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Taliento v. Portland West Neighborhood Council: The At Will Doctrine Continues to Thrive in Maine

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**TALIENTO v. PORTLAND WEST NEIGHBORHOOD
COUNCIL: THE AT WILL DOCTRINE CONTINUES
TO THRIVE IN MAINE**

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TALIENTO v. PORTLAND WEST NEIGHBORHOOD COUNCIL: THE AT WILL DOCTRINE CONTINUES TO THRIVE IN MAINE

I. INTRODUCTION

In *Taliento v. Portland West Neighborhood Planning Council*,¹ Neil Taliento, a program director at Portland West,² brought suit against his former employer claiming breach of contract for improper discharge,³ and alleging that Portland West failed to follow the procedure for termination set forth in its personnel policy.⁴ The trial court granted Portland West's motion for summary judgment, concluding that Taliento had failed to establish that he was anything other than an employee-at-will,⁵ irrespective of the plain language of Portland West's Personnel Policy

1. 1997 ME 194, 705 A.2d 696.

2. Portland West is a not-for-profit organization that acts as an umbrella for a number of community programs funded primarily by state, federal, and local grants. *See* Brief for Appellant at 2, *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, 705 A.2d 696 (No. CUM-96-812). Taliento was hired to be the program director of Portland West's Community Employment Project (CEP), which provides job training to troubled youths. *See id.* In 1994, Taliento became the program director of a new program, YouthBuild Portland. *See id.* This program, funded by a HUD grant, is designed to teach troubled youths construction skills. *See id.*

3. There were four issues on appeal. The first issue, with which this Note is primarily concerned, stated that "the [lower] court erred by finding there is no issue of material fact whether Portland West's Personnel Policies altered his status as an employee who could be terminated at will." *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, ¶ 1, 705 A.2d at 697. The second issue was that the court erred "by finding [that] he had no contractual right to an appeal process in which the president of the Board of Directors may cast a vote only to break a tie." *Id.* The third issue was that the court erred "by finding that oral promises by Portland West's Executive Director Peter O'Donnell did not create an employment contract for a definite period of time and thereby limit O'Donnell's ability to recommend his termination" *Id.* The last issue was that the court erred "by finding no issue of material fact whether he was an intended third-party beneficiary of the federal Housing and Urban Development (HUD) grants that fund Portland West's YouthBuild Portland program (YouthBuild) and that he therefore did not have an employment contract for the grant's two-year duration" *Id.*

4. *See id.* The pertinent section of Portland West's Personnel Policy, Paragraph 11, states: Termination: The Executive Director and the Program Director have the authority to recommend termination of an employee to the Personnel Committee only after documenting the problem; informing the employee[;] and giving the employee a stated period to correct the situation. The employee may appeal any decision of the Personnel Committee to the full Board of Directors.

Id. at ¶ 3, 705 A.2d at 698. Since the policy sets forth a specific three-step procedure for termination, discharge may be inferred to be for cause rather than at the will of the employer. *See infra* Part IV.A (discussing this issue further).

5. *See Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, ¶¶ 6, 8, 705 A.2d at 699. The employee-at-will doctrine, or terminable-at-will doctrine, allows an employer the absolute power to terminate its employees, hired for an indefinite term, for any reason, even if arbitrary and capricious. *See Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 (1983) [hereinafter Note, *Protecting Employees At Will*]. The theory behind the rule is that the employee, too, is free to leave her job at will. Some commentators maintain that the doctrine is premised on the concept of freedom of contract. *See id.* at 1933. It was created at a time when this country was beginning to industrialize and contractual freedom was, therefore, a valuable commodity. *Cf. id.* at 1933-34. Other

and its seemingly binding nature.⁶ Subsequently, Taliento appealed to the Supreme Judicial Court of Maine.⁷

Taliento provided the Law Court with an opportunity to consider whether personnel policies should be interpreted as binding, implied contracts⁸ between employer and employee. The Law Court found that Taliento was an employee for an indefinite term and, therefore, was terminable at the will of Portland West. This Author contends that there was, however, an *implied contract* between Taliento and Portland West.⁹ At the very least, an issue of material fact existed that should

commentators believe that the employment-at-will doctrine represents an economic or even a social response to the developing modern capitalist economy. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (explaining the origins and history of the at will doctrine). See also *infra* notes 12, 18 (citing additional authority discussing the origins of the at-will doctrine). It is commonly thought that the at-will doctrine originated in 1877 with a treatise by Horace Wood. See *id.* at 125-26. See also H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). *Blaisdell v. Lewis*, 32 Me. 515 (1851), however, is considered this state's first recognition of the doctrine.

6. There is evidence to suggest that O'Donnell and at least two board members thought that the policy was binding. See Brief for Appellant at 12, *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, 705 A.2d 696 (No. CUM-96-812) (stating: "The Superior Court also received evidence that Members of Portland West's Board of Directors understood the plain meaning of this language."). Furthermore, the Law Court found that:

Taliento testified to his familiarity with the Personnel Policies as a program director who was regularly involved in the hiring and firing of staff; in June 1995, when Taliento told O'Donnell that he wanted to terminate a staff member, O'Donnell reminded him (in a conversation documented by O'Donnell's handwritten notes) that he could not do so without following the paragraph 11 procedures; and O'Donnell admitted that he followed the requirements when recommending the termination of another employee to the Board's Personnel Committee later that year.

Taliento v. Portland W. Neighborhood Planning Council, ¶ 25, 705 A.2d at 705-06.

7. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 6, 705 A.2d at 699.

8. There is a distinction between contracts "implied in fact" and contracts "implied in law." Contracts implied in fact are one type of express contract. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.19 (Joseph M. Perillo ed., rev. ed. 1993) (stating: "[T]here is no difference between an express contract and an implied contract."). Contracts implied in law, sometimes known as quasi-contracts, are quite different. It has been suggested that contracts implied in law should not be called contracts at all because they are "created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent... Contracts are formed by expressions of assent." *Id.* § 1.20. This Note deals primarily with implied in fact contracts.

9. An implied in fact contract is simply an offer and acceptance that is not in writing but can instead be implied from the surrounding circumstances and conduct of the situation. See RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981) [hereinafter RESTATEMENT] ("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."). One Minnesota court explained that:

If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability.... The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

Pine River State Bank v. Mettelle, 333 N.W.2d 622, 626-27 (Minn. 1983).

have been submitted to a jury. The trend in a majority of jurisdictions has been toward limiting the traditional employee-at-will doctrine.¹⁰ There are legitimate reasons why Maine should follow that trend. For example, as a matter of public policy, employers should not have employee handbook provisions and personnel policies that bind only the employees. To an unwitting employee, such policies appear to be binding on *both* parties and effectively lead the employee into a false sense of security. In reality, the policies are worth little more to the employee than the paper on which they are written.¹¹

The majority of jurisdictions have recognized personnel policies and employee handbooks as creating an implied contract between employer and employee.¹² These jurisdictions reason that offer, acceptance, and consideration are ascertainable in these "handbook cases." Although many times employee handbooks contain unilateral offers to contract, they are offers nonetheless.¹³ These jurisdictions intimate that if employers want to avoid changing the employee's durational status, they have the option of boldly disclaiming that the policies constitute a part of the employee's employment contract.

Maine has gone to great lengths to prevent handbooks and personnel policies from changing employees' durational status. In the first place, for example, when ambiguities that cannot be resolved with reference to extrinsic evidence arise in contract, they are traditionally resolved against the drafter,¹⁴ which in the employ-

10. Generally speaking, other jurisdictions have sought to limit the doctrine through the formulation of employee remedies for wrongful discharge and breach of contract. Some of these remedies sound in contract, others in tort. See generally Joseph C. Marshall III, *Minimizing the Risk of Implied-Contract Employment Litigation*, PRAC. LAW. DEC. 1987, at 61, 62-64.

11. In *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980), the Michigan Supreme Court provided the following explanation of the idea that employees grow to depend upon the rules their employers provide:

[W]here an employer chooses to establish [personnel policies or practices] and makes them known to its employees, the employee relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal workforce, and the employee the peace of mind associated with job security and the conviction that he [or she] will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject;... [i]t is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.

Id. at 892. See also *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985) ("It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises.").

12. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 23, 705 A.2d at 704 n.8 (Lipez, J., dissenting). See also Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818-28 (1980) [hereinafter Note, *Protecting At Will Employees*] (setting forth a general history of the at-will doctrine, its original purpose, and recent developments limiting it).

13. No term of art is meant by the term "unilateral offer." As used in this Note, the term simply means that the offer is made by one party, the employer, and likely affords the employee no opportunity to bargain for its terms.

14. See, e.g., *John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 428 (Me. 1996) (citing *T-M Oil Co., Inc. v. Pasquale*, 388 A.2d 82, 86 (Me. 1978)); *Gendron Realty, Inc. v. N.J. Gendron Lumber Co., Inc. of Portland*, 519 A.2d 723, 725 (Me. 1987) (citing *Hills v. Gardiner Sav. Inst.*, 309 A.2d 877, 881 (Me. 1973); *Bourgoin v. Fortier*, 310 A.2d 618, 620 (Me. 1973)).

ment context is generally the employer. This has not been the case, however, in Maine's employment cases. Instead, employers have more often been favored by Maine's courts when ambiguities arise. Second, the implied-in-fact contract doctrine is a well-established standard of law¹⁵ used to recognize the existence of contracts in which assent has been manifest in some way other than express writings. But again, this long-standing doctrine is not recognized in Maine's employment cases. Finally, other jurisdictions have relied upon the theory of promissory estoppel in cases such as the instant one, reasoning that the employee relied upon the employer's promise to terminate only after a progressive warning procedure.¹⁶ In Maine, however, it is not even possible to have the handbook recognized as an offer to contract; hence, there can be no application of the promissory estoppel doctrine. The three aforementioned concepts are examples of established contract principles that have not been utilized in Maine's employment cases. This Author contends that contract principles should be applied with uniformity regardless of the substance of the dispute and especially in these handbook cases in which the elements of an implied-in-fact contract are so readily apparent. It is with these issues of contract law that this Note ultimately concerns itself.

Part II of this Note will provide an overview of Maine case law regarding the employment-at-will doctrine as well as the Law Court's treatment of employee handbooks and personnel policies in past decisions. After a brief recitation of the arguments set forth in *Taliento*, this Note goes on to consider whether the *Taliento* court's application of Maine law addresses the reality of today's employment relationships and public policy considerations. The Note then explores how another jurisdiction, Vermont, has dealt with employee handbooks. The Note concludes that the *Taliento* court's decision contradicts traditional notions of contract law and contravenes public policy concerns, and, using Vermont as a benchmark, it sets forth several suggestions for solutions to that conflict.

II. BACKGROUND

It has long been settled law in Maine that "a contract of employment for an indefinite length of time is terminable at the will of either party."¹⁷ This doctrine was developed at a time when laissez-faire economics predominated thought and freedom of contract was highly valued.¹⁸ The ability to terminate an employee

15. See *supra* notes 8-9.

16. The *Restatement (Second) of Contracts* sets forth the doctrine of promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *RESTATEMENT, supra* note 9, § 90.

17. *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97, 99 (Me. 1984). See also *DeWilde v. Guy Gannett Publ'g. Co.*, 797 F. Supp. 55, 61 (D. Me. 1992); *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 155 (Me. 1991); *Merrill v. Western Union Tel. Co.*, 78 Me. 97, 100, 2 A. 847, 848 (1886); *Blaisdell v. Lewis*, 32 Me. 515, 516 (1851). See generally *supra* notes 5, 12 (for authority regarding the origins of the at will doctrine) and *infra* note 18 (same).

18. See Theresa Ludwig Kruk, Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R. 4th 123-25 (1984). See also Note, *Protecting Employees At Will*, *supra* note 5, at 1933-35 (giving a general history of the doctrine); Elliott L. Epstein, *The Demise of Breach of Em-*

for "good cause, or bad cause, or no cause at all"¹⁹ is indeed a powerful remedy for employers. Notably, however, the United States is virtually the only industrialized nation to continue to recognize the terminable-at-will doctrine.²⁰ A recent trend has led the majority of jurisdictions to recognize that it is possible to contract out of the at will doctrine. In fact, at least thirty-eight American jurisdictions have acknowledged that the use of employment handbooks and other personnel policies that provide progressive discharge procedures create express or implied contractual restrictions on an employer's discretion to terminate employees.²¹

There was a brief time from the late 1970s to the early 1980s when it seemed that Maine, too, was moving away from strict adherence to the terminable-at-will doctrine. In *Terrio v. Millinocket Community Hospital*,²² a discharged medical technologist brought suit for breach of an alleged contract of employment.²³ Although Terrio was not hired for a definite term, and in fact had no written employment contract, the Law Court, taking the totality of circumstances into account, found in Terrio's favor.²⁴ The Law Court affirmed the trial court's finding in favor of Terrio, basing its holding on the surrounding circumstances and conduct, including oral promises. Even though Terrio was technically an at-will employee, the court looked beyond technicalities to the intent of the parties and their subjective understanding of Terrio's employment situation.²⁵

ployment Contracts and Wrongful Discharge Cases, 8 ME. B.J. 242, 244 (1993) [hereinafter Epstein, *The Demise of Breach of Employment Contracts*] ("Based upon an outmoded philosophy, the [employee at will] rule is an extreme example of the doctrines devised by 19th century apologists to justify and protect the excesses of the Industrial Revolution; it has little place in a more sophisticated and humane era"); Andre D. Bouffard, Comment, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine*, 38 ME. L. REV. 67, 67-76 (1986) (setting forth a thorough explanation of the time period in which the employment at-will doctrine became the general rule in this country).

19. *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956).

20. See Jack Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING 155, 157 (Barbara D. Dennis ed., 1980). See also Note, *Protecting At Will Employees*, *supra* note 12, at 1844 (stating that "[t]he United States is the only industrialized country without some form of comprehensive protection against wrongful discharge").

21. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 23, 705 A.2d at 704 n.8 (stating that "[a]s of this writing, 38 jurisdictions have recognized that implied employment contracts may be found on the basis of language in employee handbooks and in other personnel policies that restricts an employer's right to discharge an employee to particular reasons ('for cause') or procedures for termination" and setting forth those jurisdictions).

22. 379 A.2d 135 (Me. 1977).

23. *Id.* at 136. Hired in 1955, Terrio experienced no problems on the job until 1973 when a resident pathologist took charge of the laboratory where Terrio worked. See *id.* A personality conflict ensued, culminating with Terrio's termination in February 1975. See *id.* at 137. Terrio had been employed by the Millinocket Community Hospital [hereinafter Hospital] for approximately twenty years at the time of her dismissal. See *id.*

24. The circumstances that the court considered in coming to its conclusion included oral promises made by hospital administrators stating that Terrio "was secure in her job for 'the rest of (her) life,'" personnel policies that dealt specifically with dismissal and grievance procedures, and a company retirement plan. See *id.* at 137-38. All of these circumstances supported the court's finding that a jury could have found that there was "evidence of a specific oral promise of employment for a definite term, that is, until 'normal retirement age.'" *Id.* at 138.

25. See *id.*

Seven years later, in *Larrabee v. Penobscot Frozen Foods*,²⁶ the Law Court defined its first and only exception to the terminable-at-will doctrine. The court held that “parties may enter into an employment contract terminable only pursuant to its express terms—as ‘for cause’—by clearly stating their intention to do so, even though no consideration other than services to be performed or promised is expected by the employer, or is performed or promised by the employee.”²⁷ Although in its holding the court specifically listed “for cause” as an express term, it appears from the language of the decision to be only an example.²⁸ In other words, parties to an employment relationship may bargain for specific examples of behavior that would constitute terminable conduct, or they can use the broad term “for cause.” The court recognized that “a substantial percentage of the labor force is protected by collective bargaining agreements or are [*sic*] employed by federal or state governments, and can generally be discharged only for ‘just cause’”²⁹ and intimated that the same protection from arbitrary and capricious discharge should apply to those not covered under collective bargaining agreements.³⁰ According to *Larrabee*, then, a contract for employment may contain whatever terms the parties agree upon.

In 1985, the Law Court followed, and in fact expanded, the *Larrabee* holding when it found that an employee handbook became part of an employment contract. In *Wyman v. Osteopathic Hospital of Maine*,³¹ the court wrote: “We assume without deciding that in the case at bar there was an agreement between the parties for an employment of indefinite length terminable by the defendant only pursuant to the terms of the employee handbook.”³² Despite this reaffirmance and the Law Court’s apparent intention to bring equality and job security to public and private employees alike, the language of the *Larrabee* decision has since been eroded and its holding severely limited.

26. 486 A.2d 97 (Me. 1984). The plaintiffs in *Larrabee* expressly or impliedly promised to work for the defendant at Belfast on a full-time, continuous basis. *See id.* at 98. In exchange, the defendant expressly or impliedly promised to pay the plaintiffs a specified wage and to refrain from discharging them in bad faith or without good cause. *See id.* The defendant-employer had promulgated two documents, the “General Policy” and “Work Rules.” *See id.* *Larrabee* asserted that such documents served to buttress an implied in fact contract for employment. The Law Court agreed and set forth the exception to the terminable at will rule noted in the text. *See id.* at 99-100.

27. *Id.*

28. The plain language states “parties may enter into an employment contract terminable only pursuant to its express terms—as ‘for cause’—by clearly stating their intention to do so.” *Id.*

29. *Id.* at 99.

30. *See id.*

31. 493 A.2d 330 (Me. 1985).

32. William Wyman was hired as a chef for the Osteopathic Hospital of Maine (OHM) in 1967. *See id.* at 331. In 1981, Wyman was promoted to head chef, serving in that capacity until he was terminated in June of 1982. *See id.* Wyman was discharged for misconduct, specifically, for engaging in unsanitary workmanship. *See id.* at 332-33. Although there was no formal written employment agreement between Wyman and OHM, there was in effect at OHM an “employee handbook.” *See id.* at 331. This handbook contained the following statement: “This employee handbook outlines the hospital policies and is considered a portion of the terms and conditions of employment as well as your benefits.” *Id.*

In 1989, in *Libby v. Calais Regional Hospital*,³³ the Law Court took a noticeable step back toward the rigid terminable-at-will rule. Elizabeth Libby brought suit against her former employer, Calais Regional Hospital, for breach of contract for wrongful discharge.³⁴ When Libby was hired in 1978, she was given an employee handbook that contained provisions regarding procedures to be followed when terminating an employee.³⁵ The handbook was revised in 1982, and Libby was given an acknowledgment slip to sign to ensure that she had received and read the revised handbook.³⁶ The acknowledgment slip stated specifically that "this handbook [does] not constitute a contract of employment."³⁷ The *Libby* court recognized that "[t]he terms of an employment handbook can be used as the means by which an employment contract may be changed from one terminable-at-will to one terminable only by its express terms."³⁸ Because the handbook was accompanied by an express disclaimer of contract, however, the court found that the handbook did not alter Libby's employment status; that is, Libby remained an employee-at-will.³⁹

The court did not stop there. It went on to interpret *Larrabee* as requiring that any intention to impose restrictions upon the employer's right to discharge an employee must be clearly stated. The court implied that "clearly" meant that such restriction should be "in writing."⁴⁰ Justice Hornby, joined by Justice Roberts in the *Libby* dissent, asserted that the majority misconstrued *Larrabee* and unnecessarily elevated the term "clearly."⁴¹ The dissent argued that there were issues in *Libby* for a jury to hear and resolve. Nevertheless, *Libby* remains the standard according to which Maine courts determine the effects of employee handbooks and personnel policies on altering the terms of an at-will employment arrangement.⁴²

33. 554 A.2d 1181 (Me. 1989). For an excellent analysis of the *Libby* decision, see Russell Goldsmith, Note, *Libby v. Calais Regional Hospital: Contracting Out of Maine's Employment-at-will Doctrine*, 42 ME. L. REV. 553 (1990).

34. See *Libby v. Calais Reg'l Hosp.*, 554 A.2d at 1182.

35. See *id.* at 1182-83.

36. See *id.* at 1182.

37. See *id.*

38. *Id.* at 1183.

39. See *id.*

40. See *Libby v. Calais Reg'l Hosp.*, 554 A.2d at 1183.

41. See *id.* at 1184 (Hornby, J., dissenting).

42. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152 (Me. 1991), reaffirmed the *Libby* holding. In *Bard*, a former employee of Bath Iron Works Corporation (BIW) brought a suit, alleging discharge in violation of the Whistleblower's Protection Act, breach of employment contract, wrongful discharge, and breach of an implied covenant of good faith and fair dealing. See *id.* at 153. The trial court granted BIW's motion for summary judgment on all but the Whistleblower's Protection Act which, at the close of the evidence, was denied as well. See *id.* *Bard* appealed, alleging that his employer was retaliating against him for informing Navy inspectors of what he viewed as less than satisfactory workmanship. See *id.* at 154. *Bard* alleged that, though he was hired for an indefinite duration, BIW provided him with a pamphlet entitled "Rules and Regulations" that served to create an implied contract between he and his employer. The pamphlet stated that he could be terminated only for violating one of the rules or regulations contained therein. See *id.* at 155. The court stated that there is only one exception to the employee at-will doctrine and set it forth as follows:

The one exception is that parties to an employment contract of indefinite duration "may enter into an employment contract terminable only pursuant to its *express* terms—as 'for cause'—by *clearly stating their intention to do so.*" Such a contract must expressly restrict the employer's common law right to discharge the employee at will and clearly limit the employer to the enumerated method or methods of terminating the employment. "Written or oral language merely implying that discharge is for cause only is not sufficient to bind an employer."

In 1993, however, the Court of Appeals for the First Circuit interpreted Maine law to support the notion that a handbook does not have to explicitly state the phrase “for cause” to transform an employment relationship from terminable-at-will to discharge for cause only. In *Cummings v. South Portland Housing Authority*,⁴³ the Court of Appeals for the First Circuit determined that an employee handbook could become incorporated into an employment contract and alter the right of the employer to terminate the employee at will even if the handbook did not say that the termination had to be “for cause.”⁴⁴ This First Circuit determination effectively interjected the notion of implied contract into Maine employment law at a time when no such notion was recognized.

III. THE SUBJECT CASE:

TALIENTO V. PORTLAND WEST NEIGHBORHOOD PLANNING COUNCIL

A. The Majority Opinion

Neil Taliento worked as a youth counselor and educator for sixteen years, most recently for Portland West.⁴⁵ Taliento was hired in January of 1990, and terminated on November 21, 1995.⁴⁶ During his time at Portland West, Taliento directed two programs for troubled youths: the Community Employment Project (CEP) and YouthBuild Portland (YouthBuild).⁴⁷ Just one month prior to his termination, Taliento received a positive performance evaluation from Portland West’s Executive Director, Peter O’Donnell. Taliento received high marks in all areas of his performance and was given a five-percent raise, the highest raise afforded by the organization.⁴⁸

Portland West had a personnel policy that was distributed to its employees. One provision of the policy provided a method of termination for Portland West employees. It appeared to be the general understanding among Portland West administrators and staff that the procedure set forth in the personnel policy was to be followed whenever an employee was terminated.⁴⁹ Portland West terminated Taliento, however, without the benefit of the personnel policy procedure.⁵⁰ He appealed to the Board of Directors, but the Board denied his request for reinstatement.

Id. at 155 (quoting *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99-100 (Me. 1984) (emphasis added)). The court found no evidence of any intention (let alone the requisite clear statement of intention) that BIW would discharge its employees only for cause. Bard urged the court to overrule or limit *Libby*. The court responded, “Even if we were inclined to overrule or limit *Libby*, we would decline to do so on this record.” *Id.*

43. 985 F.2d 1 (1st Cir. 1993).

44. *See id.* at 3.

45. *See* Brief for Appellant at 2, *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, 705 A.2d 696 (No. CUM-96-812).

46. *See id.* at 2, 5.

47. Both programs were designed to assist troubled youths in developing valuable work and life skills. *See id.* at 2.

48. *See id.* at 5.

49. The evidence showed that Taliento, O’Donnell, and at least two other board members thought that the policy was mandatory. *See supra* note 6.

50. *See* Brief for Appellant at 5, *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, 705 A.2d 696 (No. CUM-96-812).

ment.⁵¹ Subsequently, Mr. Taliento brought suit against his former employer for breach of his employment contract. Taliento's complaint alleged four counts of breach of contract: "failure to satisfy the Personnel Policies termination requirements," "failure to adhere to established appeals practices," "failure to honor the promise of continued employment allegedly made by O'Donnell," and "failure to honor an implied two-year employment contract allegedly created by the HUD grant."⁵² The trial court granted Portland West's motion for summary judgment on all counts, and Taliento appealed.⁵³

Although the majority recognized that a termination procedure existed and that such procedure had been promoted and followed by the parties to this action in the past, the court looked to its decision in *Libby* and stated that "the personnel policy merely provides a procedure to be followed, a method of discharging an employee. It does not 'clearly limit [Portland West] to that method of terminating [Taliento's] employment and does not expressly restrict [Portland West's] right to discharge an employee.'"⁵⁴ The court emphasized that any deviation from the employee-at-will doctrine must be "*clearly stated*," and that the personnel policy in question did not meet that requirement.⁵⁵

The court also noted that Taliento was not discharged by O'Donnell but by the Personnel Committee.⁵⁶ The restriction in Paragraph 11 of the personnel policies, the court pointed out, "is on the authority of the Executive Director and the Program Director and does not affect the authority of the Personnel Committee, nor that of the Board of Directors."⁵⁷ Additionally, the court noted that Taliento had the benefit of an appeal within Portland West and maintained that "[t]he failure of that appeal is insufficient reason to [sic] for us to discard or ignore the law that is clear and well-settled."⁵⁸ The other counts of Taliento's complaint were given cursory attention by the court and found equally unpersuasive.⁵⁹

51. *See id.* at 6.

52. *See* Taliento v. Portland W. Neighborhood Planning Council, 1997 ME 194, ¶ 6, 705 A.2d at 698-99.

53. *See id.* ¶ 6, 705 A.2d at 699.

54. *Id.* ¶ 11, 705 A.2d at 699 (alterations in original).

55. *See id.* (emphasis in original).

56. *See id.* ¶ 12, 705 A.2d at 699.

57. *Id.*

58. Taliento v. Portland W. Neighborhood Planning Council, 1997 ME 194, ¶ 12, 705 A.2d at 699.

59. Specifically, the court stated:

Taliento's other contentions do not merit extensive consideration. There is nothing in the record to support a contract claim that Taliento was entitled to an appeal process in which the President of the Board could vote only to break a tie, and therefore no dispute of material fact exists on that point. Given O'Donnell's lack of authority to unilaterally hire Portland West employees as well as the indefinite nature of his promise, the oral promises he made to Taliento did not create an enforceable contract for a definite term of employment as a matter of law. There is no evidence that either Portland West or HUD intended to confer an enforceable benefit upon Taliento pursuant to the HUD grant awarded to fund YouthBuild; he was therefore at most an incidental beneficiary of the grant.

Id. ¶ 13, 705 A.2d at 700.

B. The Dissent

Justice Lipez, joined by Justices Roberts and Dana in dissent, expressed his opinion that “the court’s decision perpetuates the misapplication of special rules of contract law to claims that an employment contract of indefinite duration precludes at will termination.”⁶⁰ Justice Lipez wrote that Taliento’s case was an opportunity to “revisit[] our precedents in this area, reconsidering the extent to which an employment handbook or personnel policy that purports to govern termination may constitute a binding contract, and clarifying the principles of contract law to be applied in these employment cases.”⁶¹

The dissent began with a description of the historical use of implied-in-fact contracts and noted that whether a contract is express or implied makes no difference to the contract’s binding power.⁶² The distinction, the dissent wrote, “lies merely in the mode of manifesting assent.”⁶³ The dissent went on to mention that ambiguities in contract law are generally construed against the drafter, but in *Libby* this was not the case, nor was it the case in *Taliento*.⁶⁴ The dissent made clear that the majority’s deviation from traditional contract principles was unfounded.⁶⁵

Justice Lipez emphasized that the court has historically failed to justify its reasons for departing from ordinary contract principles in its consideration of employment contracts of indefinite duration.⁶⁶ The dissent could see no reason to continue this divergence, especially since it “runs counter to the trend in the majority of jurisdictions.”⁶⁷ Justice Lipez stated that “[w]hether a contract may be implied from an employee handbook or other documents, oral promises, the conduct of the parties, and other circumstances is a question of fact for a jury to decide.”⁶⁸ The dissent cited several Maine cases to support this proposition.⁶⁹

The dissent recognized the significance of *Larrabee*’s “establishment of an exception to the employment-at-will rule.”⁷⁰ It noted that it was the first time the Law Court “recognized that a provision for job security in a contract of indefinite duration could be binding without additional, independent consideration other than the services to be performed by the employee.”⁷¹ Additionally, the dissent asserted that the *Larrabee* holding did not stand for the proposition that the sole

60. *Id.* ¶ 14, 705 A.2d at 700 (Lipez, J., dissenting).

61. *Id.*

62. *Id.* at ¶ 15, 705 A.2d at 700 (Lipez, J., dissenting).

63. *Id.*

64. See supra note 14 for authority to support the proposition that ambiguities are generally construed against the drafter.

65. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 23, 705 A.2d at 704-05 (Lipez, J., dissenting).

66. See *id.* ¶ 23, 705 A.2d at 704 (Lipez, J., dissenting).

67. See *id.* ¶ 23, 705 A.2d at 704-05 (Lipez, J., dissenting).

68. *Id.* ¶ 23, 705 A.2d at 705 (Lipez, J., dissenting).

69. See *id.* (citing *Lawson v. McLeod*, 123 A.2d 199, 200 (1956); *Colvin v. Barrett*, 151 Me. 344, 350, 118 A.2d 775, 779 (Me. 1955); *Bryant v. Fogg*, 125 Me. 420, 134 A. 510 (152 Me. 67, 69, 1926); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 891-92 (Mich. 1980); *Taylor v. Nat’l Life Ins. Co.*, 652 A.2d 466, 469-71 (Vt. 1993)).

70. *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 17, 705 A.2d at 701 (Lipez, J., dissenting).

71. *Id.*

exception to the employment-at-will rule is when a contract has an explicit "for cause" provision.⁷²

To counter the majority's argument that it was the Board and not O'Donnell who terminated Taliento, the dissent noted that the termination was actually *begun* by O'Donnell.⁷³ Furthermore, Justice Lipez noted that "the record includes ample evidence that paragraph 11 was generally understood to be the mandatory method of termination."⁷⁴ Also, assuming that the policies were contractually binding, the record raises an issue of material fact concerning whether O'Donnell complied with the paragraph 11 procedures when he terminated Taliento.⁷⁵ The dissent concludes, generally speaking, by asserting that there was a genuine issue of material fact as to whether Portland West's Personnel Policies and the surrounding circumstances created an employment contract terminable pursuant to its express terms.⁷⁶ Therefore, the dissenters would vacate the summary judgment as to count I and remand that breach of contract claim for trial.⁷⁷

IV. DISCUSSION

A. *The Taliento Case*

Portland West's Personnel Policy required that a supervisor document any performance problems, inform the employee of the problem, and give the employee "a stated period to correct the situation."⁷⁸ Although Portland West's policies "contain no promises of continued employment or employment for a specific term,"⁷⁹ the fact that paragraph 11 sets forth a three-step termination procedure for the Executive Director or Program Director to follow, is evidence that Portland West intended that its employees be discharged only when there existed an irresolvable problem. How much clearer could Portland West have been in expressing that it would discharge its employees only for reasonable cause? Moreover, unlike the facts of *Libby*, Portland West's Personnel Policy provided a single method of discharge for the organization's employees. Paragraph 11 of the Portland West policy contained more than a mere *implication* that discharge was to be for cause only, it provided a specific procedure meant to restrict Portland West's ability to terminate its employees.

72. Justice Lipez observed that "[o]ur opinion [in *Larrabee*] alludes to 'for cause' only as an example of an express term pursuant to which such a contract could be terminable.... We thereby indicated that the relevant contractual term could consist of procedural protections... rather than an enumeration of substantive standards or even the recitation of the magic words 'for cause.'" *Id.* at ¶ 17, 705 A.2d at 701-02 (Lipez, J., dissenting). This idea is in agreement with the First Circuit's interpretation of Maine law in *Cummings*. See *supra* notes 42-43 and accompanying text.

73. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 24, 705 A.2d at 705 (Lipez, J., dissenting).

74. *Id.*, ¶ 25, 705 A.2d at 705 (Lipez, J., dissenting).

75. See *id.* ¶ 26, 705 A.2d at 706 (Lipez, J., dissenting).

76. See *id.* ¶¶ 25-26, 705 A.2d at 706 (Lipez, J., dissenting).

77. See *id.* ¶ 27, 705 A.2d at 706 (Lipez, J., dissenting).

78. *Id.* ¶ 3, 705 A.2d at 698.

79. *Id.*

O'Donnell informed Taliento in June of 1995 that Taliento had to follow the paragraph 11 procedures to terminate a YouthBuild staff member.⁸⁰ Taliento understood that, as a program director, he was required to follow the procedure set out in the personnel policy. When Taliento was terminated, however, he did not receive the benefit of the paragraph 11 procedure. Instead, he was discharged with no notice. He was told to "clean out his desk and leave immediately."⁸¹ It contradicts common notions of equity and public policy for an employer to impose upon its employees a code of conduct, but not itself be bound by the same code.⁸² Such inconsistency only supports the theory that the employee-at-will doctrine is one-sided, favoring employers.

Furthermore, Portland West's conduct was not indicative of an employer that viewed its employees as strictly at-will. Taliento received a positive performance evaluation from O'Donnell just one month prior to his termination.⁸³ According to O'Donnell's own account of these matters, he told Taliento that "as long as I'm around, I would like you also working here."⁸⁴ This promise, coupled with the personnel policy termination procedure would likely lead an ordinary person to believe that Portland West intended that Neil Taliento should be given cause for his termination.

Surely, the employee-at-will doctrine was not meant to frustrate contracting parties' intentions. Thus, in a case such as *Taliento*, where there is evidence that the parties to the suit have knowledge of conditions sufficient to create an implied-in-fact contract for employment; that is, offer, acceptance and consideration, it should be the jury who decides what the parties understood and intended. Furthermore, if employment contracts *are* limited only to express, written language, as the *Taliento* majority found, what then is left for the jury to decide?

A contractual provision is defined as ambiguous if a reasonable person is capable of interpreting it in more than one way.⁸⁵ Ambiguities in contracts are generally resolved against the drafter,⁸⁶ which in this case was Portland West. At the very least, a fact finder should have weighed the evidence regarding the interpretation of Portland West's Personnel Policy as it related to altering Taliento's employment status.

In *Terrio*, the Law Court recognized the implied-in-fact model of contract formation.⁸⁷ In *Larrabee*, the court recognized an exception to the at-will rule.⁸⁸

80. See *id.* ¶ 25, 705 A.2d at 705-06 (Lipez, J., dissenting).

81. *Id.* ¶ 5, 705 A.2d at 698.

82. See cases cited *supra* note 11 for authority supporting this proposition.

83. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 5, 705 A.2d at 698.

84. *Id.*

85. See BLACK'S LAW DICTIONARY 52 (6th ed. 1990). See also *Portland Valve, Inc. v. Rockwood Sys.*, 460 A.2d 1383, 1387 (Me. 1983) (explaining a contract is ambiguous if reasonably susceptible of different interpretations).

86. See *supra* note 14 citing sources to support this proposition.

87. See *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977). See also *supra* notes 8-9, for discussion of implied in fact contract theory in general.

88. See *Larrabee v. Penobscot Frozen Foods*, 486 A.2d at 99-100.

As set forth in *Larrabee*, however, the rule seemed irreconcilable with an implied-in-fact model of contract formation because it seemed to require a clearly expressed limitation. *Libby* eliminated any doubt as to the nature of the contracts to which the *Larrabee* exception would apply by indicating that exceptions to the employment-at-will rule would be limited to express contracts.⁸⁹ Specifically, the court in *Libby* recognized that “[t]he terms of an employment handbook can be used as the means by which an employment contract may be changed from one terminable-at-will to one terminable only by its express terms.”⁹⁰ The court sharpened its point by impliedly limiting the defined exception to highly specific *written* contracts.⁹¹

The *Taliento* majority asserted that the *Libby* decision settled the employee handbook issue by making it “clear that language in an employee handbook . . . providing a method of discharge and implying that discharge of an employee will be only for cause, is insufficient to restrict the employer’s common law right to terminate the employment.”⁹² It is this Author’s contention that the *Libby* holding should be limited; the Law Court went too far when it narrowed the at-will exception to express, written contracts. Implied-in-fact contracts have long been a recognized part of our jurisprudence⁹³ and should continue to be recognized uniformly, under all circumstances. An implied contract is simply a contract, composed of the traditional elements of offer, acceptance, and consideration, to which assent may be manifest by conduct rather than words.⁹⁴

Even in the event that it is determined that implied-in-fact principles should *not* apply to employment contract situations, *Libby* is distinguishable from the case at hand. In the first place, the *Libby* handbook was accompanied by an express disclaimer of contract. Because no such disclaimer existed in Portland West’s policy, Portland West should be bound by the terms that they drafted. Furthermore, in *Libby*, the “employee handbook did not clearly limit the employer to one method of termination.”⁹⁵ In contrast, “Portland West’s Policy clearly stated that Mr. O’Donnell could recommend Mr. Taliento’s termination *only* after complying with the Policy, and Mr. O’Donnell himself has admitted that the Policy was binding.”⁹⁶ It is apparent that there was a jury question on whether any portion of the personnel policy had become part of the employment contract. As Justice Hornby wrote in his *Libby* dissent, “I see no reason to insist upon the precise language ‘employees will not be terminated except for cause’ as a precondition to letting a jury find a meeting of the minds on the subject. . . . Ordinary contract law prin-

89. See *Libby v. Calais Reg’l Hosp.*, 554 A.2d at 1183.

90. *Id.*

91. This Author does not suggest that oral contracts cannot also be express contracts, only that the *Libby* decision appears to favor written contracts.

92. *Taliento v. Portland W. Neighborhood Planning Council*, ¶ 10, 705 A.2d at 699 (citations omitted).

93. See *Perry v. Sinderman*, 408 U.S. 593, 601-02 (1972) (“[T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be ‘implied.’”).

94. See RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981).

95. 94 *Id.*

96. Reply Brief of Appellant at 4, *Taliento v. Portland W. Neighborhood Planning Council*, 1997 ME 194, 705 A.2d 696 (No. CUM-96-812).

ciples should permit a factfinder simply to determine what it is that the parties agreed upon."⁹⁷

The majority implied a desire to adhere to precedent.⁹⁸ There does not appear to be any modern justification, however, for adhering so strictly to the rigid and often arbitrary and capricious employee-at-will doctrine. The court created the exception, and it is within the court's role to interpret and modify the rule as the need arises. This Author agrees with Justice Lipez when he stated in dissent:

We have not articulated in *Larrabee*, *Libby* or *Bard* a sufficient reason for our departure from ordinary contract principles in our consideration of employment contracts of indefinite duration, and the court does not do so in this case. Our departure runs counter to the trend in the majority of jurisdictions. We should end this divergence and apply the law of contracts implied in fact to employment contracts of indefinite duration.... Whether a contract be implied from an employee handbook or other documents, oral promises, the conduct of the parties, and other circumstances is a question of fact for a jury to decide.⁹⁹

To the present, the Law Court has chosen not to follow this reasoning. Perhaps in the future, through the vigorous argument of Maine's bar, the court will be persuaded otherwise.

*B. Vermont Law: A Benchmark?*¹⁰⁰

If Maine should, at some future date, choose to limit the at-will doctrine, it would do well to utilize one or more of Vermont's rationalizations.¹⁰¹ Vermont has taken a progressive view of these "handbook cases." Vermont recognizes three methods of limiting the at-will doctrine. Those methods are: (1) the public policy exception, (2) the doctrine of promissory estoppel, and (3) express or implied contract theory. Each of these methods will be examined in turn.

The first method of limiting the at-will doctrine is the public policy exception. The plaintiffs in *Payne v. Rozendaal*,¹⁰² a wrongful discharge action, complained that they were discharged from their employment solely on the basis of their age.¹⁰³ No state law was in existence when the action was commenced that would have restricted the defendant's right to discharge the plaintiffs on the basis of age. Their complaint, therefore, was dismissed in the Superior Court. The Vermont Supreme

97. *Libby v. Calais Reg'l Hosp.*, 554 A.2d at 1184 (Hornby, J., dissenting).

98. See *Taliento v. Portland W. Neighborhood Planning Council*, ¶¶ 9-10, 11, 705 A.2d at 699.

99. See *id.* ¶ 23, 705 A.2d at 704-05.

100. For a similar comparison of Maine law and Vermont law, see Jeffrey A. Thaler, *The Common Law of Employment Law in Maine: It's Broke and Needs Fixing*, 10 ME. B.J. 316 (1995). It is interesting to note that New Hampshire law and Massachusetts law are very similar to Maine.

101. It is important to recognize that Vermont views the at-will doctrine as a means of contract construction, whereas Maine appears to view the doctrine as substantive law. In other words, the at-will doctrine in Vermont is a rebuttable presumption whereas in Maine, it seems to be a substantive limitation. This is an important distinction and may be why the Law Court has resisted change in this area. See *Sherman v. Rutland Hosp., Inc.*, 500 A.2d 230, 232 (Vt. 1985). At the same time, it is possible to make changes in the substantive law. Commentators have suggested other reasons to explain the Law Court's resistance to change in this area. See, e.g., Epstein, *The Demise of Breach of Employment Contracts*, *supra* note 18, at 244.

102. *Payne v. Rozendaal*, 520 A.2d 586 (Vt. 1986).

103. See *id.* at 586-87.

Court, however, found that dismissal based solely on age "contravene[d] a clear and compelling public policy."¹⁰⁴ The court stated: "We do not find the absence of a statutory directive concerning age discrimination to be dispositive of whether a public policy against such practices existed at the time of the discharges."¹⁰⁵

Many states limit the at-will doctrine on the basis of strong public policy considerations. Courts vary the criteria for defining such public policy reasons.¹⁰⁶ Maine has not ruled out the possibility of recognizing the public policy exception.¹⁰⁷ The exception is, however, generally speaking, for major contraventions of public policy, such as discrimination, retaliatory discharge, or an employer's asking employees to perjure themselves.¹⁰⁸

It is this Author's contention that any opportunity for an employer to terminate an employee without good reason contravenes general notions of public policy. For purposes of this discussion, the definition of the term "public policy" is of utmost importance. The Supreme Court of Ohio has stated the definition of public policy succinctly:

Sometimes . . . public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court.¹⁰⁹

There is a good argument that discharging an employee for bad reason or no reason at all is shocking to the average man's conception of justice. Everyone has an interest in job security. This is one reason, among many, that the at-will doctrine has been so often criticized, and it is one reason why the doctrine should now be limited.

The second method used in Vermont to limit the at will doctrine is promissory estoppel. In *Foote v. Simmonds Precision Product Co., Inc.*,¹¹⁰ the plaintiff, a

104. *Id.* at 588.

105. *Id.*

106. *See id.*; *Kovalesky v. A.M.C. Associated Merchandising Corp.*, 551 F. Supp. 544, 547-48 (S.D.N.Y. 1982); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1033-34 (Ariz. 1985); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. Dec. 1981); *Martin v. Platt*, 386 N.E.2d 1026, 1028 (Ind. App. 1979); *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1144 (N.H. 1984); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983). Notably, the public policy exception applies not only "for refusing to do that which the law forbids (e.g., committing perjury)," but also "for doing what the law requires (e.g., serving on a jury)." *See Smith-Pfeffer v. Fernald State Sch.*, 533 N.E.2d 1368, 1371 (Mass. 1989). *See also GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 164-65 (Mass. 1995); *Upton v. JWP Businessland*, 682 N.E.2d 1357, 1358-59 (Mass. 1997).

107. *See Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 100 (Me. 1984).

108. *See supra* note 93 (citing cases from several jurisdictions that recognize a variety of public policy reasons for limiting the at will doctrine).

109. *Payne v. Rozendaal*, 520 A.2d at 588 (quoting *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Kinney*, 115 N.E. 505 (Ohio 1916)).

110. 613 A.2d 1277 (Vt. 1992).

computer operator, was discharged, allegedly for falsifying his time card.¹¹¹ The plaintiff maintained, however, "that his discharge was the result of his efforts to exercise the grievance procedure published in the [defendant's] employee handbook."¹¹² The plaintiff had an excellent work history prior to his use of the grievance procedure. The facts showed that the plaintiff was concerned about the hiring of a supervisor who was perceived by employees as unqualified.¹¹³ He wished to complain to management about this new supervisor. Concerned about his own job security, the plaintiff approached an employee relations manager who directed his attention to the grievance procedure set forth in the employee handbook.¹¹⁴ After pursuing the procedure and after experiencing escalating grief from his superiors, the plaintiff was terminated. A jury found for the plaintiff, relying on the doctrine of promissory estoppel.¹¹⁵

The handbook in *Foote* specifically stated that "[i]f you follow these steps, you cannot be criticized or penalized in any way," and the personnel manager in fact testified that the company intended that employees rely on the statement.¹¹⁶ The elements of promissory estoppel, set out in the Restatement of Contracts and followed by the *Foote* court, are as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."¹¹⁷

It is this Author's contention that any procedure set out in an employee handbook should be considered to represent the intent of the employer with regard to its interaction and relationship with its employees. In other words, if an employer sets forth a procedure in an employee handbook, it is a fair assumption that the employer's employees will rely on the idea that the procedure will be utilized fairly and at the appropriate time. In *Taliento*, for instance, it seems reasonable that Mr. Taliento would rely on the idea that, in the unfortunate event that his continued employment was called into question, the termination procedure in the personnel policy would be activated and fairly pursued, especially considering that he was directed by his superiors to use the procedure when discharging employees beneath him. Again, if an employer does not intend for the policies set forth in an employee handbook to bind the employee and employer alike, they should incorporate a statement disclaiming as much.

Finally, Vermont has recognized that "personnel manual provisions inconsistent with an at-will relationship may be used as evidence that the contract of employment requires good cause for termination despite the fact that the manual was not part of the initial employment agreement."¹¹⁸ In other words, language found in an employee handbook can, through the application of standard contract principles, alter the durational status of an at-will employee. This idea originated in

111. *See id.* at 1278.

112. *Id.*

113. *See id.*

114. *See id.*

115. 114 *See id.*

116. *Foote v. Simmonds Precision Prod. Co., Inc.*, 613 A.2d 1277, 1278 (Vt. 1992).

117. *See id.* at 1281 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981)).

118. *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466, 471 (Vt. 1993).

1985 when Vermont's Supreme Court decided that an employee and employer could bargain for, and agree to be bound by, termination provisions set forth in a personnel manual.¹¹⁹

A year later, in *Benoir v. Ethan Allen, Inc.*,¹²⁰ the Vermont Supreme Court found that an employee manual, handed out at employee orientation, became part of the employment contract and that the termination provision specifically altered the at-will status of Ethan Allen's employees.¹²¹ It appears that the holding was reached, in part, due to the fact that just *having* a termination procedure is at odds with the notion of at-will status.¹²² If an employee is truly at-will, his employer has the right to terminate him without notice, for any reason. There would be no procedure. The *Benoir* court used implied contract theory to reach its conclusion.¹²³

Overall, Vermont law is a useful benchmark for those jurisdictions, such as Maine, that have not yet limited the at-will doctrine. The *Taliento* majority examined Mr. Taliento's claims in a compartmentalized manner; that is, they did not consider all of his circumstances together, but rather in individual segments. Maine should adopt a totality-of-the-circumstances approach to evaluating these situations.¹²⁴ Such an approach would be fair and equitable, and would pave a wider avenue by which the Law Court may see its way to change the at-will doctrine.

V. CONCLUSION

In light of the trend toward limiting the employee-at-will doctrine, *Taliento* presented a logical opportunity to reassess Maine's current outlook on the subject. Employers would still have safeguards. Employers could still draft at-will provisions into their applications, for instance, or include a disclaimer of contract in their handbooks;¹²⁵ but if an employer is going to hold an employee handbook or a personnel policy out to its employees for guidance, it too should be bound by the letter of those documents.

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119. See *Sherman v. Rutland Hosp., Inc.*, 500 A.2d at 232-33 (finding that a bilateral agreement was formed to make the manual terms part of a specific employee's employment contract. Sherman left for another day the issue of "whether the employee manual itself created enforceable contract rights generally").

120. 514 A.2d 716 (Vt. 1986).

121. *Id.* at 718.

122. See *id.*

123. See *id.* See also *Farnum v. Brattleboro Retreat, Inc.*, 671 A.2d 1249 (Vt. 1995) (holding that despite disclaimers contained in employee handbooks, a jury could have reasonably concluded that the handbooks created an implied contract precluding discharge without cause); *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466 (Vt. 1993) (holding that manual provisions committing the employer to a progressive discipline system were sufficient for a jury to find that the employment contract restricted the defendant to terminating the plaintiff only for cause).

124. See *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (1981) (setting forth an example of a totality-of-the-circumstances-test cited in Vermont cases). Although Vermont has not formally adopted a totality-of-the-circumstances-test, it has quoted, with approval, jurisdictions that have adopted such an approach. See, e.g., *Benoir v. Ethan Allen, Inc.*, 514 A.2d 716, 718 (Vt. 1986).

125. See Linda S. Johnson, *The Employee Handbook: Careful Drafting Makes the Difference Between Having a Sword or a Shield*, 3 EMPLOYMENT L. BASICS 170 (1997) (explaining various safeguards employers may take when drafting employee handbooks to ensure that their employees remain at-will).