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EMPLOYMENT CONTRACTS AFTER *O'BRIEN v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.*: AN OPEN DOOR FOR FAILURE-TO-PROMOTE CLAIMS?

Employers, both public and private, are increasingly adopting policies and procedures governing their hiring and promotion decisions, in addition to more commonly encountered grievance and disciplinary procedures.[1] Such procedures are intended to reduce the risk of personnel decisions that violate anti-discrimination laws, public policy, collective bargaining agreements or other laws. However, they are also likely to create new litigation risks for employers who fail to adhere to procedures and policies intended to govern personnel decisions.

This risk is especially present in the wake of the Massachusetts Supreme Judicial Court's decision in *O'Brien v. New England Tel. & Tel. Co.*[2] *O'Brien* recognized that employers may be obligated to abide by the personnel policies and procedures contained in their employee handbooks and similar writings, and may be liable for breach of contract when they fail to do so.[3]

Because Massachusetts has not yet defined any doctrinal limits to breach of contract actions based on violations of personnel manuals, employees can conceivably assert breach of contract claims to challenge a range of personnel decisions, including an employer's decision not to promote an employee.

In Massachusetts, as in most jurisdictions, the at-will employment doctrine protects an employer's right to use subjective criteria, or any others they choose, in hiring and promotion decisions, absent consideration of unlawful factors such as age or race and absent con-

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[1] *See* 14A CLARK, BOARDMAN & CALLAGHAN, EMPLOYMENT COORDINATOR, ¶ 14,401, at 144, 401 (1997) (discussing trend among employers toward adoption of structured promotional systems based on job analysis and classification).

[2] 664 N.E.2d 843, 422 Mass. 686 (1996).

[3] *Id.* at 847, 422 Mass. at 694 (holding employer's failure to follow disciplinary procedures in terminating employee may give rise to breach of contract).

tractual limitations to the employer's discretion.[4] The use of subjective criteria, however, and judgments based on non-objective performance standards, create litigation risks for employers. An aggrieved employee can challenge an adverse decision as discriminatory. For example, based on some comparison of objective performance measures, even when such measures may not, have been the guiding force behind the decision.[5] That is not to say that employees necessarily prevail on such claims. It is difficult for aggrieved employees to overcome the long-standing judicial deference to employer discretion.[6] The at-will employment doctrine remains the law in most states, including Massachusetts.[7] Nevertheless, litigation of this nature can impose costly liability on employers; even if employers successfully defend against such claims, they can suffer significant defense costs and other burdens.[8]

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[4] *See* DeRose v. Putnam Management Co., 496 N.E.2d 428, 429, 398 Mass. 205, 206 (1986) (recognizing public policy may limit employer's discretion in making personnel decisions). *See also* Fortune v. National Cash Register, 364 N.E.2d 1251, 1256-57, 373 Mass. 96, 102-04 (1977) (recognizing implied covenant of good faith and fair dealing obligates parties to at-will employment contract).

[5] *See* Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13 (1st Cir. 1998) (affirming promotion of black police officer who scored lower on promotion exam than white officer).

[6] Villanueva v. Wellesley College, 930 F.2d 124, 131 (1st Cir. 1991) (deferring to college decision-makers in a tenure case); Kelleher v. Personnel Admin'r 657 N.E.2d 229, 234, 421 Mass. 382, 390 (1995) (deferring to managerial decisions in civil service arena under non-delegability doctrine); University of Baltimore v. Iz, 716 A.2d 1107, 1116-20, 123 Md. App. 135, 154-60 (Md. App. 1998) (deferring to University's discretion in considering teacher for tenure).

[7] *Cf.* O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 847-49, 422 Mass. 686, 691-95 (holding personnel manual can modify at-will employment doctrine).

[8] Hishon v. King & Spaulding, 467 U.S. 69, 73 (1980) (reversing dismissal of employment discrimination case); *Iz*, 716 A.2d at 1110, 123 Md. App. at 141 (reversing award of tenure to plaintiff only after discovery, a lengthy jury trial, and appeal).

In response to these risks, employers are increasingly developing and relying on uniform procedures to govern a range of personnel actions, including disciplinary, hiring and promotion decisions.[9] Use of more standardized employment policies can be a useful tool to employers seeking to avoid charges of discrimination stemming from its decisions about whom to hire or promote.[10] It is also an astute business practice.[11] Notwithstanding these benefits, however, employers should carefully draft and disseminate such policies and procedures for the very reason that employees may be able to enforce their terms against employers.[12] Various legal theories are being used to challenge professional promotion procedures.[13] For example, Title VII of the 1964 Civil Rights Act creates a right of ac-

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[9] See CLARK, BOARDMAN & CALLAGHAN, *supra* note 1, at 401(discussing current trends in employment practices).

[10] See Alfred G. Feliu, Primer of Individual Employees Rights 42, 45 (2d ed. 1996).

> The terms of a personnel manual may serve as a shield for employers as effectively as it can be a sword for employees. Management, in the collective-bargaining setting, often cites the terms of a collective bargaining agreement in support of its personnel actions. Similarly, employers often refer to the terms of the personnel manual in support of disciplinary actions or personnel decisions such as refusals to promote.

Id.

[11] *See* CLARK, BOARDMAN & CALLAGHAN, *supra* note 1, at 401. "A uniform promotion policy ensures that a company is making the best possible use of its human resources. Such a policy can also help in recruiting and retaining top-notch employees." *Id.*

[12] *See* Maureen E. McClain & Beth A. Huber, Employee Handbooks/Personnel Manuals, in LITIGATION 1998, at 171, 196 (PLI Litig. & Admin. Practice Course Handbook Series No. 581, 1998) (discussing various forms of employee manuals from the employer's perspective).

[13] *See* Richard J. Pratt, Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment At-Will Doctrine, 139 U. PA. L. REV. 197, 202 (1990) "[T]he widespread dissatisfaction in the legal community with the at-will doctrine has resulted in the development of various theories and approaches which, to one degree or another, cut serious inroads into what was once an 'absolute presumption' in favor of at-will employment." *Id.*

tion to challenge unlawful discrimination in refusals to promote.[14] Public employees may have claims under 42 U.S.C. § 1983 to challenge procedural violations of personnel policies.[15] Additionally, the use of contract theories to challenge the process underlying adverse employment decisions is receiving growing acceptance in the Commonwealth and other states.[16]

This Article will discuss: (1) the development of a breach of contract cause of action under Massachusetts law for failure to follow company procedures in employment decisions; (2) emerging trends in process-based challenges to adverse employment decisions; (3) the difficulties employees face in proving their case and procuring a remedy in contract actions based on procedural violations; and (4) practical suggestions for employers and employees.

I. DEVELOPMENT OF A BREACH OF CONTRACT CAUSE OF ACTION UNDER MASSACHUSETTS LAW FOR FAILURE TO FOLLOW COMPANY EMPLOYMENT PROCEDURES

Massachusetts continues to recognize the at-will employment doctrine.[17] This doctrine is not absolute and Massachusetts' common law recognizes several significant exceptions to it, apart from statutory prohibitions against discrimination.[18] Over the past decade, for

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[14] *See* Brown v. Trustees of Boston Univ., 891 F.2d 337, 359-61 (1st Cir. 1989) (upholding award of tenure to faculty member pursuant to Title VII).

[15] *See, e.g.*, Gray v. Board of Regents, 150 F.3d 1347, 1350-52 (11th Cir. 1998) (finding existence of tenure system means those without tenure have no due process right to continued employment); Helton v. Hawkins, 12 F. Supp. 2d 1276, 1281-82 (M.D. Ala. 1998) (stating employee with property interest in her job has constitutional right to due process before termination).

[16] *See* Gregory Mark Munson, A Straight Jacket for Employment At-Will: Recognizing Breach of Implied Contract Actions For Wrongful Demotion, 58 VAND. L. REV. 1577, 1579 (1997) (discussing expansion of exceptions to at-will employment doctrine).

[17] *See* Jackson v. Action for Boston Community Dev., 525 N.E.2d 411, 412, 403 Mass. 8, 9 (1988) (affirming both employer and employee may terminate their employment relationship at any time, without cause).

[18] DeRose v. Putnam Management Co., 496 N.E.2d 428, 430-31, 398 Mass. 205, 208-11 (1986) (holding public policy concerns create exception to at-will

example, the Massachusetts Supreme Judicial Court has recognized the viability of a contract action based on the provisions of employee manuals or handouts.[19] In Massachusetts, breach of contract actions based on an employer's procedural violations of it policies have arisen in wrongful termination claims. This doctrine, however, is developing without any necessary limitation to wrongful termination claims, inviting aggrieved employees to use their employers' stated policies and procedures to challenge what are commonly viewed as personnel decisions. The following briefly summarizes the development of this cause of action in the Commonwealth of Massachusetts.

A. Jackson v. Action for Boston Community Development

In *Jackson v. Action for Boston Community Dev.*,[20] the Massachusetts Supreme Judicial Court recognized that employee handbooks or manuals can create binding contractual obligations on employers. The Court, however, held that the employee manual in that circumstance did not bind the employer for the following reasons: (1) it contained no definite term of employment; (2) it contained language that it provided only "guidance" as to the employer's "policies"; (3) the employer retained the right to unilaterally modify the manual's terms; (4) the manual's terms were not bargained for between employer and employee; (5) the employee never signed the manual or demonstrated his acknowledgment and assent to its terms; and (6) the employer did not call special attention to the handbook.[21] The *Jackson* decision recognized the possibility that employee handbooks can, under certain circumstances, transform a traditional at-will employment relationship into an employment contract, and established the viability of actions based on implied contractual obligations between employer and employee.[22] However, the burden of

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employment doctrine); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256-57, 373 Mass. 96, 102-04 (1977) (recognizing implied covenant of good faith and fair dealing in at-will employment relationship).

[19] O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 847, 422 Mass. 686, 691 (affirming personnel manual can modify at-will employment doctrine).

[20] 525 N.E.2d 411, 403 Mass. 8 (1988).

[21] *Id.* at 414, 403 Mass. at 13.

[22] *Id.* at 415, 403 Mass. at 14.

proving each of the six criteria effectively requires aggrieved employees to demonstrate the existence of an express, rather than implied contract, as subsequent decisions for an employer's violations of an employee manual have shown.

B. Post-Jackson Decisions in the Commonwealth

Decisions subsequent to *Jackson* initially maintained *Jackson's* restrictive view of the contractual nature of employee handbooks and manuals by rigidly applying the six *Jackson* factors as the test for determining the existence of contractual obligations contained in employee handbooks.[23] Notwithstanding *Jackson's* theoretical recognition of implied employment contracts, employees could not easily enforce employers' promises given the difficulty of satisfying each of the six *Jackson* factors.

C. O'Brien v. New England Telephone & Telegraph Co.

In *O'Brien,*[24] the Supreme Judicial Court confirmed that policies and procedures contained in an employer's personnel manual could give rise to contractual obligations on the part of both employer and employee:

> The idea that an employer may ignore promises made in a personnel manual is in increasing disfavor in this country.... Surely, if the parties agree in advance of employment that a personnel manual will set forth

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[23] *See, e.g.,* Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 257 (1st Cir. 1992) (reversing jury verdict for employee where absence of four Jackson factors negated enforceability of personnel manual); Biggens v. Hazen Paper Co., 953 F.2d 1405, 1418 (1st Cir. 1992) (finding failure to adduce evidence supporting at least two elements of Jackson factors was fatal to claim); Lewis v. Gillette Co., C.A. No. 90-12257-WF, 1993 U.S. Dist. Lexis 10239 at *12 (D. Mass. July 21, 1993) (affirming that non-negotiated handbook that employee was not required to sign did not create contractual rights); Mullen v. Ludlow Hosp. Soc'y, 592 N.E.2d 1342, 1344, 32 Mass. App. Ct. 968, 969 (1992) (denying plaintiff's claim for wrongful termination because manual was not contractual basis of employment relationship).

[24] 664 N.E.2d 843, 422 Mass. 686 (1996).

> relative rights and obligations of employer and employee, the manual becomes part of the employment contract.[25]

The Supreme Judicial Court's 1996 decision in *O'Brien*, however, departed from the rigid analytical framework set forth in *Jackson*, holding that employers are obligated to abide by the terms of their employee manuals when an employee reasonably relies upon those policies.[26] An employee cannot show reasonable reliance on those procedures, however, if he or she has failed to abide by them.[27] Although *O'Brien* is a wrongful termination case, the Supreme Judicial Court drew no distinction between disciplinary procedures, such as the termination process, and other personnel procedures, including those used in promotion decisions. *O'Brien*, therefore, potentially opens the door for employees to challenge a range of personnel decisions.

D. Current State of the Law in Massachusetts

Since *O'Brien*, a handful of Massachusetts contract claims based on policies and procedures set forth in employee manuals has arisen in wrongful termination claims. In most, courts have declined to find that the employee handbooks at issue created enforceable ob-

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[25] *O'Brien*, 664 N.E.2d at 847, 422 Mass. at 691.

[26] *Id.* at 848, 422 Mass. at 694. In support of the reasonable reliance analysis, the Court stated:

> Management distributes personnel manuals because it is thought to be in its best interest to do so. Such a practice encourages employee security, satisfaction, and loyalty and a sense that every employee will be treated fairly and equally. . . . Management expects that employees will adhere to the obligations that the manual sets forth. . . . The employees may have a reasonable expectancy that management will adhere to a manual's provisions.

Id.

[27] The Supreme Judicial Court upheld the dismissal of O'Brien's claim because she failed to pursue and exhaust the grievance procedure set forth in the employee manual.

ligations.[28] Given increasing judicial recognition of exceptions and limits to the at-will employment doctrine, however, such actions remain viable.[29]

The recent decisions reflect the continuing tension between the at-will employment doctrine and exceptions to that doctrine, which restrict employers' discretion. There is no apparent doctrinal basis, however, to limit *O'Brien* to wrongful termination cases. Employee manuals cover a range of significant employment decisions, including promotion, demotion, and disciplinary actions.[30] All such decisions are subject to potential breach-of-contract claims when an employer fails to adhere to the standards and procedures set forth in the personnel manual.

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[28] *See, e.g.*, Bennett v. MBTA, No. CIV.A.93-1409E, 1998 WL 52245 at *8 (Mass. Super. Feb. 2, 1998) (finding employer's Affirmative Action Plan cannot supersede collective bargaining agreement regarding termination of employee who failed drug test); Smith v. Fallon Clinic, Inc., No. CIV.A.97-0577A, 1998 WL 296900 at *4 (Mass. Super. June 3, 1998) (finding no contract existed where manual was never distributed to non-management employees, including plaintiff); Chilson v. Polo Ralph Lauren Retail Corp., No. CIV.A.98-10081-RGS, 1998 WL 388890 at *3 (D. Mass. July 7, 1998) (finding that provision in handbook encouraging employees to share their concerns and ideas did not contractually bind employer); Hinchey v. Nynex Corp., 979 F. Supp. 40, 42-43 (D. Mass. 1997) (dismissing contract action where, before signing manual, employee withheld assent to some terms). *But see* Derrig v. Wal-Mart Stores, Inc., 942 F. Supp. 49, 56 (D. Mass. 1996) (finding no breach of contract for termination where employer expressly retained right to circumvent progressive disciplinary policy.)

[29] *See* Peter Stone Partee, Reversing the Presumption of Employment At-Will, 44 VAND. L. REV. 689, 692-700 (1991) (discussing erosion of the at-will employment doctrine and thepossibility of replacing it with other doctrines); Andrew P. Morris, Bad Date, Bad Economics, and Bad Policy: Time to Fire The Wrongful Discharge Law, 74 TEX. L. REV. 1901, 1901-03 (1996) (discussing termination in the workplace under the at-will employment doctrine); Employment At-Will State Rulings Chart, 123 IND. EMPL. RIGHTS MANUAL 505: 51-52 (BNA 1994).

[30] *See generally,* Munson, *supra* note 16, at 1602-12 (discussing the expansion of the exceptions to the at-will employment doctrine).

II. EMERGING TRENDS IN PROCEDURAL CHALLENGES TO ADVERSE EMPLOYMENT DECISIONS

Numerous other jurisdictions have recognized an employee's right to challenge personnel decisions based on the policies and procedures contained in employee manuals and handbooks, and the trend is towards increased recognition of exceptions to the at-will employment doctrine for failure to follow company procedures.[31] The exception initially was recognized in wrongful termination cases.[32] Some courts have begun to extend the exception to wrongful demotion or other disciplinary action cases.[33] However, there are no clear doctrinal limits that prevent these principles from applying equally to other types of employment decisions. In the absence of any such limitations, it appears that the cause of action is likely to expand to include wrongful failure to promote claims.[34]

In certain areas, claims for failure to promote in accordance with the employer's policies and procedures already have been recognized.[35] For example, contract claims challenging an employer's refusal to promote are well established in the area of college or uni-

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[31] *Id.*

[32] *See* Touissant v. Blue Cross Blue Shield, 292 N.W.2d 880, 892, 408 Mich. 579, 615 (1980) (affirming that employee handbook may bind employer to follow disciplinary procedures before terminating employee.).

[33] *See* Scott v. Pacific Gas & Elec. Co., 904 P.2d 834, 843, 11 Cal. 4th 454, 470, 46 Cal. Rptr. 2d 427, 436 (1995) (recognizing contract action for employer's failure to follow stated demotion procedure).

[34] *See* Munson, *supra* note 16, at 1582.

> The doctrinal principles that allowed the [Scott v. Pacific Gas and Electric Co., *supra*, note 33] 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.

Id.

[35] *See infra* notes 38-40 (discussing various contexts where plaintiff's with failure to promote claims have prevailed).

versity tenure decisions.[36] In *Williams v. Northwestern University*, the court stated: "[t]enure is essentially a contractual interest; therefore, the specific rights and duties associated with it are contained in the understandings of the parties."[37] This contractual relationship has been found to incorporate an educational institution's written policies and procedures for tenure awards as set forth in faculty handbooks and similar writings.[38]

Challenges to an employer's failure to promote in accordance with its established procedures also arise under civil service laws.[39] Breaches of contract actions have been recognized as available and adequate to remedy a failure to promote in accordance with a jurisdiction's civil service laws. Indeed, the availability of breach of contract actions may bar due process claims under 42 U.S.C. § 1983.[40] There is, however some authority recognizing that public employees may have a protected property interest in promotional

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[36] *See infra* note 38 (discussing contract nature of tenure).

[37] Williams v. Northwestern Univ., 497 N.E.2d 1226, 1229 (Ill. App. 1986). *See also* Bennett v. Wells College, 219 A.D.2d 352, 356-57, 641 N.Y.S.2d 929, 932-33 (1996) (ordering defendant to review teacher's tenure application because college failed to follow policy during initial review).

[38] *See* Klinge v. Ithaca College, 167 Misc. 2d 458, 461-64, 634 N.Y.S.2d 1000, 1002-04 (Sup. Ct. 1995) (denying summary judgment where faculty handbook terms incorporated in tenure contract entitled plaintiff to grievance process).

[39] *See, e.g.,* Johnson v. Commissioner of Pub. Safety, 243 N.E.2d 157, 160-161, 355 Mass. 94, 100-02 (1968) (holding policewoman entitled to promotion where commissioner's discretion over promotions restricted by rules and regulations); Bielewski v. Personnel Adm'r of the Div. of Personnel Admin., 663 N.E.2d 821, 826, 422 Mass. 459, 465 (1996); Trosky v. Civil Serv. Comm., 652 A.2d 813, 817, 539 Pa. 356, 363-64 (1995) (holding police officers improperly excluded from list of employees eligible for promotion examination entitled to contract relief).

[40] *See, e.g.,* Haskins v. City of Chattanooga, 877 S.W.2d 267, 270 (Tenn. Ct. App. 1998) (dismissing 42 U.S.C.A. § 1983 claim for employer's failure to promote, where adequate remedy available in contract).

procedures under state law, giving rise to procedural due process claims.[41]

Likewise, employees have successfully challenged employers' refusals to promote when such decisions violate the terms of collective bargaining agreements.[42] Decisions from these other employment contexts offer guidance as to how Massachusetts should approach contract claims arising from an employer's failure to follow established promotion procedures, and should alert employers to some of the risks attendant to such policies and procedures.[43] Conversely, attention to these decisions may also assist employees to vindicate a range of rights created by the employer's policies and procedures.[44]

III. ELEMENTS OF A BREACH OF CONTRACT CLAIM BASED ON FAILURE TO FOLLOW COMPANY PROCEDURES

An employee seeking to challenge employer's decision denying her a promotion must generally prove the following: (1) the employer's promotion procedures constitute a part of an implied contract; (2) the employer's action or omission was a substantial and material breach of its stated procedures; (3) the employer's procedural violation caused the adverse employment decision or, put another way, that *but for* the employer's procedural violation, the em-

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[41] *See* Thomas J. Conroy, III, Regulatory Promotion Provisions May Give Rise To Deprivation of Property Interest When Provisions Are Not Complied With, 16 Stetson L. Rev. 1083 (1987), *discussing* City of Riviera Beach v. Fitzgerald, 492 So. 2d 1382 (Fla. Ct. App. 1986) (recognizing public agencies providing specific guidelines for promotions may create constitutionally protected property interests). *But see* Kelleher v. Personnel Adm'r of Dept. of Personnel Admin., 657 N.E.2d 229, 234, 421 Mass. 382, 389 (1995) (holding no property interest created by inclusion on civil service promotion eligibility list).

[42] *See* Somerville v. Somerville Mun. Employees Ass'n, 481 N.E.2d 1176, 1182-83, 20 Mass. App. Ct. 594, 601-03 (1985) (finding city's failure to follow promotional procedures in civil service law violates collective bargaining agreement).

[43] *See supra* notes 39-41 (discussing other cases with contract based claims).

[44] *See infra* note 49 (discussing effect of employer-retained discretion in employees' ability to win contract based claims).

ployee would have been promoted; (4) the employee suffered damages as a result of the employer's procedural violation and; (5) the employee adhered to any grievance procedures contained in the manual in prosecuting his or her claim.[45] In Massachusetts, an employee must show a "reasonable expectancy" that the employer will adhere to the procedures.[46] An employee who brings a claim challenging her employer's decision not to promote her must generally prove each of these elements.

A. Difficulties of Proof in Failure-to-Promote Cases

In Massachusetts, an employee must first establish that the employer's handbook or other stated policy is an implied contract by demonstrating his or her awareness of the provision and reasonable reliance upon it.[47] Many cases alleging wrongful failure to promote arising from violations of an employer's procedures also fail where the employer retains some measure of discretion in making final promotion decisions, rendering nearly impossible a showing that the employee would have been promoted *but for* the procedural violation.[48] As with any breach of contract claim, the employee has the

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[45] *See* Allsup v. Mount Carmel Med. Ctr., 922 P.2d 1097, 1102, 22 Kan. App. 2d 613, 616 (Kan. Ct. App. 1996) (holding existence of implied contract would bind employee to follow grievance procedure in employment manual); O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 849, 422 Mass. 686, 695 (1996) (denying employee relief because she did not follow grievance procedures laid out in employment manual); Hom v. State of N. Dakota, 459 N.W.2d 823, 826 (N.D. 1990) (finding seven month delay in giving reasons for termination was a substantial breach of contract); Trosky v. Civil Serv. Comm'n, 652 A.2d 813, 818, 539 Pa. 356, 366 (1995) (finding procedural violations caused adverse effects to employee).

[46] *O'Brien,* 664 N.E.2d at 848, 422 Mass. at 694.

[47] *See id.* at 843, 849, 422 Mass. at 694 (holding employers' widespread preparation and distribution of manual rendered employee's reliance on its provisions almost inevitable); Massachusetts Cash Register v. Comtrex Sys. Corp., 901 F. Supp. 5, 8 (D. Mass. 1995) (stating plaintiffs must demonstrate awareness of provision and reliance upon it to show implied contract).

[48] *See, e.g., Trosky*, 652 A.2d at 817, 539 Pa. at 364 (reversing promotion of employees because employer, police commissioner, retained discretion to make final promotion decisions); Arby's Inc. v. Cooper, 454 S.E.2d 488, 489, 265 Ga.

burden of proving that a missed promotion was causally related to the procedural breach.[49] That is, employees are faced with the unenviable task of showing that but for the employer's failure to adhere to its promotion procedure, the employee would have been promoted.[50]

This is a substantial burden. In *Marotta*, for example, the Appeals Court rejected a teacher's claim for tenure based on the school committee's failure to give a teacher the required number of performance evaluations during the three-year period prior to tenure appointment. The *Marotta* Court recognized that this failure constituted a violation of the employer's procedures governing tenure awards, and was actionable as a breach of contract but rejected the

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240, 242 (1995) (holding no breach of contract claim for compensation where employee's bonuses based partially on employer's discretion); Abramson v. Division of Regents, 548 P.2d 253, 259, 56 Haw. 680, 689 (1976) (finding that in absence of provision to the contrary, president of university had final discretion to determine questions of tenure); Raynard v. Board of Regents, 708 F.2d 1235, 1237 (1983) (holding university Board of Regents retains ultimate discretion to award or deny tenure); Harbison v. Mount St. Mary College, 211 A.D.2d 697, 698, 622 N.Y.S.2d 72, 73 (1995)(affirming summary judgment for college where college has ultimate discretion to award or deny tenure).

[49] *See* Maureen S. Binetti, et. al., *The Employment At-Will Doctrine: Have Its Exceptions Swallowed The Rule?, in* LITIGATION 1998, at 447, 468 (PLI Litig. and Admin. Practice Course Handbook Series No. 581, 1998) (discussing expanding recognition of implied contracts in employment relationships). *Massachusetts Cash Register*, 901 F. Supp. at 422 (D. Mass. 1995) (holding that plaintiff must show that damages were a direct result of defendant's actions); Gillespie v. McCourt, 889 F. Supp. 5, 8 (D. Mass. 1995); Patel v. Howard Univ., 896 F. Supp. 199, 205 (D.C. Cir. 1995) (finding no causation where employee knew of employer's criticism notwithstanding employer's failure to provide performance evaluations).

[50] Marotta v. Greater New Bedford Reg'l Vocational High Sch. Dist. Comm., 589 N.E.2d 334, 335, 32 Mass. App. Ct. 938, 939 (1992) (denying teacher's tenure claim because promotion procedure did not require employer to grant tenure). *See also* Picogna v. Board of Educ., 671 A.2d 1035, 1040, 143 N.J. 391, 401-02 (1996) (holding school board not obligated to grant tenure).

teacher's claim that this violation resulted in the decision to deny him tenure.[51]

The recent decision in *University of Baltimore v. Iz*[52] illustrates the hurdles faced by employees in proving each element of a contract claim in actions arising from an employer's failure to abide by its promotion procedures. In *Iz*, the Court of Special Appeals of Maryland reversed a $425,000 jury verdict for the plaintiff on her claim that the University failed to adhere to its tenure review procedures in assessing her candidacy.[53] The plaintiff alleged she was denied tenure for lack of collegiality, a reason that was not expressly included in the criteria identified in the University manual for consideration in the tenure review process.[54] In reversing the jury verdict, the court held that the employee could not prove a causal connection between the procedural flaws and the adverse tenure decision, in light of the discretionary nature of a university's final decision to award or deny tenure.[55]

Judicial deference to the discretionary nature of tenure decisions illustrates this difficulty for plaintiffs who claim they were entitled to a promotion.[56] Thus, employers gain some measure of pro-

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[51] *See* Marotta, 589 N.E. 2d at 335, 32 Mass. App. Ct. at 939. The plaintiff, however, was unable to prove that this failure proximately caused his tenure denial.

[52] 716 A.2d 1107, 123 Md. App. 135 (1998).

[53] *Id.* at 1129, 123 Md. App. at 179.

[54] *Id.* at 1122, 123 Md. App. at 164.

[55] *Id.* at 1117, 123 Md. App. at 155.

[56] *See id., quoting* Baker v. Lafayette College, 504 A.2d 247, 350 Pa. Super. 68, (1986).

> The evaluation of the performance of a college professor and of his or her suitability to the educational needs, goals and philosophies of a particular institution necessarily involves many subjective, nonquantifiable factors. . . .Even if the faculty member's performance has been exemplary, measured by the most objective yardstick possible, the institution may wish to hire another person because, for example, an individual with superior qualifications has become available, or the institution decides that this particular faculty member does not mesh

tection by expressly retaining discretion in making professional promotion decisions.[57] Conversely, an employer's failure to expressly retain some measure of discretion in making promotion decisions invites judicial intervention into the decision-making process.[58]

In the area of public employment, Massachusetts has struggled to balance employers' discretionary authority to make promotion decisions with employees' reasonable expectations that established policies will be followed.[59] Courts are even more deferential to this discretion in tenure decisions.[60] However, this deference may not continue in the absence of an employer's express declaration of

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> with the institution's educational goals and philosophies, however excellent his work and distinguished his scholarship.

Id.

[57] *See Baker*, 532 A.2d at 256-57, 350 Pa. Super. at 87 (affirming dismissal of contract claim for decision not to renew tenure appointment).

[58] *See* Gray v. Loyola Univ. of Chicago, 652 N.E.2d 1306, 1309, 27 Ill. App. 3d 259, 263 (1995). "Failure to offer a tenured faculty member the yearly [renewal] contract could not terminate tenure unless the tenure policy of the college set out in the faculty manual is interpreted as discretionary." *Id.* See also Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (finding unilateral contract doctrine does not unduly circumscribe employer's discretion where employer could expressly retained discretion).

[59] *See* School Comm. of Danvers v. Tyman, 360 N.E.2d 877, 881, 372 Mass. 106, 113 (1977). "Although a school committee may not surrender its authority to make tenure decisions, there is no reason why a school committee may not bind itself to follow certain procedures precedent to the making of any such decision." *Id.*

[60] *See* Claggett v. Wake Forest Univ., 486 S.E.2d 443, 448, 126 N.C. App. 602, 611 (1997) *quoting* Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979) ("Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions."). *See also School Comm. of Danvers*, 360 N.E.2d at 880-81, 372 Mass. at 111-14 (1997) (deferring to school committee's discretion).

this discretion, especially where the employer has established promotion procedures and policies.[61]

Similarly, the non-delegability doctrine, arising from civil service laws, recognizes that certain managerial decisions, including promotions, require the exercise of discretion, which is entitled to judicial deference.[62] This doctrine, however, is balanced against a primary objective of the civil service system: "assuring that all employees are protected from arbitrary and capricious actions."[63] Massachusetts has recognized that employees may enforce the promotional policies established by a public employer notwithstanding the non-delegability doctrine, recognizing that the doctrine does not vitiate an employer's duty to adhere to its established procedures.[64] Adherence to requirements, which provide some assurance that the selection process will be fairly conducted, mitigates the risk of harsh, abrupt and uninformed decisions, absent express limitations on the exercise of this discretion, or compelling circumstances.[65] Enforcement of such procedures also protects against unlawful discrimina-

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[61] *See* Roufaiel v. Ithaca College, 241 A.D.2d 865, 867, 660 N.Y.S.2d 595, 598 (1997) (allowing breach of contract claim against college-employer where college limited its own discretion in tenure review process).

[62] *See* Blue Hills Reg'l Dist. Sch. Comm. v. Flight, 409 N.E.2d 226, 230, 10 Mass. App. Ct. 459, 464 (1980) ("Unless a school committee has authority to employ and discharge teachers it would be difficult to perform properly its duty of managing a school system.").

[63] Kelleher v. Personnel Adm'r of Dept. of Personnel Admin., 657 N.E.2d 229, 233, 421 Mass. 383, 389 (1995).

[64] *See Blue Hills*, 409 N.E.2d at 231, 10 Mass. App. Ct. at 465. "Although a school committee cannot be compelled without its explicit consent to delegate its power to select for a management position the person it deems best qualified . . . there is no reason why it may not bind itself to follow certain procedures precedent to the making of any such decision." *Id.*

[65] *See* Johnson v. Commissioner of Pub. Safety, 243 N.E.2d 157, 160, 355 Mass. 94, 100 (1968) (recognizing that discretionary authority to grant promotions is statutorily limited by civil service law). *See also Blue Hills*, 421 N.E.2d at 756, 383 Mass. at 644 (1981) (refusing to promote based on sex of employee is an exception to non-delegability doctrine).

tion against employees in the public sector.[66] For example, in *Town of Burlington v. Labor Relations Commission*,[67] the Massachusetts Appeals Court upheld a Labor Relations Commission determination that but for the town's failure to abide by procedures governing promotions, motivated by anti-union animus, the employee would have been promoted.[68]

Certainly not every de minimus departure from established procedures gives rise to a breach of contract claim.[69] Other jurisdictions have adopted the "substantial compliance" doctrine in assessing whether a procedural flaw may give rise to an action for breach of contract. In *Klinge v. Ithaca College*,[70] for example, the court held that the faculty handbook promulgated by the employer-college limited the manner in which it could demote or otherwise discipline a professor for alleged misconduct, and could not be wholly ignored, compelling the college's substantial compliance with its procedures.[71] In *Hom v. State of North Dakota*,[72] the North Dakota Supreme Court held that a several month delay in providing the plaintiff, a teacher, reasons for refusal to renew his contract constituted an actionable violation of the college's appointment policy.[73] The Court stated that although a "court may ignore trifling departures in the performance of a contract", a seven month delay violated the plaintiff's "substantial interest" in timely resolving the dispute.[74] Practically speaking, an employer should not be required to comply with techni-

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[66] Burlington v. Labor Relations Comm'n, 459 N.E.2d 125, 17 Mass. App. Ct. 402 (1984).

[67] 459 N.E.2d 125, 17 Mass. App. Ct. 402 (1984).

[68] *Id.* *See also* Rutan v. Republican Party, 497 U.S. 62 (1990) (holding prohibition against political affiliation discrimination applies to promotion and other significant personnel decisions).

[69] *See* De Simone v. Siena College, 243 A.D.2d 1037, 1039, 663 N.Y.S.2d 701, 702 (1997) (holding college's two-day delay in contract renewal notification to de minimus breach and not actionable).

[70] 167 Misc. 2d 458, 634 N.Y.S.2d 1000 (Sup. Ct. 1995).

[71] *Klinge*, 167 Misc. 2d at 464, 634 N.Y.S.2d at 1004.

[72] 459 N.W.2d 823, 825 (N.D. 1990).

[73] *Id.* at 826.

[74] *Id.*

cal minutiae, but should be required to substantially perform it promises.[75] Massachusetts has held that an employer's substantial violation of its disciplinary policies is presumptive evidence that the procedural violation resulted in a wrongful termination,[76] but has not addressed this issue in the context of refusal to promote claims.

B. The Difficult Issue of Remedy

Even if the employee can demonstrate a material breach of established procedures, the employee faces steep burdens in establishing the right to any damages or other remedy. In cases arising in the civil service contexts, for example, an employee may be limited to the remedy of administrative review of the decision.[77]

1. The Limited Availability of Equitable Relief

Equitable relief, especially that of specific performance, to remedy breaches of employment contracts is awarded only in exceptional circumstances.[78] In contrast, Title VII of the 1964 Civil Rights

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[75] *Id.* at 825 (observing that substantial compliance analysis focuses on whether procedures' purpose has been fulfilled). *See also* Piacitelli v. Southern Utah State College, 636 P.2d 1063, 1067 (Utah 1981). "While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail in the . . . procedure is not actionable." *Id.*

[76] *See* Goldhor v. New Hampshire College, 521 N.E.2d 1381, 1384, 25 Mass. App. Ct. 716, 720-721 (1988) (placing burden on university to prove that procedural failings were not a violation of contract).

[77] *See, e.g.,* Odessa v. Barton, 967 S.W.2d 834, 835 (Tx. 1998) (limiting employees to administrative review of adverse employment decisions as outlined in employee manual).

[78] Gray v. Loyola Univ. of Chicago, 652 N.E.2d 1306, 1309, 274 Ill. App. 3d 259, 263, 210 Ill. Dec. 330, 333 (1995) ("[f]uture employment obligations, like any personal service contracts, are not amenable to specific performance."). *See also* Mahler v. New York State Ass'n for Retarded Children, Inc., 112 A.D.2d 707, 708, 491 N.Y.S.2d 880, 881 (1985) (denying reinstatement remedy for wrongful discharge claims because damages available and hostilities frequently existing between parties).

Act allows a court broad discretion to fashion equitable relief.[79] The Massachusetts Supreme Judicial Court, for example, limits the authority of an arbitrator to fashion relief for violations of a tenure review policy.[80]

There are courts that have granted specific performance. In *Haskins v. City of Chattanooga*,[81] however, Tennessee's Appeals Court upheld a trial court's order granting the plaintiff police officers' promotion. This award was upheld in the context of the court's finding that plaintiffs had no cognizable claim under 42 U.S.C.A. §1983, because their state law contract claims provided an adequate remedy.[82] *In Bennett v. Wells College*,[83] the court ordered Wells College to conduct a de novo tenure review of a teacher who prevailed on her claim that the college had failed to adhere to its tenure review procedure in considering her candidacy for tenure. Although such a remedy appears fair and adequate to redress a procedural violation, one is left wondering whether any employee would be satisfied with such an award, especially if it has been won through

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[79] *See* Brown v. Trustees of Boston Univ., 891 F.2d 337, 359-60 (1st Cir. 1989) (upholding tenure award under Title VII, in order to effectuate statutory purpose).

[80] School Comm. of Danvers v. Tyman, 360 N.E.2d 877, 881, 372 Mass. 106, 114 (1977).

> The agreement to follow certain procedures preliminary to exercising its right to decide a tenure question, and to permit arbitration of a claim that it has failed to follow those procedures, does not impinge on a school committee's right to make the ultimate [tenure] decision. If a violation is found by the arbitrator, he may not grant tenure to the treacher, but he may fashion a remedy which falls short of intruding into the school committee's exclusive domain. Some violations of evaluation procedures may be trivial and not justify any relief. Not all violations of a teacher's rights, even constitutional rights, will justify reinstatement.

Id.

[81] 877 S.W.2d 267 (Tenn. App. 1993).

[82] *Id.* at 270-71.

[83] 219 A.D.2d 352, 357, 641 N.Y.S.2d 929, 933 (1996).

litigation against the employer, who will be evaluating the employee for the second time.

Other decisions indicate that employees may be bound by sole and exclusive remedy provisions contained in manuals and limiting an employee's remedy to use of the grievance procedure.[84] Thus, for example, aggrieved employees may be limited to an internal company review process.[85]

2. The Measure of Damages

The availability of damages for contract actions arising from procedural violations presents the difficult question of assessing the damage caused by that violation. This is especially the case in failure to promote claims, because of the discretionary element present in most such decisions.[86]

In the absence of proof that the procedural violation caused the employer's decision not to promote, employees are not entitled to

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[84] *See* Odessa v. Barton, 967 S.W.2d 834, 836 (1998) (limiting employees to administrative review of adverse employment decisions as outlined in employee manual); Plummer v. Humana of Kansas, Inc., 715 F. Supp. 302, 304 (D. Kan. 1988) (barring action where employee failed to use grievance procedure provided in handbook as employee's sole recourse).

[85] *See supra* note 84 (discussing effect of grievance procedures prescribed by employee manuals on employee's ability to bring suit).

[86] *See* Trosky v. Civil Serv. Comm'n, 652 A.2d 813, 817, 539 Pa. 356, 363 (1995) quoting RESTATEMENT (SECOND) OF CONTRACTS, § 344, cmt. a:

> In addressing the concept of remedies generally, we may note that in the law of contracts remedies for breach are designed to protect either a party's expectation interest 'by attempting to put him in as good a position as he would have been had the contract been performed, that is, had there been no breach'; his reliance interest 'by attempting to put him back in the position in which he would have been had the contract not been made'; or his restitution interest '[by requiring] the other party to disgorge the benefit he has received by returning it to the party who conferred it.' (alteration in original).

Id.

expectation damages.[87] In both *Trosky* and *Filice*, for example, Pennsylvania's highest court rejected awards of expectation damages.[88] The Court rejected an award of future wages in *Filice*, and an actual promotion in *Trosky*.[89] In both cases, the employer's procedural violation involved the improper omission of the plaintiffs' names from lists of those eligible for promotion, where the court held that awarding the actual promotion would place the plaintiffs in better positions than if the employers had not violated their promotion procedures.[90] The *Trosky* and *Filice* courts also concluded that even if the names had been included on the list of those eligible for promotion, they were not necessarily assured of receiving the promotion.[91] The rationale for this approach is that employees are not entitled to the benefit of a bargain that was never reached, and so cannot recover damages for a promotion that was never granted.[92]

The Court took a different approach to the problem of damages in *Hom v. State of North Dakota*.[93] In *Hom*, a University's failure to timely give the plaintiff-teacher reasons for the decision not to renew her contract, as required by state regulations, justified damages (back pay) occasioned by the seven-month delay in complying

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[87] *See e.g.* Klinge v. Ithaca College, 167 Misc. 2d 458, 464, 634 N.Y.S.2d 1000, 1004 (Sup. Ct. 1995) (entitling professor demoted in violation of handbook to compensatory damages measured by difference between former and demoted salary). *See also Trosky*, 652 A.2d at 818, 539 Pa. at 365; Paul v. Lankenau Hosp., 543 A.2d 1148, 1158, 375 Pa. Super. 1, 21 (1988) (rejecting damage awards that put employee in a better position than he or she would have been had the contract been performed); Filice v. Department of Labor and Industry, 660 A.2d 241, 244 (Pa. 1995) (placing employee on list of those eligible for promotion was appropriate remedy).

[88] *See supra* note 87 (discussing measure of damages).

[89] *See supra* note 87.

[90] *See Trosky*, 652 A.2d at 817-18, 539 Pa. at 364; *Filice*, 660 A.2d at 244.

[91] *See Trosky*, 652 A.2d at 817-18, 539 Pa. at 364; *Filice*, 660 A.2d at 244.

[92] *See Trosky*, 652 A.2d at 818, 539 Pa. at 365 (reversing promotion where commissioner, in his disretion, should have superceded eligibility list and denied promotion); *Filice*, 660 A.2d at 244.

[93] 459 N.W.2d 823 (N.D. 1990).

with the regulation.[94] The court, however, rejected a lower court's award of continuing damages (front pay), finding that after the teacher had been properly notified of the decision not to renew her contract, she could have mitigated any further damages.[95]

Some courts have granted only nominal damages for procedural violations of employment contracts, generally finding that the resulting harm from such procedural violations is too tenuous or speculative to justify anything other than nominal damages.[96]

IV. CONCLUSION

In summary, breaches of contract actions based on employee manuals are emerging as cognizable and viable courses of action. Employees hoping to pursue such claims have difficult hurdles to overcome with respect to liability, equitable remedy, and damages.

A. Practical Advice to Employers

Given the increasing judicial recognition of contract claims arising from an employer's failure to adhere to its established procedures when making personnel decisions, employers who include such procedures in employee manuals and other written policy statements should draft them cautiously. Perhaps most importantly, employers should clearly and unambiguously state that any procedures governing promotions and similar personnel decisions are subject to the employer's ultimate discretion to render such decisions. Second, employers should establish grievance procedures for employees alleging an employer's violation of its policies and pro-

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[94] *See id.* at 826

[95] *See id.*, at 826; *see also* Henley v. Fingal Pub. Sch. Dist. #54, 219 N.W.2d 106, 110-11 (N.D. 1974) (finding failure to notify teacher of non-renewal in accordance with regulations justifies compensatory damages).

[96] *See* Patel v. Howard Univ., 818 F. Supp. 199, 205 (D.C. Cir.1995) (awarding nominal damages where employer's failure to provide monthly performance evaluations not shown as cause of non-renewal of employee's contract); Sepanske v. Bendix Corp., 384 N.W.2d 54, 59, 147 Mich. App. 819, 829 (1985) (awarding nominal damages for employer's wrongful demotion because employee could not prove entitlement to permanent employment).

cedures, and should include the requirement that employees exhaust such procedures. Third, it might be helpful to state specifically that such manual is not intended to create any contractual obligation on the part of the employer or rights in the employee.

Of course, the most carefully drafted employee handbooks are of no use to employers in the absence of uniform, consistent application of the employer's policies and procedures. To that end, employers should ensure that supervisory and managerial employees are well trained and competent to implement the employer's policies and procedures.

B. Practical Advice to Employees

An employee aggrieved by an employer's adverse employment decision should, first and foremost, pursue and exhaust any grievance procedures the employer has established. Before embarking upon costly litigation, employees should carefully consider the type of relief available to remedy the employer's failure to adhere to its policies and procedures. In doing so, employees should ask themselves the following questions: (1) Was the employer's violation a substantial and material departure from the established procedures? (2) Is there evidence that *but for* the employer's failure to abide by its procedures, the employee would have received a promotion or other personnel benefit? (3) In the absence of such evidence, is there any evidence of reliance damages? (4) Is there any limitation on remedies contained within the policy itself, or would any form of equitable relief grant a fair and meaningful remedy?

Although the recent encroachment upon the at-will employment doctrine as embodied by procedural claims arising from personnel manuals can benefit employers and employees alike, enforcing such procedures is not a simple task for either employer or employee. The viability of these claims as a means by which employees can challenge a range of employment decisions and obtain fair, yet meaningful relief, remains to be seen.

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