

4-1-2003

North Carolina Employment Case Law: Contract Principles Abandoned

Steven A. McCloskey

Follow this and additional works at: <https://archives.law.nccu.edu/nclcr>

 Part of the [Labor and Employment Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

McCloskey, Steven A. (2003) "North Carolina Employment Case Law: Contract Principles Abandoned," *North Carolina Central Law Review*: Vol. 25 : No. 2 , Article 3.
Available at: <https://archives.law.nccu.edu/nclcr/vol25/iss2/3>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

NORTH CAROLINA EMPLOYMENT CASE LAW: CONTRACT PRINCIPLES ABANDONED

STEVEN A. McCLOSKEY*

PURPOSE

The purpose of this article is to examine North Carolina legal cases involving employment policy manuals, and the failure of the courts to apply well-established principles of contract law in their analyses of those cases. The article will then briefly examine the misapplication of contract principles in cases involving lifetime or permanent employment, and termination for cause only.¹

EMPLOYMENT POLICY MANUALS – ARE THEY ENFORCEABLE AS PART OF THE EMPLOYMENT CONTRACT?

In North Carolina, the most frequent answer from the courts to the question above has been a resounding “No.” However, our neighbor to the south has adopted a more enlightened philosophy concerning policy manuals:

It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as “a gratuitous, non-binding statement, of general policy” whenever it works to his disadvantage. Assuredly, the employer would view these policies differently if it were the employee who failed to follow them.²

That quote comes from the Supreme Court of South Carolina. The opinion sounds in equity, or simple fairness. And that is fine as far as it goes. But as will be shown, principles of contract law should be an

* Steve McCloskey received a B.S. from Virginia Tech in 1974, and a J.D., *cum laude*, from NC Central University School of Law in 1999. McCloskey has a general practice in Winston-Salem, NC, which practice includes employment law.

1. In this article, “lifetime” and “permanent” employment are generally considered as synonymous; however, “termination for cause only” is qualitatively different and will be distinguished from lifetime/permanent employment when appropriate. When collectively referring to all three types of employment relationship, the generic term “long-term employment” will be used. The current case law states that “lifetime” and “permanent” employment are sufficiently definite terms as to duration, but only when additional consideration is given by the plaintiff. (To further complicate matters, some cases hinge on the meaning of “continued” employment. See *Kurtzman v. Applied Analytical Indust., Inc.*, 493 S.E.2d 420 (N.C. 1997)).

2. *Small v. Spring Indust., Inc.*, 357 S.E.2d 452 (S.C. 1987).

even better method by which to enforce the policies in an employment manual. At this time in North Carolina, unfortunately, they are not.

The closest that North Carolina has come to echoing the sentiment expressed in South Carolina's *Spring Industries* case was in dictum written by Chief Justice Exum, and which succinctly expresses the crux of this paper:

In my view an employer's personnel policies, if couched in language that either expressly or *by implication* makes promises to employees, may bind the employer to these promises and restrict the employer's power to discharge *even if the policies are unilaterally promulgated* and are supported by *no consideration apart from the employee's acceptance or continuation of employment*.³

To a very limited extent, North Carolina has adopted the principle expressed by Chief Justice Exum in *Harris*, i.e. - that an employer should be bound by what it puts in an employment manual. This principle is embodied in two statutes dealing with matters that are almost always covered topics in a company's policy manual, i.e. - vacations and wages.

§ 95-25.12 Vacation pay.

No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the *company policy or practice*. Employees shall be notified in accordance with G.S. 95-25.13 of any *policy or practice* which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss for forfeiture.⁴

§ 95-25.13 Notification, posting, and records.

Every employer shall:

- 1) notify its employees, orally or in writing at the time hiring, of the promised wages and date and place for payment;
- 2) make available to its employees, in writing or through a posted notice maintained in a place accessible to its employees, employment *practices and policies* with regard to the promised wages . . .⁵

Note the use of the words "policies" and "practices" in the two statutes above. In passing these laws, the Legislature has codified the common sense notion that (at least in regard to vacation time or pay,

3. *Harris v. Duke Power Co.*, 356 S.E.2d 357 (N.C. 1987) (Exum, C.J., concurring) (emphasis added).

4. N.C. GEN. STAT. § 95-25.12 (2002). See also *Narron v. Hardee's Food Sys., Inc.*, 331 S.E.2d 205 (N.C. 1985), "Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses, and vacation pay, an employer may cause a loss or forfeiture of such if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned."

5. N.C. GEN. STAT. § 95-25.13 (2002).

and regular pay) the employee is entitled to rely on the employer's policies and practices, which policies and practices are often expressed in a policy manual.

What is interesting is the "disconnect" between the principle expressed in the statutes on the one hand, i.e. - that employers are bound by the representations in their handbooks, and the vast majority of our court opinions, which hold that policies in employment manuals are not enforceable (aside from the aforementioned vacation and wage promises, and a few other benefits).

There is nothing to indicate whether the Legislature adopted the statutes because of equity/tort principles, or theories of contract law, or both. But whatever the basis, the Legislature has codified, at least as to vacation pay and regular pay, the same philosophy adopted by the South Carolina Supreme Court in *Spring Industries*, and expressed in Justice Exum's dictum in *Harris*, i.e. - what an employer puts in its policy manual stands for something, and the employer should be held to it, just like it holds the employee to those policies. There is no good reason why an employer should be made to honor (by way of the statutes) policies on vacation and wages, but be given a pass when it comes to other representations in an employment handbook. These policies relate to topics which are often of great importance to employees, and upon which employees understandably rely.

A PROMISE IS A PROMISE⁶ . . . MAYBE

The case of *Rucker v. First Union National Bank*⁷ is fairly typical of employment decisions both as to the issues involved and the analysis of those issues, and so it will be discussed at some length in this paper. In *Rucker*, employee-plaintiff was terminated and she sued her former employer for breach of contract based on policies in the company policy manual, which included representations concerning vacation pay and "continuing employment."⁸ The court wrote: "This Court has previously distinguished between issues of benefits or compensation earned during employment and the issue of an employee entitlement

6. "Promise. The manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981). Thus, all promises are for future performance. In *Rucker*, those promises in the employment manual pertained to vacation pay and continued employment.

7. 389 S.E.2d 622 (N.C. App. 1990).

8. Unfortunately, the court did not include in its opinion any description of the policy allegedly violated by the defendant, and relied upon by the plaintiff to establish that her employment was other than at-will. Instead, the court merely wrote: "[Plaintiff] contends that defendants' issuance of two employee handbooks to plaintiff . . . created a unilateral contract between the parties and removed plaintiff from the status of an 'at-will' employee." *Id.*, at 624 (emphasis added).

to *continued employment*. The former addresses earned benefits, while the latter concerns a future benefit not yet earned.”⁹

In order to award plaintiff her vacation pay from First Union (but still uphold at-will employment), the *Rucker* court drew a false dichotomy between the “earned benefit” of vacation pay, and the “future benefit not yet earned” of continued employment. The court missed the point that prior to plaintiff’s earning her vacation pay, the vacation pay policy — like the policy of continued employment - was a promise for a “future benefit not yet earned.”

The difference between the two promised benefits¹⁰ is when they are paid. The promised benefit of vacation time or pay may be unrealized, or unpaid, for months before being paid by the employer.¹¹ The promised benefit of continuing employment is realized, or “paid,” by the employer on an ongoing, daily basis: today’s labor is the consideration for today’s continuing employment, and tomorrow’s labor will be the consideration for tomorrow’s continuing employment, and so on. Although the timing of the respective payment (or realization) of the benefit may be different, there is no rule of contract law that makes one of those promises less enforceable than the other.

The real reason for the different treatment by the court is because the payment of vacation pay is enforceable,¹² while a promise of continued employment is not so protected. While the statute is important because it protects employees to a certain extent, that would not matter in a proper contract analysis; what should matter are basic contract

9. *Id.* at 625 (emphasis added). See also C. DANIEL BARRETT, NORTH CAROLINA EMPLOYMENT LAW, § 15-3, pp-226-227 Lexis Publishing (1998), citing the *Rucker* opinion (emphasis added): “North Carolina courts make a distinction between an employee’s entitlement to earned and accrued benefits and entitlement to future employment based on an employer’s unilateral promises. . . . However, North Carolina courts have held that employers can be bound to unilaterally promulgated policies and policy manuals concerning benefits under a unilateral analysis. In short, *unilateral policies concerning benefits are contractually binding once the employee earns the benefit whereas unilateral promises regarding continued employment are not binding.*”

10. “Benefit. Advantage; profit; fruit; privilege; gain; interest . . . Benefits are something to advantage of, or profit to, recipient.” BLACK’S LAW DICTIONARY, 6th Ed. (1990). Continued employment, like vacation pay, would certainly be “to [the] advantage of” the employee, and to many employees, continued employment would be a far more important benefit than receiving an annual paid vacation.

11. Aside from the inconvenience to the employer, there is no reason that the promise of vacation pay — like the promise of continued employment - could not be fulfilled each day (rather than accrue). That is, after working each day, employer could cut a check to employee for the pro rata vacation pay she earned that day. Of course, that is not an efficient business practice, and so an employee accrues the vacation pay.

12. N.C. GEN. STAT. § 95-25.12 (2002), “. . . if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice.”

principles, i.e., the parties' promises and performances, consideration given, and objective intentions.¹³

CONTRACT LAW IS SACRIFICED TO AT-WILL EMPLOYMENT

Terminable-at-will employment has a long history in North Carolina, and the at-will principle has been zealously guarded by our courts.¹⁴ The problem is that in doing so, the courts have undermined an even older principle . . . freedom of contract, the terms of the contract being embodied in the policy manual.

In ruling that policy manuals are not part of the employment agreement, the courts have completely eviscerated the bedrock concepts of implied contract, unilateral contract, and course of performance. Simply put, the courts have ignored basic contract law out of a misguided belief that if they were to enforce the policy manual as part of the employment contract, we would witness the collapse of at-will employment in North Carolina.¹⁵

For example, *Rucker*¹⁶ is a poor decision for at least five reasons. First, as previously discussed, the *Rucker* court draws a false dichotomy between the "earned benefit" of vacation pay, and the "future benefit not yet earned" of continued employment.¹⁷ As to plaintiff's attempt to overcome the presumption of at-will employment, the *Rucker* panel ruled that the manual was not a contract for two reasons: First, because employer First Union could unilaterally promulgate changes in its policies (which is ironic because an employer can unilaterally change its vacation policy under N.C. GEN. STAT. § 95-25.12). Second, the policy manual was not a contract because it had not been expressly incorporated into the employment agreement. But after finding that the manual was not a contract, the court decided for plaintiff on the vacation pay issue, and justified its finding, in part, by referring to the (supposedly non-contractual) manual: "Pursuant to defendant's manual, an employee not dismissed for cause is entitled to

13. As to intent being objective (as opposed to subjective), see RESTATEMENT (SECOND) OF CONTRACTS §§ 2, Comment b, 21.

14. For a comprehensive review of the development of at-will employment, see J. Wilson Parker, *The Uses of The Past: The Surprising History of Terminable-At-Will Employment in North Carolina*, 22 WAKE FOREST L. REVIEW 167 (1987).

15. See *supra* note 7, at 625 (emphasis added). "We decline to apply a unilateral contract analysis to the issue of wrongful discharge. This court has previously distinguished between issues of benefits earned during employment and the issue of an employee entitlement to continued employment. The former addresses earned benefits while the latter concerns a future benefit not yet earned. Further, to apply a unilateral contract analysis to the situation before us would, in effect, require us to abandon the 'at-will' doctrine which is the law in this State. This we cannot do."

Rucker was cited earlier in this paper. It

16. *Supra* note 6.

17. *Id.*

compensation for unused vacation time.” In short, an employee can believe some policies in a handbook, but not others. The court offered no guidelines for the employee on how to distinguish real promises from gratuitous promises.

Second, the court failed to tell the reader what handbook policy that plaintiff relied upon in arguing that she had been wrongfully terminated, or how the policy read (a surprisingly common omission in these cases); instead, the court merely opined that “unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.”

Third, the court concluded that applying a unilateral contract analysis to wrongful discharge would require the abandonment of the at-will doctrine in North Carolina. That is a gross overstatement: a unilateral contract analysis might require the court to abandon the at-will doctrine in this particular case, but if that was the objective intent of the parties, then so be it . . . that’s freedom of contract.

Fourth, the *Rucker* court implies – incorrectly - that it is a necessary (though not sufficient) prerequisite for the employee to sign an acknowledgement that she has received and/or read the policy manual in order for the manual to be incorporated into the employment agreement.

Fifth, as an alternative to her breach of contract claim, plaintiff *Rucker* included causes of action for misrepresentation vis-à-vis First Union’s policy handbooks. The court wrote: “We have concluded above that the employment manuals cannot be considered part of the plaintiff’s employment contract since they were not expressly included in it. Therefore, plaintiff cannot establish a legal claim to having been misled based on the manuals.” There is no requirement in the elements of negligent or intentional misrepresentation that there be a contract between the parties.

EMPLOYMENT POLICIES

According to Webster’s,¹⁸ a policy is “a definite course of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” Whether they are called employment policies, policy manuals, employee handbooks or any similar variation, employment policies serve several important functions in the workplace. Employers obviously feel that policy handbooks are worthwhile since they go to significant time and expense to write them. Policies, especially written policies, are beneficial to the employer because they convey the employer’s expectations of its em-

18. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (2nd Ed. 1997).

ployees, which promote consistency in the daily interactions between employers and employees. Consistency fosters fairness in the workplace, which makes for better morale and increased productivity. A course of performance¹⁹ develops between the parties as to the policies, and employees come to rely on the representations in the policy manual.

Despite the utility and importance of the policy manual to employers and employees, the courts will not even consider enforcing a policy in a handbook unless the plaintiff-employee can demonstrate that the handbook is part of, or has been incorporated into, the basic employment contract.²⁰ The courts have made the incorporation requirement an almost impossibly high hurdle for plaintiff, when, in fact, it shouldn't be because of the principle of implied contract.

IMPLIED CONTRACTS

At § 4, the Restatement (Second) of Contracts reads: "How a Promise May Be Made. A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."²¹

Comment *a* to § 4 states:

Contracts are often spoken of as expressed or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.²²

Even if one assumes that the run-of-the-mill policy manual is not an express contract, it typically has the characteristics of an implied contract:

An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding . . . It is an agreement which legitimately can be inferred from intention of

19. "Course of Performance. The understandings of performance which develop by conduct without objection between two parties during the performance of an executory contract." BLACK'S LAW DICTIONARY (6th Ed. 1990). See also *Mulberry-Fairplains Water Ass'n, Inc. v. Town of North Wilkesboro*, 412 S.E.2d 910 (N.C. App. 1992) (contract was modified by parties course of performance).

20. Although not specifically stated, the courts have implied that there is a basic or primary employment contract, which presumably is a very bare-bones agreement consisting of the services to be performed by the employee, and the wages to be paid by the employer.

21. RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) (emphasis added).

22. *Id.* at Comment *a*.

the parties as evidenced by circumstances and ordinary course of dealing and common understanding . . .²³

Implied contracts are pervasive in everyday life. Imagine the wasted time and inconvenience if we completely did away with the implied contract: every time you wanted to pump gas in your car you would have to expressly contract with the service station attendant; you and the restaurateur would have to expressly agree to the terms of your dining at that restaurant, etc. But because of its great utility in our daily affairs, the implied contract is alive and well in North Carolina (other than in the employment context), and the North Carolina Supreme Court agrees with the principles expressed in the Restatement:

A contract implied in fact . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract . . . *An implied contract is valid and enforceable as if it were express or written . . .* Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact . . . With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.²⁴

Despite the *Snyder* opinion above, North Carolina courts have, with a few notable exceptions, refused to apply the principle of implied contract in employment policy cases.

MISCONSTRUCTION OF CONTRACT LAW: #1 – THE REQUIREMENT OF AN EXPRESS INCORPORATION

The current law vis-à-vis employment handbooks can be stated as follows: unless expressly incorporated within the contract, unilaterally promulgated employment policies do not become part of the employment contract so as to negate the doctrine that employment is terminable at the will of either the employer or the employee (see the chart of cases, table 1).

The result has been that employers, often large corporations with their own in-house counsel, can violate with impunity the very policies that they expect the employees to obey. This asymmetry is not only unfair, but will be shown to violate the most fundamental tenets of contract law. The longstanding, fundamental principle of implied con-

23. BLACK'S LAW DICTIONARY, 323 (6th Ed. 1990).

24. *Snyder v. Freeman*, 266 S.E.2d 593 (N.C. 1980) (emphasis added, internal quotation marks and citations omitted).

tract is decimated by our courts' requirement of an "express incorporation" of the policy manual.

The fountainhead for the requirement of incorporation of the policy manual (as opposed to its being an implied contract) is the 1975 case of *George v. Wake County Opportunities, Inc.*²⁵ The accompanying chart (Table 1) illustrates the history of this line of cases, and shows how one poor reading of the source case by the *Griffin* court eight years later has perpetuated some bad contract law over the years. Each case that follows dutifully recites the magic phrases: unless "expressly incorporated" into the contract, a "unilaterally promulgated" employment manual does not become part of the employment contract. The problem is that the *George* opinion says nothing about a requirement for an "express" incorporation.²⁶ The *George* panel apparently did not consider the possibility that the policy manual had been incorporated into the employment agreement by way of a theory of implied contract or the parties' course of performance.

Unfortunately, in the 1983 case of *Griffin v. Housing Authority of the City of Durham*,²⁷ the court cited *George*, and added a very important word . . . "expressly":

Defendant's personnel policies, which were amended after plaintiff was hired, were not *expressly* incorporated in plaintiff's contract, and without such inclusion defendant was not obligated to follow its personnel policies in dismissing the plaintiff.²⁸

The *George* and *Griffin* decisions and their progeny are bad contract law because the requirement of an incorporation, and particularly an express incorporation, precludes the plaintiff from demonstrating the existence of an implied contract. The practical effect of plaintiff's inability to show an express incorporation is that she will not survive a 12(b)(6) motion, or motion for summary judgment. Additionally, when the courts require an express incorporation of a policy manual, they render worthless the parties' course of performance, which performance may modify the basic agreement.²⁹ The cases that followed *Griffin* over the last 20 years adopted its language and perpetuated the requirement of an express incorporation of the policy manual into the basic employment contract, and thereby defeated the principle of implied contract.

25. *George v. Wake County Opportunities, Inc.*, 217 S.E.2d 128 (N.C. App.), *cert. denied*, 218 S.E.2d 466 (N.C. 1975), *cert. denied*, 425 U.S. 975 (1976).

26. *Id.* at 130. "Although alleged by plaintiff, there is nothing in the record to indicate that the dismissal procedure was *incorporated* into her contract. Without some such provision, defendant had the right to dismiss Mrs. George at any time and for any reason." (Emphasis added).

27. *Griffin v. Housing Authority of the City of Durham*, 303 S.E.2d 200 (N.C. App. 1983).

28. See *supra* note 16, at 201 (emphasis added).

29. See *Mulberry-Fairplains Water Ass'n, Inc. v. Town of North Wilkesboro*, 412 S.E.2d 910 (N.C. App. 1992) (contract was modified by parties' course of performance).

MISCONSTRUCTION OF CONTRACT LAW: #2 - UNILATERALLY
PROMULGATED policies cannot form the basis of a
contract

North Carolina courts have perpetuated a second mistake relating to contracts and employment manuals, i.e. – if the employer can unilaterally promulgate (i.e. – change at will) its employment policies, then the policy manual cannot constitute a contract.

The derivation of this theory is found in *Williams v. Biscuitville, Inc.*³⁰ In law school, first-year students are repeatedly warned that headnotes to a case are not a part of the opinion, and do not constitute the law. Yet in the *Biscuitville* opinion, one wonders if subsequent courts paid more attention to the Westlaw Headnote (#5) which goes further than the text of the opinion it attempts to summarize. The headnote reads:

[5] Master and Servant

Provision of operations manual requiring one verbal and one written warning before plaintiff could be discharged was not a basis for establishing a breach of employment contract for failure to provide plaintiff with a verbal and written warning where provision was merely a part of a policy which was unilaterally implemented by defendants and could be changed by them.³¹

The clear implication of the headnote is that plaintiff cannot establish a breach of contract because the policy of a verbal-plus-written warning was unilaterally implemented. However, the headnote seems a bit stronger than the portion of the opinion that it summarizes, and which reads as follows:

The testimony of Mr. Hassenfelt was that the plaintiff had received a verbal and written warning, but we do not put the decision of this case on that ground. As we read provision for discharge after “one verbal and one written warning,” it is not the exclusive way for discharging employees. It was a part of a policy which was unilaterally implemented by the employer and could be changed by it. The employer could discharge plaintiff by ways other than as set forth in the policy manual.³²

In the actual text of the opinion above, the court says that the verbal-plus-written warning policy contained in the manual was not the exclusive method by which plaintiff could have been fired.³³ The

30. 253 S.E.2d 18 (N.C. App. 1979).

31. *Id.* (Emphasis added.)

32. *Id.* at 20 (emphasis added).

33. The particular provision of the manual read: “After one verbal and one written warning, the managing partner [plaintiff] is subject to a fine, loss of salary or dismissal.” In interpreting this policy, I would come down on the side of the plaintiff, i.e. - he could only be terminated after a verbal and written warning. At best, the meaning is ambiguous, and in holding for the defendants, the *Biscuitville* court ignored an important rule of interpretation, found at RESTATEMENT

headnote, on the other hand, seems to say that the verbal-plus-written warning policy was not enforceable by plaintiff simply because employer can unilaterally implement or change those policies.

The *Biscuitville* case was later cited in *Walker v. Westinghouse*.³⁴ Regardless of whether the *Walker* court adopted the *Biscuitville* headnote or the text, *Walker* gave additional force to the notion that unilaterally promulgated policies can not become part of the employment contract. In fact, the *Walker* court went further: it was the first opinion to combine the two aforementioned mistakes of contract law. The Court wrote:

Nevertheless, the law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.³⁵

The *Walker* court looked to the aforementioned fountainhead cases for its misconstruction and misapplication of contract law.³⁶ Thus, since 1985, these two faulty concepts of contract law have been merged and perpetuated in case after case involving employment policy manuals.

But unilaterally promulgated changes are not a problem in unilateral contracts.³⁷ One example is your credit card agreement. Visa, MasterCard, et. Al. reserve the right to change their rates, or anything

(SECOND) OF CONTRACTS § 206 (1981): "Interpretation Against the Draftsman. In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Of course, that assumes that the manual constituted a contract. See also *Wood-Hopkins Contracting Co. v. North Carolina State Ports Auth.*, 202 S.E.2d 473 (N.C. 1974) (citations omitted): "It is a rule of contracts that in case of disputed items, the interpretation of the contract will be inclined against the person who drafted it. . . . Another rule of law . . . is that when general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics."

34. 335 S.E.2d 79 (N.C. App. 1985).

35. *Id.*, at 83.

36. The plaintiff in *Walker* relied upon the following passage in the handbook to explain his belief that it was part of his employment agreement with the defendant: "This revised handbook . . . describes the relationship we have with our people . . . and our *obligations* to you and your *obligations* to your fellow employees and the plant. Some of the *obligations* are in the form of policies and procedures . . . some a result of mutual trust . . . some a matter of conscience." *Walker v. Westinghouse Elec. Corp.*, 335 S.E.2d 79, 81 (N.C. App. 1985) (emphasis added). Despite defendant's using the word "obligations" three times in this brief section of its policy manual, the *Walker* court apparently ignored the plain meaning of the word: "obligation: 1. something by which a person is bound to do certain things . . . ; 3. a binding promise, contract, sense of duty, etc.; 4. the act of obligating oneself, as by a promise or contract; 5. an agreement enforceable by law." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2nd Ed. 1997).

37. See, e.g., 27 AM JUR 2D 25. "Modification by means of handbook and manual provisions. An employer may modify the employment relationship through the policies of an employee manual. When an employment handbook implicitly modifies the employment contract, the consideration supporting the modification is often deemed to be the employee's staying on the job despite his or her freedom to leave."

else they want to change in the user agreement.³⁸ If, after notification of the changes, you choose to use your credit card, then you have agreed to be bound by the changes. If you don't accept the change(s), then don't use the card. The same thing applies with a new employment policy: if, after notification of the change, you choose to show up at work and perform your job duties, then you have agreed to be bound by the change, and continuing in your employment is the consideration for the revised policy manual. If you don't agree to the new policy, then you are free to quit.

There are no good reasons offered in the various court opinions for their aversion to allowing "unilaterally promulgated" changes to be a part of the employment contract. The *Biscuitville* court cited no authority for its finding that "a policy which was unilaterally implemented by the employer" could not constitute a contract. But in reviewing this line of cases, the reader intuits the courts' reliance on the long-discarded concept of "mutuality of obligation," i.e. - if the employer is free to change the policies at its will, but the employee is not, then the contract/manual is void for lack of mutuality. The concept of mutuality is disparaged in the Restatement (Second) of Contracts.³⁹ Mutuality has never been a requirement in unilateral contracts.⁴⁰ The unilateral nature of the contract does not make it any less binding, nor does the fact that it is an at-will contract.

Most employment agreements are unilateral contracts, e.g., an employer makes a unilateral offer/promise such as: "If you come to work for me tomorrow and make widgets, I'll pay you \$15 per hour." Employee accepts the offer by performing, i.e., by coming to work the next morning and making widgets. Employer and employee are free

38. My Visa agreement reads: "The use of the card may be otherwise limited by us *at our discretion*." And recently I received an insert with my monthly Visa bill. It read: "Important Amendments To Your Credit Card Agreement. The amendments described below *change the terms* of your Credit Card Agreement. These changes will be effective and applied to your credit card account . . ."

39. RESTATEMENT (SECOND) OF CONTRACTS § 34(2) (1981) reads as follows: "If the requirement of consideration is met, there is no additional requirement of . . . (c) 'mutuality of obligation.'" Comment *f* to §? 34(2) states: "Clause (c) of this section *negates any supposed requirement of 'mutuality of obligation.'* Such a requirement has sometimes been asserted in the form, 'Both parties must be bound or neither is bound.' That statement is obviously erroneous as applied to an exchange of promise for performance, *i.e.*, a unilateral contract. Even in the ordinary case of the exchange of promise for promise, § ?34(2) ?makes it clear that voidable and unenforceable promises may be consideration." (Emphasis added.)??

40. *See, e.g.*, 27 AM. JUR. 2D EMPLOYMENT RELATIONSHIP § 15 (1996). "Consideration: nature and sufficiency. When the parties have exchanged something of value, courts will generally refuse to examine the adequacy of the consideration. With regard to unilateral employment contracts, the benefits conferred under the terms of the employer's promise constitute consideration for the employee, and the employee's performance in reliance on the employer's promise furnishes consideration to the employer. *No mutuality of obligation is involved in a unilateral employment contract.*" (Emphasis added)

to terminate the relationship at any time. The offer of employment is renewed each day.⁴¹ The consideration given by the employer is its promise to pay for employee's labor; employee's performance of making the widgets is the consideration that both accepts and completes the contract. The ability to accept or reject employer's unilateral offer of work applies to other unilaterally promulgated terms, *i.e.*, policies, of the employment agreement.

The 1999 case of *Howard v. Oakwood Homes Corp.*,⁴² is a rare example of a decision that was based on a proper contract analysis. The court correctly ruled in favor of the defendant-employer and wrote: "Although arbitration is favored in the law, in order to be enforced, the underlying agreement must first be shown to be valid as determined by a common law contract analysis . . ." The court correctly applied a number of the principles discussed in this article when it found that a Dispute Resolution Program (DRP) had become part of the employment contract after employer:

- i) mailed a copy of the Dispute Resolution Program to employees with a memo (thereby providing notice of the change in terms) . . .
- ii) which memo stated that an employee's decision to continue employment with the defendant would constitute an agreement to be bound (unilateral contract offer, which was accepted by employee's continuing performance⁴³) . . .
- iii) by the terms of the Dispute Resolution Program (which terms were unilaterally promulgated by the employer).⁴⁴

In its analysis of whether the Dispute Resolution Program was part of the employment agreement, the court found it informative that em-

41. In a strict sense, an at-will contract can be viewed as being re-offered and re-accepted on a moment-by-moment basis.

42. 516 S.E.2d 879 (N.C. App. 1999).

43. A number of court opinions have implied that the employee's signing an acknowledgment that she has received and read the policy manual is a necessary (but not sufficient) prerequisite to incorporating the policy manual into the employment contract. See *Howell v. Town of Carolina Beach*, 417 S.E.2d 277 (N.C. App. 1992); *Salt v. Applied Analytical*, 412 S.E. 2d 97 (N.C. App. 1991); *Rucker v. First Union Nat'l Bank*, 389 S.E. 2d 622 (N.C. App. 1990); *Trought v. Richardson*, 338 S.E.2d 617 (N.C. App. 1990). These opinions seem to have "morphed" a statute of frauds analysis from what should be a routine, implied contract analysis. The statute of frauds requires that certain contracts be in writing and signed by the party against whom enforcement is sought. Employment contracts (and especially at-will contracts) would not typically come under the statute of frauds. Thus, there is no requirement of a writing nor a signature by either party. See also JOHN N. HUTSON, JR & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW, § 2-7-1, 67-68 Lexis Publishing, (1st Ed. 2001): "As a general rule, unless otherwise required by statute, signing a written contract is not always required to create a binding agreement . . . Moreover, the parties' oral agreement, in conjunction with their subsequent course of conduct, can be an express contract despite the failure to execute a contemplated written version of the agreement. Failing to memorialize an oral contract does not invalidate the agreement but instead merely affects the mode of proving the terms of the contract."

44. *Supra* note 37, at 882.

ployee/plaintiff had previously used the DRP to rescind her first termination by the company. In other words, there was a course of performance by the parties as to this one particular term of employment.⁴⁵ The court concluded that: “[E]mployer’s proffer of the agreement implied that both employer and employee would be bound by the agreement . . .”⁴⁶

In this one opinion, the *Howard* court acknowledged the following important contract principles: 1) the viability of implied-in-fact contracts and contract terms, 2) that a course of performance can demonstrate the existence of a contract, 3) that a unilaterally promulgated change in a term/policy of employment does not preclude the enforcement of that term, and 4) approved the concept that an employee’s continuing performance constitutes consideration in a unilateral, at-will contract, and for any subsequent changes thereto.

MISCONSTRUCTION OF CONTRACT LAW: #3 - PERMANENT/LIFETIME EMPLOYMENT AND THE REQUIREMENT OF ADDITIONAL CONSIDERATION

Apart from policy manual cases, there is another area of employment law where the North Carolina courts have misapplied principles of contract law. These cases involve alleged promises of long-term employment, usually described as lifetime employment, permanent employment, or termination for cause only.⁴⁷ Generally, the courts have not been sympathetic to the employee-plaintiff’s claim unless there is some evidence of “additional consideration” (i.e., over and above the employee’s labor) to support employer’s alleged promise of long-term employment.

45. In this case, the parties had a course of performance as to the particular policy being litigated. However, in trying to prove that the policy manual had been incorporated into the employment agreement, a plaintiff would only have to demonstrate that, as a whole, the manual’s policies and procedures had governed the parties past conduct, and not that the specific policy being litigated had ever been the basis for a course of performance. Ordinarily, there wouldn’t be a “course of performance” for a (litigated) policy like termination procedures because one strike and you’re out, i.e. - there is no chance to establish a course of performance as to that particular employee and that particular policy. See *RESTATEMENT (SECOND) OF CONTRACTS* §734(2)? (1981): “Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.”

46. *Id.* at 881 (citing with approval *O’Neill v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir.1997)).

47. Regarding long-term contracts and a potential statute of frauds problem: “There is no requirement in this State that contracts for services not to be performed within a year be in writing and signed by the party to be charged therewith.” *Messer v. Laurel Hill Assocs.*, 378 S.E.2d 220 (N.C. App. 1989). Even if North Carolina had such a statute of frauds (i.e. - requirement of a writing) for contracts not to be performed within a year of its making, there probably would not be a problem with a long-term employment contract because “promises [of lifetime employment] are not within the one-year provision of the Statute, since [employee’s] life may terminate within a year.” *RESTATEMENT (SECOND) OF CONTRACTS* § 130, Illus. 2 (1981).

One problem in this line of cases has been the blurring of meaning among the terms “permanent employment,” “lifetime employment,” and “termination-for-cause-only.”⁴⁸ Courts have often used the terms interchangeably, as if they were synonymous. For example, in *Mortensen v. Magneti Marelli, USA, Inc.*,⁴⁹ the court wrote:

If, however, the employment agreement expressly or impliedly provides that the employment will be *permanent, for life* or *terminable for cause only* and the employee gives an independent valuable consideration other than his services for the position, the employment can be terminated only for cause until the passage of a reasonable time.⁵⁰

The cases involving long-term employment and the requirement of additional consideration have a long history in North Carolina. In *Fisher v. John L. Roper Lumber Co.*,⁵¹ an employee who had lost an arm while working was promised lifetime employment in return for his promise not to sue the employer for his job-related injury. The Supreme Court ruled that this was an enforceable contract because the employee’s waiver of his right to sue was adequate consideration to support the employer’s promise of lifetime employment.⁵²

Fisher was correctly decided, but it left the impression that some additional consideration beyond the employee’s labor was required to support an offer of lifetime employment. That was true in the *Fisher* case because that was what the parties had agreed upon: lifetime employment in exchange for Fisher waiving his right to sue. But it does not follow that additional consideration is required in all cases of lifetime employment. If the parties agree that an employer will provide lifetime employment in return for an employee’s service, and only for an employee’s service, then no additional consideration is necessary.⁵³

48. While “permanent” and “lifetime” might be seen as synonymous in the employment context, “termination for cause only” is another matter. My opinion is that someone who has a legitimate permanent/lifetime contract could still be terminated, but only for serious misconduct; with “termination for cause only,” the “cause” could involve less egregious workplace violations, such as insubordination or incompetence. But absent some “cause,” the termination-for-cause-only contract should last for as long as the services are satisfactorily performed, possibly for a lifetime.

49. 470 S.E.2d 354 (N.C. App. 1996).

50. *Id.* (emphasis added, citations omitted). Aside from lumping the italicized terms as if they were interchangeable, the court further confused things with its last seven words in the quoted passage, i.e. – “until the passage of a reasonable time.” In no other such case can one find the “passage of a reasonable time” as a relevant factor in determining any aspect of the employment status of an individual.

51. 111 S.E. 857 (N.C. 1922).

52. *Id.* at 738. The *Fisher* court also ruled that “lifetime employment” was sufficiently definite as to duration to allow for the formation of the contract.

53. 30 C.J.S. EMPLOYER-EMPLOYEE § 23 (1992): “A contract for permanent employment must be supported by sufficient consideration. While it has been held that a contract for permanent employment or employment for life is not unenforceable because the only consideration for it, as far as the employer is concerned, is the employee’s promise to render the services called for by the contract, some courts have apparently taken the view that such contracts, unless sup-

The courts have made a common mistake in their analyses of long-term employment cases, an example of which is found in *McMurry v. Cochrane Furniture Co.*,⁵⁴ wherein the court wrote:

Thus, while plaintiff may have received a contract for *permanent employment*, where there is no additional expression as to *duration*, a contract for permanent employment implies an indefinite general hiring, terminable at will. *To change the nature of such a contract*, the employee must provide some *additional consideration* beyond the obligation to perform services.⁵⁵

In the *McMurry* opinion, the court states that an offer of “permanent” employment is indefinite as to duration and that the agreement is terminable at will.⁵⁶ However, the court goes on to say that if some additional consideration is furnished by the employee, then what had been an at-will agreement could become permanent employment.⁵⁷ The fallacy in the court’s reasoning is that the giving of some additional consideration by the employee makes the word “permanent” – as in “permanent employment” – more definite as to the duration of the agreement. The court does not explain how the giving of additional consideration alters the definition of “permanent,” and in fact, the additional consideration serves no such purpose.

The real reason that courts require additional consideration in long-term employment cases is for evidentiary purposes. Offers of long-term employment are inherently suspect for two reasons: 1) such offers are rare in the business world because, understandably, employers generally do not want to bind themselves to employees for many years; and 2) the alleged offer is often verbal.

ported by good consideration in addition to the services to be performed, are not binding and enforceable as such. However, if the parties’ intention to create a permanent employment contract is clearly manifested, *there is no requirement for additional consideration* apart from the primary exchange of services or wages.” (Emphasis added.)

54. 425 S.E.2d 735 (N.C. App. 1993).

55. *Id.* at 738. (Emphasis added, internal quotes and citations omitted)

56. “Contracts for Permanent or Life Employment. A contract for permanent employment or employment for life is not so vague and indefinite as to time as to be void and unenforceable because of uncertainty or indefiniteness. However, in order to be enforceable a lifetime employment contract must be clearly, specifically, and definitely expressed.” 30 CJS 23 (1992).

“It has been held that a contract is void for uncertainty which does not specify the period for its continuance. However, the absence of an agreement as to duration of employment will not necessarily defeat a contract, and a contract of employment is not unenforceable on the ground of uncertainty because the precise period of its duration is not specified, but is only approximated. *A contract is also not fatally indefinite merely because its duration is not fixed by the calendar, but by reference to the existence or happening of certain events, contingencies, or conditions.* It has been held that a contract for as long a time as the employer should use patent rights assigned to it by the employee, or for as long as the employee faithfully and diligently performs the duties of his employment, or until such time as the employee should be physically incapacitated to work is enforceable.” 30 CJS 22. (Emphasis added)

57. *Id.* at 738.

A long-term employment contract means that an employer could be bound for a very long time, possibly 40-50 years. The courts have been saying, *sub silentio*, that they require more “convincing” by the plaintiff that such a long-term agreement was actually offered by the employer. Some form of additional consideration would tend to corroborate that something other than an at-will employment was contemplated. But that evidentiary function should not be confused with the adequacy of the employee’s consideration:

[I]f a consideration over and above the consideration supplied by the employee’s services or promises of services is exchanged for the promise of permanent employment, some courts have indicated that the hiring will not then be considered to be at will. This approach gropes toward a fair result but confuses the questions of indefiniteness and consideration . . . If the employee has paid in money or in some other way for the promise of “permanent employment”, it is likely that both parties understood that employment was to endure as long as the employee is able to perform the work for which he is hired, or at least until retirement age. The payment of a consideration is an evidentiary factor bearing on the proper interpretation of the parties’ intention. It follows that other evidentiary factors can perform the same function. In each case all of the circumstances are to be considered . . . the presence or absence of an additional consideration should not be conclusive on this score. Unfortunately, however, the courts have tended to deal with the question mechanically, as if a *stare decisis* could provide the method by which the intention of the parties could be determined. The same dichotomy exists in the case of a promise of lifetime employment.⁵⁸

The following hypothetical makes clear why additional consideration should not necessarily be required to support a long-term contract. Suppose Big Basketball Shoe Company (employer) desires to improve its public image. As part of that plan, it hires a retired, highly-regarded former basketball coach (employee) to attend some basketball games at the University where former coach/employee had coached for 20 years. Both parties are represented by counsel, and arrive at an agreement which is memorialized in writing: “In consideration of former coach/employee’s performance of attending three home basketball games per season for as long as employee is physically able to do so, Big Basketball Shoe Company shall pay employee \$10,000 per month for the remainder of employee’s lifetime. Big Basketball Shoe Company will designate the three games that employee must attend each season, and will designate where employee must sit

58. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS*, 60-61 (3rd Ed., 1987) (emphasis added).

at each game. Employer shall withhold appropriate federal, state and local taxes from employee's monthly pay."

Over five basketball seasons, the parties establish a course of performance, i.e. – former coach attends the designated games at University, sits in the designated seats, and Big Basketball Shoe Company pays employee the \$10,000 per month, less withheld taxes. In year six, Big Basketball Shoe Company reneges on the agreement. According to the current case law dealing with lifetime and permanent employment contracts, former coach/employee could not enforce payment for the balance of the period of employment. i.e. - the rest of his life. Although coach has given consideration (attending three games per season for five seasons), he has not given additional consideration for the promise of lifetime employment, and his claim for breach of contract fails as a matter of law.

There is no good reason why this agreement should not be enforceable: both parties were represented by counsel, the agreement was freely negotiated by parties who mutually assented to its (written) terms, the duration of the contract is explicit, and consideration has been given by each party.⁵⁹ Why, then, should there be a need for employee/former coach to offer an additional consideration?

To reiterate, the courts requiring additional consideration wanted corroboration of the existence of a long-term employment contract.⁶⁰ Instead, the courts have conveyed the incorrect notion that the additional consideration is necessary to reciprocate for the presumably greater detriment an employer would undertake in offering the long-term employment. In other words, the courts have incorrectly held that the consideration of employee working every day is not adequate to support the employer's promise of lifetime employment.

However, the Restatement 2d of Contracts reads: "Adequacy of Consideration. If the requirement of consideration is met, there is no

59. Whether one chooses to use a bargained-for exchange paradigm, or a benefit-detriment paradigm, both parties have clearly given adequate consideration to support a contract.

60. When asked why he did not believe in UFOs, Carl Sagan responded: "Extraordinary claims require extraordinary evidence." Because permanent or lifetime contracts are so extraordinary (and usually not written), the courts have, like Sagan, demanded "extraordinary evidence," which evidence is furnished by the additional-consideration requirement. However, a requirement for additional consideration means that the plaintiff who has not given additional consideration to the employer will not survive a 12(b)(6) motion, or motion for summary judgment, even though plaintiff may have otherwise-compelling evidence to support his claim of a long-term contract, e.g., sworn affidavits from co-worker witnesses. Remarkably, under the current case law, even if the defendant-employer admits that: 1) he intended to offer the plaintiff/employee lifetime employment; 2) he did offer lifetime employment to plaintiff; 3) employee accepted the offer and started work; but 4) employer changed his mind and subsequently revoked his offer, then employee's claim for breach of contract would still fail as a matter of law because employee gave no *additional* consideration for the promise of lifetime employment.

additional requirement of . . . (b) equivalence in the values exchanged.”⁶¹

Comment *c* to § 79 reads:

Ordinarily, therefore, courts do not inquire into the adequacy of consideration. This is particularly so when one or both of the values exchanged are uncertain or difficult to measure. But it is also applied even when it is clear that the transaction is a mixture of bargain and gift. . . . the requirement of consideration is not a safeguard against imprudent and improvident contracts except in cases where it appears that there is no bargain in fact.⁶²

There can be little doubt that, as in the hypothetical above, an employee’s labor is adequate consideration to support promises made by the employer, including policies contained in a handbook, and promises of long-term employment. While additional consideration would be relevant evidence if it exists, it should not be required to support a long-term employment agreement.

STARE DECISIS

With a few notable exceptions, our courts have failed to properly apply fundamental principles of contract law in two lines of employment law, *i.e.*, cases involving the incorporation of policy manuals into the employment contract, and cases involving the requirement of additional consideration in long-term employment agreements. It is interesting to follow the “judicial ripples” that fan out from the inappropriate inclusion of a single ill-conceived word (*e.g.*, expressly incorporated). But it is also disheartening to see how those ripples have perpetuated injustice over the decades.

A proper application of the principles of law will sometimes result in injustice. An improper application of legal principles almost guarantees that result.

This Court has always attached great importance to the doctrine of *stare decisis*, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application. Nonetheless, *stare decisis* will not be applied when it results in perpetuation of error or grievous wrong, since the compulsion of the doctrine is, in reality, moral and intellectual, rather than arbitrary and inflexible.⁶³

It is time for our courts to redress the injustice that has resulted from the persistent misapplication of well-established contract principles in the field of employment law.

61. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

62. *Id.*

63. *Wiles v. R. Welpanel Construction Co., Inc.*, 243 S.E.2d 756, 758 (N.C. 1978) (citations omitted).