).


218. See Reid, 790 F.2d at 460-61 (finding the disclaimer effective where "there was no
plied this principle in Batchelor v. Sears, Roebuck & Co.\textsuperscript{219} In Batchelor, the employee executed an employment application containing a disclaimer which disavowed termination for cause.\textsuperscript{220} The disclaimer also limited the authority to modify its terms to the president or vice president of the employer, Sears.\textsuperscript{221} The employee was discharged without cause and subsequently commenced a wrongful discharge action claiming that the no cause provision of her employment contract was modified by the alleged statements of her former manager.\textsuperscript{222} The court rejected this claim, noting that “even if the representations of the manager could be understood as a modification of the no cause provisions of the contract, Sears would not be bound because the manager was without authority to make any such modification.”\textsuperscript{223}

D. Modification of Existing Employer Statements to Include Disclaimers

The issue arises as to whether existing employer statements may be modified to include disclaimers. Where the employer has reserved the right to modify statements promulgated to its employees, disclaimers will be effective where they are subsequently added to these statements.\textsuperscript{224} This is a persuasive reason as to why the employer

showing that the handbook had been written or approved by the president or a vice-president of Sears.”); Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480, 1486 (E.D. Mich. 1983) (finding that representations of employee’s former manager are not effective where “the terms of plaintiff’s employment contract preclude modification except by the president or vice-president of the company.”); Eliel v. Sears, Roebuck & Co., 150 Mich. App. 137, 140, 387 N.W.2d 842, 844 (1985) (holding that the disclaimer was effective in circumstances where the “[p]laintiff does not contend that any statements [contrary to the disclaimer] were made by the president or vice president of Sears.”); see also Shelby v. Zayre Corp., 474 So. 2d 1069, 1070 (Ala. 1985) (finding that statements allegedly made by assistant manager contrary to disclaimer do not override disclaimer since plaintiff could not have relied on alleged statements of the assistant manager to her detriment in face of the disclaimer).

Employers have attempted to utilize clauses which limit the means by which the disclaimer may be altered, such as by requiring modifications to be in writing. Such clauses, however, are not likely to be effective since it is established that “contracting parties cannot today restrict their power to contract with each other tomorrow.” J. CALAMARI & J. PERILLO, supra note 120, § 5-14(b), at 264; accord E. FARNSWORTH, supra note 114, § 7.6, at 475.

220. Id. at 1483.
221. Id.; see also supra text accompanying note 196 (quoting the disclaimer used by Sears in its employment applications).
222. 574 F. Supp. at 1482.
223. Id. at 1486.
224. See, e.g., Lee v. Sperry Corp., 678 F. Supp. 1415, 1418 (D. Minn. 1987) (stating that “[t]he handbook provided to [the employee] at the commencement of his employment noted that [the employer’s] personnel policies and handbook could change.”); Brookshaw v.
should reserve the right to modify its statements—even if it does not now choose to include disclaimers.

More difficult problems arise, however, where the employer has not reserved the right to modify statements promulgated to its employees. Disclaimers that alter non-promissory statements are not likely to be challenged. In contrast is the situation in which the employer now attempts to disclaim that which it had previously promised.

Courts have recognized that employers may modify statements they have made concerning the employment relationship—at least to the extent that such alterations do not interfere with accrued rights. In jurisdictions enforcing promissory statements by employers through equitable principles, statements that are modified before an employee is terminated will be held to give the employee no legitimate expectation to that which is disclaimed. In jurisdic-

South St. Paul Feed, Inc., 381 N.W.2d 33, 36 (Minn. Ct. App. 1986) (stating that if the employer “chooses to modify its existing policies, a new unilateral contract is offered, and an employee can signify acceptance by remaining on the job.” (citation omitted)); see also Shaver v. F.W. Woolworth Co., 669 F. Supp. 243, 246-47 (E.D. Wis. 1986) (holding that seniority rights may be modified where the right to modify has been reserved), aff'd, 840 F.2d 1361 (7th Cir.), cert. denied, 109 S. Ct. 145 (1988).


227. See, e.g., Leathem v. Research Found. of City Univ. of New York, 658 F. Supp. 651, 654-55 (S.D.N.Y. 1987); see also Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 619, 292 N.W.2d 880, 895 (1980) (asserting that where policies are subject to unilateral changes by the employer, the employee would "have no legitimate expectation that any partic-
tions enforcing promissory statements by employers through traditional contract principles, employers who modify their statements will be considered to recast the terms upon which the employment relationship will be maintained in the future.228

Courts utilizing traditional contract principles have provided guidance regarding how an employer may effectively amend its statements to include, for example, disclaimers.229 An employer must give its employees notice of the modification.230 In addition, the modification should be unambiguous regarding, for instance, the employees to whom the new or changed term is intended to apply.231

Courts have explained that where employees continue to work after they become aware of the applicable changed condition, acceptance of the modification is inferred, and the modification may subsequently be enforced.232 For example, in Lee v. Sperry Corp.,233

The usual policy will continue to remain in force.").


229. See, e.g., Helle v. Landmark, Inc., 15 Ohio App. 3d I, 472 N.E.2d 765; see also Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1198-99 (E.D. Va. 1987) (indicating that an employer should take affirmative steps to ensure that employees are made aware of the new policy and that they understand the terms of the policy); Barry Gilberg, Ltd. v. Craftex Corp., 665 F. Supp. 585, 595 (N.D. Ill. 1987) (finding that employees should be given an opportunity to reject the modification, and if they fail to do so, they will be bound by it, but if they do reject the modification, employers are free to fire them).

230. See Helle, 15 Ohio App. 3d at 13, 472 N.E.2d at 777 (requiring "legally adequate notice" to employees for any modification of statements concerning the employment relationship).

231. See Sadler v. Basin Elec. Power Coop., 409 N.W.2d 87, 89 (N.D. 1987) (reversing summary judgment for employer where issue of material fact existed as to whether disclaimer placed in a subsequently promulgated handbook was "intended to apply to existing employees . . .").


augment, modify and even withdraw the offer contained in the handbook in response to the employer's changing needs and circumstances. When an employer distributes a new handbook or portion thereof, the employer makes a new offer of employment.
The terms of the new offer are defined by the contents of the new handbook, and the new offer becomes effective on the date the new handbook is distributed. Or, when a
an employee, Lee, received at the commencement of his employment
an employee handbook and personnel procedures which contained
certain procedures pertaining to employment termination. Several
months later, Lee received a revised employee handbook which con-
tained the following disclaimer:

Neither the offer and acceptance of employment or the establish-
ment and maintenance of operating policies and procedures by the
Company create a contract of employment except as might be
approved in writing by the Sperry Univac Vice President, Human
Resources. Although it is intended that the relationship between
Sperry Univac and its employees will grow and be in the best inter-
ests of both the employee and the company, the relationship is ter-
minal at any time at the will of either the employee or the com-
pany, and without the need to indicate a specific reason or cause.

In 1985, Lee was laid off without being afforded any of the ter-
mination procedures outlined in the original manual he received
when his employment commenced. Lee subsequently filed an ac-
on alleging that the employer breached his employment contract by
not adhering to those procedures. The employer moved for sum-
mary judgment on the ground that the employee’s claim was invali-
dated by the disclaimer included in the revised handbook. Ap-
plying the law of a state which utilizes traditional contract principles to
enforce employer statements, the district court recognized that an
employment relationship based upon a unilateral contract can be
modified. The court noted that although other courts have been
asked to enforce employer statements which promise other than at-
will employment, “the principle seems equally applicable to the op-

handbook is withdrawn, i.e. revoked, the new offer becomes effective on the date
that the employer notifies the employee of the revocation of the handbook. Employ-
ees accept the new offer and provide consideration by continuing their employment.

concurring in part and dissenting in part).
234. Id. at 1417-18.
235. Id. at 1417.
236. See id. at 1416, 1418.
237. See id. at 1417-18. Lee also claimed that his termination violated the Minnesota
Human Rights Act. Id. at 1416-17.
238. Id. at 1418. The revised handbook was subsequently amended to include more lim-
itating language. See id. at 1417-18. Although it is disputed whether Lee ever received the final
modification, the court deemed this immaterial since Lee admitted receiving the revised hand-
book. Id. at 1418 n.3.
239. Id. at 1418.
posite transformation." After examining the facts of *Lee*, the court held that the explicit disclaimer was effective in negating the employee's claim and granted the employer's motion for summary judgment. In support of its conclusion, the court reasoned that Lee's unilateral contract-based claim was eliminated by modification of his employment contract since the new limiting language was added to the handbook and he continued to work for over three years thereunder.

Other courts, however, have shown more concern about the requirement that the employee assent to a new or changed term in order for it to become a part of the employment contract. For example, in *Thompson v. Kings Entertainment Co.*, Thompson was hired in 1977 by Taft Broadcasting Corporation and in 1980 was given an Employees Manual (the 1980 Manual) which defined a dismissal as "a separation initiated by [the employer] for cause." Taft's business was acquired by Kings in 1984. In July 1985, the new employer issued an Employment Handbook (the 1985 Handbook), which it had drafted. Thompson received the 1985 Handbook which contained a disclaimer stating that either the employer or the employee "may terminate [the] employment at any time with or without cause and with or without notice." In August 1985, Thompson's employment was terminated, and he subsequently filed an action alleging that he was wrongfully discharged. Specifically, Thompson claimed that the disclaimer in the 1985 Handbook providing for an at-will employment relationship had no effect and that the 1980 Manual's "for cause" provision should therefore govern. The employer subsequently filed a motion for summary judgment.

240. *Id.* (construing Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)).
241. *Id.*
242. *Id.*
245. *Id.* at 1195 (emphasis added) (quoting the 1980 Manual distributed by Taft).
246. *Id.*
247. *Id.*
248. *Id.* (quoting the 1985 Handbook distributed by Kings).
249. *Id.*
250. *Id.* at 1196.
251. *Id.* at 1195.
contained in the 1985 Handbook constituted an offer which would govern the terms of the relationship if the terms of the offer were accepted by the employee. The court rejected the contention, however, that mere awareness of the new terms and continuation of work could be considered an acceptance. Rather, the court held that there must be specific evidence showing that the employee "understood the 1985 Handbook’s terms to be controlling . . . ." Since the employer did not provide such evidence, the court denied its motion for summary judgment. As a result of Thompson and similar cases, the prudent employer should receive from its employees a formal acknowledgment of any newly included disclaimer or other modification in its statements to the employees.

V. Conclusion

The number of recently instituted wrongful termination actions has grown considerably. Many of these actions concern disputes over the terms of the employment relationship. This Article has suggested that employers should utilize disclaimers as a means to define the terms of the employment relationship and has proposed certain guidelines to help ensure the effectiveness of the disclaimers. Although the law pertaining to disclaimers in the employment context is in its formative stages, it is clear that the utilization of disclaimers will promote more certainty and equity in the employment relationship. Hence, the effective utilization of disclaimers will undoubtedly yield positive consequences for both the employer and the employee.

252. Id. at 1198.
253. Id. at 1198-99.
254. Id. at 1199.
255. Id.
256. See supra note 2 and accompanying text.
APPENDIX

STATE RECOGNITION OF LIMITATIONS TO THE EMPLOYMENT AT WILL RULE*

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