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I. INTRODUCTION

For over a century, employment at-will has been the law in almost all American jurisdictions.[1] As a result, employers can fire their employees, and employees can quit, with or without reason.[2] In addition, employers have the authority under the at-will rule to regulate all terms and conditions of employment.[3] During the past two decades a series of judicial exceptions to the at-will rule that prohibit termination of an employee for a variety of reasons have eroded the at-will doctrine.[4] These exceptions fall into two categories. First, an employer may not terminate an employee for reasons that violate public policy.[5] Second, an employer may not terminate an employee who received an explicit or implied promise that termination would only occur for good cause.[6]

Until recently, judicial exceptions to the at-will doctrine were limited to actions for wrongful discharge. The terms and conditions of employment, such as demotion,[7] reprimand, fringe benefits, promotion, or any other employer action short of termination, remained subject to the employer's complete discretion under the at-will

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1. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 Wash. L. Rev. 719, 719-27 (1991) (describing the history of the employment at-will doctrine).

2. Id. at 720.

3. See id. at 720-21 (noting that, traditionally, an employment agreement fixing only the method of compensation did not regulate the duration of employment).

4. Statutory exceptions have also eroded the at-will doctrine. These exceptions include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1994); the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (1994 & Supp.); and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq. (1994 & Supp.). These statutory exceptions, however, are not within the scope of this Note.

5. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 322 (1981) (stating that an employee may not be discharged when the dismissal "violates fundamental principles of public policy").

6. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 384-88 (1988) (stating that an agreement that termination would be based only on good cause creates an exception to the general rule of employment at-will).

7. "Terms and conditions of employment" refers to the phase of the employment relationship between hiring and termination. Federal statutory laws do not permit an employer "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual." 42 U.S.C. § 2000e-2(a) (emphasis added). This provision includes terms and conditions of employment, such as a failure to promote to partner. *Hishon v. King & Spalding*, 467 U.S. 69, 74-75 (1984).

doctrine. In *Scott v. Pacific Gas and Electric Company*,[8] however, the California Supreme Court recognized two employees' wrongful demotion claim. This recognition of wrongful demotion indicates a willingness by one of the country's leading employment jurisdictions to expand the implied contract exception beyond wrongful discharge. Moreover, since demotion is just one aspect of the terms and conditions of employment, a recognition of wrongful demotion indicates that the implied contract exception is applicable to all the terms and conditions of employment. The implied contract may now govern all phases of the employment relationship. This approach is a radical expansion of settled law and has the potential to reshape American employment law by relegating the at-will doctrine to those few and unimportant portions of unemployment law not subject to an implied contract.

In Part II, this Note will examine the impact of the *Scott* decision on the employment at-will doctrine by providing a brief background of the events leading to the *Scott* decision, an overview of the *Scott* decision and its reasoning, and the position of jurisdictions other than California. This Note will then demonstrate, in Part III, that recognition of wrongful demotion creates a cause of action encompassing almost all terms and conditions of employment. Wrongful demotion will cover almost all terms and conditions of employment because wrongful demotion has no intrinsic doctrinal limitations and extrinsic limitations prove to be inadequate or unsupported by policy. Part IV will consider the policies underlying wrongful demotion and analyze possible employer responses to its recognition. Finally, Part V will conclude that recognizing wrongful demotion reduces an employer's at-will discretion to the point at which the at-will doctrine is completely circumscribed by an implied contract straitjacket that relegates the at-will rule to regulation of the most minor terms and conditions of employment.

8. 11 Cal. 4th 454, 904 P.2d 834, 845-46 (1995).

II. THE ORIGINS OF WRONGFUL DEMOTION

A. Employment At-Will

Employment at-will is generally recognized as the child of Horace Wood, a commentator on American law in the late nineteenth century.[9] In 1877, Wood wrote that "a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out to be a yearly hiring, the burden is upon him to establish it by proof."[10] Wood cited four cases in support of this proposition, but none of the cases truly supported the at-will rule.[11] A variety of other commentators and courts, however, eventually adopted the doctrine,[12] and by the early twentieth century, the Supreme Court provided constitutional protection for the rule.[13]

In 1959, the first crack appeared in the at-will doctrine when California recognized a public policy exception in *Peterman v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 396*.[14] Over a decade later, other courts began to follow California's lead in recognizing exceptions to the at-will rule,[15] and by the mid-1980s, the at-will doctrine had suffered

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9. Peck, 66 Wash. L. Rev. at 722 (cited in note 1) (noting that Wood's definitive treatise, which set forth the at-will rule, has been criticized by scholars, in part because the cases used by Wood to develop the at-will rule did not support this proposition).

10. Horace G. Wood, *A Treatise on the Law of Master & Servant* § 134 at 272 (John D. Parsons, Jr., 1877).

11. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880, 886-87 (1980) (analyzing the four major cases cited by Wood in his treatise and concluding that they do not stand for an employment at-will rule). See Alfred W. Blumrosen, *Employer Discipline: U.S. Report*, 18 Rutgers L. Rev. 428, 432-33 (1964) (discussing the judicial shift away from Wood's view as a result of changed circumstances and the policy decision to free capital for the expansion of industry).

12. Peck, 66 Wash. L. Rev. at 722-23 (cited in note 1).

13. See *Coppage v. Kansas*, 236 U.S. 1, 10-13 (1915) (holding that a state government could not, consistent with due process, prohibit an employer from only hiring employees who agree not to join a union), overruled in part by *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 177 (1941); *Adair v. United States*, 208 U.S. 161, 174-75 (1908) (concluding that the federal government could not, consistent with due process, compel an employer to employ any person against the will of the employer), overruled in part by *Phelps Dodge*, 313 U.S. at 177. See also Peter S. Partee, Note, *Reversing the Presumption of Employment At Will*, 44 Vand. L. Rev. 689, 689 (1991) (noting the prominence of the at-will doctrine throughout most of the twentieth century).

14. 174 Cal. App. 2d 184, 344 P.2d 25, 27 (1959).

15. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549, 551-52 (1974) (recognizing a public policy exception to the at-will doctrine); *Toussaint*, 292 N.W.2d at 891-92 (recognizing an implied contract exception to the at-will doctrine).

substantial erosion.[16] For example, in a state recognizing a public policy exception to the at-will rule, an employer may not terminate an employee for refusing to perform an illegal act, such as indecent exposure.[17] Other common public policy exceptions prohibit termination for exercising a statutory right,[18] performing a statutory obligation,[19] or reporting an employer's statutory violation.[20]

In addition to the generally recognized public policy exception, most jurisdictions also prohibit termination without cause when the employer has agreed to terminate employees only for good cause.[21] While good cause agreements may be express or implied, most are implied from the employer's oral assurances, past practices, and employment policies.[22] An ever-widening source for implied contracts is employee handbooks,[23] which typically outline grounds for discipline and discharge, describe procedures for determining if discharge or

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16. See Partee, 44 Vand. L. Rev. at 690 (cited in note 13) (discussing state judicial exceptions to the at-will doctrine). For articles criticizing the at-will doctrine, see Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1410-13 (1967) (discussing the inadequacy of existing limits upon the rights of employers to discharge their employees); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Ohio St. L. J. 1, 4-8 (1979) (outlining an employee's need for further job protection); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 482-91 (1976) (discussing employees' need to be free from unjust or oppressive discipline by employers). For articles supporting the at-will rule, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947, 950-79 (1984) (stating that parties should be free to adopt employment at-will if they desire and that employment at-will should be used to "fill in the gaps" of employment contracts); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire the Wrongful Discharge Law*, 74 Tex. L. Rev. 1901, 1905-33 (1996) (rebutting common criticisms of the employment at-will doctrine).

17. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1035-36 (1985).

18. See *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425, 428 (1973) (concluding that retaliatory discharge in response to the filing of a workers' compensation claim is wrongful); *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 589-94 (Minn. Ct. App. 1986) (concluding that the discharge of an employee for refusing to violate a provision of the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392, 392 (1960), codified as amended at 42 U.S.C. §§ 7401 et seq. (1994), was wrongful).

19. See *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512, 515-16 (1975) (holding that an employee cannot be discharged for performing jury duty).

20. See *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 386-88 (1980) (discussing the discharge of an employee who attempted to ensure that his employer complied with Connecticut food and drug laws).

21. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627-30 (Minn. 1983) (concluding that employment contracts with an indefinite duration do not preclude employers from agreeing to be bound by additional job security provisions contained in employee handbooks).

22. See notes 44-55 and accompanying text (discussing courts that have implied such agreements).

23. See note 105 and accompanying text (citing cases examining the effect of employee handbooks).

discipline is warranted, and outline other policy statements regarding the terms and conditions of the employment relationship. An implied contract arising from an employee handbook and the implied contract exception to the at-will doctrine provided the foundation for California's decision in *Scott v. Pacific Gas and Electric Company*.[24]

B. California's Recognition of Wrongful Demotion

The plaintiffs in *Scott*, C. Byron Scott and Al Johnson, were two employees of Pacific Gas and Electric Company ("PG&E").[25] Scott and Johnson were senior managers at PG&E and had been employed for twenty-four and twenty years respectively.[26] The two men also operated an outside consulting firm called S&J Engineering Corporation.[27] PG&E was not only aware of the outside business but had, in fact, encouraged its employees to operate such businesses.[28] Scott and Johnson contended that their intervention into an investigation by PG&E's internal auditing department earned them the enmity of the auditing personnel and led to an investigation of their outside business.[29] Following the investigation, PG&E suspended Scott and Johnson because of a conflict of interest between S&J Engineering and PG&E.[30]

PG&E provided Scott and Johnson with a chance to respond to the allegations against them.[31] Although their response refuted PG&E's allegations, PG&E demoted Scott and Johnson to positions they had held fourteen and sixteen years earlier, relieved them of all supervisory duties, and cut their salaries and benefits by twenty-five percent.[32] Following these disciplinary actions, Scott and Johnson sued, alleging that PG&E had breached an implied contract outlined in the company's personnel policies manual.[33] The manual included a system of "positive discipline" that imposed a series of escalating penalties in response to employee misbehavior.[34] Initial penalties

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24. 904 P.2d at 845-46.
25. Id. at 835.
26. Id. at 835-36.
27. Id. at 836.
28. *Scott v. Pacific Gas and Electric Co.*, 36 Cal. App. 4th 1500, 1503-04 (1994), reversed by *Scott*, 904 P.2d at 834.
29. *Scott*, 904 P.2d at 836.
30. Id.
31. Id. at 836-37.
32. Id. at 837.
33. Id. Additionally, Scott and Johnson received a favorable jury verdict in the trial court on their claim of a breach of the covenant of good faith and fair dealing. See id. at 838 n.2.
34. Id. at 837.

included counseling and guidance. These measures were followed by several intermediate steps and culminated in termination of employees who could not abide by PG&E's rules.[35] According to the manual, demotion was an intermediate step "particularly appropriate when the employee shows an 'ability deficiency.' "[36] PG&E presented no evidence that it used the positive discipline system before demoting Scott and Johnson, while Scott and Johnson presented evidence that they were innocent of the allegations PG&E had leveled against them.[37] Because the jury found an implied contractual agreement to demote only for good cause, and no such cause existed, the court awarded Scott $700,000 and Johnson $625,000 in past and future economic damages, as well as $75,000 each for emotional distress.[38]

The California Court of Appeals reversed the lower court, finding that an implied contract term for an action other than termination was "too vague and uncertain to be enforceable."[39] The California Supreme Court, however, rejected the appellate court's argument that the implied contract was too vague[40] and held that no rational reason existed to preclude an employer's policy of only demoting for good cause from becoming an implied contract term.[41] The court reasoned that an implied agreement not to demote without cause is no more vague than commonly enforced agreements not to terminate without cause.[42] Further, PG&E's system of positive discipline provided definite terms on which to base an enforceable contract, even if the rest of the handbook was too vague to form a contract.[43] The California Supreme Court's recognition of wrongful demotion as a cause of action based on an implied contract made it the first state

35. Id.
36. Id.
37. Id. at 837-38.
38. Id. at 838. Why the jury awarded emotional damages is unclear. Perhaps they were provided for PG&E's violation of the California Public Utilities Code since the explanation of the statutory violation is in a footnote attached to a sentence discussing the emotional damages. Id. at 838 n.2 (citing Cal. Pub. Util. Code § 453(a) (West 1975 & Supp. 1994)). In addition, this Public Utilities Code section prohibits discriminatory activity, which is typically more likely to warrant damages for emotional distress. See *Scott*, 36 Cal. App. 4th at 1510-11 (concluding that the employees could not maintain an action for violation of Cal. Pub. Util. Code § 453(a)).
39. *Scott*, 36 Cal. App. 4th at 1506.
40. *Scott*, 904 P.2d at 841.
41. Id. at 839.
42. Id. at 841.
43. Id.

supreme court to extend an exception to the at-will doctrine beyond termination.[44]

C. *Wrongful Demotion in Jurisdictions Outside California*

Although California was the first jurisdiction to recognize wrongful demotion based on an implied contract, several other jurisdictions have displayed a willingness to consider wrongful demotion, under either the implied contract or public policy exceptions to the at-will doctrine.[45] Some jurisdictions considering wrongful demotion rejected it outright.[46] Michigan wrestled extensively with wrongful demotion after the Michigan Supreme Court first recognized an exception to the at-will doctrine based on an implied contract in

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44. Several lower courts have also recognized wrongful demotion. See *Sivell v. Conwed Corp.*, 666 F. Supp. 23, 28 (D. Conn. 1987) (holding that Connecticut law does not bar a breach of contract claim based upon allegations of wrongful demotion); *Salimi v. Farmers Ins. Group*, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (remanding for further proceedings on a claim of wrongful demotion based on the existence of an implied contract). See also *Richards v. Detroit Free Press*, 173 Mich. App. 256, 433 N.W.2d 320, 322 (1988) (concluding that a breach of implied contract action for wrongful demotion falls within exceptions to the employment at-will doctrine), remanded by *Richards v. Detroit Free Press*, 433 Mich. 913, 448 N.W.2d 351, 351 (1989). But see *Fischaber v. General Motors Corp., Buick Motors Div.*, 174 Mich. App. 450, 436 N.W.2d 386, 389 (1988) (rejecting the existence of wrongful demotion).

45. See *Taylor v. Washington Metropolitan Area Transit Authority*, 922 F. Supp. 665, 675 (D.D.C. 1996) (concluding that the plaintiff was not wrongfully demoted in violation of public policy, but reserving decision on whether such a tort action existed); *Hoopes v. City of Chester*, 473 F. Supp. 1214, 1223-24 n.4 (E.D. Penn. 1979) (remarking that the plaintiff appeared to have a claim for wrongful demotion based on Pennsylvania's wrongful discharge law); *Brigham v. Dillon Companies, Inc.*, 262 Kan. 212, 935 P.2d 1054, 1054 (1997) (recognizing the tort of retaliatory demotion). The prevailing judicial assumption is that an extension of the public policy exception beyond wrongful discharge would provide public policy protection to all phases of the employment relationship so that, for example, an employer could not demote an employee for providing truthful testimony about the criminal activity of her employer. *Hoopes*, 473 F. Supp. at 1223 n.4. In *Hoopes*, a sheriff asserted several claims following his demotion for cooperating with federal law enforcement officials in the prosecution of a city official. Id. at 1215-17. The court stated, in dicta, that it could find no reason why Pennsylvania's public policy exception prohibiting retaliation for refusing te violate the law should not apply to demotions as well as terminations and that the only distinction would be one of damages. Id. at 1223-24 n.4. See also *Taylor*, 922 F. Supp. at 675 (rejecting the tort of wrongful demotion in the "whistleblower" context, but finding that it would be valid in the same situation as wrongful discharge claims, namely demotions for refusing to violate the law).

46. See *Baker v. Perfection Hy-test*, 1996 U.S. App. LEXIS 27, *8 (10th Cir.) (applying Oklahoma law and rejecting the tert of wrongful demotion); *Ludwig v. C&A Wallcoverings, Inc.*, 960 F.2d 40, 43 (7th Cir. 1992) (concluding that Illinois law would not allow a tort action for wrongful demotion); *Baragar v. State Farm Ins. Co.*, 860 F. Supp. 1257, 1262 (W.D. Mich. 1994) (applying Michigan law and rejecting a claim for wrongful demotion based on contract but admitting that Michigan law was unclear on the issue); *Clark v. Eagle Systems, Inc.*, 279 Mont. 279, 927 P.2d 995, 998-99 (1996) (refusing to recognize wrongful demotion under Montana's Wrongful Discharge from Employment Act, Mont. Code Ann. § 39-2-904 (1995), which requires either actual or constructive discharge to state a claim).

Toussaint v. Blue Cross & Blue Shield of Michigan.[47] After *Toussaint*, a wrongful discharge case, whether the implied contract exception applied to lesser quantums of discipline such as demotion was unclear. When the Michigan Court of Appeals held that an employer's promise not to demote without good cause gave rise to an enforceable contract in *Richards v. Detroit Free Press*,[48] it appeared that Michigan would recognize wrongful demotion.[49] The *Richards* court analogized demotion from a better job to a lesser job as a discharge from the better job, and stated that "demotion will support a wrongful discharge claim."[50]

Subsequent Michigan appellate decisions, however, refused to follow *Richards* and recognize wrongful demotion.[51] The Michigan Supreme Court has given little indication of how it might resolve the issue. For example, when an employee claimed that the employer's change to the compensation system forced him to resign, the Michigan Supreme Court concluded that the employee had a legally valid claim for the breach of an oral employment contract.[52] The court's holding indicated that *Toussaint* would apply to situations other than wrongful discharge, although the court did not make any explicit statements to that effect.[53] In a factually similar case, however, the Michigan Supreme Court wrote that "it does not logically follow that *Toussaint* should be extended into the area of compensation."[54]

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47. 408 Mich. 579, 292 N.W.2d 880, 894-95 (1980).

48. 173 Mich. App. 256, 433 N.W.2d 320, 320 (1988), remanded by *Richards v. Detroit Free Press*, 433 Mich. 913, 448 N.W.2d 351, 351 (1989).

49. Id. at 322. Richards was demoted from assistant superintendent to a journeyman printer. Id. Richards argued that his supervisor's assurance that the Press only demoted for cause created an enforceable contract. Id. The Michigan Court of Appeals relied on *Toussaint* to conclude that the plaintiff's action was cognizable in Michigan. Id. Other Michigan courts, however, have been more reluctant to recognize actions for wrongful demotion. See, for example, *Baragar*, 860 F. Supp. at 1260 (concluding that Michigan law would probably not recognize a wrongful demotion action based upon an implied contract); *Fischaber*, 436 N.W.2d at 386 (refusing to allow an action for changes in job assignment that violate an implied contract).

50. *Richards*, 433 N.W.2d at 322. The *Richards* decision was remanded on numerous occasions for reconsideration in light of several recent Michigan Supreme Court rulings. See *Richards v. Detroit Free Press*, 444 Mich. 953, 514 N.W.2d 763, 763 (1994) (denying motion for reconsideration of the Michigan Supreme Court's denial of leave to appeal); *Richards v. Detroit Free Press*, 439 Mich. 895, 478 N.W.2d 438, 438 (1991) (remanding *Richards*, 433 N.W.2d at 320, in light of *Rowe v. Montgomery Ward & Co., Inc.*, 437 Mich. 627, 473 N.W.2d 268, 268 (1991)); *Richards v. Detroit Free Press*, 433 Mich. 913, 448 N.W.2d 351, 351 (1989) (remanding *Richards*, 433 N.W.2d at 320, in light of *In re Certified Question*, 432 Mich. 438, 443 N.W.2d 112, 112 (1989), and *Bullock v. Automobile Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114, 114 (1989)).

51. For Michigan courts reaching opposite results, see note 49.

52. *Bullock v. Automobile Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114, 119-20 (1989).

53. Id. at 120 n.12.

54. *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 652, 473 N.W.2d 652, 656 (1991). Specifically, *Dumas* concerned three groups of plaintiffs, one of which consisted of 139

Implied contract actions, such as wrongful demotion, are not a widely accepted remedy for employees who can prove their employer broke a promise regarding a term or condition of employment. This Note will demonstrate that the recognition of wrongful demotion claims has the potential to reshape the employer-employee relationship in both California and those jurisdictions that follow California's lead. The doctrinal principles that allowed the *Scott* court to extend actions for the breach of an implied contract from termination to demotion provide no rationale why courts must stop at demotion. Conceptually, no reason exists why any term or condition of employment, such as promotion policies, transfer policies, coffee breaks, or work schedules, will not become subject to implied contract actions by employees who believe their employer has failed to honor a promise.[55] Consequently, implied contracts, rather than the at-will rule, will govern most aspects of the employment relationship unless some limiting principle exists.

III. LACK OF PRACTICAL AND DOCTRINAL LIMITS TO WRONGFUL DEMOTION ACTIONS

The *Scott* court identified a number of reasons that compelled it to recognize an action for wrongful demotion, but also offered a variety of principles that would limit the reach of wrongful demotion and similar implied contract actions. A careful examination of these limiting principles, however, shows that they will ultimately prove unsuccessful in restricting litigation over the terms and conditions of employment. Additionally, subsequent exploration of the underlying doctrine that compelled the *Scott* court to recognize wrongful demotion reveals that the doctrine, in fact, mandates recognition of breach of implied contract actions for any term or condition of employment, not just demotion.

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salespersons who had been informed when they were hired that they would be paid on a seven percent commission basis. Id. at 654. After the implementation of a less lucrative flat rate commission, these claimants attempted to enforce an implied contract to be paid under the seven percent system. Id. The court found that the plaintiffs could not recover because *Toussaint* did not extend beyond the wrongful discharge scenario. Id. at 657.

55. See *Scott*, 904 P.2d at 838 (discussing California courts' extension of implied-in-fact contract terms to non-monetary employee benefits). See also *Ludwig*, 960 F.2d at 43 (stating that recognition of the tort of wrongful demotion could lead to actions for transfers, promotions, alterations in job duties, and disciplinary proceedings).

A. Lack of Practical Limits

The courts that have rejected public policy and contract exceptions to the at-will doctrine for wrongful demotion have consistently expressed concern over the possible increase in this type of litigation.[56] These courts have also expressed concern about the amount and cost of litigation associated with wrongful demotion actions, as well as actions arising from transfers, job duty changes, and discipline.[57] In response to similar arguments advanced by the *Scott* defendants, however, the California Supreme Court proposed three principles that would limit the amount of litigation surrounding terms and conditions of employment: manifestations by the employer of an intent not to be bound by any apparent promises,[58] the doctrine of unenforceability of vague promises,[59] and limitations on damages available to employees under a breach of contract action.[60] These three principles, however, do not effectively limit the amount of litigation potentially generated by the *Scott* decision.

1. The Limitation on Implied Contract Actions Provided by an Employer's Manifestation of an Intent Not to Be Bound to Implied Promises

In *Scott*, PG&E argued that recognition of a cause of action for wrongful demotion would violate public policy because it would "inevitably open the door to a whole host of lesser employment decisions" and involve the courts excessively in the workplace.[61] The court rejected this argument for two reasons. First, the court thought that PG&E and other employers could change their policies to avoid the creation of unwanted contractual obligations.[62] Second, the court hinted that employer disclaimers, presumably located in employee

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56. See *Ludwig*, 960 F.2d at 43 (observing that "[r]ecognizing a retaliation tort for actions short of termination could subject employers to terrents of unwanted and vexatious suits filed by disgruntled employees at every juncture in the employment process"). See also *Bullock*, 444 N.W.2d at 136 (Griffin, J., concurring in part and dissenting in part) (stating that recognizing breach of implied contract actions for measures short of discharge would be very costly).

57. See noto 55 and accompanying text. See also *Baragar*, 860 F. Supp. at 1261-62 (relying on a Michigan state court's reasoning that recognizing wrongful demotion would lead to time-consuming and costly litigation to reject a wrongful demotion claim).

58. *Scott*, 904 P.2d at 844-45.

59. Id. at 845.

60. Id.

61. Id. at 843.

62. Id. at 844.

handbooks, could prevent liability for wrongful demotion and similar actions.[63] Therefore, one proposed means of limiting the litigation associated with wrongful demotion is for employers to prevent the creation of unwanted promises. According to the *Scott* court, employers can prevent unwanted promises either by not making any promises or by disclaiming all promises as non-binding.[64]

a. *Manifesting an Intent Not to Be Bound by Avoiding Promises to Employees*

An employer's ability to avoid making promises to employees, however, is severely circumscribed by two practical observations. First is the growing importance of fringe benefits and other non-traditional compensation to corporations who wish to attract the most qualified employees.[65] In an era of corporate belt-tightening, employers must offer inducements other than salary to attract employees. These inducements might include continuing education courses,[66] in-house child care,[67] or corporate perks such as parking spots and private offices. While the *Scott* court may warn employers not to promise these benefits if they do not wish to be bound by the promise, the reality is that such promises are a necessary part of an employer's business.[68] This need to attract employees with promises about the terms and conditions of employment undercuts the *Scott* court's advice to avoid the creation of implied contracts.

Similarly, many reasons exist why an employer will want to make promises that the *Scott* court thinks the employer should avoid. Promising to impose discipline only for good cause and introducing

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63. Id. at 845.

64. Id. at 844-45.

65. See, for example, *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257, 1264 (1985) (stating that an employee policy manual providing job security "grants an important, fundamental protection" to employees), modifed by *Woolley v. Hoffmann-La Roche, Inc.*, 101 N.J. 10, 499 A.2d 515, 515 (1985).

66. Note that 55% of employers in a 1993 survey offered this benefit to employees. Colonial Life and Accident Company and Employer's Council on Flexible Compensation, *Workplace Pulse National Survey* 8 (1993). Other benefits offered by employers included long-term care (44%), wellness programs (33%), health education courses (33%), dependent care reimbursement (24%), and group legal services (21%). Id.

67. According to one survey, nine percent of American employers offer this benefit, although 78% provide some sort of child care benefits. Hewitt Associates, *Work and Family Benefits Provided by Major U.S. Employers in 1993*, Medical Benefits 11 (Dec. 15, 1993).

68. See *Swanson v. Liquid Air Corp.*, 118 Wash. 2d 512, 826 P.2d 664, 679 (1992) (binding employer to promises made by a mid-level supervisor to avoid unionization of corporate truckers).

"industrial due process,"[69] such as PG&E's positive discipline system, provide the employer with an improved work force.[70] Indeed, the *Scott* court relied on the benefits of the positive discipline system to PG&E when responding to PG&E's argument that enforcing implied contract terms would be inherently harmful to employers.[71] The court cited five improvements the employer receives when instituting programs similar to PG&E's positive discipline system: (1) a more responsible and loyal work force as a result of employees who are more committed to the enterprise, (2) the avoidance of union interference, (3) the reduction in litigation associated with statutory civil rights claims and wrongful discharge actions, (4) the ability to attract new employees and retain current ones, and (5) the reduced absenteeism.[72] Employers who offer flextime, telecommuting, child care subsidies, near-site day care, and other benefits have found that employee retention rates, customer retention rates, and corporate profits increase dramatically.[73] Improved performance as a result of additional benefits and protections to employees indicates that an employer may not be able to avoid creating unwanted contractual obligations. Consequently, the *Scott* court's assertion that an employer can avoid litigation by not making promises appears unrealistic because of employers' need to attract and retain a productive and committed work force through the use of "good cause" provisions, industrial due process, and other benefits.

Another reason an employer may not be able to avoid contractual obligations is that implied promises will invariably arise from promises casually made by supervisors, or from practices beyond the control of management.[74] In wrongful discharge actions, implied promises can be found in any of the circumstances surrounding the

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69. "Industrial due process" refers to the self-imposed investigatory and disciplinary procedures of many employers.

70. *Scott*, 904 P.2d at 843; *Toussaint*, 292 N.W.2d at 892.

71. *Scott*, 904 P.2d at 843.

72. Id. (citing James R. Redeker, *Employee Discipline: Policies and Practices* 106 (BNA, 1989)); Chimezie A. B. Osigweh and William R. Hutchinson, *Positive Discipline*, 28 Hum. Resource Mgmt. 367, 382 (1989)).

73. See Stacey Hartmann, *Happy Workers Drive Profits*, The Tennessean 1E (Mar. 19, 1997) (discussing the positive effects on company profitability when additional benefits are offered to employees). For example, after instituting numerous "family-friendly" practices, First Tennessee Bank found that customer service satisfaction increased by 60%, customer retention increased by 7%, employee retention increased by 100%, and company prefits increased by 55%. Id.

74. *Scott*, 904 P.2d at 844-45.

employment relationship.[75] Relevant factors under a "totality of circumstances" analysis include personnel policies, longevity of service, assurances of continued employment, and industry practice.[76] The *Scott* court expressed a willingness to examine the totality of the circumstances to determine if an implied promise regarding demotion existed.[77] Presumably, therefore, factors similar to those that create implied contracts in wrongful discharge cases would create promises regarding other terms and conditions of employment. The understandable willingness of courts to look at the totality of the surrounding circumstances to find an implied promise indicates that casual promises made by low or mid-level supervisors, an employer's treatment of other employees, or industry practice could create an enforceable right from actions that are largely beyond the control of management.[78] The ease of finding an implied promise somewhere in the employment relationship underscores the employer's inability to avoid unwanted contractual obligations.[79]

b. Manifesting an Intent Not to Be Bound to Implied Promises by Disclaiming All Promises to Employees

The California Supreme Court suggested that employers could avoid contractual liability for implied promises through the use of disclaimers.[80] In an employee handbook, clear and prominent disclaimers provide employers with a method to avoid binding themselves to any policy contained in the manual.[81] For example, some

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75. *Pugh*, 116 Cal. App. 3d at 329.

76. Id.; *Scott*, 904 P.2d at 839.

77. *Scott*, 904 P.2d at 839.

78. See *Swanson*, 826 P.2d at 677 (holding that a disclaimer purporting to require only president or vice-president authorization of employment contracts is not valid in a multi-national corporation with thousands of employees).

79. See *Scott*, 904 P.2d at 844 (discussing PG&E's argument that employers will often be bound by promises arising from events beyond the control of senior management).

80. Id. at 845.

81. See, for example, *Dell v. Montgomery Ward and Co., Inc.*, 811 F.2d 970, 974 (6th Cir. 1987) (concluding that terms of employment set forth in an employee handbook did not provide discharged employees with a cause of action for breach of an implied contract); *Therrien v. United Air Lincs, Inc.*, 670 F. Supp. 1517, 1522 (D. Colo. 1987) (noting that Colorado law does not recognize an action for breach of an implied contract based upon provisions in an employee handbook that clearly stated that the employee handbook did not constitute a contract of employment); *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 517 A.2d 786, 794 (1986) (holding that a disclaimer in an employee manual was valid since the disclaimer was contained in an agreement voluntarily entered into without fraud, mistake, or oppression); *Woolley*, 491 A.2d at 1271 (stating that disclaimers in employee manuals will be enforced if they are placed in a prominent place and are adequately worded); *Bailey v. Perkins Restaurants, Inc.*, 398 N.W.2d 120, 123 (N.D. 1986) (concluding that a "clear and conspicuous disclaimer" in an employee handbook preserved the "presumption of at-will employment"); *Taylor v. Systems Research*

employee handbooks contain procedures outlining a system of "progressive discipline" that requires the employer to follow progressively more severe discipline procedures when disciplining or discharging an employee.[82] To avoid using the prescribed disciplinary system, an employer can include language in the employee handbook stating that the manual includes no promise of any kind. As a result, the employer remains free to discharge or demote without cause and ignore its own system of progressive discipline.[83]

The availability of disclaimers as a defense to wrongful demotion and similar actions is an open question despite the widespread acceptance of the defense in wrongful discharge cases.[84] Although the *Scott* court stated that the issue of the use of disclaimers was not before it, the court suggested that disclaimers might be a method employers could use to avoid wrongful demotion litigation.[85] It seems unlikely that the court would suggest a defense the court believed was unavailable. In addition, Justice Souter, writing for the court as a justice on the New Hampshire Supreme Court, stated that a disclaimer could relieve the employer of a promise to pay severance benefits.[86] This indicates that other courts might also be willing to expand the use of disclaimers beyond the wrongful discharge scenario.[87]

To understand how an employer's use of disclaimers might be ineffective in wrongful demotion scenarios, one should understand the limitations that courts have placed on the effectiveness of disclaimers in the wrongful discharge scenario.[88] Generally, two requirements

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Laboratories, Inc., 51 Ohio App. 3d 15, 554 N.E.2d 114, 115 (1988) (stating that disclaimers in an employee handbook create an at-will employment relationship); *Meade v. Appalachian Power Co.*, 1988 Va. Cir. LEXIS 29, *8-9 (stating that effective disclaimers must be placed in a "very prominent position" and must be stated in "clear and unambiguous terms").

82. *Ferrara v. Nielsen*, 799 P.2d 458, 461 (Colo. Ct. App. 1990).

83. *Woolley*, 491 A.2d at 1271.

84. See *Scott*, 904 P.2d at 845 (refusing to decide the effect of a disclaimer upon an implied contractual obligation not to demote an employee).

85. Id.

86. *Panto v. Moore Business Forms, Inc.*, 130 N.H. 730, 547 A.2d 260, 286 (1988).

87. The only distinction between a disclaimer covering promises for good-cause termination and a disclaimer applying to a promise regarding a term or condition of employment is the scope of the employment relationship covered by the disclaimer. A disclaimer purporting to cover all terms and conditions of employment is disclaiming *all* promises created between hiring and termination. A disclaimer regarding termination purports to cover only one (albeit important) sliver of the employment relationship.

88. Another possible attack on the use of employer disclaimers was litigated in *Heurtebise v. Reliable Business Computers*, 452 Mich. 405, 550 N.W.2d 243, 247 (1996), cert. denied, *Reliable Business Computers v. Heurtebise*, 117 S. Ct. 1311, 1311, 137 L. Ed. 2d 474, 474 (1997). In

must be met to have an effective disclaimer: The disclaimer must be clear and conspicuous,[89] and it must not be negated by contradictory promises.[90] Both requirements will likely pose a problem for employers seeking to avoid liability for the breach of implied contracts.

i. Disclaimers Must Be Clear and Conspicuous

In many jurisdictions, the clear and conspicuous requirement for the display of disclaimers has become a significant hurdle for

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Heurtebise, an employee sought to avoid arbitration of her sexual discrimination grievance with her employer. Id. at 245. The employer relied on its employee handbook, which stated that employees " 'may challenge the propriety of dismissal . . . only through arbitration.' " Id. (quoting the employee handbook at issue). The document also contained a clear and prominent disclaimer: " 'Each employee has the absolute right to terminate his/her own employment at any time, without notice, and for any reason whatsoever, and the company has the same right.' " Id. at 247 (quoting the employee handbook at issue) (emphasis omitted). The court concluded that the inclusion of the disclaimer meant that the employer did not intend to be bound by any provision in the handbook and, therefore, the employee was not required to arbitrate her claim. Id. The court reached this conclusion in spite of the court of appeal's holding, on an incomplete record, that the disclaimer only applied te the employee's at-will status. Id. at 246. This case could be interpreted as saying that employers may not disclaim any promises regarding job security if they wish to cempel arbitration. Given the prominence and widespread use of arbitration, similar reasoning in other jurisdictions could severely limit an employer's ability to disclaim premises regarding job security, "for cause" demotion requirements, disciplinary proceedings, and other terms and conditions of employment. Whether an arbitration agreement provided somewhere other than in the employee manual would be disclaimed remains an open question. Such an agreement should be just as enforceable as any other express or implied promise. Theoretically, the *Heurtebise* holding puts employers in a Catch-22. If employers place the arbitration agreement in the employee manual, then it is negated by a disclaimer. If employers create a separate arbitration agreement, however, they cannot seek to enforce it without being bound by other express or implied contracts covering various terms and conditions of employment that arise independently of the employee manual. See also *Meade*, 1988 Va. Cir. LEXIS 29 at *8-11 (implying that a disclaimer in an employee handbook disclaims the entire contract, including the arbitration clanse, because the employee would be bound to arbitrate if the entire manual was not disclaimed).

89. *Jones v. Central Peninsula General Hosp.*, 779 P.2d 783, 788 (Alaska 1989); *Hicks v. Methodist Medical Center*, 229 Ill. App. 3d 610, 593 N.E.2d 119, 121-22 (1992); *Woolley*, 491 A.2d at 1271; *Osterman-Levitt v. Medquest, Inc.*, 513 N.W.2d 70, 74 (N.D. 1994); *Kumpf v. United Tel. Co. of Carolinas, Inc.*, 311 S.C. 533, 429 S.E.2d 869, 872 (1993); *Swanson*, 826 P.2d at 673; *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 341 (1995); *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 989 (Wyo. 1991). See generally George L. Blum, Annotation, *Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship*, 17 A.L.R. 5th 1, 1-2 (1994) ("Blum Annotation") (collecting cases concerning disclaimers of representations contained in employee personnel manuals).

90. *Greene v. Howard University*, 412 F.2d 1128, 1135 (D.D.C. 1969); *Wagenseller*, 710 P.2d at 1037-38; *Morriss v. Coleman Co., Inc.*, 241 Kan. 501, 738 P.2d 841, 849 (1987); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307, 310-11 (1981); *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693, 697 (1995); *Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589, 596 (1994); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 583 (1995); *Swanson*, 826 P.2d at 674-75. See Blum Annotation at 1 (cited in note 89) (collecting cases that discuss the effectiveness of disclaimers contained in employee manuals).

employers in wrongful discharge cases.[91] Frequently, disclaimers fail to prevent an employer's liability because they are displayed in an obscure location,[92] but courts have rejected them for other reasons as well. For example, disclaimers written in "confusing legalese" do not provide the clarity necessary to inform an employee that the handbook does not create a binding promise.[93] Since wrongful demotion actions cover more promises than wrongful discharge actions, employers will have more difficulty providing clear and conspicuous disclaimers regarding the terms and conditions of employment than regarding wrongful discharge. Consequently, employers will be even less successful when disclaiming promises regarding the terms and conditions of employment than when disclaiming promises regarding termination.

More troubling than the conspicuousness requirement for employers is that disclaimers cannot negate all promises. They must be directed at specific promises. In the wrongful discharge scenario, for example, employees who receive oral assurances of job security, even when the handbook has a broad disclaimer against job security, are entitled to rely on those assurances because the disclaimer was limited to the handbook provisions.[94] In another case, a disclaimer in an employee handbook providing that policy statements in the manual did not create a contract was found to disclaim only the handbook's

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91. See, for example, *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81, 555 A.2d 12, 16 (1989) (finding that a disclaimer that did not use language similar to previous case law would not disclaim an implied contract for employment); *Osterman-Levitt*, 513 N.W.2d at 73-74 (finding that a disclaimer stating that "[e]mployment at the hospital is based upon mutual consent" and that "either the employee or the hospital may find it necessary to sever the employment relationship" was not explicit enough to be enforceable); *Williams*, 459 S.E.2d at 340-41 (holding that a disclaimer stating "[m]y employment may be terminated at any time without advance notice" was not clear, conspicuous, and understandable); *McDonald*, 820 P.2d at 988-89 (holding that summary judgment for the employer was an error when a disclaimer, which was not set off by a border or larger print, stated "I agree that any offer of employment, and acceptance thereof, does not constitute a binding contract of any length, and that such employment is terminable at the will of either party").

92. See *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 287-88 (Iowa 1995) (collecting cases and comparing those that found clear and conspicuous disclaimers with those that did not).

93. See, for example, *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 643 A.2d 554, 560 (1994) (holding that a disclaimer stating "[t]he terms and procedures contained [in the employee manual] are not contractual and are subject to change and interpretation at the sole discretion of the company, and without prior notice or consideration to any employee" was confusing "legalese").

94. *Hanna v. Security Pacific Business Credit, Inc.*, 231 Cal. App. 3d 427, 438-39 (1991), review denied and opinion withdrawn by *Hanna v. Security Pacific Business Credit, Inc.*, 91 Cal. Daily Op. Serv. 7227, 7227 (Cal. Ct. App. 1991).

policy statements, and did not negate the promise of job security located elsewhere in the manual.[95] Similarly, in *Butler v. Walker Power, Inc.*,[96] a statement that the handbook did not create a contract of employment was not a valid disclaimer because the disclaimer applied to termination, but left the disciplinary procedures intact.[97] Significantly, the *Butler* court relied on *Panto v. Moore Business Forms, Inc.*,[98] which held that an employer's promise to provide post-termination benefits constituted a binding modification to an employment contract.[99] The implication of *Panto*, according to the *Butler* court, is that contractual elements aside from promises of job security exist and that these elements require separate disclaimers.[100] Consequently, disclaimers must be directed at specific promises regarding the terms and conditions of employment and cannot disclaim all promises within the employment relationship simultaneously.[101]

Employers will have a particularly difficult time if they must specifically disclaim every term or condition of employment that can create an implied contract. Clear and prominent disclaimers will be especially difficult to provide for unwritten employment practices, the promises of mid-level supervisors, and other situations outside the controlled setting of an employee handbook. For example, a supervisor's promise that laid-off workers will be re-hired before new workers are hired will be almost impossible for an employer to disclaim[102]

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95. *Williams*, 459 S.E.2d at 341-42.

96. 137 N.H. 432, 629 A.2d 91 (1993). The court found that a disclaimer stating "this Handbook is not an expressed or implied contract of employment" effectively negated any implied contract requiring "cause" for termination. Id. at 92-94. The court stated, however, that the plaintiff could assert damages for the employer's failure to follow its own disciplinary procedure, which had not been disclaimed. Id. at 94.

97. Id. at 93-94.

98. 130 N.H. 730, 547 A.2d 260 (1988).

99. Id. at 265.

100. *Butler*, 629 A.2d at 93.

101. Id. at 93-94. See, for example, *Jones*, 779 P.2d at 788 (making a distinction between the effect of a disclaimer of policy guidelines, such as provisions relating to employee appearance, and the effect of a disclaimer of provisions conferring rights upon employees, such as grievance procedures); *Farnum v. Brattleboro Retreat, Inc.*, 164 Vt. 488, 671 A.2d 1249, 1254 (1995) (stating that a boilerplate disclaimer in an employee handbook that employment is at-will does not "negate any implied contract [or] procedural protections" created by the handbook); *Dent v. Fruth*, 192 W. Va. 506, 453 S.E.2d 340, 343-44 (1994) (stating that disclaimers in an employee handbook that provided the handbook did not create a contract but that failed to state employment was at-will did not prevent the existence of an implied contract requiring "cause" to terminate employees).

102. See, for example, *Bower v. AT&T Technologies, Inc.*, 852 F.2d 361, 362-63 (8th Cir. 1988) (applying Missouri law and discussing the effect of a promise to re-hire former employees). The *Bower* court enforced promises that an AT&T Regional Manager and Warehouse Superintendent made as AT&T's agents. Id.

because this and similar promises are made without the knowledge of senior management.[103]

In addition, significant problems exist with allowing employers to make disclaimers that apply to all implied promises in an employment relationship. Allowing employers to disclaim any and all promises would prevent an employee from relying on any promise made by a superior—a situation that is undesirable for both employees and employers alike. Further, a disclaimer attempting to limit employment rights to those granted by the corporate president greatly reduces an employer's flexibility because supervisors cannot make promises in an effort to resolve disputes or prevent crises.[104] Some courts have expressed discomfort with the notion that employers can attract and retain good workers with implied promises and benefits, require their employees to follow company policy, and then disclaim or escape that policy when it no longer suits them.[105]

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103. See *Swanson*, 826 P.2d at 666 (binding a corporation to a promise of a supervisor not to fire truckers without good cause, despite the existence of a disclaimer in the employee handbook stating that only the president or executive vice-president of the corporation could make employment contracts).

104. Id. at 676-77 (stating that allowing a disclaimer to have the broad preemptive effect desired by the corporation would conflict with the employer's need to change its position). In *Swanson*, the supervisor entered into an agreement with the corporation's truckers to settle ongoing salary and seniority disputes and prevent the need for unionization. Id. at 665-66.

105. See, for example, *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170, 174 (1984) (stating that when an employer chooses te issue a policy or manual, and its actions or terms encourage reliance on the policy or manual, despite the existence of a disclaimer, the employer must abide by the policy or manual and "may not treat it as illusory"); *Woolley*, 491 A.2d at 1271 (stating, in dicta, that "[i]t would be unfair te 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" and that "[w]hat is sought here is basic honesty"); *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452, 454-55 (1987) (stating that equitable and social policies indicate that employers should not be permitted to provide potentially misleading employee manuals while being able to deviate from them whenever the employers choose); *Farnum*, 671 A.2d at 1254 (asserting that inclusion of "boilerplate language" providing for at-will employment does not "negate any implied contract [or] procedural protections" contained in the handbook); *Swanson*, 826 P.2d at 677 (stating that an employer is not "entitled to make extensive promises as to working conditions—promises which directly benefit the employer in that the employees are likely to carry out their job satisfacterily with promises of assured working conditions—and then ignore those promises as illusory"); *Williams*, 459 S.E.2d at 341 (stating that employers should not possess tbe ability to deviate from an employee handbook and "discharge employees for no reason or any reason"). *Williams* states tbe point most directly when explaining why disclaimers deserve a narrow effect:

> There is a certain unseemliness in an employer in effect saying to its employees: "Here are the rules; if you abide by them, I will continue to employ you," while simultaneously saying: "If you break your promise and fail to abide by the rules, you are fired; but if I break my promise and fire you for reasons or procedures contrary te the rules, you cannot do anything about it."

459 S.E.2d at 341 n.22.

ii. Contradictory Practices Must Not Negate the Disclaimer

Concerns regarding illusory promises also underlie the second hurdle to a valid disclaimer: The disclaimer may not be negated by contradictory practices of the employer. The creation of a contract and the impact of the disclaimer are questions of fact for the jury[106] and many jurisdictions consider a disclaimer to be nothing more than one indicator of intent in an employment contract.[107] Consequently, in addition to the disclaimer, the trier of fact is free to consider other provisions in the handbook containing promissory language,[108] the employer's course of conduct,[109] the nature of the employment,[110] and other circumstances surrounding the relationship when determining whether an implied contract exists.[111]

In wrongful discharge cases, contradictory practices have been found to negate a variety of disclaimers in employee handbooks. For example, courts have rejected disclaimers associated with a hospital's

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106. *Morriss*, 738 P.2d at 849; *Southwest Gas Corp.*, 901 P.2d at 697-98; *Fleming*, 450 S.E.2d at 596; *Farnum*, 671 A.2d at 1255; *Swanson*, 826 P.2d at 673.

107. See, for example, *Zaccardi v. Zales Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988) (applying New Mexico law and finding that a personnel manual gave rise to an implied contract based upon an examination of the statements and actions of the parties involved); *Morriss*, 738 P.2d at 849 (considering statements made by an employee's supervisor and other language contained in an employee handbook when construing the effect of disclaimer); *Southwest Gas Corp.*, 901 P.2d at 697-98 (factoring in other promissory language contained in an employee handbook to consider the effect of a disclaimer); *Fleming*, 450 S.E.2d at 596 (stating that the disclaimer is only one factor to consider in deciding whether promises contained in a handbook should be enforced); *Farnum*, 671 A.2d at 1254 (observing that a disclaimer must be read in light of all other circumstances bearing on the employment agreement); *Swanson*, 826 P.2d at 674-75 (providing examples of employer practices that negate the effectiveness of disclaimers). See also Patricia M. Leonard, Note, *Unjust Dismissal of Employees At Will: Are Disclaimers a Final Solution*, 15 Fordham Urb. L. J. 533, 562 (1987) (concluding that disclaimers are only one factor to consider in an analysis of a wrongful discharge case).

108. *Wagenseller*, 710 P.2d at 1038 (noting that the "parameters of the [employment] relationship" are to be determined from the "totality of the parties' statements and actions"); *Morriss*, 738 P.2d at 849 (stating that language contained in an employee handbook, along with other factors, should be considered in determining what terms of employment existed between the parties).

109. *Schipani*, 302 N.W.2d at 310-11 (discussing the effect of an employer's oral or written assurances upon a disclaimer contained in an employee manual); *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1005 (Utah 1991) (Stewart, J., concurring) (stating that an employer's actions can rebut the presumption of employment at-will and can create implied contract terms); *Ross*, 665 A.2d at 583 (stating that an employer's conduct can modify a disclaimer set forth in an employee policy manual).

110. *Morriss*, 738 P.2d at 849 (noting that the nature of employment often is a factor in determining the intent of the parties entering into the employment relationship).

111. Id. (listing other factors that courts often examine te determine the intent of the parties to an employment relationship); *Farnum*, 671 A.2d at 1255 (stating that a disclaimer must be examined "in the context of all the other provisions in the [employee] handbook and any other circumstances bearing on the status of the employment agreement").

promise to treat all employees fairly and in accordance with Christian principles,[112] with an employer's customary practice of providing non-tenured teachers a hearing before termination,[113] and with an employer's oral assurance of long-term employment.[114] The rationale for negating clear and prominent disclaimers in the face of contradictory practices is concern over the enforcement of illusory promises.[115] The danger is that contradictory practices allow an employer to receive enhanced morale and employee retention through assurances of fair disciplinary procedures and other favorable employment practices but ultimately escape from the cost of following such procedures and practices through a disclaimer.[116]

Contradictory practices are more likely to negate disclaimers covering wrongful demotion and similar implied contract actions than disclaimers covering termination. Because termination is a single defined event in an employment relationship, employers can disclaim promises regarding job security with comparative ease.[117] Disclaiming *all* promises regarding *all* terms and conditions of employment, however, might be impossible for employers in jurisdictions that are willing to look at contradictory practices. Employers must make some promises in addition to wages to ensure an orderly and satisfied work force. Furthermore, supervisors and mid-level managers who are less concerned with long-term liability and more concerned with the daily or monthly bottom line are likely to provide incentives and inducements that create implied contracts. Consequently, the *Scott* court's suggestion that disclaimers and other indicators of an employer's intent not to be bound by implied promises will limit litigation may be fictitious when applied to implied contract actions regarding terms and conditions of employment.

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112. *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 815 P.2d 72, 82 (1991).

113. *Greene*, 412 F.2d at 1131.

114. *Southwest Gas Corp.*, 901 P.2d at 697.

115. *Leikvold*, 688 P.2d at 174 (concluding that if an employer issues a policy statement and encourages reliance on the statement, it may not treat the promise as illusory).

116. See *Ross*, 665 A.2d at 583 (stating that other circumstances must be considered when evaluating the effectiveness of a disclaimer because, if not, the "employer could have it both ways—enjoying the morale-enhancing benefits of fair procedures most of the time, but relying on a handbook disclaimer whenever it chose to jettison its procedures in a particular case").

117. *Scott*, 36 Cal. App. 4th at 1507.

2. The Limitation on Implied Contract Actions Provided by the Unenforceability of Vague Promises

Another potential limit to wrongful demotion claims and similar actions regarding other terms and conditions of employment is that many implied promises may be too vague to enforce. This situation is particularly troublesome when an employee seeks to bind an employer to a policy promising some sort of substantive right, as opposed to a procedural guarantee.[118]

The California Court of Appeals relied on the unenforceability of vague promises when it refused to recognize wrongful demotion as a valid cause of action.[119] The appellate court stated that promotions, demotions, transfers, and "other operational decisions" were inherently uncertain promises because of the large variety of factors that were considered to create such promises.[120] Because factors such as an employer's personnel policies, oral assurances, and praise, promotion, or criticism of the employee could all lead to an implied contract,[121] the court concluded that too many methods existed by which an employee could discern an implied promise.[122]

Other courts have struggled with uncertain implied promises in the employment context. For example, a statement that the employer is "vitally interested in encouraging . . . personal growth and development" and, therefore, constantly evaluates the "employee's responsibility and worth," is too vague to promise anything that might prevent demotion.[123] Similarly, a promise to consider the compensation of employees in other companies is too vague to support an action alleging that an employer had broken its promise to keep employees adequately compensated.[124] Perhaps the most significant

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118. See *Scott*, 904 P.2d at 841 (discussing, and dismissing, an employer's contention that an implied promise "not to demote without good cause and to follow certain disciplinary rules" was unenforceably vague).

119. *Scott*, 36 Cal. App. 4th at 1506. The court of appeals also thought the damages were too vague to permit recovery. Id. at 1510. For a discussion of why the damages award in a wrongful demotion action might be vague, see Part III.B.3.

120. *Scott*, 36 Cal. App. 4th at 1506-07.

121. Id. at 1507.

122. Id.

123. *Rodgers v. Flint Journal*, 779 F. Supp. 70, 72 (E.D. Mich. 1991).

124. *Ladas v. California State Automobile Ass'n*, 19 Cal. App. 4th 761, 771 (1993). For other cases finding promises unenforceably vague, see *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 857 (Minn. 1986) (asserting that a handbook provision stating "[i]n the event of serious offense, an employee may be terminated immediately" is too vague to create an implied contract when "serious offense" is not defined); *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 329-31 (Minn. 1979) (stating that a discharge for violating a rule against restaurant employees eating food without payment is unenforceably vague when managers

case finding a promise unenforceably vague is *Rochlis v. Walt Disney Co.*[125] In *Rochlis*, a former senior executive at Walt Disney brought an unsuccessful action alleging breach of implied promises to pay salary increases "appropriate" to the employee's performance and to allow him to participate meaningfully in the employer's creative decisions, and report directly to Disney's Chief Executive Officer.[126] According to the *Scott* court, *Rochlis* exemplified the limits that vagueness would impose on the implied contract claims that PG&E contended would flood employers if wrongful demotion were recognized.[127]

Several factors indicate, however, that this limitation on the scope of the *Scott* decision is not as severe as it might appear. First, the inquiry by a trier of fact into whether a promise was made to demote only for cause and whether such cause existed is "virtually identical to the inquiry it would be called on to make in the wrongful discharge context and a host of other contractual settings."[128] No reason exists why a court should be less willing to let a jury decide an allegedly vague promise regarding a term or condition of employment than an allegedly vague promise regarding termination. If a jury can decide that an employer's promise to return an employee to a position of "equivalent or greater responsibility" following permissive leave is clear enough to create an implied contract, then a jury can decide whether a system of positive discipline creates a promise to demote only for good cause.[129]

Second, a variety of tools are available for the trier of fact to flesh out apparently vague promises. An employer's treatment of other employees regarding the same benefit provides significant in-

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routinely ignored the rule); *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 368 (Okla. 1994) (asserting that a handbook provision stating "[t]he Company will respect the privacy of its employees" is too vague to be enforced); *Machen v. Budd Wheel Co.*, 294 Pa. 69, 143 A. 482, 485 (1928) (stating that a company's assurance that an employee's future with the company would be certain if he turned over a patent was no more than a "friendly assurance" of employment and too vague to permit enforcement).

125. 19 Cal. App. 4th 201 (1993).

126. Id. at 213.

127. *Scott*, 904 P.2d at 845.

128. Id. at 841.

129. See *Sepanske v. Bendix Corp.*, 147 Mich. App. 819, 384 N.W.2d 54, 59 (1985) (concluding that a jury must determine whether a promise to return an employee to a position of "equivalent or greater responsibility" created an implied contract and upholding a jury determination that a position in a tax department was not equivalent to a position in a payroll department).

sight into agreements made with the entire work force.[130] In addition, if a problem with vagueness exists in the terms of an employment contract, particularly when the contract arises from an employee handbook or other written instrument, the ambiguity is created by the employer, who should be bound by the contract.[131] The fact that the employer is often the drafter of employee handbooks mitigates the apparent harshness of holding an employer to an allegedly vague promise.[132] Finally, as in *Scott*, when promises regarding "for cause" demotion or discipline are vague, an employer's failure to follow its own disciplinary procedures is often easy to discern.[133] In fact, in *Salimi v. Farmers Insurance Group*, the Colorado Court of Appeals recognized a wrongful demotion action based solely on the employer's failure to follow its own disciplinary procedures.[134]

Vagueness may preclude some employees from pursuing claims for wrongful demotion or similar actions, but the number of precluded employees should not be overstated. The limits imposed by vagueness in wrongful demotion cases, like vagueness in wrongful discharge cases, are questions of fact that are easily resolved by a jury's examination of an employer's course of conduct. Furthermore, an employer's failure to follow its own disciplinary procedures often provides a red flag that something is amiss. Once again, a potential limitation on actions that are based on the breach of an implied contract for a term or condition of employment appears largely ineffective.

3. The Limitation on Implied Contract Actions Provided by the Lack of Ascertainable Damages

A final potential limit on implied contract actions regarding various terms and conditions of employment is briefly worth considering. The argument is that a court's ability to ascertain significant damages will limit litigation. Nothing warrants the belief that dam-

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130. See *Woolley*, 491 A.2d at 1269 (concluding that, despite the lack of certain terms, an employment agreement was enforceable, in part because the agreement applied to the employer's entire workforce).

131. See id. (stating that an employer should gain no advantage from any ambiguity in terms created by the employer).

132. See *Swanson*, 826 P.2d at 678 (rejecting the argument that an employer should be able to discharge without notice an employee for fighting, even though fighting was not on the list of no-notice offenses, because the employer set out the policy in the employee handbook).

133. See *Scott*, 904 P.2d at 841 (concluding that an employer's rules and procedures concerning demotion were "sufficiently clear to permit a trier of fact to determine whether the company had complied with them").

134. 684 P.2d 264, 264-65 (Colo. Ct. App. 1984).

ages will be any harder to ascertain in wrongful demotion actions than in wrongful discharge actions. Indeed, the *Scott* trial court readily accepted the damages that the court of appeals found speculative.[135] The court of appeals found that damages were not reasonably certain because the award of future earnings was based on the difference between the plaintiffs' salaries in their lower and higher paid positions, and nothing prevented the plaintiffs from leaving PG&E after receiving the award and accepting a job at a salary commensurate with their higher paid positions.[136] Awarding damages in this situation, however, is no more uncertain than many ADEA front-pay awards for demotion.[137]

Furthermore, as the *Scott* court noted, an employer's failure to follow disciplinary procedures breaches an implied contract.[138] A limited number of cases have held that full contract damages are available for a termination or demotion that is not in compliance with the employer's own disciplinary procedures.[139] Allowing full contract damages makes sense because failure to follow the promised procedures is as much a breach of contract as a demotion in violation of a good cause provision. Similar types of remedies in other statutory schemes and the widespread existence of industrial due process indicate that a lack of any ascertainable damages will filter out only the weakest implied contract claims. Therefore, a promise to provide a certain number of coffee breaks would not be enforceable because the damages are not ascertainable. A lack of ascertainable damages, however, appears unlikely to affect larger claims, such as wrongful demotion, failure to promote, and wrongful refusals to provide merit

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135. Compare *Scott*, 904 P.2d at 846 (noting the existence of an "ascertainable pecuniary loss" as a result of the employer's breach) with *Scott*, 36 Cal. App. 4th at 1510 (stating that "the measure of damages is speculative").

136. *Scott*, 36 Cal. App. 4th at 1510.

137. See, for example, *Padilla v. Metro-North Commuter R.R.*, 1995 U.S. Dist. LEXIS 26, *11-13 (S.D.N.Y.) (awarding front pay for a demotion that violated the ADEA); *Zampino v. Supermarkets General Corp.*, 821 F. Supp. 1067, 1072 (E.D. Pa. 1993) (same).

138. *Scott*, 904 P.2d at 840.

139. *Mecurio v. Therm-O-Disc, Inc.*, 92 Ohio App. 3d 131, 634 N.E.2d 633, 636 (1993) (affirming an award of back pay and front pay for an employer's failure to follow its own disciplinary procedures before terminating an employee). See also *Zaccardi*, 856 F.2d at 1477 (finding that an employer's failure to follow its own disciplinary procedures, without more, creates an issue for a jury); *Greene*, 412 F.2d at 1131 (concluding that an implied contract to provide a disciplinary hearing allows teachers who were denied the hearing to prove and recover damages); *Salimi*, 684 P.2d at 265 (reversing a dismissal of a breach of contract action for a demotion that only violated an employer's grievance procedures); *Frain v. City of St. Paul*, 261 Minn. 409, 112 N.W.2d 795, 796-98 (1962) (awarding damages to an employee who was demoted by a city without a required hearing).

salary increases.[140] Regardless, the fact that employees may lack an incentive to seek damages for smaller claims does not affect the constraining impact on at-will employment of recognizing wrongful demotion.

4. Summary of the Practical Limits to Wrongful Demotion Actions

The California Supreme Court postulated three potential limits on the expansion of implied contract actions beyond wrongful demotion. First, employers can either avoid making any promises that would create an implied contract or disclaim any promises that are made. This limit is ineffectual because employers need to be able to make promises to employees and because disclaimers must be clear and conspicuous to be effective and may be negated by contradictory practices. Second, the *Scott* court stated that many implied promises regarding terms and conditions of employment are unenforceably vague. This limitation is no more effective in claims regarding terms or conditions of employment than it is in a wrongful discharge scenario, and furthermore, surrounding circumstances can clarify seemingly vague promises. Third, the *Scott* court speculated that damages might not be ascertainable for the more "minor matters" an employee may bring to court. Employer disciplinary procedures, however, are often clear enough to indicate a breach of an implied contract when other provisions are vague. In addition, no reason exists to expect that determining damages will be any more difficult in wrongful demotion cases than in wrongful discharge cases. Because the *Scott* decision is not limited by any of the external factors identified by the California Supreme Court, one should look for a limitation that is provided by the doctrine of the implied contract itself.

B. Lack of Doctrinal Limits

Analysis of employment agreements does not follow typical bilateral contract rules, which require a promise to be exchanged for a promise. Instead, most courts use unilateral contract analysis when analyzing implied employment agreements.[141] Under a unilateral

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140. See *Osterman-Levitt*, 513 N.W.2d at 73 (reciting portions of an employee handbook containing such provisions).

141. See *Pugh*, 116 Cal. App. 3d at 325-26 (stating that "no analytical reason" exists why a promise by an employee to render services may not support an employer's promise "both to pay a particular wage and to refrain from arbitrary dismissal"); *Toussaint*, 292 N.W.2d at 892 (concluding that employer statements of policy can unilaterally create contractual rights enforceable by employees); *Woolley*, 491 A.2d at 1267 (stating that an employee policy manual is an

contract analysis, showing that the employee made a promise in exchange for the employer's promise, for example, to demote only for good cause, is unnecessary.[142] The employer's verbal assurances or circulation of an employee handbook constitute an offer the employee can accept by continued work. In addition, the employee's continued work provides consideration for the employer's promise.[143]

Traditionally, courts attacked the unilateral approach on the grounds that the employee needed to provide independent consideration to support the implied contract.[144] The employee's agreement to work, reasoned these courts, was only consideration for the employer's promise to pay wages.[145] Courts applying a unilateral contract analysis, however, rejected the traditional approach, arguing that it is contrary to the general rule that a court will not inquire into the adequacy of consideration.[146] Because they refused to inquire into the adequacy of consideration, these courts agreed that undivided consideration may be exchanged for one or several promises, given together or separately.[147] Additionally, no requirement exists for a

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"offer that seeks the formation of a unilateral contract"). See also *Panto*, 547 A.2d at 266 (categorizing and explaining various approaches to enforcing implied contracts arising from employee manuals). In 1985, the New Jersey Supreme Court wrote that "most out-of-stato cases demoustrate an unwillingness to give contractual force to company policy manuals." *Woolley*, 491 A.2d at 1262 (citing cases that did not imply contracts based upon employee policy manuals). In 1984, one commentator calculated that only 18 jurisdictions recognized implied-in-fact contracts, including employee manuals, in the employment contoxt. Kennetli T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1, 17 & n.92 (1984). By 1994, however, only six jurisdictions (Delaware, Florida, Indiana, Missouri, Northi Carolina, and Tennessee) liad refused to recognize employee handbooks as a source for creating implied contracts for job security, while 10 otliers (Iowa, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island, and Virginia) liad no clear indication from tlie state courts. *Employment at Will State Rulings Chart*, 123 Individual Empl. Riglits Man. (BNA) 505:51-52 (1994).

142. *Woolley*, 491 A.2d at 1267.

143. *Pugh*, 16 Cal. App. 3d at 325; *Salimi*, 684 P.2d at 265; *Panto*, 547 A.2d at 268; *Woolley*, 491 A.2d at 1267.

144. Lopatka, 40 Bus. Law. at 18 (cited in note 141).

145. See id. at 17 (discussing the rejection of a unilateral contract analysis by some courts).

146. *Pugh*, 16 Cal. App. 3d at 325; *Woolley*, 491 A.2d at 1267; Lopatka, 40 Bus. Law. at 17 (cited in note 141).

147. *Pugh*, 16 Cal. App. 3d at 325; *Woolley*, 491 A.2d at 1267. See Joseph M. Perillo and Helen Hadjiyannakis Bender, 2 *Corbin on Contracts* § 5.12 at 56 (West, 1995) (allowing a "single and undivided cousideration" to be exchanged for multiple pronises). Also, note that courts requiring independent consideration to enforce a provision in an employee manual generally require this consideration as a rule of construction, not of substance. See *Pugh*, 16 Cal. App. 3d at 326 (stating that a rule requiring independent consideration is a rule of construction serving an evidentiary function, rather than a substantive requirement).

meeting of the minds or other bargaining, which had been another stumbling block to finding implied contracts in the workplace.[148]

Unilateral contract analysis allows employees to bind their employers to policies outlined in employee handbooks.[149] In the typical case, an employer circulates a handbook outlining policies and procedures the employer will follow before disciplining or discharging an employee. The handbook may also make statements regarding stock options,[150] sick days, demotions,[151] severance pay,[152] or other employee concerns. An employer who circulates such a manual may be bound by those provisions regarding discharge of an employee when the provisions give the employee a reasonable expectation of receiving those benefits.[153] Until *Scott*, employers had been bound to provisions or assurances regarding job security but generally had been free to ignore other provisions. The *Scott* court reasoned that no inherent requirement exists to restrict unilateral contract analysis to termination provisions when the same handbook may make similar promises regarding other terms and conditions of employment.[154] The fact that demotion is a lesser quantum of discipline than termination should not affect the enforceability of any promise made to demote for cause, except as to the measure of damages.[155]

Similar reasoning appears to support the decision of a Colorado appellate court that reversed the dismissal of a wrongful demotion claim by an employee alleging that his employer failed to follow its own disciplinary procedures.[156] The court did not distinguish between discharge and demotion and simply applied unilateral contract

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148. *Toussaint*, 292 N.W.2d at 892; *Woolley*, 491 A.2d at 1267. See *Pugh*, 16 Cal. App. 3d at 325-26 (omitting bargaining as a requirement for enforcing employee policy manual provisions).

149. See Lopatka, 40 Bus. Law. at 17-26 (cited in note 141) (discussing some courts' application of implied contract terms to defeat employment at-will).

150. *Newberger v. Rifkind*, 28 Cal. App. 3d 1070, 1072 (1972).

151. *Scott*, 904 P.2d at 836.

152. *Panto*, 547 A.2d at 261.

153. See generally Richard A. Winters, Note, *Employee Handbooks and Employment At-Will Contracts*, 1985 Duke L. J. 196, 205-19 (discussing different analytical approaches to binding employers to employee handbooks).

154. *Scott*, 904 P.2d at 839. See *Anthony v. Jersey Central Power & Light*, 51 N.J. Super. 139, 143 A.2d 762, 764 (N.J. Super. Ct. App. Div. 1958) (applying unilateral contract analysis to enforce an employer's alleged implied promise to provide severance benefits).

155. See *Hoopes*, 473 F. Supp. at 1224 n.4 (stating, in dicta, that any distinction between demotion and termination would "seem to go only to the measure of damages, and not to the recognition of the employee's cause of action"); *Scott*, 904 P.2d at 845-46 (rejecting an employer's argument that implied contract terms outside the realm of wrongful termination should not be enforced).

156. *Salimi*, 684 P.2d at 264-65.

analysis to the employee handbook to find an implied promise to follow the disciplinary procedures.[157]

Other courts have occasionally bound employers to promises beyond job security provisions.[158] The Michigan Court of Appeals found that wrongful demotion fell within the state's implied contract exception to wrongful discharge because a "demotion from one job to a lesser job is a discharge from the first job."[159] Courts that have been willing to look beyond job security provisions for implied promises have held employers to promises to re-hire laid-off employees,[160] and to pay stock options,[161] severance benefits,[162] and pensions.[163] These courts have relied on unilateral contract analysis to allow claims for breach of an implied contract.[164]

One common factor in decisions applying unilateral contract analysis to cases other than termination is that the benefit offered by the employer, allegedly as a gratuity, created an incentive for the employee to continue working.[165] For example, in *Hepp v. Lockheed-California Co.*,[166] employees alleged that Lockheed had breached a promise to re-hire laid-off employees before hiring new applicants.[167] In response to Lockheed's argument that such a promise was not binding for lack of consideration, the court stated "[a]n employee might well be induced to take employment with defendant in spite of the risk of periodic layoff if the employee knows he will be given preference in rehiring . . . as economic conditions change."[168] The existence of similar incentives in other implied contracts indicates

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157. Id.

158. See *Richards*, 433 N.W.2d at 321-22 (finding an implied contract to demote only for cause).

159. Id. at 322. *Richards* is virtually isolated among Michigan cases finding wrongful demotion. Supporting cases include *Schipani*, 302 N.W.2d at 307, but opposing cases include *Fischaber*, 436 N.W.2d at 386.

160. *Bower*, 852 F.2d at 363; *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 718-19 (1978).

161. *Newberger*, 28 Cal. App. 3d at 1076.

162. *Chinn v. China National Aviation Corp.*, 138 Cal. App. 2d 98, 291 P.2d 91, 93-94 (1955); *Panto*, 547 A.2d at 267; *Anthony*, 143 A.2d at 764-66.

163. *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P.2d 807, 815 (1948).

164. See *Hepp*, 86 Cal. App. 3d at 719 (concluding that an employee's continued employment constituted consideration for an employer's promise to rehire laid-off employees); *Anthony*, 143 A.2d at 764 (concluding that an employer's promise to provide severance pay constituted an "offer in return for rondition of services in employment by the employee").

165. *Hepp*, 86 Cal. App. 3d at 719; *Anthony*, 143 A.2d at 764.

166. 86 Cal. App. 3d 714 (1978).

167. Id. at 719.

168. Id.

that some courts may be receptive to implied contract actions regarding terms or conditions of employment. The reasoning indicates that nothing mandates that unilateral contract analysis stop with wrongful discharge claims.[169]

At least one court, however, has reached the opposite conclusion when analyzing a claim for the breach of an implied promise regarding a term or condition of employment. In *Dumas v. Auto Club Insurance Association*,[170] the Michigan Supreme Court addressed the issue of whether an employer could change its compensation system despite having promised its employees that it would continue to use its original compensation system.[171] Conceptually, the question was whether an employee had any contractual rights, aside from promises regarding termination, based on an employee handbook or implied contract.

Previously, in *Toussaint*, the Michigan Supreme Court had indicated its willingness to bind employers to promises beyond discharge.[172] This position was grounded in a discussion of earlier Michigan cases that required employers to provide death benefits,[173] severance pay,[174] or profit sharing income[175] to employees who had received assurances of such payments.[176] The *Toussaint* court went on to conclude that employers who establish a personnel policy to terminate only with good cause create a legitimate expectation by the employee of such treatment.[177] As a result, such policies contractually bind the employer.[178]

In *Dumas*, the plaintiff sought to bind an employer to statements regarding the form of compensation.[179] Initially, the decisions cited in *Toussaint* and the court's langnage in *Toussaint* appeared to

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169. *Scott*, 36 Cal. App. 4th at 1514 (White, P.J., dissenting) (stating that "I perceive no reason why the contract principles enunciated in *Pugh* . . . are not equally applicable to implied contracts not to discipline employees without good cause").

170. 437 Mich. 652, 473 N.W.2d 652 (1991).

171. Id. at 654. The company changed its commission plan from one based on a percentage of sales to one based on a fixed rate commission for each sale. Id.

172. *Toussaint*, 292 N.W.2d at 894. The court stated that "[t]he right to continued employment absent cause for termination may, thus, because of stated employer policies and established procedures, be enforceable in contract just as are rights so derived [from] bonuses, pensions, and other forms of compensation." Id.

173. *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385, 386 (1936).

174. *Gaydos v. White Motor Corp.*, 54 Mich. App. 143, 220 N.W.2d 697, 700 (1974); *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 211 N.W.2d 101, 102-03 (1973).

175. *Couch v. Administrative Committee of the Difco Laboratories, Inc., Salaried Emp. Profit Sharing Trust*, 44 Mich. App. 44, 205 N.W.2d 24, 25-26 (1972).

176. *Toussaint*, 292 N.W.2d at 894.

177. Id. at 893-94.

178. Id. at 894-95.

179. *Dumas*, 473 N.W.2d at 655-56.

preclude the employer from changing the form of compensation. The Michigan Supreme Court, however, distinguished the earlier cases by saying that the benefits provided by the employer in those cases were exchanged for work already performed and, therefore, those cases operated under "traditional contract principles."[180] By contrast, under *Toussaint*, which "does not follow traditional contract analysis," an employee must show a legitimate expectation of the benefit.[181] Because *Dumas* did not concern employees with vested contract rights, the court held that traditional contract analysis was unavailable and that the case would necessarily have to fall within *Toussaint* to bind the employer to the original compensation system.[182] The court refused to extend *Toussaint* beyond the "wrongful discharge scenario," because doing so would interfere with the business judgment and discretion of corporate officers and hamper the need for businesses to be adaptable and flexible in the "modern economic climate."[183]

Concerns regarding litigation and judicial oversight are the crux of employers' resistance to actions for wrongful demotion and other implied contract actions.[184] Employers fear that expensive litigation initiated by disgruntled employees raising trivial and frivolous issues will swamp their business.[185] They also worry about the efficiency of operating in a setting in which managers, manuals, and departmental practice must be scrutinized in an effort to avoid lawsuits.[186] While the employers' concerns may be overstated, they reflect the policy arguments frequently raised by defendants in wrongful demotion litigation. Such concerns probably explain the different results of the *Dumas* case, as compared to the *Scott* case. Part IV will

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180. Id. at 656.
181. Id.
182. Id.
183. Id. at 656-57.
184. See *Scott*, 904 P.2d at 843 (discussing and dismissing an employer's concerns regarding the increased costs of extending implied agreements to employee demotion); *Dumas*, 473 N.W.2d at 656-57 (discussing the reluctance of courts to interfere with the "needed flexibility of business to change their policies to respond to changing economic circumstances"); *Bullock*, 444 N.W.2d at 136 (Griffin, J., concurring in part and dissenting in part) (noting the "enormous potential cost" that could result from the extension of the *Toussaint* decision beyond wrongful discharge).
185. See *Scott*, 904 P.2d at 843 (discussing an employer's claim that enforcing implied agreements governing employee demotion will "inevitably open the door to lawsuits concerning a whole host of lesser employment decisions").
186. See id. (discussing an employer's concerns that enforcing implied agreements governing employee demotion would lead to judicial intrnsion on an employer's "exercise of managerial discretion").

examine this policy and look for countervailing policies in an effort to resolve the fundamental difference between the *Dumas* court and the *Scott* court.

IV. POLICIES UNDERLYING WRONGFUL DEMOTION

The resistance to actions based on implied contracts regarding terms and conditions of employment has centered on concerns about judicial overinvolvement in the management of the employer's business. Employers argue that judicial second-guessing reduces flexibility and increases costs.[187] Furthermore, in efforts to minimize these effects, employers may react by granting fewer benefits and establishing fewer clear policies. If implied contracts are not recognized, however, aggrieved employees argue that they accepted employment under false pretenses. They also claim that attracting qualified employees with policies and promises that the employer has no intention of honoring is unfair. Courts must reconcile these conflicting policies when deciding actions for wrongful demotion.

In *Scott*, PG&E resisted the wrongful demotion action by arguing that "every act or omission regarding performance evaluations, promotions, transfers, or other perquisites would be subject to judicial determination as to whether the policy or practice at issue contained an implied 'good cause' promise," leading to a "judicial invasion" into the employer's business.[188] This is the employers' fundamental objection to actions such as wrongful demotion. Justice Griffin of the Michigan Supreme Court echoed the concern in response to the court's decision allowing a breach of contract action based on an implied contract concerning an employer's promised method of compensation.[189] He wrote that "it is difficult to imagine the scope of difficulties and mischief that would be encountered if judicial exceptions to the at-will doctrine were extended beyond wrongful discharge into every facet of the employment relationship."[190] Justice Griffin claimed that extending the implied contract exception beyond wrongful discharge cases would entail "enormous" costs and cause significant damage to the employer-employee relationship.[191]

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187. See id. (discussing arguments made by an employer that enforcing implied agreements governing employee demotion would lead to higher costs and decreased productivity).

188. Id.

189. *Bullock*, 444 N.W.2d at 136 (Griffin, J., concurring in part and dissenting in part).

190. Id.

191. Id.

The potential response by employers faced with expanded liability for implied promises creates further policy concerns. If employers seek to prevent liability by not making promises, as the *Scott* court suggests,[192] they may restrict the authority of mid-level managers and supervisors to make binding promises. Restricted in this manner, mid-level managers and supervisors may send even the most detailed questions to the executive level in an effort to avoid making unauthorized promises.[193] The inflexibility and stagnation that would result in decision making would impair employers' recognized need to be adaptive and efficient.[194] Generally, courts have been reluctant to interfere with an employer's business judgment because of concerns about inefficiency and lack of judicial business acumen.[195] The same concerns apply with equal force when recognizing actions like wrongful demotion.

Another possible employer response includes creating personnel policies and promises so vague as to be unenforceable.[196] This approach would have a deleterious effect on employees, who could not be sure upon which benefits and procedures they could rely, and on courts, who would be left with an unidentifiable standard and two equally compelling interpretations. More troubling is that employers, fearing potential litigation, may choose not to provide many of the benefits or internal disciplinary procedures that could eventually lead to lawsuits.[197] Consequently, a large number of employees who enjoy these benefits may be deprived of them. Ironically, a cause of action adopted to help employees receive promised benefits and procedures may cause employers to eliminate those benefits and procedures, rather than face liability for failure to comply with them.

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192. *Scott*, 904 P.2d at 844.

193. See *Swanson*, 826 P.2d at 673-79 (finding that a disclaimer attempting to invalidate all employment decisions except those made by the corporate president or vice-president was not an obstacle to an action based on the breach of an implied promise).

194. See *Dumas*, 473 N.W.2d at 656-57 (stating that the need for business flexibility precludes actions beyond wrongful termination). But see *Toussaint*, 292 N.W.2d at 894 (rejecting this argument).

195. See *Dumas*, 473 N.W.2d at 656-57 (concluding that courts should not interfere with the business judgment of corporate officers and directors).

196. See *Western States Minerals Corp. v. Jones*, 1991 Nev. LEXIS 17, *55 (Steffen, J., dissenting) (stating that judicial use of employee handbooks will cause employers to "load" their handbooks with disclaimers and non-commitment language), rehearing granted and opinion withdrawn in *Western States Minerals Corp. v. Jones*, 107 Nev. 116, 807 P.2d 1392, 1392 (1991).

197. Id. See also *Williams*, 459 S.E.2d at 341 (recognizing that opening employers to liability through a narrow interpretation of a disclaimer in an employee handbook may cause some employers not to issue handbooks).

Fear of high costs, loss of employer discretion, and the creation of incentives adverse to employee interests may inhibit some courts from recognizing actions for wrongful demotion. Courts could justify a distinction between the widely recognized action for wrongful discharge and the controversial action for wrongful demotion by noting that termination is a form of "economic capital punishment," whereas demotion or cutting a coffee break by five minutes is within an employer's policy-making realm.[198] Such a position would create first- and second-class employment rights. Employee terminations would be treated as a first-class right entitled to heightened scrutiny, whereas actions falling short of demotion would be second-class rights subject to increased deference to the employer.[199]

The distinction between discharge and demotion evaporates, however, when the policy issues are viewed contractually. Contractually, the employer is not sacrificing flexibility or profits when it provides benefits or procedures to its employees. Instead, the employer is seeking to improve its work force through improved morale and favorable working conditions. Therefore, implied contracts are properly viewed as a voluntary exchange of employer benefits for enhanced productivity and compliance with company policy. The employer has bargained away its discretion and flexibility and, therefore, "may not treat its promise as illusory."[200] Furthermore, the *courts* do not restrict the employer under a contractual view because a contract, even an implied contract, is within the employer's policy-making realm.[201]

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198. *Baragar*, 860 F. Supp. at 1262. But see *Brigham*, 935 P.2d at 1058 (rejecting appellate court's distinction between discharge and demotion).

199. The distinction between first- and second-class employment rights is analogous to distinctions made in First Amendment jurisprudence, in which commercial speech (as opposed to political speech) is a second-class right and restrictions on it receive less scrutiny than other first amendment claims. See, for example, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976) (granting deference to legislative regulation of commercial speech and suggesting that commercial speech should receive a "different degree of protection" than noncommercial speech). See also id. at 786 (Rehnquist, J., dissenting) (stating that the Court created "second-class First Amendment rights . . . in commercial speech").

200. *Toussaint*, 292 N.W.2d at 893. See *Leikvold*, 688 P.2d at 1704 (stating that an employer who chooses to issue a policy manual and who encourages reliance on the policies may not "selectively abide" by the policies); *Scott*, 904 P.2d at 843 (holding that employers' "voluntary commitments" to personnel policies are not contrary to public policy). See also *Ross*, 665 A.2d at 583-84 (stating that the employer has the power to control its contractual obligations).

201. See *Scott*, 904 P.2d at 844-45 (noting that an employer has the ability to avoid "unwanted contractual obligations" by altering its policies and procedures); *Toussaint*, 292 N.W.2d at 892 (stating that an employer has the power to control its contractual obligations); *Panto*, 547 A.2d at 268 (noting that an employer can avoid its obligations by stating that the policies at issue are not enforceable).

Similar reasoning explains why employers will be reluctant to abolish implied promises in their businesses. Employers expect and receive benefits from their implied promises.[202] Even a benefit as mundane as a fifteen-minute coffee break is provided under the assumption that the employee is more productive with an occasional rest. Employers are probably not willing to sacrifice the acknowledged benefits of established disciplinary procedures because of implied contract actions, although they may attempt to apply those procedures more consistently rather than face liability for ignoring them.

Undoubtedly, some employers will make vague promises in hopes of attracting and retaining employees and then use the vagueness defense to avoid complying with the promises. Concern over the use of vague promises to prevent employee lawsuits, however, seems premature. Employers are unlikely to use this defense for two reasons. First, the procedures and policies in employee manuals and other sources are provided for reasons other than merely attracting and retaining productive employees. Clear procedures and policies allow management to avoid litigation by using consistent and non-discriminatory guidelines in its treatment of employees.[203] Second, vague procedures may actually lead to *increased* litigation because an aggrieved employee is likely to see promises when an employer sees nothing and file a lawsuit nonetheless.[204] Vague policies and procedures seem likely to create litigation by allowing employee perceptions of fair treatment and discriminatory motives greater latitude than clear procedures and policies might allow.

Employer concerns about judicial oversight are nullified by viewing the employment arrangement contractually. An employer bargains for improved morale,[205] reduced absenteeism,[206] and an enhanced ability to attract employees and provides "for cause" demotion provisions and fair disciplinary procedures in return.[207] An employer who seeks to benefit from employee inducements but wants to avoid

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202. James R. Redeker, *Employee Discipline: Policies and Practices* 106 (BNA, 1989) (outlining the benefits that employers receive from developing employee due process and discipline systems).

203. Id.

204. See notes 123-27 and accompanying text (listing cases refusing to enforce implied promises in the employment setting because the promises made by employers were too vague).

205. *Ross*, 665 A.2d at 583.

206. Osigweh and Hutchinson, 28 Hum. Resource Mgmt. at 382 (cited in note 72).

207. See Redeker, *Employee Discipline* at 106 (cited in note 202) (discussing the potential benefits of adopting a "fair system of progressive discipline").

the associated costs, however, must be disfavored.[208] The exchange of a promise for an act is at the heart of contract law.[209] Failure to enforce an employer's promise to demote only for good cause in return for an employee's continued and enhanced activity contradicts this fundamental notion.

A brief survey of the terrain covered thus far is appropriate before turning to the significance of the *Scott* decision's impact on the employment at-will doctrine. Demotion is no different than other terms and conditions of employment and, so long as wrongful demotion is recognized, implied contract actions should be available for any implied promise within the employment relationship. These actions are available for any grievance during the employment relationship unless some limiting principle controls. Disclaimers, unenforceably vague promises, and a lack of ascertainable damages, however, do not effectively limit the scope of implied contract actions regarding terms and conditions of employment. Intrinsic limitations to the *Scott* decision based on unilateral contract theory are similarly non-limiting because wrongful demotion and other claims regarding terms and conditions of employment meet the elements of a valid unilateral contract.

Policy concerns regarding judicial scrutiny of day-to-day business decisions also provide no reason to limit implied contract actions to wrongful discharge settings. Employers who provide benefits and favorable conditions in return for enhanced productivity cannot refuse to supply promised benefits and procedures after receiving enhanced productivity. Without limiting principles, wrongful demotion and other actions concerning terms and conditions of employment can arise from any portion of the employer-employee relationship governed by an implied promise. When every term and condition of employment, from discharge to coffee breaks, is subject to challenge, how much at-will is left in the at-will doctrine?

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208. *Williams*, 459 S.E.2d at 341. The Supreme Court has recognized this fact implicitly in the Title VII realm. In *Hishon*, the Court found that a law firm had breached its implied promise to make the plaintiff a partner, noting that, as a "matter of course," this promise was a key inducement behind the plaintiff's acceptance of employment and, therefore, was deserving of Title VII protection. *Hishon*, 467 U.S. at 74-75.

209. Restatement (Second) of Contracts § 71 (1981).

V. ASSESSING EMPLOYMENT AT-WILL IN THE AFTERMATH OF WRONGFUL DEMOTION

At one time, the at-will doctrine controlled all aspects of the employment relationship: hiring, the terms and conditions of employment, and termination. Later, recognition of wrongful discharge limited an employer's ability to terminate an employee. The vast portion of the employer-employee relationship between hiring and termination, however, remained completely subject to the employer's discretion under the at-will doctrine. *Scott* was the first state supreme court decision to allow an action for the breach of an implied contract between hiring and termination. As demonstrated, though, once courts cross the line from recognizing implied contracts regarding termination to those regarding the terms and conditions of employment, no further limiting principle exists. The primary significance of the *Scott* decision, and the aspect that distinguishes it from a wrongful discharge action, is the scope of the employer's discretion restricted by implied contracts. Wrongful discharge law creates liability for employers who promise job security but terminate employees without cause. The *Scott* decision, however, creates liability for breach of an implied promise regarding *any* phase of the employment relationship, rather than just termination.

The large number of sources that can create implied contracts regarding a term or condition of employment also distinguishes wrongful demotion from wrongful discharge and further decreases employer discretion. An employer's implied promise to terminate only for good cause may arise from an employer's personnel policies, routine personnel practices, actions or communications assuring continued employment, industry practices, or the employee's length of service or promotions.[210] Clearly, an employer is significantly restricted[211] by these factors in its decision to terminate employees "for no cause, or even a bad cause."[212] Not only can these same factors likely imply promises regarding a term or condition of employment,[213] but examining the employer-employee relationship between hiring and termina-

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210. *Pugh*, 116 Cal. App. 3d at 327, 329.

211. See id. at 321 (discussing the "variety of limitations upon the employer's power of dismissal").

212. See *Payne v. Railroad*, 81 Tenn. 507, 517-18 (1884) (stating that an employer may terminate an employee "for any cause, good or bad, or without cause"), overruled on other grounds by *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134, 134 (1915).

213. *Scott*, 904 P.2d at 841.

tion for implied promises created by this expansive list of factors will lead to the discovery of numerous implied promises. For example, before *Scott*, a supervisor's promise to transfer junior employees before senior employees would not bind the employer because the promise did not relate to job security. After *Scott*, however, an employer would be required to transfer the junior employees first. Similarly, before *Scott*, consistently demoting employees after providing at least one written warning would not prohibit an employer from demoting an employee without a warning. After *Scott*, the employer would have to provide at least one written warning.[214]

Thus, recognition of wrongful demotion subjects the entire employment relationship to scrutiny for implied promises. Regardless of the phase of the employer-employee relationship, any benefit or employer practice may be part of an implied contract between the employer and employee. The interstices that remain unfilled by some sort of implied agreement will be few because of the extensive number of ways in which an implied contract can be formed. Implied contracts will likely exist for personnel decisions such as demotions, transfers, promotions, bonuses, and other fringe benefits since past treatment of similarly situated employees or a supervisor's oral assurances can create enforceable contracts.

If the vast majority of working conditions and disciplinary actions are subject to a standard other than at-will,[215] the question remains: What has become of the at-will doctrine? At the very least, recognition of wrongful demotion indicates the continued erosion of the at-will doctrine. Since the at-will doctrine only regulates those portions of the employment relationship that are unaffected by an implied contract, and the *Scott* decision expands the portion of the employment relationship that the implied contract controls, then the implied contract now governs most of the employer-employee relationship. Consequently, the at-will rule governs very little of the employment relationship in those jurisdictions following *Scott*. Although the at-will doctrine will continue to exist, it will do so only in the limited situations in which no implied contract governs the conduct of the employer and employee.

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214. See id. at 838-40 (concluding that an employer's course of conduct and adherence to policies and procedures create an implied contractual obligation to continue the conduct and procedures in the future).

215. These conditions and actions would include limitations placed on an employer's ability to demote and, as long as the *Scott* action were to hold in tort, te make other adverse employment decisions in violation of public policy. See notes 45-46 for cases indicating that demotion can violate public policy.

Recognizing breach of implied contract actions for terms and conditions of employment could have two possible results. First, if employers become the subject of numerous and costly lawsuits, then pressure for legislative reform may officially put an end to employment at-will.[216] Alternatively, courts may continue to recognize the at-will doctrine, but find that implied contracts have supplanted the at-will rule in every significant facet of the employment relationship. Such judicial intervention into the employer-employee relationship, however, is arguably contrary to congressional intent. In attempting to provide substantive guarantees to all employees (as opposed to providing protection from discriminatory behavior), Congress has enacted legislation giving employees the right to organize and bargain collectively,[217] but it has not provided for judicial intervention through new causes of action.[218] Moreover, judicial intervention creates an ever-widening dichotomy between unionized and non-unionized employee protections.[219]

One state legislature, however, has taken a more vigorous approach. Montana's Wrongful Discharge from Employment Act[220] prohibits an employer from discharging an employee without good cause and codifies the prohibition against dismissals in violation of public policy or an employer's personnel policy.[221] The Act does not, however, cover wrongful demotion.[222] Arizona is the only other state to have enacted similar legislation, but it is much less favorable to employees than Montana's act.[223] Arizona appears to have simply codified the implied contract exception and recognized that employers may not terminate an employee if they have guaranteed employment in either an employee handbook or a similar document distributed to the employee.[224] Arizona's act signals a legislative acceptance of the

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216. See notes 220-21 and accompanying text (discussing Montana's legislative abolition of the at-will rule).

217. National Labor Relations Act, 29 U.S.C. § 157 (1994) (giving employees the right to form unions and bargain collectively).

218. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 622-24 (1992) (urging industrial self-government through federal collective bargaining law).

219. Id. at 577.

220. Mont. Code Ann. §§ 39-2-901 et seq. (1995).

221. Id. § 39-2-904.

222. *Clark*, 927 P.2d at 998 (refusing to recognize wrongful demotion under Montana's wrongful discharge statute).

223. Employment Protection Act, Ariz. Rev. Stat. Ann. § 23-1501 (West 1996).

224. Id. § 23-1501(2). The Arizona Act states:

implied contract exception—an exception that theoretically should encompass wrongful demotion.

Allowing states to pass legislation, rather than waiting for the courts to chip away at the at-will doctrine, cause a great deal of confusion regarding the state of employment law, and face charges of excessive activism, may be the best approach because of legislation's broad, immediate sweep. In the absence of federal legislation, such actions by the states would also provide a "healthy experimentation" with various approaches.[225] In fact, one commentator has suggested that state remedies, including wrongful discharge, have been expanded to replace the judicial erosion of federal collective bargaining rights.[226] If this suggestion is correct, legislative support of collective bargaining is not undermined as clearly because state expansion of employment rights is countering judicial erosion of the legislative protection of the National Labor Relations Act.

Considerable debate exists regarding which approach, employee organization, federal legislation, or state legislation, is better suited to reform employment law to make it more palatable for both employers and employees.[227] Whether legislation or continued judicial erosion of the at-will doctrine will resolve this debate is unclear. Regardless, breach of implied contract actions, such as wrongful

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> The employment relationship is severable at the pleasure of either the employee or employer unless both . . . have signed a written contract to the contrary . . . . [This contract may] be set forth in the employment handbook or manual or similar document . . . if that document expresses the intent that it is a contract of employment . . . .

Id.

225. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 Neb. L. Rev. 56, 71 (1988). Professor St. Antoine suggests several approaches to state legislation of wrongful discharge laws, including adoption of a "just cause" requirement for all dismissals; exclusion of some classes of employees (such as unionized employees); and adjudication of disputes, costs, remedies, and the scope of discipline. Id. at 71-81. Interestingly, Professor St. Antoine urges that legislation should provide a remedy for wrongful demotion. Id. at 76.

226. Van Wezel Stone, 59 U. Chi. L. Rev. at 591-93 (cited in note 218).

227. Compare Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. Chi. L. Rev. 1012, 1040 (1984) (arguing that employment law has moved "toward direct imposition of specific minimal terms and standards where problems in the workplace have been perceived" and that employment law should move "away from [a] governmentally sheltered monopoly status for labor unions") with Van Wezel Stone, 59 U. Chi. L. Rev. at 636-38 (cited in note 218) (countering with four reasons why collective bargaining is superior to the expansion of judicial remedies).

demotion, spell either the legislative end of employment at-will or the judicial relegation of the doctrine to the margins of American employment law.

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