

At Will Employment in Washington: A Review of *Thompson v. St. Regis Paper Co.* and Its Progeny

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The Washington State Supreme Court's decision in *Thompson v. St. Regis Paper Co.*¹ in July, 1984, was a landmark decision in the area of employment at will law in Washington. Prior to *Thompson*, Washington courts had followed the traditional American rule that a contract for employment of unspecified duration was terminable at the will of either party and that the employer could discharge the employee at any time for any reason.² Thus, an employee who was not given an express promise of employment for a fixed period of time was considered to be employed at will, and could not maintain an action for wrongful discharge against his employer except in very limited circumstances.³

While the *Thompson* court did not abandon the at will rule entirely, it established two new exceptions under which an at will employee could recover damages from a former employer. These exceptions are based upon the employer's conduct in terminating the employment relationship or upon the reasons behind the decision to terminate. The first exception allows the employee to bring a breach of contract claim based upon provisions contained in an employee policy manual or handbook limiting the employer's right to discharge.⁴ The second allows the employee to recover in tort if the discharge contravenes a clearly mandated public policy.⁵

By abandoning the rule insulating employers from liability for the discharge of an at will employee, Washington joined a growing number of states that have formulated exceptions to

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1. 102 Wash. 2d 219, 685 P.2d 1081 (1984).

2. See *Roberts v. ARCO*, 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977).

3. See *infra* notes 13-23 and accompanying text.

4. *Thompson*, 102 Wash. 2d at 230, 685 P.2d at 1088.

5. *Id.* at 232, 685 P.2d at 1089.

the traditional at will employment doctrine in order to alleviate some of its perceived harshness and unfairness to the employee.⁶ Prior to *Thompson*, many jurisdictions already had adopted some form of tort-based public policy exceptions to the at will rule.⁷ Contract-based exceptions were less widely recognized and more controversial.⁸ By adopting both contract and tort exceptions to the at will rule in a single opinion, the *Thompson* court appeared to signal a new, more favorable judicial attitude toward protecting the rights of Washington at will employees from unfair termination.

At the same time, the *Thompson* opinion no doubt caused considerable concern among employers in Washington. Read

6. See Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 MICH. I. L. REF. 277 (1983); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

7. At the time *Thompson* was decided, the following jurisdictions had adopted an exception to the at will rule based upon public policy: *Tameny v. ARCO*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Jackson v. Minidoka Irrig. Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

8. See, e.g., Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1975). The *Thompson* court also noted that several jurisdictions, including California, had also recognized a "bad faith" exception to the at will rule by implying into every employment contract an obligation of good faith and fair dealing. The court expressly rejected the "bad faith" exception on the ground that it would subject every employee discharge to judicial review under an "amorphous" standard and would unnecessarily intrude upon the employer's interest in managing his business. *Thompson*, 102 Wash. 2d at 227, 685 P.2d at 1086.

Several commentators have suggested that the problems arising from the at will status of non-union employees should be dealt with through legislation. See, e.g., Comment, *Employment At Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151 (1987); Comment, *Unjust Discharge: Why Non-Union Employees Need a Just Cause Statute*, 25 WILLAMETTE L. REV. 135 (1989). A thorough discussion of the merits of such proposals is beyond the scope of this article. It is worth noting, however, that legislative attempts to establish a "just cause" standard for dismissal or special arbitration procedures would face a number of substantive and procedural difficulties. See Grodin, *Past, Present, and Future in Wrongful Termination Law*, 6 THE LABOR LAWYER 97, 103-06 (1990) for a discussion of the problems that would be encountered in attempting to arbitrate wrongful termination claims under a just cause standard.

broadly, *Thompson* raised the specter of civil liability in almost every employee termination, no matter how necessary or justified. In particular, the implied contract exception, while nominally applicable only to statements made in an employee handbook, provided a theoretical justification for making any communication between an employer and its employees a possible basis for a wrongful termination claim.

Thompson also left unanswered important questions with respect to both the procedural and substantive aspects of the at will employee's newly found rights. The *Thompson* opinion failed to clearly define the jury's role in determining whether an employee handbook or manual modified the at will relationship by providing protection from dismissal under certain circumstances. The opinion left in doubt the proper allocation of the burden of proof as to the reason for a dismissal and the scope of protection afforded employees against erroneous employer termination decisions. The decision also did not address whether circumstances outside the language of the handbook or manual could be taken into account in determining whether the handbook created specific obligations limiting the employer's power to discharge its employees. As illustrated by recent appellate court cases, these questions are only now being fully addressed. How those questions are resolved could significantly affect the balance of the rights between Washington employers and their at will employees.

At present, there is no clear indication from the courts as to which way the tide will ultimately turn. While the general trend has been to apply the *Thompson* exceptions narrowly, several recent cases indicate the possibility of a more expansive application of the principles established in *Thompson*. The purpose of this Article is to examine the nature and origin of the issues now being faced by Washington courts in the area of at will employment and to argue that the well-established legal principles governing other kinds of contracts be consistently applied to at will employment contracts. This will result in a proper balance between the desire to protect at will employees from unfair termination and the need to allow employers the freedom to make decisions in the hiring and termination of at will employees without undue interference.

This Article will first review the historical development of the at will rule from English common law through the significant Washington state cases leading up to the *Thompson* deci-

sion. Next, the *Thompson* case will be analyzed with particular emphasis on the employee handbook exception to the at will rule. The Article will then discuss cases decided after *Thompson* and the manner in which the courts have attempted to resolve some of the questions raised by the *Thompson* opinion. The probable effects of an expansive interpretation of the *Thompson* handbook exception on employer-employee relations will be considered in light of the actions employers may take to avoid liability and exposure to *Thompson*-type claims by discharged employees. Finally, the Article will argue that the consistent adherence to established contract law principals in the application of *Thompson* will benefit both employers and employees by providing adequate protection against unjust dismissal of at will employees while, at the same time, enhancing the ability of employers to communicate with their at will employees.

I. HISTORY OF THE AT WILL RULE

Under traditional English common law, a hiring was presumed to be for one full year.⁹ This rule was founded on the needs of an agrarian society and a recognition of a personal obligation of the master to care for his servants, who were obligated in turn to remain with the master throughout the four seasons.¹⁰ This system ensured that the master would not lose his labor force during the harvest season when it was needed the most and that the servant would not be dismissed during the winter or other periods of decreased activity.¹¹ Toward the end of the 19th Century, however, the emergence of a greater variety of employment situations caused the English courts gradually to relinquish the presumption of a yearly hiring and adopt a rule that service contracts could be terminated upon reasonable notice.¹²

Early American courts relied heavily on English precedents.¹³ Instead of following the reasonable notice rule, however, American jurisdictions developed three competing approaches to deal with indefinite hirings.¹⁴ One approach pre-

9. Feinman, *The Development of the Employee At Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976).

10. *Id.*

11. *Id.*

12. *Id.* at 121.

13. *Id.* at 122.

14. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1975).

sumed that a hiring continued for the period of time fixed for payment. Another approach treated the intended length of an employment contract as a question of fact to be determined in each case without the aid of a presumption.¹⁵ The third approach presumed that an indefinite hiring was terminable at the will of either party. That presumption, which became known as Wood's rule after treatise writer Horace J. Wood, eventually won out.

In his treatise on master/servant relations, Wood stated the rule as follows:

With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof.¹⁶

With the coming of the Industrial Age, a number of American courts began applying the at will presumption systematically and rigorously to employment contracts.¹⁷ Facilitated by the concepts of laissez-faire economics and by the formalist ideology that guided the early development of contract law in America,¹⁸ the at will rule was soon transformed into a right of the employer to discharge an employee of indefinite hiring at any time for any reason, even for a cause morally wrong, without at the same time being guilty of a legal wrong.¹⁹ While even this harsh formulation of the at will rule would appear to

15. See, e.g., *Smith v. Theobald*, 86 Ky. 141, 5 S.W. 394 (1887); *Bascom v. Shillito*, 37 Ohio St. 431 (1882).

16. H. WOOD, *MASTER AND SERVANT* § 134 (2nd ed. 1887). Most commentators criticize Wood's formulation of the rule as not being supported by the cited cases. See *Feinman*, *supra* note 9, at 126; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351 (1975). At least one commentator, however, has argued that Wood's rule was a correct reflection of the law and that subsequent cases attributed to him a stricter rule than he actually espoused. Larson, *Why We Should Not Abandon The Presumption That Employment Is Terminable At Will*, 23 IDAHO L. REV. 219, 222 (1986). That view appears to have some merit because Wood's treatise stated only that an indefinite hiring was presumed to be terminable at will. Thus, the presumption in theory could be overcome by any competent evidence showing that the parties had some other intent.

17. See, e.g., *Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (C.C.E.D.N.Y. 1908); *Greer v. Arlington Mills Mfg. Co.*, 17 Del. 581, 43 A. 609 (Sup. Ct. 1899); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

18. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

19. See *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915); see also *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976) for a more recent formulation of the rule in its absolute form. In *Fawcett*, the court held that the employer's right to terminate is absolute and not limited by principles that protect

leave open the possibility of implied contractual modification, in practice the employee without a written contract of employment for a definite period of time was precluded from making any factual showing upon which implied contract rights might be based.²⁰

This abdication of judicial oversight of the employment relation reached its peak in two Supreme Court cases, *Adair v. United States*²¹ and *Coppage v. Kansas*.²² In each case, the United States Supreme Court held that legislative attempts to regulate employment contracts violated the employer's fundamental right to discharge its employees. *Adair* and *Coppage* have subsequently been repudiated by the Supreme Court, and as the court in *Thompson* noted, the employer's prerogative to discharge at will employees has been significantly limited in recent years by both federal and state legislation.²³ Nevertheless, the at will rule remains in force to some extent in most states, and subject only to specific limitations imposed by statute or court rule, an employer may still terminate an at will employee for no cause or for any cause, even a cause which may appear morally wrong.

II. EMPLOYMENT AT WILL IN WASHINGTON

In early Washington cases in which employment contracts were at issue, the Washington Supreme Court followed the prevailing American rule that employment contracts for an indefinite term were terminable at will unless the employee gave additional consideration beyond the services rendered.²⁴ The additional consideration had to be something that the parties had not contemplated at the time of employment. For example, in *Heideman v. Tall's Travel Shops, Inc.*,²⁵ the Washington Supreme Court rejected the plaintiff's contention that leaving his former job to take up employment with the defendant was sufficient consideration to support the defendant's

persons from gross or reckless conduct, willful or malicious acts, or acts done with insult or in bad faith.

20. See Feinman, *supra* note 9, at 129.

21. 208 U.S. 161 (1890) (holding unconstitutional a federal statute preventing common carriers from firing employees for union membership).

22. 236 U.S. 1 (1915) (holding unconstitutional a state statute forbidding contracts requiring employees to agree not to join a union).

23. *Thompson*, 102 Wash. 2d at 226, 685 P.2d at 1085-86.

24. *Grensman v. West Coast Power Co.*, 3 Wash. 2d 404, 101 P.2d 316 (1940); *Heideman v. Tall's Travel Shops, Inc.*, 192 Wash. 513, 73 P.2d 1323 (1937).

25. 192 Wash. 513, 73 P.2d 1323 (1937).

promise of lifetime employment.²⁶

In later cases, the court appeared to adopt a more flexible approach, holding that the question of whether an employment was for a fixed or an indefinite period of time must be determined by the circumstances of each case.²⁷ In theory, this allowed the employee to show implied contract rights to job security by introducing evidence that his employment was for a fixed period of time, and therefore not at will. However, an employee who had not been given express assurances that his employment would last for a specific period of time faced a difficult task in establishing such implied contract rights.²⁸

The first indication that the Washington Supreme Court might be willing to reconsider its position on the terminable-at-will doctrine came in 1977 in *Roberts v. ARCO*.²⁹ In *Roberts*, the employee alleged that he had been discriminated against because of his age, that the circumstances of his employment created an implied condition that he would not be terminated in bad faith, and that he could be terminated only for just cause.³⁰ The *Roberts* court characterized the employee's claim of implied contract rights as involving two distinct issues: (1) whether there was an implied agreement that the employee would be terminated only for just cause; and (2) whether the employee had, in addition to the contemplated services, given consideration which would limit his employer's right to terminate at will.³¹

The *Roberts* court first held that the employee had only a subjective understanding or expectation that he would be discharged only for just cause, and that such an understanding or expectation was insufficient to support a finding of an implied agreement.³² The court also held that the fact that the employee had foregone another job opportunity when he was first employed by ARCO and had moved his family four times during his employment with ARCO did not amount to

26. *Id.* at 518, 72 P.2d at 1325.

27. *Lasser v. Grumbaum Bros. Furniture Co., Inc.*, 46 Wash. 2d 408, 281 P.2d 832 (1955).

28. *Roberts v. ARCO*, 88 Wash. 2d 887, 568 P.2d 674 (1977); *Webster v. Schauble*, 65 Wash. 2d 849, 400 P.2d 292 (1965).

29. 88 Wash. 2d 887, 568 P.2d 674 (1977).

30. *Id.* at 889, 568 P.2d at 766.

31. *Id.* at 894, 568 P.2d at 768-69.

32. *Id.* at 895, 568 P.2d at 769.

independent consideration in addition to expected services.³³ Finally, the *Roberts* court noted that several other jurisdictions had carved out some limited exceptions to the terminable-at-will rule, but concluded that although "the future of [the at will] doctrine is a compelling issue, it is one that must be left for another day and different facts."³⁴

In 1982, the Washington Court of Appeals was presented with an opportunity to modify Washington's terminable-at-will doctrine in the case of *Parker v. United Air Lines, Inc.*³⁵ In *Parker*, United Airlines had fired an employee who had been with the company for 12 years for allegedly retaining payments intended for United Airlines and for misusing her travel pass privileges.³⁶ After two unsuccessful attempts to challenge her termination through the company's internal grievance procedures, the employee sued for wrongful discharge. The trial court dismissed the suit on summary judgment.³⁷

On appeal, the employee argued that statements made to her at an employee orientation session and on certain employment forms created an implied contractual right to continued employment absent just cause for termination.³⁸ These statements did not specifically provide that the employee would be terminated only for cause, but indicated that, upon completion of a probationary period, the employee would be entitled to a determination that there was cause for any dismissal and could appeal any disciplinary action to a higher official within the company.³⁹ In addition, United's employee manual contained a statement that an employee could be terminated for just cause or for economic reasons.⁴⁰ The employee argued that these statements implicitly excluded terminations based on other reasons.⁴¹

The court of appeals rejected these arguments and, citing *Roberts*, held that the employee had only a subjective understanding that she would be terminated only for just cause and that this subjective understanding was insufficient to defeat

33. *Id.* at 896, 568 P.2d at 769 (citing *Heideman v. Tall's Travel Shops, Inc.*, 192 Wash. 513, 73 P.2d 1323).

34. *Id.* at 898, 568 P.2d at 770.

35. *Parker v. United Air Lines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (1982).

36. *Id.* at 723, 649 P.2d at 182.

37. *Id.*

38. *Id.* at 724, 649 P.2d at 182.

39. *Id.* at 724-25, 649 P.2d at 182-83.

40. *Id.* at 725, 649 P.2d at 183.

41. *Id.*

the at will status of her employment.⁴² In reaching this conclusion, the court of appeals, by implication, determined that a reasonable person would not have interpreted the statements made by United as being a promise of continued employment. That determination appears correct in that the statements made by United seemed to promise only that certain procedures would be followed in any termination. Parker did not specifically allege that she had been denied any such procedural rights and, indeed, did not file suit against United until the available grievance procedure had been concluded. The Washington Supreme Court refused to review the court of appeals' decision. As a result, the at will rule remained intact until the *Thompson* decision 3 years later.

III. *THOMPSON V. ST. REGIS PAPER CO.*

In 1984, Kenneth L. Thompson brought his appeal before the Washington Supreme Court after his wrongful discharge claim had been dismissed by the superior court on summary judgment. Thompson, a Divisional Controller for St. Regis Paper Co., had been asked to resign after 17 years of service with the company. During those 17 years, St. Regis had promoted Thompson several times and had awarded him regular bonuses under the company's management incentive compensation plan. The day following the request for his resignation, in fact, Thompson was awarded an additional \$10,000.00 bonus for his last year's performance. He was also awarded severance pay in accordance with a section in the company's policy and procedures guide, which stated that all employee terminations would be "processed in a manner which will at all times be fair, reasonable and just."⁴³ According to Thompson, the only explanation given to him for his termination was that he "had stepped on somebody's toes."⁴⁴

Thompson alleged that St. Regis had acted "dishonestly" and without "good faith" and had demanded his resignation in retaliation for his having instituted certain accounting procedures in compliance with a federal anti-bribery statute, the Foreign Corrupt Practices Act of 1977.⁴⁵ Thompson also

42. *Id.*

43. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 222, 685 P.2d 1081, 1084 (1984).

44. *Id.* at 221, 685 P.2d at 1083.

45. *Id.*

argued that the provisions of the policy and procedures guide, coupled with his good employment record, created an implied contract that he would be terminated only for just cause.⁴⁶

In dismissing the suit, the trial court held that Thompson's employment was terminable at will and that no implied contract existed to limit St. Regis's power of termination. The court reasoned that St. Regis's stated policies of fair treatment, and its requirement of a probationary period and review prior to termination did not create an implied contract that Thompson was subject to termination only for just cause. Having determined that Thompson could be terminated at any time for any reason, the trial court also denied Thompson's motion to compel St. Regis to answer interrogatories concerning the reason for his termination.⁴⁷ The Washington Supreme Court granted direct review.

In the first sentence of the opinion, Justice Brachtenbach summarized the supreme court's view of the case: "Does a terminable-at-will employee have a cause of action for wrongful discharge when his employer summarily discharges him and gives no reason for so doing?"⁴⁸ The answer the court had in mind is clear from the manner in which it phrased the issue. The difficulty for the court, however, was reaching the desired result without completely abandoning the terminable-at-will rule to which that it had consistently adhered in the past.

The court chose to adopt two narrowly tailored exceptions to the at will rule—one based upon tort principles and the other upon implied contract principles. The tort-based exception provides that an employer may be liable for discharging an at will employee if the reason for the discharge contravenes some clearly defined public policy. The most obvious example of this type of discharge is the firing of an employee because the employee refuses to engage in some illegal conduct on behalf of the employer.⁴⁹ This exception has been widely recognized and does not appear to impose an unreasonable burden on employers if the concept of public policy is clearly defined.

46. *Id.* at 222, 685 P.2d at 1084.

47. *Id.* at 223, 685 P.2d at 1084.

48. *Id.* at 221, 685 P.2d at 1084.

49. *See, e.g., Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (bank employee discharged for attempting to require employer's compliance with state consumer protection laws). Nearly every jurisdiction to have considered the issue has adopted some form of public policy exception to the employment-at will rule. *See supra* note 7.

If the public policy is easily ascertainable, employers can determine when a termination or other discharge may result in liability and conduct themselves accordingly.⁵⁰ Recognizing this need to define public policy narrowly, the court in *Thompson* limited the scope of the exception to clear violations of policy specifically identified by a valid statute, regulation or published court decision.⁵¹

In devising an implied contract exception to the at will rule, the Washington Supreme Court relied heavily on *Toussaint v. Blue Cross and Blue Shield*,⁵² a Michigan Supreme Court opinion which was one of the first cases to recognize the "employee handbook" exception. In *Toussaint*, the employee policy manual in question stated that the employer's intention was "[t]o provide for the administration of fair, consistent and reasonable corrective discipline" and "to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only."⁵³ The court held that these statements of company policy were sufficient to create legally enforceable obligations on the part of the employer.⁵⁴ The court justified its holding by asserting that:

[W]here an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. . . . It 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. The employer has then created a situation "instinct with an obligation."⁵⁵

50. A good example of the limitations of the *Thompson* public policy exception is found in *Trumbauer v. Group Health Cooperative of Puget Sound*, 635 F. Supp. 543 (W.D. Wash. 1986). In *Trumbauer*, the plaintiff was dismissed because his relationship with his supervisor violated the employer's "anti-nepotism" policy. The plaintiff claimed that his dismissal violated public policy because it infringed upon his freedom of association and right to privacy under the Washington State Constitution. The District Court dismissed the claim, however, because it did not find any legislatively or judicially recognized public policy against discrimination based upon social relationships. *Id.* at 549.

51. *Thompson*, 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089.

52. 408 Mich. 579, 292 N.W.2d 880 (1980).

53. *Toussaint*, 408 Mich. at 617, 292 N.W. 2d at 893.

54. *Id.* at 618-19, 292 N.W.2d at 894.

55. *Id.* at 613, 292 N.W.2d at 892.

The *Toussaint* analysis ignores the traditional contract requirements of consideration and bargained-for exchange. Apparently, the employee need not even be aware of the specific provisions of a policy manual in order to have those provisions enforced against the employer. Nor is the employee required to give any additional consideration to make the employer's unilateral statement binding. The result appears to rest more upon general equitable considerations than on traditional contract law. Failure to enforce such provisions would be "unfair" since the employer would supposedly obtain the benefit of "an orderly, cooperative and loyal work force" while giving up nothing in return. Thus, the employer may not treat its "promise" as meaningless.⁵⁶

While adopting much of the *Toussaint* reasoning, the Washington Supreme Court took a slightly different analytical approach. Although the court noted that employers expect and intend certain statements in their employee handbooks to have a beneficial effect upon the employment relationship, the court did not find this fact alone to be a sufficient basis for finding an implied contract. Instead, the court focused on the individual employee and whether or not the employee had justifiably relied on an express promise in the employee handbook of "specific treatment in specific situations."⁵⁷

While the court did not cite § 90 of the Restatement (Second) of Contracts, its emphasis on specific representations in the employee handbook upon which the employee might rely by remaining on the job and not actively seeking other employment suggests that the *Thompson* handbook exception is actually based upon the doctrine of promissory estoppel. That doctrine has two principal parts. First, the promisor is bound only by those promises which he does or should reasonably expect others to rely upon, and second, enforcement of the promise must be necessary to avoid injustice.⁵⁸ Thus, a legal obligation will arise when the following elements are present:

- (1) a promise;
- (2) which the promisor reasonably expects will induce action or forbearance in reliance by the promisee or third party;
- (3) actual reliance by the promisee or third party; and

56. *Id.*

57. *Thompson*, 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088.

58. RESTATEMENT (SECOND) OF CONTRACTS § 90, comment a. (1981).

(4) injustice if the promise is not enforced.⁵⁹

The concept of promissory estoppel probably does not accurately describe what typically happens when an employer distributes an employee handbook to his employees. While the employer may seek to establish general guidelines applicable to its employees as a group, it seems unlikely that the employer expects or intends to make any specific commitment to treat individual employees in any particular manner. In many cases, the primary intent of the employer is to communicate to the employees what is expected of them. Nor is it likely that the employer expects any individual employee to interpret statements regarding how the employer intends to treat the workforce as a whole as an express promise limiting the employer's future conduct in a particular case, especially where the language is general rather than specific. Moreover, employee manuals are usually subject to unilateral modification or withdrawal by the employer.⁶⁰

In addition, the idea that an employee might rely upon a particular provision in an employee handbook by remaining on the job and not seeking other employment implies that, but for the inclusion of that provision, the employee would have quit his job or would have actively sought another job. However, where an employee is otherwise satisfied with the conditions of employment, it seems doubtful that he or she would in fact quit or seek other work because of the absence of written termination policies or guidelines. It is more likely that any thoughtful consideration by the employee of statements regarding termination policies does not ordinarily occur until after the employee has been discharged or threatened with discharge.

These conceptual difficulties with the application of the doctrine of promissory estoppel to at will employment are considerably lessened, however, if the handbook contains statements that the employer will engage in or refrain from certain specified conduct with regard to terminating individual employees. Where an employer uses such language in an employment handbook, it appears that the employer in fact intends to make a commitment to each individual employee and that the employee upon reading the statement could reasonably believe that he or she could rely on such a commit-

59. RESTATEMENT (SECOND) OF TORTS § 90.

60. See Larson, *supra* note 16, at 232.

ment, until it is withdrawn by the employer. Such a statement of specific future conduct by the employer, as opposed to general statements of "fair treatment" for all employees, would thus be more likely to influence a particular employee to forego other employment opportunities and to remain on the job.

However, it is relatively easy for a dismissed employee to claim such reliance, and whether justified reliance occurred will ordinarily be a question of fact to be resolved by a jury. That determination is likely to be guided by general considerations of fairness because most juries will not readily grasp the legal distinction between a broad statement of intent to treat employees fairly and a more narrow promise of specific treatment in specific situations. In addition, sympathy for the terminated employee may cause juries to read more into broad policy statements than the language itself justifies. Thus, there may be little practical difference at the trial stage between the broad equitable approach used by the court in *Toussaint* and the more narrow implied contract analysis employed by the court in *Thompson*.

Nevertheless, the differences between these two analytical methods may be significant at the pre-trial stage of litigation. Whereas, under *Toussaint* the employee need not even be aware of a particular policy provision in an employee handbook, an employee bringing an action based upon *Thompson* must be able to allege that he had read the specific provision relied upon or was otherwise aware of its existence.⁶¹ Absent such knowledge, the employee cannot claim to have "justifiably relied" on the employer's promise. Furthermore, the employee must establish that the statements relied upon constituted a promise of "specific treatment." A promise is defined by the Restatement (Second) of Contracts as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding a commitment has been made."⁶² Where there is no dispute as to the language employed, the court should determine as a matter of law whether a particular statement, or series of statements, is capable of being construed as a promise.⁶³ Therefore, a plain-

61. *Stewart v. Chevron Chemical Co.*, 111 Wash. 2d 609, 614, 762 P.2d 1143, 1146 (1988).

62. RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

63. *Messerly v. Asamera Minerals (U.S.), Inc.*, 55 Wash. App. 811, 816, 780 P.2d 1327, 1330 (1989) (citing *Stewart v. Chevron Chemical Co.*, 111 Wash. 2d 609, 613, 762

tiff under *Thompson* may be prevented from presenting his or her claim to a jury if the court concludes that the statement relied upon did not amount to a promise. *Thompson* provides, in effect, a method by which the court can cut short a claim that is not well founded.

Unfortunately, the *Thompson* opinion did not clearly state whether the court or the jury has responsibility for making the initial determination that a particular statement in a handbook constitutes a promise. The court stated only that the question of whether any statements contained in *Thompson's* employee handbook amounted to promises of specific treatment in specific situations presented a material issue of fact.⁶⁴ On the surface, this statement would appear to allow a jury to peruse an entire handbook or manual for any language that it believes constitutes such a promise and thus, places employers at the mercy of juries who arguably will tend to favor the employee.⁶⁵

P.2d 1143, 1146 (1988)); see *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E.2d 820 (1960) (in which the court held that statements in a letter from a father to his son that he would like for the son to take over the family farm if the son was willing to work it did not constitute an offer to convey the farm to the son); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 117 N.W.2d 213, (1962) (in which the court held that a statement in an employee handbook that a "person is not discharged without cause, and it is customary to give a warning and an opportunity to 'make good' before final dismissal" did not amount to a promise of dismissal for just cause only). *But see Granfield v. Catholic University of America*, 530 F.2d 1035, 1040 (D.C. Cir. 1976) in which the appellate court treated the trial court's determination that "amorphous" statements regarding the University's aims to achieve salary "parity" did not constitute a promise.

64. *Thompson*, 102 Wash. 2d at 233, 685 P.2d at 1089. Several Washington cases are in direct conflict over this issue. *Adler v. Ryder Truck Rental, Inc.*, 53 Wash. App. 33, 765 P.2d 910 (1988), *review denied*, 112 Wash. 2d 1013 (1989) and *Brady v. Daily World*, 105 Wash. 2d 770, 718 P.2d 785 (1986) indicate that whether a promise has been made is a question of fact to be determined by the jury along with whether the promise has been justifiably relied upon by the employee. *Stewart v. Chevron Chemical Co.*, 111 Wash. 2d 609, 762 P.2d 1143 (1988), *Messerly v. Asamera Minerals (U.S.), Inc.*, 55 Wash. App. 811, 780 P.2d 1327 (1989), and *Swanson v. Liquid Air Corp.*, 55 Wash. App. 917, 781 P.2d 900 (1989) indicate that whether a promise has been made is a question of law for the Court, while the question of reliance is one for the jury. The latter cases are the better reasoned in that they more clearly distinguish the employer's act of making a promise from the employee's act of relying on that promise. See 1 A. CORBIN, 1 CORBIN ON CONTRACTS § 13 (Supp. 1990) (approving the methodology employed in *Stewart v. Chevron Chemical Co.* as consistent with the general rule that "construction" of a contract raises a question of law while "interpretation" of the language may involve a factual inquiry to determine the meaning of vague or ambiguous terms).

65. See *Lopatka, The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law of the 80's*, 40 BUS. LAWYER 1, 4 (November 1984). The idea that juries tend to favor employees in wrongful termination suits is not without some statistical support. For example, in 120 jury trials of wrongful termination suits

While no court has yet gone that far, some have allowed the jury to decide whether the employer has made a promise to its employees where the language of the handbook does not clearly manifest an intention to act or refrain from acting in a specified manner.⁶⁶

At least one court, *Leikvold v. Valley View Community Hosp.*,⁶⁷ has specifically held that the question of whether a statement contained in an employee handbook is a promise is one of law when the language employed is clear and unambiguous, but becomes one of fact to be resolved by the jury when the language is ambiguous.⁶⁸ While this approach has been recommended by some commentators, it is inconsistent with general principals of contract interpretation. As a general rule, any ambiguity in the language of a contract will be construed against the person who drafted the contract. Thus, if a handbook contains a statement that is ambiguous but is nonetheless capable of being construed as a promise by the employee, then it should be construed against the employer who drafted the handbook. If the statement is ambiguous but not capable of being reasonably construed as a promise to the employee, then no obligation arises. Either way, there is no need to have a jury "interpret" ambiguous language. In essence, the two step approach used in *Leikvold* begs the initial question of whether a promise of any kind has been made but then allows the jury to determine what was supposedly promised.

It has been suggested that Washington should adopt the *Leikvold* approach because jurors are better qualified to determine a layperson's understanding of handbook language than are judges who are educated in legal terminology.⁶⁹ Even if that assumption is true, it is irrelevant. Under general contract principles, a statement that is made outside the context of a bargained-for exchange becomes binding on the person mak-

in California between 1980 and 1986, 81 (67.5%) resulted in a verdict for the plaintiff. J. DERTOUZOS, E. HOLLAND, P. EBENER, *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (1988) pp. 19-26.

66. See, e.g., *Siekawitch v. Washington Beef Producers, Inc.*, 58 Wash. App. 454, 793 P.2d 994 (1990) (in which language in the employee handbook was susceptible to differing interpretations and the evidence conflicted as to which interpretation was intended; therefore, it was a question for the jury whether the employee justifiably relied on a promise of specific treatment in specific situations).

67. 141 Ariz. 544, 688 P.2d 785 (1986).

68. *Id.*

69. See Note, *The Personnel Manual Exception to Employment-At-Will: Is Job Security Merely an Illusion?*, 64 WASH. L. REV. 997, 1007 (1989).

ing the statement only if that person expects or reasonably should expect that persons hearing the statement will believe that a commitment is being made and will rely upon the statement in some manner.⁷⁰ Thus, the jury's or the employee's subjective understanding of a particular statement cannot, and should not, by itself, make the statement binding on the employer, a statement that may have been made without any reasonable expectation that the employee would think a promise was being made.

The correct approach is to allow the court to make the initial determination as to whether any statement made by the employer constitutes a promise expected to induce reliance.⁷¹ The handbook will usually be part of the evidence at trial, so there will be no factual dispute about what was actually stated. The court, having experience in applying the objective "reasonable person" standard in other contexts, is probably in a better position to make a proper determination as to whether a statement has sufficient manifestation of intent to justify an employee's understanding that a commitment has been made by the employer.

In addition, the employer will not be subject to varied interpretations of the same language by different juries. Under the *Leikvold* approach, a jury in one case could determine that a statement constituted a promise intended or expected to induce reliance, while a jury in another case could determine that the same statement made in the same or similar circumstances did not constitute a promise. The resulting uncertainty would severely limit the ability of employers to communicate in writing with their employees without risking liability. Conversely, a determination as a matter of law by an appellate court that a particular type of statement could or could not be reasonably construed as a promise of specific treatment in a specific situation would have precedential significance and would bring greater stability and predictability to employer-employee communication within the at will relationship.

IV. HANDBOOK DISCLAIMERS

Another issue that has caused considerable confusion

70. See, RESTATEMENT (SECOND) OF CONTRACTS § § 2 and 90 (1981).

71. See *Messerly v. Asamera Minerals (U.S.), Inc.*, 55 Wash. App. 811, 816, 780 P.2d 1327, 1330 (1989).

among the courts is the use of disclaimers by employers to avoid liability under *Thompson*. The court in *Thompson* specifically stated that a properly worded and conspicuously placed disclaimer could prevent statements in an employee handbook from resulting in any unintended modification of an employee's at will status.⁷² Apparently, the court felt that such a disclaimer would preclude an employee from justifiably relying on a statement contained in the handbook, even though the statement could be regarded as a promise of specific treatment in specific situations.

Language stating that the employee remains dischargeable at will despite other statements or representations by the employer may be included in a written contract as well. The Washington Supreme Court has held that parol evidence, including statements in an employee handbook, cannot be used to modify the parties' express agreement regarding the employee's at will status.⁷³ While the result may be the same in many cases, the distinction between a disclaimer contained in an employee manual and an express agreement that the employee will remain terminable at will is crucial to a determination of whether the employee's at will status has been modified. The legal requirements for modifying an express bargained-for contract are different from the legal requirements for establishing an implied contract based upon a unilateral promise. Unfortunately, the courts have sometimes failed to recognize the difference and, as a result, have given disclaimers greater effect than they deserve.

In *Hibbert v. Centennial Villas, Inc.*,⁷⁴ for example, the employee was given a handbook and an "optional grievance procedure" following a two-week orientation. Both the handbook and grievance procedure contained statements that employment remained terminable at will. The employee signed an acknowledgment that she had read and understood the employer's policies and would abide by them. She also signed statements that the employer's personnel policies were

72. *Thompson*, 102 Wash. 2d at 230-31, 685 P.2d at 1088.

73. *St. Yves v. Mid State Bank*, 111 Wash. 2d 374, 757 P.2d 1384 (1988). In *St. Yves*, the plaintiff had been employed as the president of a bank pursuant to a written contract. One part of the contract stated that the term of the contract would be two years. Another part of the contract stated that *St. Yves* could be terminated by the bank at any time for any reason. The court refused to consider the provisions of the personnel manual because it determined that the written contract was not ambiguous.

74. 56 Wash. App. 889, 786 P.2d 309 (1990).

not to be interpreted as a promise of employment and that the employer could unilaterally change or withdraw the policies at any time.⁷⁵ The employee brought an action for wrongful discharge, claiming that the employee handbook created an implied contract for just cause termination only and that she had been terminated without cause. The court of appeals upheld dismissal of the employee's claim, holding that the disclaimer language contained in the employee handbook and later statements signed by the employee precluded, as a matter of law, any claim of an implied contract.⁷⁶

The *Hibbert* court cited *St. Yves v. Mid State Bank*⁷⁷ as support for its ruling. The *St. Yves* case, however, involved a bargained-for contract between a bank and its president which provided that the employee was terminable at will. In *Hibbert*, on the other hand, the employee merely acknowledged statements that were unilateral expressions by the employer. The employee's signature was apparently a requirement of continued employment. Neither the language of the statements nor the circumstances under which they were signed indicates that the parties expressly agreed to any terms of employment.

Nevertheless, the court reasoned that *St. Yves* was controlling because "[t]o the extent the parties expressly agreed on anything, they agreed that Hibbert's employment was terminable at-will."⁷⁸ The court's reasoning in *Hibbert* is problematic because there was clearly no express "agreement" or "meeting of the minds" between employer and employee regarding the employee's at will status.⁷⁹ In addition, the employee apparently received no additional consideration for acknowledging the employer's unilateral statement. Thus, unlike *St. Yves*, no express contract was formed.

In *Hibbert*, the handbook upon which the employee claims to have relied did not contain an explicit disclaimer. Such was not the case, however, in *Messerly v. Asamera Minerals (U.S.), Inc.*,⁸⁰ where the court properly held that a disclaimer in an employee handbook that had been distributed several years after the employee was hired "preserved" the employee's at

75. *Id.* at 891, 786 P.2d at 310.

76. *Id.* at 892-93, 786 P.2d at 311.

77. 111 Wash. 2d 374, 757 P.2d 1384 (1988).

78. *Hibbert*, 56 Wash. App. at 892, 786 P.2d at 311.

79. *Id.* at 904-05, 786 P.2d at 318 (Ringold, J., dissenting).

80. 55 Wash. App. 811, 780 P.2d 1327 (1989).

will status.⁸¹ The court in *Messerly* did not find that the disclaimer in the handbook was "conspicuous." It did hold, however, that the plaintiff could not claim to have been unaware of the disclaimer because the disclaimer had been specifically explained to him when the handbook was distributed to the employees.⁸²

As illustrated by *Hibbert*, *St. Yves*, and *Messerly*, there is a significant difference between an express agreement that an employee is dischargeable at will and a disclaimer contained in an application, employee handbook or other document unilaterally issued by the employer. An express contract may only be modified when the parties manifest a mutual intent to be bound and provide new consideration.⁸³ Under *Thompson*, however, an employee's at will status can be modified without any manifest meeting of the minds and without any additional consideration flowing to the employer. A unilateral promise and justified reliance is all that is required. Thus, while disclaimer language in an employee manual or handbook may, under certain circumstances, prevent an employee from claiming justifiable reliance on an employer's unilateral statements, disclaimers should not be given the same effect as an express agreement that an employee is terminable at will. In some cases, it may be appropriate, despite a disclaimer, to allow the jury to determine whether the employee did in fact rely on the employer's promise where circumstances indicate that the employee's reliance may have been justified (for example, where the employer later makes specific promises in writing that are not accompanied by a disclaimer or which directly contradict previous disclaimer statements). In contrast, where the employee has expressly agreed to remain terminable at the will of the employer, the circumstances must show a mutual intent to change the terms of the contract.

Unfortunately, the Washington State Supreme Court has further confused this issue recently by remanding the case of *Swanson v. Liquid Air Corp.*,⁸⁴ for reconsideration in light of the *St. Yves* decision. In *Swanson*, the employee was issued a

81. *Id.* at 816-17, 780 P.2d at 1330-31.

82. *Id.*

83. *Rosellini v. Banduro*, 83 Wash. 2d 268, 273, 517 P.2d 955, 958 (1974).

84. 55 Wash. App. 917, 781 P.2d 900 (1989), *remanded*, 114 Wash. 2d 1008, 788 P.2d 531, *aff'd after remand sub nom.*, *Swanson v. LeDuc*, No. 115-40-9-II, 791 P.2d 257 (1990).

handbook containing a disclaimer.⁸⁵ Several years later, the employee received several additional statements of company policy which did not include any disclaimer language. The court of appeals held that the disclaimer in the handbook did not necessarily prevent the employee from justifiably relying on the later statements.⁸⁶ The Washington Supreme Court remanded the case for reconsideration in light of *St. Yves* without explanation.⁸⁷

While the supreme court did not indicate the reason for its remand order, the court apparently felt that the disclaimer in the handbook issued to the employee in *Swanson* had the same legal effect as the contract signed by the employee in *St. Yves* and that the court of appeals erred by allowing the question of the employee's reliance to be submitted to a jury. It is doubtful, however, that the court of appeals and the parties in *Swanson* simply overlooked the *St. Yves* decision. A more logical explanation is that the parties and the court recognized that *St. Yves* has no application in the absence of an express contract of employment. Indeed, the court of appeals confirmed this assessment in its Order on Reconsideration adhering to its original opinion.⁸⁸

In any event, there remains a direct conflict between *Hibbert* and *Swanson* as to whether an employer's unilateral statement that an employee is terminable at will necessarily prevents an employee from asserting an implied contract claim for wrongful discharge under *Thompson*. The supreme court's remand of *Swanson* seems to indicate that, for the present, the court thinks that such statements do or should have such preclusive effect.

Such a ruling would, as a practical matter, completely undermine the handbook exception to the at will rule as set forth in *Thompson*. Once the employer has included a general disclaimer in a handbook, the employer could thereafter make promises to its employees with impunity, because the employee could not claim justifiable reliance on even the most explicit promises. Even honest employers might unintentionally mislead employees by paying less attention to the kinds of statements included in handbooks and similar publications. Greater

85. *Id.* at 918, 781 P.2d at 901.

86. *Id.* at 922, 781 P.2d at 903.

87. *Swanson v. Liquid Air Corp.*, 114 Wash. 2d 1008; see *Hibbert v. Central Villas, Inc.*, 56 Wash. App. 889, 906, 786 P.2d 309, 319 (1990) (Ringold, J., dissenting).

88. *Swanson v. LeDuc*, No. 11540-9-II, 791 P.2d 257 (1990).

attention to the possible effects of such statements upon employees should be encouraged rather than discouraged.

V. BURDEN OF PROOF

Another question raised by the *Thompson* decision is the proper allocation of the burden of proof between employee and employer. With respect to the public policy exception to the at will rule, the court stated that once the employee had demonstrated that his discharge may have been motivated by reasons contrary to public policy, the burden would shift to the employer to show that the reasons for dismissal were other than that claimed by the employee.⁸⁹ However, the court in *Thompson* did not make clear whether the employer's burden at that point was to simply produce some evidence of a proper motive or to persuade the fact finder that such a motive was in fact the reason for the employee's termination.

The court also did not discuss the allocation of the burden of proof in the context of implied contract rights arising out of an employee handbook. Presumably, the court expected that an employee would be required to prove each element of his claim in the same manner as any other party asserting a breach of contract. That is, the employee would have to prove that a specific promise of specific treatment was made by the employer, that the employee relied on that promise by staying on the job and not seeking other employment, and that the employee was terminated in a manner contrary to the employer's promise.⁹⁰

In *Baldwin v. Sisters of Providence*,⁹¹ the Washington Supreme Court set out the proper allocation of the burden of proof under the implied contract exception of *Thompson*. At the same time, the court clarified the standard for determining whether the employer had complied with any promises to the employee of specific treatment in specific situations. In *Baldwin*, the employee manual at issue contained a provision for "just cause" dismissal and set forth a four-step grievance procedure for resolving employee complaints.⁹² The trial court

89. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232-33, 685 P.2d 1081, 1089 (1984).

90. *Id.* at 230, 685 P.2d at 1088.

91. 112 Wash. 2d 127, 769 P.2d 298 (1989).

92. *Id.* at 129, 769 P.2d at 299.

instructed the jury that the employer had the burden of proving that the employee had been dismissed for just cause.

The supreme court reversed, holding that the trial court's instruction was in error. The court ruled that once the employee had made out a prima facie case of discrimination, the employer was required only to articulate some legitimate reason for the employee's dismissal.⁹³ The ultimate burden of persuasion, however, remained with the employee.⁹⁴ The court reasoned that defendants in an action under *Thompson* should not face a greater burden than they would face in statutory actions for discrimination.⁹⁵ The court also reasoned that requiring the employee to prove a breach of the employer's implied promise would maintain a proper balance between the employer's interest in running his business and the employee's interest in continued employment.⁹⁶

The trial court in *Baldwin* had also instructed the jury that "just cause" meant that the employer had "a good, substantial and legitimate business reason" for discharging the employee.⁹⁷ The supreme court found this instruction to be erroneous as well and held that, where an employer has contractually bound himself to discharge an employee for just cause only, the existence of just cause is a matter to be determined by the employer, in the exercise of good faith.⁹⁸ Thus, the jury should have been instructed that it could find in favor of the plaintiff only if the decision to discharge the employee was not supported by substantial evidence, the employer did not reasonably believe the evidence to be true, or the employer acted arbitrarily, capriciously, or for an illegal reason.⁹⁹ The court reasoned that allowing the employer to make a good faith determination as to the existence of just cause strikes a proper balance between the desire to protect employees from arbitrary or improperly motivated termination decisions and the desire not to unnecessarily infringe upon the employer's prerogative of running his business as he sees fit.¹⁰⁰

93. *Id.* at 135-36, 769 P.2d at 302-03.

94. *Id.*

95. *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *Grimwood v. University of Puget Sound*, 110 Wash. 2d 355, 753 P.2d 517 (1988)).

96. *Baldwin*, 112 Wash. at 135-36, 769 P.2d at 302-03.

97. *Id.* at 136, 769 P.2d at 303.

98. *Id.* at 138-39, 769 P.2d at 304.

99. *Id.* at 139, 769 P.2d at 304.

100. *Id.* (citing *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982)).

While some may criticize *Baldwin* on the ground that it fails to accord the employer's promise any real value, the *Baldwin* court's reasoning is analytically sound in light of *Thompson*. If the employer has obligated himself to provide his employees with "specific treatment in specific situations" with regard to dismissals, then the employee can reasonably expect only that the employer will do what he has promised. The language in the handbook will often establish both grounds for dismissal and procedures for effecting a termination. The employer promises that he will take certain steps precipitating a discharge only if it is determined that specific grounds are found to exist. Where the employer follows those steps and makes a good faith determination that results in a discharge, he has kept his promise to the employee, even if that determination later turns out to be incorrect.

A rule allowing juries to second guess the employer's decision as to whether just cause for termination exists would not only hold the employer to a standard of perfection, but would also severely restrict the employer's ability to terminate employees for legitimate reasons affecting the employer's business. In practice, such a rule would allow the employee a second chance to challenge his termination before a fact finder who is likely to be more sympathetic and less familiar with the actual conditions and practices of the workplace. As a result, employers would feel secure in terminating an employee only when the evidence in support of a just cause finding is so overwhelming that even the most sympathetic jury would be likely to uphold the employer's action. In the end, employers may decide that the benefits of such a process are outweighed by the risks involved.

On the other hand, protecting the employer's good faith determination of adequate grounds for discharge will encourage employers to conduct a thorough review of all employee terminations since a failure to do so might be seen as evidence of bad faith or improper motive. The increased attention given to termination proceedings should benefit both the employer and its employees because both suffer when a productive employee is terminated for reasons not connected to the employee's ability or performance.

VI. LITIGATION AFTER *THOMPSON*

The *Thompson* decision had the potential to foster wide-

spread litigation over statements in employee handbooks and allow terminated at will employees to recover substantial awards. Nevertheless, in Washington, claims for wrongful discharge under the employee handbook theory have been relatively rare compared to some jurisdictions and have met with only limited success.¹⁰¹ Under *Thompson*, a plaintiff normally will not have difficulty showing that he stayed on the job and did not seek other employment. A plaintiff can make such a showing by simply testifying that he or she was satisfied with the conditions of his or her employment, including the employer's termination policies. The plaintiff may find it difficult, however, to show specific knowledge of the particular handbook provision relied upon¹⁰² or to convince the court that the statements therein constituted a legal promise.¹⁰³ In addition, Washington appellate courts, for the most part, have not looked favorably upon wrongful discharge claims,¹⁰⁴ and have limited the reach of the *Thompson* holding.¹⁰⁵ This tendency

101. See, e.g., *Stewart v. Chevron Chemical Co.*, 111 Wash. 2d 609, 762 P.2d 1142 (1988); *St. Yves v. Mid State Bank*, 111 Wash. 2d 374, 757 P.2d 1384 (1988); *Grimwood v. University of Puget Sound, Inc.*, 110 Wash. 2d 355, 753 P.2d 517 (1988).

102. See *Stewart*, 111 Wash. 2d at 614-15, 762 P.2d at 1146; *Grimwood*, 110 Wash. 2d at 366-67, 753 P.2d at 522-23.

103. See, e.g., *Slaughter v. County Fire Protection Dist. No. 20*, 50 Wash. App. 733, 750 P.2d 656 (1988); *Armstrong v. The Richland Clinic, Inc., P.S.*, 42 Wash. App. 181, 709 P.2d 1237 (1985).

104. See *St. Yves*, 111 Wash. 2d at 379, 757 P.2d at 1387.

105. See, e.g., *McGuire v. State*, 58 Wash. App. 195, 791 P.2d 929 (1990) in which the court held that state administrative agencies lack the authority under state law to modify an employee's at will status. Thus, any promise contained in an employee handbook issued by a state agency is void, even if the promise would otherwise be binding under *Thompson*.

The experience of wrongful discharge claimants in Washington is not unlike that in many other states. See Note, *At-Will Employment in Michigan Courts: Perception and Reality*, 63 U. DET. L. REV. 751 (1986); Note, *The Case for Keeping Employment-At-Will: An Analysis of Ohio's Position and the Use of Disclaimers to Avoid Wrongful Discharge Litigation*, 16 CAP. U. L. REV. 723 (1987). See also, *Nixon v. Celotex Corp.*, 693 F. Supp. 547 (W.D. Mich. 1988) (implied contract doctrine of *Toussaint* does not apply to reduction in force layoff); *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. S. Ct. 1988) (handbook containing general statements of self-imposed policies held insufficient to modify employee's at will status); *Stratton v. Chevrolet Motor Div., General Motors Corp.*, 229 Neb. 771, 428 N.W.2d 910 (1988) (employer policies in handbook disseminated to employees did not modify contract of employment); *Towns v. Emery Air Freight, No. C-3-86-573* (S.D. Ohio 1988) (1988 WL 156258) (3 IER 911).

In one often cited case from California, retrial of plaintiff's wrongful discharge claim for breach of implied contract and covenant of good faith resulted in a jury verdict for the employer. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), *trial after remand*, 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (1988).

In Michigan, cases following *Toussaint* have often construed the implied contract

to limit the effect of *Thompson* may be attributable to a combination of two things: (1) a judicial reluctance to interfere with the prerogatives of the employer when there is no clear showing that the employer was motivated by some immoral or reprehensible purpose, and (2) scepticism regarding the motives of the employee in bringing an action against his or her former employer.

On the other hand, plaintiffs' lack of success under *Thompson* type claims in Washington may simply reflect an absence of widespread abuse by employers of the power to terminate their at will employees. In almost every Washington case after *Thompson*, the employer has come forth with a plausible, business-related explanation for the plaintiff's discharge.¹⁰⁶ In light of the ease with which employers are

exception to the at will rule narrowly. In *Valentine v. General American Credit*, 420 Mich. 256, 362 N.W.2d 628 (1984), the court explained the *Toussaint* decision by stating that it "did not recognize employment as a fundamental right or create a new 'special right.' The only right held in *Toussaint* to be enforceable was the right that arose out of the promise not to terminate except for cause." *Id.* at 258, 362 N.W.2d at 629. In *Lendl v. Quick Pik Food Stores, Inc.*, the Michigan Court of Appeals interpreted *Toussaint* to allow modification of an employment contract during the course of the employment relationship to effectively nullify an earlier representation to the employee that her employment would continue as long as her performance was satisfactory. 133 Mich. App. 583, 586-87, 349 N.W.2d 529 (1984).

This is not to say, however, that plaintiffs have never successfully asserted such claims. In an Ohio case, *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 483 N.W.2d 150 (1985) a jury awarded a discharged employee \$57,750.00 after the Ohio Supreme Court reversed the trial court's summary judgment in favor of the employer. *Id.* In a recent Sixth Circuit case, *Diggs v. Pepsi Cola*, 861 F.2d 914 (6th Cir. 1988) the appeals court applied Michigan law to uphold the bulk of a \$217,774.00 judgment in favor of the employee. The *Diggs* court noted that *Toussaint* had generally been given a narrow construction, but it refused to overrule the district court's finding that a promise of continued employment in the employer's performance appraisal system endured so long as the employee's work was "satisfactory," created an implied contractual right to be terminated only for just cause. *Id.*

At will employee plaintiffs have obtained similar awards in a number of jurisdictions, including some in which the courts have embraced broader exceptions to the at will rule. See *Pratt v. Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988) (upholding \$62,000.00 jury award for economic damages for wrongful discharge claim based upon employee handbook and an additional \$60,000.00 in non-economic damages); *Ritchie v. Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 413 N.W. 2d 796 (upholding jury verdict for plaintiff but remanding for reconsideration of defendant's request for remittitur of \$560,000.00 future damages award); *Stark v. Circle K Corp.*, 230 Mont. 468, 751 P.2d 162 (upholding \$200,000.00 award for breach of contract of good faith and \$70,000.00 punitive damages); *Mers v. Dispatch Printing Co.*, 39 Ohio App. 3d 99, 529 N.E.2d 958 (1988) (upholding award of \$53,094.00 for implied contract claim based upon employee handbook and a like amount for claim based upon theory of promissory estoppel).

106. See, e.g., *Swanson v. Liquid Air Corporation*, 55 Wash. App. 917, 920, 781 P.2d at 900, 902, remanded, 114 Wash. 2d 1008, 788 P.2d 531, *aff'd after remand sub nom.*

apparently able to meet this burden of articulating a legitimate reason for discharging an employee, a cynical view of *Thompson* might be that it now stands for nothing more than that an employer cannot discharge an at will employee unless the employer can find or manufacture some legitimate reason for its action. Such an assessment of *Thompson* would not be entirely accurate, however, because the mere recital of a legitimate business reason for terminating an employee will not insulate the employer from liability.¹⁰⁷ Moreover, two recent Washington cases appear to significantly broaden the scope of the employee handbook exception as set forth in *Thompson*.

First, *Brady v. Daily World*,¹⁰⁸ involved an employee who the employer fired for alleged intoxication on the job. The employee claimed reliance upon a provision in a personnel handbook which stated that a decision to terminate an employee would be made "only after careful consideration of all known facts."¹⁰⁹ After deciding that *Thompson* could be applied retroactively to the plaintiff in *Brady*, whose appeal from summary judgment had been stayed pending the outcome of *Thompson*, the Washington Supreme Court determined that the plaintiff had made a showing sufficient to avoid summary judgment. The court held that whether any of the policies set forth in the personnel manual amounted to promises of specific treatment in specific situations was a question of fact which remained to be "proven."¹¹⁰ After reviewing the allegations on both sides regarding Brady's conduct on and off the job, the court easily concluded that a number of factual issues existed as to whether the plaintiff had actually been intoxicated on the job and whether that was the true reason for his termination.¹¹¹

The problem with the court's analysis in *Brady* is that the

Swanson v. LeDuc, No. 11540-9-II, 791 P.2d 257 (1990) (truck driver fired for fighting on company premises); Hibbert v. Centennial Villas, Inc., 56 Wash. App. 889, 891-92, 786 P.2d at 309, 310 (nurse discharged for "carelessness and disregard for patient safety"); Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 357, 753 P.2d 517, 517-18 (food services director discharged for noncooperative behavior and failure to complete certain mandatory tasks).

107. Articulating a legitimate reason for discharging the employee merely shifts the burden of proof as to the actual reason back to the employee. See *supra* notes 89-100 and accompanying text.

108. *Brady v. Daily World*, 105 Wash. 2d 770, 718 P.2d 785 (1986).

109. *Id.* at 772, 718 P.2d at 786. This handbook involved in the *Brady* case also listed a number of grounds for dismissal, including intoxication or drug abuse.

110. *Id.* at 775, 718 P.2d at 788.

111. *Id.* at 776, 718 P.2d at 788.

truth of the employer's reasons for discharging the employee is only relevant where the employer has somehow limited his right to terminate his at will employees. Absent such a limitation, the employer would be free to discharge the employee for any reason or no reason at all. Whether the employer has limited that right by making promises of specific treatment in specific situations should normally be a question of law unless there is a dispute about what statements were made or the context in which they were made.¹¹²

Nevertheless, *Brady* remains the latest word from the Washington Supreme Court on *Thompson* and was recently followed by Division Three of the Court of Appeals in *Adler v. Ryder Truck Rental, Inc.*¹¹³ In *Adler*, the court of appeals held that, although statements made in an employee handbook did not create any implied contract rights in the employee with respect to termination, other evidence was sufficient to make out a prima facie case of wrongful discharge, including evidence of the employee's subjective understanding that termination would be for cause.¹¹⁴ In spite of the apparent conflicts between *Adler* and the supreme court's decisions in *Thompson* and *Roberts v. ARCO*,¹¹⁵ in which the court held that the plaintiff's subjective understanding that he would be terminated for just cause only could not support a wrongful discharge claim, the supreme court denied review of *Adler*.¹¹⁶

The *Adler* decision is especially troubling because it seems to expand the scope of the implied contract exception for statements made in employee handbooks beyond the context of the handbook itself, or any other written statements distributed to the employee. The court in *Adler* expressly found that the statements made in the handbook did not constitute specific promises sufficient to bind the employer, yet determined that other circumstances, unrelated to the handbook or the employee's understanding of its terms, raised a question of fact as to whether the employee could be discharged for cause only. Indeed, the court seemed to take as a given that the employee had already established his right to continued employment

112. *Messery v. Asamera Minerals (U.S.), Inc.*, 55 Wash. App. 811, 816, 780 P.2d 1327, 1330 (1960). See also *supra* notes 63-64 and accompanying text.

113. 53 Wash. App. 33, 765 P.2d 910 (1988), *review denied*, 112 Wash. 2d 1013 (1989).

114. *Id.* at 37-38, 765 P.2d at 912.

115. 88 Wash. 2d 887, 568 P.2d 764 (1977).

116. 112 Wash. 2d 1013 (1989).

absent some cause for dismissal.¹¹⁷ One must wonder then, whether the existence of a handbook or other writing is any longer a prerequisite to an implied contract claim under *Thompson*, or whether a simple allegation by the employee that he understood that termination would be for cause only, coupled with some evidence to support that understanding, will now suffice.

VII. AVOIDING LIABILITY UNDER *THOMPSON*

The most effective way for an employer to avoid any possibility of liability under *Thompson's* employee handbook exception is simply not to publish any type of handbook manual for distribution to employees and/or removing those already in circulation. Because many employers find distributing written guidelines and statements of policy to their employees to be valuable, such measures are too extreme. In addition, the employee gains nothing if his employer takes such action. Therefore, many employers will continue to publish and distribute employee handbooks so long as the perceived benefits are not outweighed by the perceived risks.

The simplest and most effective way for an employer to reduce the risk that statements in employee handbooks or manuals will be construed as part of the employment contract is to include in the handbook a disclaimer that no statements therein should be regarded as binding upon the employer. The handbook might also contain an explicit statement reaffirming the at will status of the employee. The employer could also include similar language in employment applications, assignment of patent rights, or any other documents signed by the employee relating to his employment status.¹¹⁸

Although the use of such disclaimers has been specifically approved in *Thompson*,¹¹⁹ disclaimers alone may not always be effective.¹²⁰ Thus, the employer should remove any vague or

117. See *Adler*, 53 Wash. App. at 38, 765 P.2d at 912-13.

118. See M. Whitt and S. Goldman, *Avoiding Liability in Employee Handbooks*, 14 EMPL. REL. L.J. 5 (1988).

119. *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984).

120. See, e.g., *Morris v. Coleman Co.*, 241 Kan. 501, 738 P.2d 841 (1987) (holding that because a disclaimer contained in the company's handbook conflicted with other language in the handbook and oral statements made to the employee, an issue of fact was created as to whether the handbook was part of the contract of employment); see also *Aiello v. United Airlines, Inc.*, 818 F.2d 1196 (5th Cir. 1987) (disclaimers

potentially misleading language which could inadvertently affect the validity of a disclaimer from its employee handbooks and any other documents distributed to its employees.¹²¹ Supervisory personnel should be regularly instructed not to make any verbal representations that could be viewed as modifying the written terms of a handbook or other written statement, and the handbook itself should contain a statement that no representative of the company other than those persons or bodies authorized to modify the company's employment policies may enter into any agreement contrary to the provisions of the handbook.

In addition to the above precautions, the employer can further limit his potential exposure by thoroughly documenting the employer's relationship with each employee.¹²² Documenting the employee's initial hiring, performance history and termination can serve several functions. First, in the absence of documentation, any questions regarding the employee's performance, the communication of any deficiencies to the employee, or the real reason for the employee's termination will be a matter of the employer's word against the employee's. Thus, a question of fact arises which may have to be resolved by a jury. Second, good documentation and communication with the employee may prevent the discharged employee from feeling compelled or, at least, justified in bringing an action against the employer in the first place.

To be effective, documentation should be both accurate and consistent. If it is not, it could have unintended consequences. For example, if an employee is given good or adequate performance ratings over a period of time when, his performance was not in fact, satisfactory, the employer may find it difficult to convince a jury that deficient performance was the real reason for the employee's termination. Also, when an employee is not given any specific explanation for his discharge, both the employee and a potential jury are likely to suspect an improper reason or motive. Thus, even though doing so may be unpleasant, the employer should always be prepared to inform the discharged employee of the precise rea-

attempting to disavow promises upon which employee could be expected to rely may be ineffective).

121. See Coome, *Employee Handbooks: Asset or Liability*, 12 EMPL. REL. L.J. 4, 14 (1987).

122. See Keyes, *Document Against Employee Suits*, 34 PRACT. LAWYER No.4, 21 (1988).

sons for the dismissal and to support those reasons with adequate documentation. Following such recommendations will by no means guarantee that an employer will never be sued for wrongful discharge, but may decrease the likelihood that a dispute will end up in court and may also increase the employer's chances of successfully defending any such suit.¹²³

Implementing some or all of the steps outlined above represents an added cost to the employer and may seem unnecessarily cumbersome. However, this added cost is not without some benefit. Many of the steps set forth above are not only useful to avoid lawsuits, but also help to maintain good employer-employee relations. The employer will benefit in terms of morale, productivity, and stability in the work force from increased documentation and communication of the employee termination process as well as other aspects of the employee's work history, such as job performance evaluations.

The employer, however, is not the only one who benefits. Greater attention to employee performance evaluations and frank communication of the results to the employee allow the employee to take corrective measures where appropriate. Thorough and well documented procedures for termination give an employee the opportunity to discover errors in the decision making process, such as reliance on false or inaccurate information, which can then be pointed out to the employer. Also, clear and unequivocal statements in an employee handbook of the employer's lack of intent to modify the employee's at will status will prevent employees from believing subjectively that they have job security when they do not. The employee can then make more informed decisions about staying on the job or seeking other employment.

VIII. CONCLUSION

Five years after it was published, *Thompson* remains the most significant statement to date by the Washington State Supreme Court on the subject of at will employee rights. By adopting two previously unrecognized exceptions to the at will rule, the Court clearly signaled a departure from the rigid application of the rule that had characterized previous decisions. Subsequent decisions have shown that *Thompson* was not a first step toward complete abandonment of the at will

123. *Id.*

doctrine. On the contrary, the supreme court and lower courts have tended to limit the reach of *Thompson* for the most part. At other times, the Washington Supreme Court and several court of appeals decisions have given *Thompson* a broader application than the *Thompson* opinion itself would seem to justify. This has created a certain amount of confusion, particularly in the area of implied contract rights arising from employee handbooks.

In any event, the balance of rights between employers and at will employees does not appear to have been radically altered. As noted in *Thompson* itself, there already exists significant state and federal statutory restrictions on the right of employers to discharge at will employees, particularly minority and elderly employees, who may be most at risk of unfair termination.

Thompson provides at will employees with an additional mechanism for seeking redress in the courts where the employer's conduct in terminating the employee has been particularly egregious or otherwise manifestly unfair. So long as *Thompson* is interpreted and applied with reference to established principals of contract law, employers in Washington should be able to make employee termination decisions based upon legitimate business reasons without undue fear of litigation or liability.

Nevertheless, the threat of litigation under *Thompson* will continue to cause employers to deal more cautiously with their at will employees and to adopt safeguards against litigation. Because many of those safeguards benefit both the employer and the employee, the net effect of *Thompson* on the at will employment relationship can be greater cooperation and communication between employers and employees, rather than greater division.

On the other hand, several recent cases indicate a possible broadening of the scope of *Thompson's* implied contract theory of liability. Any significant expansion of *Thompson* in that regard could discourage open communication between employers and employees and undo whatever benefit *Thompson* has achieved. That would be an unfortunate result. Some individual plaintiffs might benefit from an expansion of implied contract liability under *Thompson*, but at will employees as a whole would suffer from the resulting decreased communication between employee and employer.

Someday, and perhaps soon, the Washington Supreme Court may be compelled to resolve the questions raised by *Thompson* and its progeny, particularly questions pertaining to the effect of the employee handbooks. In doing so, the court should be guided not only by considerations of fairness to discharged employees, but also by the effect that its decisions are likely to have on the at will employment relationship in general. As noted in *Thompson*, it is the employer who defines and retains independent control over the working relationship.¹²⁴ Thus, whether a rule of liability for discharge of at will employees will benefit those employees as a whole depends to a great extent on how employers are likely to react to it.

124. *Thompson*, 102 Wash. 2d at 229, 685 P.2d at 1087.