EMPLOYMENT "BY THE BOOK" IN NEW JERSEY: *WOOLLEY* AND ITS PROGENY

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INTRODUCTION

In 1985, the New Jersey Supreme Court decided *Woolley v. Hoffmann-La Roche, Inc.*[1] and held that, under certain conditions, provisions in an employee manual may create an implied contract not to terminate employment except for good cause.[2] The *Woolley* decision has, in some cases, significantly altered the relationship between employers and employees.[3] Further, while *Woolley* resolved whether an employee manual may ever give rise to an employment contract, it left a host of other questions unanswered.[4] This article analyzes the effects of *Woolley* on New Jersey employment law and how federal and state courts, applying New Jersey law, have addressed the questions left unanswered in *Woolley*.

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1 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

2 *Id.* at 307, 491 A.2d at 1269-70.

3 *See, e.g.*, Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 117, 570 A.2d 903, 917 (1990) (declining to apply *Woolley* retroactively because it "made fundamentally new law"). Writing for the court in *Grigoletti*, Justice Handler observed:

> *Woolley* took a quantum leap forward in holding that contractual obligations could be implied in fact from an employment manual, and gave such manuals and similar employer policies a legal significance not theretofore found. The decision forever changed the balance of power between certain employers and their at-will employees. After *Woolley*, such employers no longer possessed the virtually unfettered freedom to terminate at-will employees.

Id.

4 *See, e.g.*, Michael A. Chagares, Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465, 489-90 (1986) (noting that *Woolley* created various new issues including when and to what effect an employment manual could be revised by the employer and whether *Woolley* was to be applied retroactively).

I. THE EMPLOYMENT AT-WILL RULE

The general rule in New Jersey is that the employment relationship is terminable at the will of either the employer or the employee, unless the employer and employee have an agreement that states otherwise.[5] As the New Jersey Supreme Court noted, "[a]n employer can fire an at-will employee for no specific reason or simply because an employee is bothering the boss."[6] Of course, there are statutory and common law exceptions to the employment at-will rule. An employer may not terminate an employee for a reason that would violate state or federal anti-discrimination laws.[7] Nor may an employer terminate an employee for the sole purpose of preventing the employee from attaining a right to pension plan benefits.[8] Further, an employer may not

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[5] *See, e.g.*, Erickson v. Marsh & McLennan Co., 117 N.J. 539, 561, 569 A.2d 793, 804 (1990) ("A 'contentious' 'at-will' employee can be fired for a false cause or no cause at all. That firing may be unfair but it is not illegal."); English v. College of Medicine and Dentistry of New Jersey, 73 N.J. 20, 23, 372 A.2d 295, 297 (1977) ("At common law an employer had the unbridled authority to discharge, with or without cause, an employee in the absence of contractual [or] statutory restrictions."); Schlenk v. Lehigh Valley R.R. Co., 1 N.J. 131, 135, 62 A.2d 380, 381 (1948) ("Equity has no inherent jurisdiction over the relation of employer and employee. Each is free, in the absence of contract or statute, to discontinue the relation at will, with or without cause."); Hindle v. Morrison Steel Co., 92 N.J. Super. 75, 81, 223 A.2d 193, 196 (App. Div. 1966) ("[I]n the absence of a contract, an employment, unless otherwise specified, is generally at will and subject to termination with or without cause."); Piechowski v. Matarese, 54 N.J. Super. 333, 344, 148 A.2d 872, 878 (App. Div. 1959) (Absent a statute, contract or other agreement, employment is typically an at-will relationship which may be terminated with or without cause.). *See also* Chagares, *supra* note 4, at 469-70 (discussing the genesis of the employment at will rule).

[6] Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191, 536 A.2d 237, 238 (1988).

[7] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (prohibiting employment discrimination on account of race, color, religion, sex, national origin or pregnancy); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634 (1988) (prohibiting age discrimination); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-28 (West 1976 & Supp. 1991) (prohibiting discrimination on the basis of, *inter alia*, race, sex, age, handicap, national origin or sexual preference); N.J. STAT. ANN. 34:6B-1 (prohibiting the making of employment decisions based upon whether an employee does or does not smoke or use tobacco products "unless the employer has a rational basis for doing so which is reasonably related to employment"); Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (West 1988 & Supp. 1991) (protecting certain "whistleblowers"). *See also* Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101 to 12213 (West Supp. 1991) (federal statute prohibiting discrimination against individuals with disabilities, employment title effective July 26, 1992).

[8] Section 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (1988) [hereinafter ERISA].

terminate an employee where the "discharge is contrary to a clear mandate of public policy."[9]

Unlike these statutory and judicial exceptions, *Woolley* is not an abrogation of the employment at-will presumption, but rather a recognition that, as always, the employer and employee are free to contract for terms and conditions of employment, such as termination only "for cause."[10] Where *Woolley* broke new ground was in its use of unilateral contract analysis to determine that employee manual provisions concerning job security and termination procedure could constitute an offer to contract which an employee could accept through continued employment.

II. THE *WOOLLEY* DECISION

Richard Woolley (Woolley) commenced employment with Hoffmann-La Roche, Inc. (Hoffmann-La Roche) in 1969. In December, 1969, Hoffmann-La Roche issued to Woolley a copy of the Hoffmann-La Roche, Inc. Personnel Policy Manual. This manual provided, in part, that "[i]t is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."[11] The manual also devoted five pages to "termination," and specifically defined five types of terminations: (1) "layoff;" (2) "discharge due to performance;" (3) "discharge, disciplinary;" (4) "retirement;" and (5) "resignation."[12] Significantly, the manual did not include a category for "discharge without cause." The manual also included a detailed pro-

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[9] Pierce v. Ortho Pharmaceutical Co., 84 N.J. 58, 417 A.2d 505 (1980). The *Pierce* court specifically reaffirmed the vitality of the employment at-will rule, noting that as a result "employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason." *Id.* at 73, 417 A.2d at 512.

[10] *See* McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 520, 499 A.2d 526, 529 (App. Div. 1985) ("*Woolley* is not . . . 'an exception to the at-will doctrine' . . . but, rather, a recognition of basic contract principles concerning acceptance of unilateral contracts.") (citation omitted); Piechowski v. Matarese, 54 N.J. Super. 333, 344, 148 A.2d 872, 878 (App. Div. 1959) ("In the absence of a *contract* or statute, an employment, unless otherwise specified, is generally at will and subject to termination with or without cause." (emphasis added)). Because *Woolley* did not abrogate the at-will rule, the *Woolley* court's criticism of the rule appears somewhat superfluous. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 290-92, 491 A.2d 1257, 1260-62, *modified*, 101 N.J. 10, 499 A.2d 515 (1985). This is especially so in light of the New Jersey Supreme Court's post-*Woolley* decisions reaffirming the vitality of the at-will rule. *See* Erickson v. Marsh & McClennan Co., 117 N.J. 539, 560, 569 A.2d 793, 804 (1990); Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191, 536 A.2d 237, 238 (1988).

[11] *Woolley*, 99 N.J. at 287 n.2, 491 A.2d at 1259.

[12] *Id.*

cedure entitled "Guidelines for Discharge Due to Performance," which was to be followed prior to discharging an employee for cause.

In May, 1978, Hoffmann-La Roche requested Woolley's resignation, citing a loss of confidence in his abilities. After Woolley twice refused to resign, he was terminated in July, 1978. Woolley subsequently filed suit, claiming, *inter alia*, that the employee manual created a contract that contemplated discharge only for cause, and then only after the manual's termination procedures were followed.[13] The trial court granted Hoffmann-La Roche's motion for summary judgment, holding that the manual was not contractually binding and that Woolley's employment was terminable at will. The appellate court affirmed.

The New Jersey Supreme Court, however, reversed and remanded. Chief Justice Wilentz, writing for the court, applied a unilateral contract analysis and directed the trial court upon remand to consider the manual's job security provisions as binding unless the manual prominently and unmistakenly indicated that those provisions were not binding, or unless there was other similar proof that established Hoffman-La Roche's intent not to be bound.[14]

Initially, the court distinguished—but did not overrule—prior cases such as *Savarese v. Pyrene Mfg. Co.*[15] in which the court had declined to enforce a purported oral "lifetime" employment contract. Chief Justice Wilentz observed that *Savarese*[16] involved a contract with a specific employee, not a general agreement that applied to all employees. The *Woolley* court noted that while a "lifetime" contract purported to protect the employee against *any* termination, the employee manual "contract" protected the

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[13] Woolley had also alleged intentional infliction of emotional distress and defamation, but consented to the dismissal of those claims. *Id.* at 286, 491 A.2d at 1258.

[14] The record before the supreme court contained only eight pages of the manual. *Id.* at 298 n.7, 491 A.2d at 1265 n.7. Therefore, the court did not know the nature and extent of other areas covered in the employee manual and whether the rest of the manual was consonant with terms that the court deduced from the eight pages before it.

[15] 9 N.J. 595, 89 A.2d 237 (1952).

[16] *Id.* In *Savarese*, the New Jersey Supreme Court noted:

> Agreements of this nature have not been upheld except where it most convincingly appears it was the intent of the parties to enter into such long-range commitments and they must be clearly, specifically and definitely expressed. Only then is it grudgingly conceded that not all such contracts are "so vague and indefinite as to time as to be void and unenforceable because of uncertainty or indefiniteness."

Id. at 601, 89 A.2d at 240 (citations omitted).

employee only from *arbitrary* termination.[17]

After concluding that *Savarese* did not dispose of Woolley's claim, the court found that the termination clauses of the manual could constitute an offer. In making this determination, the court not only examined the specific manual provisions at issue, but also stressed the context of the manual's preparation and distribution. Although it appeared that the manual was not distributed to all employees, the court nevertheless concluded, that Hoffman-La Roche intended that all employees be advised of the benefits conferred by the manual, absent contradictory evidence.[18] The supreme court also found it significant that the manual was the single document given to the employees that purported to establish the employment terms and conditions. Moreover, the manual was carefully drafted and prepared by the company with all of the indicia of corporate legitimacy. The court emphasized that the mere fact of distribution suggested the manual's importance.[19]

The second factor the court considered in finding that the manual constituted an offer was the specific manual provisions.

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[17] Curiously, the *Woolley* court failed to note that *Savarese* indicated that even a "lifetime" contract may be terminated by the employer for cause, such as unsatisfactory employee performance. *Id.*, 89 A.2d at 239-40 (citations omitted). *See also* Alter v. Resorts Int'l, Inc., 234 N.J. Super. 409, 416, 560 A.2d 1290, 1294 (Ch. Div. 1989) ("lifetime contracts, even where upheld, only preclude a discharge 'without cause' "). The court emphasized, however, that the *duration* of a contract arising from a manual is indefinite. *Woolley*, 99 N.J. at 301 n.8, 491 A.2d at 1266 n.8. Justice Wilentz enumerated several examples of when an employee manual contract ordinarily may be terminated:

> [W]hen the employee's performance is inadequate; when business circumstances require a general reduction in the employment force, the positions eliminated including that of plaintiff; when those same circumstances require the elimination of employees performing a certain function, for instance, for technological reasons, and plaintiff performed such functions; when business conditions require a general reduction in salary, a reduction which brings plaintiff's pay below that which he is willing to accept; or when any change, including the cessation of business, requires the elimination of plaintiff's position, an elimination made in good faith in pursuit of legitimate business objectives: all of these terminations . . . are ordinarily contemplated in a contract arising from a manual, although the list does not purport to be exhaustive.

Id.

[18] The court suggested that it was somewhat handicapped by the state of the record concerning, *inter alia*, the extent of the manual's distribution, but nevertheless assumed that Hoffmann-LaRoche intended to publish the manual's contents to all employees. *Woolley*, 99 N.J. at 298 n.7, 491 A.2d at 1265 n.7. This assumption was critical to the court's holding. *See id.*

[19] *Id.* at 299, 491 A.2d at 1265.

The chief justice wrote that unless the manual's language were such that "no one could reasonably have thought it was intended to create legally binding obligations," the manual's termination provisions would be deemed to be an obligation undertaken by Hoffman-La Roche.[20] In this regard, the court relied upon the comprehensive and definite nature of the manual's termination and job security provisions, as well as an explicit introductory "policy" statement which asserted that Hoffmann-La Roche's policy was not to fire any employee who was doing a good job. Indeed, the court held that even if other manual provisions regarding other aspects of the employment relationship, such as duration, wages, hours of work and the precise services to be rendered were so indefinite as to cause problems of interpretation, such problems would not render the termination provisions—which the court concluded were "explicit and clear"—unenforceable.[21]

After determining that the manual's termination provisions could be construed as an offer,[22] Chief Justice Wilentz next addressed the issues of acceptance and consideration. The court concluded that the job security provisions in an employee manual which was "widely distributed" throughout a large employee workforce, were supported by consideration and might therefore be enforced as binding. Observing that the acceptance depended "on what the promisor had bargained for," the court deemed it "reasonable" to interpret the manual "as seeking continued work from the employees. . . ." As such, the court construed the manual to be an offer seeking formation of a unilateral contract—in effect, a promise of job security in exchange for continued work by the employees. The court further held that, given the circumstances, reliance by the employees upon the manual's promise was to be presumed.[23]

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[20] *Id.*

[21] *Id.* at 305-06, 491 A.2d at 1269. It is clear that viable contractual claims cannot be made regarding conditions of employment which are not expressed in definite terms in a manual, although the *Woolley* court did not explicitly address this issue. *See Savarese*, 9 N.J. at 599, 89 A.2d at 237 (citation omitted) ("To be enforceable . . . a contract must be sufficiently definite in its terms that the performances to be rendered by each party can be reasonably ascertained.").

[22] The court did not hold that the manual constituted an offer as a matter of law, but stated that a jury could so find. *Woolley*, 99 N.J. at 301, 491 A.2d at 1266. Later in the opinion, however, Chief Justice Wilentz suggested that such a jury determination might be unnecessary, stating "[a]s we view the matter, it may very well be that the court can make all of the determinations required." *Id.* at 307 n.13, 491 A.2d at 1270 n.13.

[23] The court explained that the presumption of reliance resulted in a binding

The court advised that even where the circumstances of the manual's preparation and distribution and the specific manual provision rendered the manual capable of being construed as a binding contract, employers could avoid any legal obligation in one of several ways, including by inserting an appropriate disclaimer "in a very prominent position."[24]

The *Woolley* court specifically left certain issues unresolved. Because Woolley's employment was not for a fixed term, the court did not evaluate the impact of a job security clause where employment is alleged to be for fixed term. The court also expressed no opinion as to whether or to what extent an employee manual could be modified to adversely affect a binding job security provision. The court also left open the damage issue, asserting that damages were difficult to assess in such cases.[25] As discussed in Part IV, a number of other questions, although not specifically identified by the *Woolley* court, also were left for later courts to resolve.

III. QUESTIONS RAISED BUT NOT ANSWERED IN *WOOLLEY*: THE CURRENT STATE OF THE LAW

A. Introduction

Courts applying the *Woolley* decision have recognized and resolved a number of questions left open by the supreme court. Post-*Woolley* decisions have affirmed that *Woolley* did not abrogate the employment "at-will" rule, that not every expression of employer policy or procedure constitutes a contract, and that even where an employer issues a handbook that gives rise to a *Woolley*-type contract, the employer still retains substantial freedom to

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job security provision as soon as the manual was distributed. *Id.* at 304-05 n.10, 491 A.2d at 1268 n.10.

[24] *Id.* at 309, 491 A.2d at 1271. *See infra* note 122 and accompanying text.

[25] Noting that Woolley had died prior to oral argument, the court assumed that the calculation would require, at a minimum, a comparison between the salary Woolley received up until his death and the salary he would have received had he remained employed by Hoffmann-LaRoche. *Woolley*, 99 N.J. at 308, 491 A.2d at 1270. The court also initially held that the issue of whether "good cause" existed for the termination would not be tried on remand because Hoffmann-La Roche had not complied with the manual's termination provisions. *Id.* at 307-08, 491 A.2d at 1269-70. The supreme court subsequently modified this part of the decision and permitted Hoffmann-La Roche to attempt to prove on remand that it (1) followed the termination provisions and (2) had good cause to discharge Woolley. Woolley v. Hoffmann-La Roche Inc., 101 N.J. 10, 10-11, 499 A.2d 515, 515 (1985). Hoffmann-La Roche had conceded these points only for the purposes of its summary judgment motion. *Id.*

set the terms and conditions of employment, so long as the employer follows its own widely-distributed policies. While other issues remain, *Woolley* and its progeny provide significant guidance on how such issues should be resolved.

B. Extent of Distribution

The circumstances surrounding the distribution of the Hoffmann-La Roche employee manual figured prominently in the *Woolley* court's decision.[26] Indeed, Chief Justice Wilentz acknowledged that such a finding was central to the court's reasoning.[27] Regardless of the language in a manual or other policy statement, the document clearly will not have any legal significance under *Woolley* unless it has been "widely distributed among a large workforce."[28] The court failed to specify, however, to what extent a manual must be distributed to be considered binding.

In *Preston v. Claridge Hotel & Casino*,[29] the New Jersey Superior Court, Appellate Division, applying *Woolley*, held that an em-

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[26] *Woolley*, 99 N.J. at 297-99, 491 A.2d at 1264-65. Faced with a "somewhat meager record" that did not answer all of the important questions, the court made certain assumptions to reach its holding:

> [The manual's] terms are of such importance to all employees that in the absence of contradicting evidence, it would seem clear that it was intended by Hoffmann-La Roche that *all* employees be advised of the benefits it confers.
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> We take judicial notice of the fact that Hoffmann-La Roche is a substantial company with many employees in New Jersey. *The record permits the conclusion that the policy manual represents the most reliable statement of the terms of their employment.* . . . [W]ithout minimizing the importance of its specific provisions, the context of the manual's preparation and distribution is, to us, the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment. . . . Having been employed . . . without any individual employment contract, by an employer whose good reputation made it so attractive, *the employee is given this one document* that purports to set forth the terms and conditions of his employment . . . . The mere fact of *the manual's distribution suggests its importance.*

Id. at 298-99, 491 A.2d at 1265 (emphasis added). The court further acknowledged that "we shall assume that the manual's origin, *dissemination*, and continued existence is similar in context to that of the ordinary personnel policy manual, of which context we take judicial notice." *Id.* at 298 n.7, 491 A.2d at 1265 n.7 (emphasis added).

[27] Chief Justice Wilentz wrote that "[i]n determining the manual's meaning and effect, we *must* consider the probable context in which it was disseminated and the environment surrounding its continued existence." *Id.* at 298, 491 A.2d at 1265 (emphasis added).

[28] Apparently, a document distributed to a *small* workforce might not give rise to a *Woolley* contract, although no New Jersey court has considered this question.

[29] 231 N.J. Super. 81, 555 A.2d 13 (App. Div. 1989).

ployer's policy manuals created a contractual agreement to discharge only for cause, partly because of the manuals' widespread distribution among, and their application to, the workforce.[30] Clearly, however, an employer's document that merely "covers" all employees is insufficient to give rise to a *Woolley* contract. Many employer policy statements apply to virtually all employees, yet are not necessarily "widely distributed" throughout the workforce. Where distribution is not "widespread" or the plaintiff has not been supplied with a copy of the document at issue, state and federal courts have held that such documents cannot form the basis of a *Woolley* breach of contract claim.

For instance, in *Ware v. Prudential Insurance Co.*,[31] the appellate court rejected a *Woolley* claim premised upon a document entitled "Guide for Vice-Presidents, Regional Marketing" that was not widely distributed. The *Ware* court noted that copies of the guide were sent only to certain high level executives and/or their assistants and that neither the plaintiff nor any other employee at his level received a copy of the document. The *Ware* court rejected the plaintiff's reliance on the manual to establish a *Woolley* employment contract because, *inter alia*, the manual had not been widely distributed among the employer's workforce.[32]

Citing *Ware*, the appellate court in *House v. Carter-Wallace,*

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[30] *Id.* at 86, 555 A.2d at 15. Other factors that the *Preston* court found determinative were:

> [T]he required reading and signing of the employee handbooks; the provision of a progressive scheme of discipline for the enumerated types of prohibited conduct; the testimony of Claridge's Executive Director of Human Resources that it was Claridge's general policy to terminate employees only for cause, and, most importantly, the various representations of "maximum job security."

Id. See also infra notes 130-38 and accompanying text.

[31] 220 N.J. Super. 135, 531 A.2d 757 (App. Div. 1987), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988).

[32] The court specifically held:

> The limited distribution and obvious internal management objectives of the Guide is a further reason for concluding that plaintiff and other employees of defendant could not have had a "reasonable expectation" that the document was intended to confer "employee benefits." . . . No copy was sent to plaintiff or any other employee at his level of management. Nor does the record indicate that there was any organized program to disseminate the contents of the document to employees other than those to whom it was sent.

Id. at 144-45, 531 A.2d at 761. The court also relied on an individual, specific agreement that Ware had signed with the employer stipulating that the employment was at will.

Inc.,[33] held that no reasonable expectation of job security could be created based upon a document which had not been distributed to the employees. In so holding, the court noted that the internal company memorandum relied upon by the employee had not been widely distributed throughout the company. Moreover, even if the provisions were binding, the court found that the document's termination procedures had been followed.[34] Similarly, in *Labus v. Navistar International Transport Corp.*,[35] the United States District Court for the District of New Jersey determined that a manual which the plaintiff never saw and that was distributed "only to certain upper-level employees" could not form the basis of a *Woolley* claim. The court specifically held that there could be no reasonable reliance upon a promise in a manual that the plaintiff never saw.[36]

Where the document at issue was intended only to be used by supervisors in helping them manage their subordinates, courts have held that no *Woolley* promise is created.[37] Often an employer will distribute *two* manuals: one for employees generally and one for managers. The managerial guide is typically more detailed and is intended to guide supervisors in their application of company guidelines. In such cases, courts will not allow recovery under a *Woolley* theory based upon the managerial guide both because, by its nature, the guide is considered an "internal" document and because, in the words of *Woolley*, it is the more widely distributed handbook that is the "most reliable statement of the

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[33] 232 N.J. Super. 42, 556 A.2d 353 (App. Div.), *certif. denied*, 117 N.J. 154, 564 A.2d 874 (1989).

[34] *Id.* at 55, 556 A.2d at 360 (citing *Ware*, 220 N.J. Super. at 144-46, 531 A.2d at 761-62). The *House* court's finding that the document was never "distributed" to the plaintiff suggests that the employer must *intend* to place the document into the employee's hands and that it is insufficient that an employee may have actually seen or had access to the document. Thus, for example, a secretary for a human resources manager might have knowledge of numerous internal policy documents, but cannot rely upon those documents to support a *Woolley* claim because the documents were not "distributed" to the secretary. *See Woolley*, 99 N.J. at 293, 491 A.2d at 1262 ("Here . . . we have the *knowing* distribution of an apparently carefully thought-out policy manual intended to cover all employees. . . .") (emphasis added). *See also* Morrison v. Prudential Ins. Co. of Am., Civ. No. 90-1017, slip op. at 14-15 (D.N.J. Apr. 9, 1991) (employer's intent with respect to distribution of internal corporate manual controls).

[35] 740 F. Supp. 1053 (D.N.J. 1990).

[36] *Id.* at 1062; *see also* Callahan v. Pioneer Communications of Am., No. A-3440-88T5, slip op. at 3 (N.J. Super. Ct. App. Div. Oct. 3, 1989) (holding that because "plaintiff did not receive the handbook until after his employment commenced," he could not "have relied on it as defining the terms and conditions of his job").

[37] *See infra* note 59 and accompanying text.

terms of the [employees'] employment."[38] Internal company manuals are simply not the type of document that *Woolley* intended to enforce.[39]

The "widespread distribution" requirement of *Woolley* is in accord with basic contract law that an offer cannot be legally binding unless communicated to an intended recipient.[40] Moreover, even if a paticular employee has in fact received the document upon which he is relying, the employee still must show widespread distribution in order to recover under its provisions.[41]

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[38] *Woolley*, 99 N.J. at 298-99, 491 A.2d at 1265.

[39] *See, e.g.*, Morrison v. Prudential Ins. Co. of Am., Civ. No. 90-1017, slip op. at 15 (D.N.J. Apr. 9, 1991) ("It seems clear that the manual that Prudential intended to use to inform its workforce of employment benefits was not the [supervisory] Administrative Manual, but rather was the [employee's] manual entitled "You and the Prudential" which was in fact distributed to all employees."); Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 146, 531 A.2d 757, 762 (App. Div. 1987), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988) ("The fact that defendant did not distribute the [supervisory] Guide to plaintiff but rather gave him a different guide which is silent with respect to the employment rights of managers also indicates that the intent of the Guide—as well as other policy guides issued by defendant—is solely to delineate management responsibilities."); Mills v. Thomas & Betts Corp., Civ. No. 87-983 (D.N.J. Sept. 14, 1987), *aff'd*, No. 87-5731, slip op. at 3 (3d Cir. Mar. 11, 1988) (the limited distribution manager's manual "was not the type of manual the *Woolley* court held to be contractually binding").

In *Mills*, the court distinguished an ordinary employee handbook given to all employees from a "headquarters" type publication of limited distribution. *Mills*, Civ. No. 87-983, slip op. at 22-23. The court held that only the general, widely disseminated employee handbook was similar to "that which the *Woolley* court termed the [contractually binding] 'ordinary personnel policy manual.' " *Id.* at 23. The Third Circuit Court of Appeals, in affirming summary judgment for the employer, expressly approved of the lower court's analysis. *Mills*, No. 87-5731, slip op. at 3.

[40] *See* Soloff v. Josephson, 21 N.J. Super. 106, 109-10, 90 A.2d 891, 893 (App. Div. 1952) ("Basic requirements of an informal contract are a valuable consideration and a manifestation of mutual assent by the parties thereto. . . . Mutual assent usually takes the form of an offer, which must be communicated to the offeree, and an acceptance thereof by the latter, either by words or conduct.")(citations omitted); 1A CORBIN ON CONTRACTS § 59 (1963) ("There is no power of acceptance by one to whom the offer is wholly unknown."); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 33 (3d ed. 1957) ("An offeree cannot actually assent to an offer unless he knows of its existence."). *Cf. Woolley*, 99 N.J. at 304-05 n.10, 491 A.2d at 1268 n.10 (although reliance on handbook provisions will be presumed, the manual provisions become binding when the manual is distributed; this suggests that employees need not receive or know of the manual so long as widespread distribution is made). The implications of this aspect of the *Woolley* rule for an employer who wishes to issue a revised manual are discussed *infra* notes 151-55 and accompanying text.

[41] *Morrison*, Civ. No. 90-1017, slip op. at 15-16 n.8. In *Morrison*, the employer set forth progressive discipline guidelines in an internal manual that was not distributed to employees at the plaintiff's level. The plaintiff and several other supervi-

C. *When Does a Statement in An Employer Document Constitute a Promise?*

Much post-*Woolley* litigation has centered on the nature of the employer statements in a manual that may give rise to an implied promise of job security. To be legally binding *Woolley* required that a widely disseminated manual must, "when fairly read, provide[] that certain benefits are an incident of the employment (including, especially, job security provisions). . . ."[42] Commitment, that is, evidence of an actual promise, must be present within the document.[43] The focus is on the employer's objective manifestation of intent and, therefore, an employee's subjective belief that he was the beneficiary of a promise cannot bind the employer.[44]

An employer that is held to statements in a manual may be deemed to have waived a significant right—the right to terminate the employment relationship at-will. Because waiver entails the intentional relinquishment of a known right, the party alleged to have waived the right must have known of, and intentionally relinquished, the right.[45] The employer must have advised its employees, via the handbook, that the employer is expressly waiving its legal right to discharge an employee without cause. Arguably, this principle has been applied implicitly, if not explicitly, in cases interpreting handbook provisions allegedly creating a *Woolley* contract.

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sors attended a training seminar, however, at which the portion of the manual dealing with progressive discipline was discussed. Even though the plaintiff said she "received" the document, the court held that this did "not elevate the distribution to that contemplated under *Woolley*," because very few employees attended such seminars. *Id.*

42 *Woolley*, 99 N.J. at 297, 491 A.2d at 1264.

43 *Id. See also* Palulis v. Ethyl Petroleum Additives, Inc., Civ. No. 89-3903, slip op. at 17-18 (D.N.J. Jan. 24, 1991) (the issue is "whether, when fairly read, passages could reasonably be interpreted to contain a promise of continued employment so long as plaintiff's work performance was satisfactory"); Brunner v. Abex Corp., 661 F. Supp. 1351, 1355 (D.N.J. 1986) (100-page manual did not contain promise of continued employment).

44 *See Woolley*, 99 N.J. at 297-98, 491 A.2d at 1264-65 (only the "reasonable expectations of the employees," fostered by employer manual provisions, are binding). *See also id.* at 299, 491 A.2d at 1265-66 (termination provisions not binding where a reasonable employee would not have interpreted them as such); Carney v. Dexter Shoe Co., 701 F. Supp. 1093, 1103 (D.N.J. 1988) (plaintiff's testimony that he believed he had a secure future with the employer, based apparently on the "comfortable working environment," is insufficient to create an employment contract).

45 Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 291, 544 A.2d 377, 384 (1988) (citations omitted).

Indeed, mere aspirational statements of an employer's general philosophy or ideals clearly cannot constitute contractually binding promises under *Woolley*. Rather, an explicit statement of a specific, detailed employer policy, not undermined by any other language in the handbook, is required to establish that the employer is clearly waiving its right to discharge without cause. Thus, the absence of either a specific policy statement proving that an employer has voluntarily limited its authority to discharge employees or the existence of detailed, comprehensive, termination provisions covering all of the ways that employment may be severed is generally fatal to a *Woolley* claim.

The leading case considering this aspect of *Woolley* is *Kane v. Milikowsy*.[46] In *Kane*, the employer published a document entitled "Company Rules," which set forth twenty-seven offenses that could result in disciplinary action. The document advised employees that the first violation of all but the most serious offenses would result only in a verbal warning, with a written warning for a second violation and suspension after the third violation. A fourth violation within an eighteen month period would result in the employee's discharge. The plaintiff argued that this document, among others, created an implied promise that no employee would be terminated without cause.[47]

The New Jersey Superior Court, Appellate Division, disagreed and held that the document merely identified the infractions and the consequences for violations thereof. The appellate court observed that the *Woolley* manual specifically defined the types of termination in an extensive manual section concerning the subject of termination. This "comprehensive treatment" by the *Woolley* manual, the court found, was distinguishable from the "Company Rules" memorandum, which did not purport to be tended as a "comprehensive" treatment of employee terminations and procedures. The court further observed that the *Woolley* manual expressly stated the employer's policy of "retain[ing] to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effec-

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46 224 N.J. Super. 613, 541 A.2d 233 (App. Div. 1988).

47 Plaintiff also relied upon memoranda that (1) established a management committee on labor relations; (2) described various employee benefits including salary reviews, bonuses and health benefits; and (3) announced the creation of a performance appraisal procedure for determining employee compensation each year. *Id.* at 615-16, 541 A.2d at 234-35. The court found no implied promise within any of those documents.

tively."[48] The court found that there was no similar policy statement in the memorandum relied upon by the plaintiff. Thus, the *Kane* court, adhering to the parameters set by *Woolley*, held that the memoranda contained neither a comprehensive treatment of the subject of termination nor clear and specific job security provisions—key prerequisites to a *Woolley* contract—and therefore no enforceable promise existed.[49]

Similarly, in *Palulis v. Ethyl Petroleum Additives, Inc.*,[50] the United States District Court for the District of New Jersey held that, as a matter of law, a handbook that contained no comprehensive treatment of the subject of termination could not give rise to a *Woolley* contract.[51] The handbook contained, *inter alia*, a "pledge" which provided in part that "[w]e believe that only through the willing efforts and teamwork of all employees can we achieve the maximum earnings, *job security*, employee benefits and opportunity for growth and advancement that we all desire."[52] The handbook also contained a two paragraph discussion of ter-

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[48] *Woolley*, 99 N.J. at 287 n.2, 491 A.2d at 1259 n.2 (1985). *See also supra* note 11 and accompanying text.

[49] *Kane*, 224 N.J. Super. at 616, 541 A.2d at 235. The detailed nature of the termination provisions were central to the *Woolley* court's holding and were repeatedly noted by the court throughout its opinion. *See Woolley*, 99 N.J. at 287 n.2, 491 A.2d at 1259 n.2 (noting that five pages of the manual were devoted to the provisions on "termination"). The *Woolley* court suggested that reasonable expectations of job security could arise when an employee was given the manual in question because the *one* document contained *all* of the "terms and conditions of his employment." *Id.* at 299, 491 A.2d at 1265. The court additionally observed that the document was "obviously carefully prepared by the company with all of the appearances of corporate legitimacy that one could imagine." *Id.* Finally, the court noted the "set of detailed procedures" set forth in the manual. *Id.* at 308, 491 A.2d at 1270.

[50] Civ. No. 89-3903 (D.N.J. Jan. 24, 1991).

[51] *Id.*, slip op. at 19.

[52] *Id.*, slip op. at 17-18 n.5 (emphasis added). The "pledge" statement further provided:

> In recognition of these beliefs, and of the Company's responsibility to employees:
> **WE PLEDGE**
> 1. To provide earnings that will fairly compensate employees for their work, their ability and their time.
> 2. To make available a soundly planned and financed benefit program that will protect employees and their families against certain

mination and discipline entitled "Proper Conduct."[53]

Judge Brown distinguished *Woolley's* "detailed termination procedures" and held that the brief disciplinary provisions in the "Proper Conduct" statement, "when fairly read," could not be interpreted reasonably as a promise of continued employment if the plaintiff performed satisfactorily.[54] Regarding the purely aspirational "Pledge" provisions, the court observed that "[o]bviously, such language is 'such that no one could reasonably have thought it was intended to create legally binding obligations. . . .' "[55]

The *Palulis* court's holding reflects a common sense acknowledgment that there is an obvious difference between an expression of goals (whether expressed as a pledge, business philosophy, statement of principles, or the like) and an objectively manifested intent to assume a binding legal obligation. Arguably, most employers strive to be fair and not to discharge employees without reason. *Palulis* recognizes that mere communication of such an ideal in broad language, without more, can-

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financial hazards of life and provide employees with retirement security.

3. *To provide stable employment as far as practical to all employees.*

4. To treat every employee with consideration and respect, and to handle any complaint promptly and fairly.

5. To weigh all decisions with full regard for their effect on the welfare of all employees.

6. To provide safe, clean and congenial working conditions and proper equipment to help all employees do their jobs efficiently.

7. To provide employees with opportunities for self-improvement and advancement commensurate with their demonstrated ability and effort.

Id. (emphasis added).

[53] The "Proper Conduct" statement provided:

> Disciplinary action may be a talk with the supervisor; [i]t may be a formal warning; [i]t may be time off without pay; or it may be discharge. The action taken, of course, will depend upon the seriousness of the offense.
>
> In each case, an employee being disciplined will have an opportunity to explain actions. [Our] policy is to treat all employees fairly at all times. This policy will always apply to situations regarding discipline.

Id., slip op. at 16-17.

[54] *Id.*, slip op. at 18 (citation omitted). The court noted "the statement referred to by plaintiff does not even approach the detailed termination procedures that were involved in *Woolley*. Nor could these passages 'purport to cover comprehensively the subject of termination' and as such they provide no basis for an implied promise not to terminate without cause." *Id.* (quoting Kane v. Milikowsky, 224 N.J. Super. 613, 616, 541 A.2d 233, 235 (App. Div. 1988)).

[55] *Id.*, slip op. at 18 n.5 (quoting *Woolley*, 99 N.J. at 299, 491 A.2d at 1265).

not evidence a legal intent to abrogate the at-will nature of the employment relationship.[56]

In *Maietta v. United Parcel Service, Inc.*,[57] the court held that pursuant to *Woolley* and its progeny, a policy manual may convert an at-will employment relationship to one of termination only for cause only where the manual comprehensively and "clearly and exhaustively" establishes the procedure for the employee's termination.[58] Judge Lechner further held that the manual must describe the dischargeable actions and the pre-discharge disciplinary procedures the employer obligated itself to undertake.[59]

Similarly, courts have held that an employer's publication of a non-exhaustive list of dischargeable offenses does not necessar-

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[56] *But see* Preston v. Claridge Hotel & Casino, 231 N.J. Super. 81, 555 A.2d 12 (App. Div. 1989). One of the factors that the *Preston* court considered in determining that Claridge Hotel & Casino's handbook created a *Woolley* contract was "the testimony of Claridge's Executive Director of Human Resources that it was Claridge's general policy to terminate employees only for cause. . ." *Id.* at 86, 555 A.2d at 15. Consideration of such testimony in support of a *Woolley* claim is questionable in light of *Woolley's* "widespread distribution" requirement. *See supra* notes 29-42 and accompanying text. Merely because an employer does not routinely fire employees for no reason clearly cannot constitute a waiver of the right to terminate employment with or without cause. Indeed, even the widespread communication of such a policy to employees would not necessarily require a finding that the employer thereby intended to waive its legal right to terminate at-will. It does not appear that this factor was pertinent to the *Preston* court's decision, however, in light of the comprehensive termination and disciplinary provisions of the handbook as well as the numerous representations of "maximum job security" published in the employer's manuals. *Preston*, 231 N.J. Super. at 86, 555 A.2d at 15.

[57] 749 F. Supp. 1344 (D.N.J. 1990), *aff'd without opinion*, 932 F.2d 960 (3d Cir. 1991).

[58] *Id.* at 1361.

[59] *Id.* at 1362. Numerous other courts have held that a *Woolley* contract cannot arise absent a comprehensive treatment of the subject of termination and specific job-security provisions. *See* Abate v. Monroe Systems for Business, Civ. No. 85-2946, slip op. at 21-22 (D.N.J. May 8, 1989) (list of grounds for disciplinary action did not imply that the list was exhaustive and cannot be construed as an implied promise); Weber v. LDC/Milton Roy, 42 FEP Cases (BNA) 1507, 1518 (D.N.J. 1986) (manual's statement warning that employees may be discharged for any number of reasons is not the type of "specific and detailed provisions such as those at issue in *Woolley*"). *See also* McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 519-20, 499 A.2d 526, 528-29 (App. Div. 1985) (employer's telegram, after expiration of labor agreement, offering reemployment to certain striking employees does not create an implied promise of job security under *Woolley*). *Cf. Preston*, 231 N.J. Super. at 86, 555 A.2d at 15 (enforcing handbook containing detailed step-by-step procedures for handling employee problems, a progressive discipline system, enumerating the dischargeable conduct and containing a representation that "[w]hile you work for the [employer] . . . [y]ou will receive maximum job security.").

ily give rise to an implied promise to discharge only for cause.[60] In *Radwan v. Beecham Laboratories,*[61] the manual contained a provision that a dismissal for cause "*may include, but is not limited to*" six enumerated examples.[62] Further, the manual did not proscribe procedures for terminating an employee for cause. The plaintiff had also signed an employment application which explicitly stipulated that the employment was at-will and could be terminated by the employer at any time. In affirming the district court's award of summary judgment for the employer on the plaintiff's *Woolley* claim, the United States Court of Appeals for the Third Circuit that under *Woolley*, it is for the court to determine whether the plaintiff could have any reasonable expectation that the manual granted him the right to be discharged only for cause. Although the court found that the employment application provision disposed of the plaintiff's claim, the court noted that his *Woolley* claim still failed because the manual's "fairly detailed enumneration of grounds for dismissal with cause is not exclusive." Therefore, the court held, the manual did not impliedly limit the grounds upon which the employer could terminate the employee.

In *Schwartz v. Leasametric, Inc.*,[63] however, the New Jersey Superior Court, Appellate Division, assumed on review of the employer's motion for summary judgment that the employee handbook was binding, even though the manual contained a list of dischargeable offenses that explicitly provided that the list was "not exhaustive."[64] Unlike the manual in *Radwan*, the widely distributed handbook contained a pre-termination procedure, in-

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60 Even an apparently exhaustive list may not give rise to a *Woolley* contract. *See, e.g.*, Kane v. Milikowsky, 224 N.J. Super. 613, 617-18, 541 A.2d 233, 235-36 (App. Div. 1988) (no *Woolley* contract arose from list of 27 specific rules that appeared exhaustive).

61 850 F.2d 147 (3d Cir. 1988).

62 *Id.* at 149 (emphasis added).

63 224 N.J. Super. 21, 539 A.2d 744 (App. Div. 1988).

64 Both the employer and the plaintiff apparently assumed, for purposes of appeal, that the manual's provisions were binding. Brief and Appendix for Appellant at 16, Schwartz v. Leasametric, Inc., 222 N.J. Super. 21, 539 A.2d 744 (App. Div. 1988); Brief and Appendix for Respondent at 15, Schwartz v. Leasametric, Inc., 222 N.J. Super. 21, 539 A.2d 744 (App. Div. 1988). The employer's argument was simply that the plaintiff's termination was consistent with the manual's provisions. Brief and Appendix for Appellant at 15, Schwartz v. Leasametric, Inc., 222 N.J. Super. 21, 539 A.2d 744 (App. Div. 1988). Therefore, the appellate division simply assumed that the manual was binding and determined there was a fact question as to whether the employer followed the manual's termination provisions. *Schwartz*, 224 N.J. Super. at 31, 539 A.2d at 749-50. If the issue of whether the manual was binding had been disputed, the appellate division arguably would have determined,

cluding a three-step progressive disciplinary system. For purposes of the summary judgment motion, the appellate court determined that a fact question existed as to whether the employer followed the manual's termination provisions and, therefore, reversed the grant of summary judgment on that claim.

Claims that an implied promise of no termination without cause can be crafted from other handbook provisions have met with mixed success. In *Preston v. Claridge Hotel & Casino*,[65] for example, the manuals did not explicitly state that employees could be discharged only for just cause. The appellate court nevertheless held that manual statements that the employer intended to provide "maximum job security," when considered together with comprehensive termination provisions and procedures, created an implied contract not to terminate except for cause.[66]

By contrast, a pledge within a manual of a corporate "climate" intended to provide employees with "job security" did not equate to a promise of discharge for cause only.[67] Nor were statements in a manual that an employer would be "fair," "even-handed" and "equitable" construed to create binding contractual obligations.[68] For instance, in *Brunner v. Abex Corp.*,[69] the court held that a company personnel manual providing that the "broad program of employee benefits which are outlined in this book will assist in providing security and protection for your family during your working years and beyond into retirement" did not give rise to a *Woolley* contract.[70]

Similarly, in *Abate v. Monroe Systems for Business*,[71] the plaintiff attempted to craft a reasonable expectation of "discharge for just cause" out of several sections of the employer's handbook. One section provided, in part, that the employer "provides equal

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in light of its then-recent *Kane* decision, that the manual's provisions were not binding. *See Kane*, 224 N.J. Super. at 613, 541 A.2d at 233.

65 231 N.J. Super. 81, 555 A.2d 12 (App. Div. 1989).

66 *Id.* at 86, 555 A.2d at 15.

67 *See* Callahan v. Pioneer Communications of Am., No. A-3440-88T5, slip op. at 2-3 (N.J. Super. Ct. App. Div. Oct. 17, 1989).

68 *See* Maietta v. United Parcel Service, 749 F. Supp. 1344, 1361-62 (D.N.J. 1990), *aff'd without opinion*, 932 F.2d 960 (3d Cir. 1991); Palulis v. Ethyl Petroleum Additives, Civ. No. 89-3903, slip op. at 17-18 n.5 (D.N.J. Jan. 24, 1991); Abate v. Monroe Systems for Business, Civ. No. 85-2946, slip op. at 21-22 (D.N.J. May 8, 1989).

69 661 F. Supp. 1351 (D.N.J. 1986).

70 *Id.* at 1352. In so holding, the court noted that the 100-page personnel manual contained "utterly no discussion, as [opposed to the manual] in *Woolley*, of termination proceedings." *Id.*

71 Civ. No. 85-2946 (D.N.J. May 8, 1989).

treatment of all employees concerning . . . discharge" and "[i]t is our policy to provide equal employment opportunities on the basis of merit and qualifications."[72] The court held that a statement of equal treatment of employees did not create a reasonable expectation that any employee would only be discharged for cause.[73]

Courts in other jurisdictions that recognize *Woolley*-type implied employment contracts have held that the mere listing of possible grounds for termination in a handbook or manual does not limit an employer's right to discharge employees at will.[74]

D. Breach of Promise—Discharge Without "Just Cause"

Perhaps the most significant issue raised by *Woolley*, assuming an implied contract has been formed, is the scope of the employer's obligation. The *Woolley* court concerned an alleged implied contract not to discharge employees except "for cause."[75] The court explained the scope of the "for cause" commitment, noting that it ony protected employees from "arbitrary" termination.[76] Certain types of discharge are deemed

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[72] *Abate*, Civ. No. 85-2956, slip op. at 22.

[73] *Id.*, slip op. at 21. *See also* First Atlantic Leasing Corp. v. Tracey, 738 F. Supp. 863 (D.N.J. 1990). In *First Atlantic Leasing*, the employer had a general, company policy of providing severance pay, but denied such to the plaintiff upon his termination. The policy was not in writing, but was apparently adhered to in most cases. The court refused to elevate past practice into a binding contractual commitment: "In the absence of express terms conveyed to specific employees, an employer should not become legally bound to treat each and every employee in the same fashion based upon past policies and practices." *Id.* at 878 (citations omitted).

[74] *See, e.g.*, Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986) (mere listing of possible grounds for discharge does *not* create an implied contract of "for cause" termination for non-listed actions because the handbook language did not identify the acts as the exclusive grounds for discharge.); Arnold v. Diet Center, Inc., 746 P.2d 1040, 1043 (Idaho Ct. App. 1987) (summary judgment granted where handbook stated listing of various grounds for termination was "illustrative . . . and is not intended to be all-inclusive" notwithstanding the inclusion of a progressive discipline system in the handbook); Hinson v. Cameron, 742 P.2d 549, 556 (Okla. 1987) (summary judgment granted to employer on alleged implied contract claim based on manual providing a non-exhaustive list of grounds for termination); McCluskey v. Unicare Health Facility, Inc., 448 So. 2d 398, 400-01 (Ala. 1986) (affirming summary judgment for employer based on handbook listing grounds for termination which "include, but are not limited to the following" because the provision allowed termination on grounds other than those provided); Jones v. EG&G Idaho, Inc., 726 P.2d 703, 706 (Idaho 1986) (employee handbook with list of dischargeable infractions, "*not intended to be all inclusive*," created an at-will employment relationship) (emphasis in original).

[75] Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 307, 491 A.2d 1257, 1271, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

[76] *Id.* at 300, 491 A.2d at 1266. *See also* Shebar v. Sanyo Business Systems Corp.,

non-arbitrary as a matter of law. Indeed, the *Woolley* court provided a non-exhaustive list of such reasons.[77]

In *Fried v. Aftec, Inc.*,[78] the court addressed the meaning of termination "for cause" in the context of an individual employment contract which did not indicate how the parties intended to define "for cause."[79] The court observed that in all other New Jersey decisions involving termination "for cause," a "special understanding" (i.e., a specific definition of the term) between the parties existed. Such an understanding was lacking in the plaintiff's employment contract, however.

The *Fried* court, after reviewing the existing case law, summarized the general principles that the courts had utilized in defining "for cause." The court concluded that cause denotes "an objective, rather than a personal, subjective test" to be viewed from the employer's perspective. The *Fried* court held that, absent an agreement or definition of the term, the analysis of whether "cause" existed required an evaluation of the employer's reason for the discharge and whether a reasonable employer, acting in good faith, could have considered the reason as sufficient for discharging the employee.[80]

Under this formulation, the measure of dissatisfaction is judged from the perspective of the reasonable employer, not the employee. While the employer cannot discharge the employee because of a "subjective dislike or disapproval" of the employee,[81] the jury could not substitute its judgment or view of the equities for the employer's judgment.[82]

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111 N.J. 276, 287, 544 A.2d 377, 382 (1988) ("a promise to discharge only for cause . . . protects the employee only from arbitrary termination").

77 *See supra* note 50. *See also* Maietta v. United Parcel Service, 749 F. Supp. 1344, 1362-63 (D.N.J. 1990), *aff'd without opinion*, 932 F.2d 960 (3d Cir. 1991) (misconduct provides good cause to terminate an employee); Linn v. Beneficial Commercial Corp., 226 N.J. Super. 74, 80, 543 A.2d 954, 957 (App. Div. 1988) (discharge for legitimate business reason is acceptable).

78 246 N.J. Super. 245, 587 A.2d 290 (App. Div. 1991).

79 Although *Fried* did not concern an implied "for cause" *Woolley* employment contract, the court's discussion is nevertheless interesting.

80 *Id.* at 257, 587 A.2d at 296 (citation omitted). The appellate court remanded the case and directed that the issue of whether "cause" existed be left to the jury because the parties themselves had not defined "good cause." *Id.* at 254, 587 A.2d at 294.

81 *Id.* at 256, 587 A.2d at 295.

82 The *Fried* court's submission to the jury of the issue of whether the plaintiff had been terminated "for cause" does not mean that the issue will always be a jury question. Armed with this definition, future courts could decide as a matter of law that good cause existed on an undisputed factual record. *See, e.g.*, Maietta v. United Parcel Service, 749 F. Supp. 1344, 1362 (D.N.J. 1990), *aff'd without opinion*, 932 F.2d

The *Fried* court made it clear that its opinion applied only when the parties had provided no meaning to the phrase "for cause." Concededly, this problem will not arise in a case alleging violation of a *Woolley* contract because for an implied promise to be created at all pursuant to an employee manual, the manual must contain, *inter alia*, a comprehensive treatment of the subject of termination.[83] Such provisions will, in virtually every case, provide meaning to the implied promise of discharge only for good cause. Indeed, if a court cannot determine the meaning of an implied contract, that failure is substantial evidence that the manual's treatment is not sufficiently comprehensive to support a finding that its terms are binding.

In any event, under a *Woolley* contract the employer retains substantial discretion in deciding when good cause exists because *Woolley* contracts, which create an implied promise of discharge only for cause, only prohibit arbitrary terminations.[84] To overcome that hurdle, the employer need merely decide, in good faith and based upon credible evidence, that good cause exists.[85]

Of course, an employer can also avoid requiring to substantiate whether "cause" exists by specifically defining the term in a document that can create a *Woolley* contract. An employer may also reserve the discretion to resolve employee misconduct on an individual basis by so stipulating in the manual. The employer can also expand its authority to determine what conduct constitutes "cause in any number of ways."

For example, in *Vitale v. Bally's Park Place, Inc.*,[86] the employer's policy manual provided that "[a] single incident of misconduct, if severe enough in the judgment of management, may

960 (3d Cir. 1991) (deciding good cause issue as a matter of law). *See also Woolley*, 99 N.J. at 307 n.13, 491 A.2d at 1270 n.13 (court may decide issues of whether promise was created and whether good cause for the discharge existed); First Atlantic Leasing Corp. v. Tracey, 738 F. Supp. 863, 873 (D.N.J. 1990) (entering summary judgment on behalf of employer when the court found that cause existed for the discharge).

83 *See supra* note 50 and accompanying text.

84 *Maietta*, 749 F. Supp. at 1363 (citing Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 287, 544 A.2d 377, 382 (1988); *Woolley*, 99 N.J. at 301 n.8, 491 A.2d at 1266 n.8).

85 *Maietta*, 749 F. Supp. at 1363 (citing Vitale v. Bally's Park Place, Inc., No. A-228-88T5, 1989 LEXIS 475, at *3 (N.J. Super. App. Div. May 5, 1989)). In *Vitale*, the court noted that the manual provided that discharge "remain[ed] a management prerogative, subject only to management's opinion," because of language stating that an employee would be fired for misconduct if such was "severe enough in the judgment of management."

86 No. A-228-88T5, 1989 LEXIS 475 (N.J. Super. App. Div. May 5, 1989).

result in immediate discharge for just cause."[87] The court held that while the manual created contractual rights for the employees, the plaintiff could still be terminated as long as the employer followed the manual's termination procedures. In *Vitale*, the employer merely had to determine, in good faith, that there was credible evidence to support its decision.

Similarly, in *Morrison v. Prudential Insurance Co. of America*,[88] the manual permitted immediate discharge for any act which, "in the opinion of an appropriate . . . [administrator, constituted] an employee-induced termination."[89] Elsewhere, the manual stated that the manual's contents were guidelines and that individual circumstances might call for different approaches. The court held that the employer was only required to make a reasonable determination that cause existed because the manual gave the employer great discretion to determine on a case by case basis whether to discharge its employees.[90]

E. Breach of Other Promises Within the Manual

The termination of employment typically results in allegations of an implied employment contract. The focus, therefore, is often on the manual's disciplinary and termination provisions. The typical employee handbook, however, encompasses numerous subjects other than discipline and discharge, such as vacation and holiday schedules, dress codes and the like. Because the *Woolley* court found the manual's "job security" provisions to be a determinative factor,[91] it is unclear to what extent employer handbook statements on such other subjects can be read as *promises* and not merely as general, descriptive guidelines.[92]

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87 *Id.* at *2.

88 Civ. No. 90-1017 (D.N.J. Apr. 9, 1991).

89 *Id.*, slip op. at 8.

90 *Id.* at 20.

91 Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 300, 491 A.2d 1257, 1266, *modified*, 101 N.J. 10 499 A.2d 515 (1985). The court made the job security provisions binding because the reason for doing so, namely that all other benefits would otherwise become vulnerable, was "particularly persuasive." *Id.*

92 *See* Anthony v. Jersey Central Power & Light Co., 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958) (employer's widely distributed severance pay rule could constitute a binding promise). To the extent that severance pay policy may be deemed an "employee benefit plan" pursuant to § 3 of ERISA, 29 U.S.C. § 1002 (1988), the *Anthony* holding may be preempted by § 514 of ERISA, 29 U.S.C. § 1144 (1988) (superseding "any and all State laws insofar as they may now or hereafter relate to [certain non-exempt] employee benefit plan [3].").

In *Grigoletti v. Ortho Pharmaceutical Corp.*,[93] two female plaintiffs commenced an action against their employer alleging sex and age discrimination. The plaintiffs alleged that male employees were paid more for the same work, that the employer tolerated a sexually hostile work environment and that the employer retaliated against one of the plaintiffs for objecting to sexual harassment. In addition to alleging that the employer had violated the New Jersey Law Against Discrimination[94] (NJLAD), the plaintiffs alleged that the employer had wrongfully discharged them in violation of the employer's personnel manual.

The appellate court conceded that the plaintiffs' contract claims exceeded the specific holding of *Woolley* because the plaintiffs sought to enforce provisions of the personnel manual other than the termination provisions.[95] The court observed that the manual provided that employer harassment and gossiping were valid and punishable grievances. Further, the manual provided that the employer would, upon transferring an employee to a new position, make "every effort" to ensure that the employee's salary was commensurate with the salaries of other employees in that position.[96]

The appellate court concluded that because the manual did not have a disclaimer as to the enforceability of the manual's provisions, *Woolley* required that the court construe the provisions in accordance with the employees' "reasonable expectations."[97] Thus, the court found no legal reason not to enforce the manual's provisions. The court observed that it was not deciding whether the plaintiffs' claims could be sustained under *Woolley*,[98] but merely that *Woolley* did not bar them from bringing the claims simply because they were not relying upon a job security provision.

The New Jersey Supreme Court reversed the appellate court's *Woolley* interpretation because the supreme court found

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93 226 N.J. Super. 518, 545 A.2d 185 (App. Div. 1988), *modified in part, rev'd in part and remanded*, 118 N.J. 89, 570 A.2d 903 (1990).

94 N.J. STAT. ANN. §§ 10:5-1 to 10:5-28 (West 1976 & Supp. 1991).

95 *Grigoletti*, 226 N.J. Super. at 526-27, 545 A.2d at 189.

96 *Id.* at 527 n.2, 545 A.2d at 189 n.2.

97 *Id.* at 527, 545 A.2d at 189 (quoting *Woolley*, 99 N.J. at 297-98, 491 A.2d at 1264).

98 *Id.* at 528, 545 A.2d at 191. The court, although noting an absence in the record on which to decide, may have been contemplating the language of the provisions which, for example, only obligated the employer to employ "best efforts" to make the salaries consistent.

that *Woolley* was not to be applied retroactively.[99] Thus, the supreme court did not decide whether the plaintiff's claims were cognizable under *Woolley*. Had the supreme court decided to apply *Woolley* retroactively, however, the court should not have extended the *Woolley* doctrine to the provisions at issue in *Grigoletti* because of the significance the *Woolley* court found in the "job security" provisions in the *Woolley* manual.[100] Nevertheless, the *Grigoletti* appellate court decision indicates that employers should carefully consider the wording of all provisions in an employee manual because, absent an appropriate disclaimer, the employer may face unanticipated breach of contract claims.[101]

For example, a manual may contain the employer's express commitment to give current employees an opportunity to apply for vacant positions before the employer seeks applicants outside the company. Or a manual might contain promissory language in which the employer obligates itself to make all promotions based strictly on merit or on seniority. In each case, an employer might decide, for good business reasons, not to follow such provisions. The employer may then find itself in an apparent violation of its "promise" in the manual and be confronted with a disgruntled employee alleging that the employer breached its contractual promise. *Grigoletti* is a reminder that all provisions in a manual, if explicitly limiting an employer's discretion, may be used against the employer.[102]

F. Woolley and the Implied Covenant of Good Faith

In addition to alleging that a discharge violated an implied *Woolley* contract, a plaintiff may also allege that the employer violated an implied covenant of good faith and fair dealing existing within the *Woolley* contract.[103] In this event, the plaintiff may also

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99 Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 118, 570 A.2d 903, 917 (1990).

100 *Woolley*, 99 N.J. at 300, 491 A.2d at 1266.

101 The *Grigoletti* manual did not contain a disclaimer. *Grigoletti*, 226 N.J. Super. at 527, 545 A.2d at 189.

102 An employer may prevail on such a claim by offering a good business reason for not complying with the manual's provisions. If the manual is explicitly drafted to remove all discretion from the employer, however, the employer may have a high burden of proof.

103 *See generally* Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prod., 69 N.J. 123, 129-30, 351 A.2d 349, 352 (1976) (discussing the implied covenant of good faith and fair dealing); Noye v. Hoffman-La Roche, Inc. 238 N.J. Super. 430, 570 A.2d 12 (App. Div.), *certif. denied*, 122 N.J. 146, 584 A.2d 218 (1990) (discussing the covenant in the context of an implied employment contract).

seek to imply terms in addition to the plain language of a contract created under *Woolley*.[104] The contours of the alleged covenant are unclear, the courts having simply stated that neither contracting party may injure the other party's rights to the benefits of the contract.[105] The implied covenant theory has been used, however, in an attempt to defeat an employer's claim that it had good cause to terminate an employee.[106]

That a *Woolley* contract contains an implied covenant of good faith and fair dealing was recognized in *Noye v. Hoffmann-La Roche, Inc.* .[107] In *Noye*, the plaintiff was terminated following allegations that he sexually harassed his female subordinate. The plaintiff denied any harassment and contended that he was terminated without reason or an opportunity to challenge the charges, in violation of the employer's disciplinary policy. The plaintiff also claimed that the employer's action violated an implied covenant of good faith and fair dealing.

The New Jersey Superior Court, Appellate Division, accepted the plaintiff's argument that a *Woolley* contract contains an implied covenant of good faith and fair dealing.[108] The court defined the covenant in the context of an employer's investigation of alleged misconduct and the subsequent termination of an employee. The court found that it would have been proper to instruct the jury that the covenant was not breached if the defendant "acted reasonably [and] in good faith."[109]

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104 *See* Onderdonk v. Presbyterian Homes of New Jersey, 85 N.J. 171, 182, 425 A.2d 1057, 1062 (1981)(citations omitted) ("Arrangements embodied in a contract may be such that the parties have impliedly agreed to certain terms and conditions which have not been expressly stated in the written document.").

105 *Id.* (citations omitted); *Bak-A-Lum*, 69 N.J. at 129, 351 A.2d at 352 (citations omitted).

106 *See* Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 570 A.2d 12 (App. Div.), *certif. denied*, 122 N.J. 146, 584 A.2d 218 (1990). The concept has also been advanced to object to allegedly arbitrary employer action under a written contract. Nolan v. Control Data Corp., 243 N.J. Super. 420, 579 A.2d 1252 (App. Div. 1990). In *Nolan*, the employee did not have an implied *Woolley*-type contract, but had signed a written compensation agreement that was allegedly breached.

107 238 N.J. Super. 430, 570 A.2d 12 (App. Div.), *certif. denied*, 122 N.J. 146, 584 A.2d 218 (1990).

108 *Id.* at 432, 579 A.2d at 13 (citing Bak-A-Lum Corp. v. Alcoa Bldg. Prod., 69 N.J. 123, 129-30, 351 A.2d 349, 352 (1976)).

109 *Id.* at 433, 570 A.2d at 13. The court held that:

> [A] lack of good faith is implicit in a violation of a covenant of good faith and fair dealing. A finding that defendant reasonably believed the plaintiff had sexually harassed his female subordinate would necessarily bar a finding that the covenant had been violated. Defendant's good faith was not dependent upon an ultimate jury finding as to whether or not the harassment existed.

Because neither a *Woolley* contract nor the implied covenant arising under it are breached by reasonable employer action, the implied covenant theory is of limited use to employees when challenging employer actions. Arguably, the *Noye* court erred in finding that such an implied obligation could arise under a *Woolley* contract, however, because the obligation is inconsistent with the nature of the contract considered in *Woolley*. The *Noye* court simply decided, without any analysis, that a *Woolley* contract, "like any other contract," contains an implied covenant of good faith and fair dealing.[110] The analysis set forth in *Woolley*, however, undermines the *Noye* court's conclusory assumption.

In *Woolley*, the court adopted a unilateral contract analysis as the legal basis for enforcing promises in a unilaterally promulgated employee handbook.[111] In the unilateral contract situation as applied in *Woolley*, the "offer" made by the employer is "accepted" by the employee when the latter continues working. There is no bargaining between the parties.

By contrast, the very nature of the implied covenant theory requires prior bargaining to imply a promise in addition to those expressly agreed upon because:

> [U]nder general contract law terms may be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to specifically express them because of sheer inadvertence or because the term was too obvious to need expression.[112]

Because the offeror of a *unilateral* contract—such as a *Woolley* contract—offers the contract *without* bargaining with the offeree, the parties could not have intended to add other terms to the offer. Therefore, to imply *additional* terms at the request of the offeree would allow the employee to unilaterally modify the terms of the contract. This result would constitute a contract modification and is

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Id. See also Morrison v. Prudential Ins. Co. of Am., Civ. No. 90-1017, slip op. at 21 (D.N.J. Apr. 9, 1991) (even if a *Woolley* contract were found, the employer need only have acted reasonably) (citations omitted). The appellate court in *Noye* also held that even if the plaintiff had established a breach of the covenant, contract damages, but not tort damages, would lie. *Noye*, 238 N.J. Super. at 436, 570 A.2d at 15.

110 *Id.* at 432, 570 A.2d at 13 (citation omitted).

111 Woolley v. Hoffman La Roche, Inc. 99 N.J. 284, 302, 491 A.2d 1257, 1267, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

112 Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522, 530 (1965) (citations omitted). The *Palisades* decision was cited favorably in *Onderdonk v. Presbyterian Homes of New Jersey*, 85 N.J. 171, 182-83, 425 A.2d 1057, 1062-63 (1981), and *Bak-A-Lum*, 69 N.J. at 129-30, 351 A.2d at 352.

a drastic extension of the unilateral contract analysis adopted in *Woolley*. It remains to be seen whether the New Jersey Supreme Court will recognize the inconsistency between the appellate court's reasoning in *Noye* and the analysis in *Woolley*.

Even in the absence of a *Woolley* contract, plaintiffs have sought to challenge employer actions under the implied covenant theory. These claims are sometimes based on the theory that *Woolley* signalled the end of the employment at-will doctrine. Such claims, however, have been uniformly rejected.[113]

G. *Oral Statements*

The *Woolley* doctrine that an implied employment contract to discharge only for cause may arise from an employee manual has thus far not been extended to oral policy statements. Indeed, in *Brunner v. Abex Corp.*,[114] the court noted that *Woolley* was limited "even in its broadest interpretation" to written communications.[115] Subsequently, in *Shebar v. Sanyo Business Systems Corp.*,[116] an appellate court held that a *Woolley* contract could arise from "a definitive, established, company-wide employer policy, however expressed."[117] The New Jersey Supreme Court affirmed on

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[113] *See, e.g.*, McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 520, 499 A.2d 526, 529 (App. Div. 1985) ("Since plaintiff was working without a contract as an at-will employee, his argument that every contract imposes a duty of a good faith and fair dealing is irrelevant. One cannot read additional terms into a non-existent contract."); *Id.* at 520, 499 A.2d at 529. *See Noye*, 238 N.J. Super. at 434, 570 A.2d at 14 ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing."); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 55, 556 A.2d 353, 360 (App. Div.), *certif. denied*, 117 N.J. 154, 564 A.2d 874 (1989) (quoting Citizens State Bank of New Jersey v. Libertelli, 215 N.J. Super. 190, 194, 521 A.2d 867, 869 (App. Div. 1987) (no implied covenant restricts employer's authority to discharge at-will employees)). *See also* Erickson v. Marsh & McLennan Co., 117 N.J. 539, 561, 569 A.2d 793, 804 (1990) ("A 'contentious' 'at-will' employee can be fired for a false cause or no cause at all. That firing may be unfair but it is not illegal."); Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191, 536 A.2d 237, 238 (1988) ("An employer can fire an at-will employee for no specific reason or simply because an employee is bothering the boss.").

[114] 661 F. Supp. 1351 (D.N.J. 1991).

[115] *Id.* at 1356.

[116] 218 N.J. Super. 111, 120, 526 A.2d 1144, 1148-49 (App. Div. 1987), *aff'd on other grounds*, 111 N.J. 276, 544 A.2d 377 (1988).

[117] *Shebar*, 218 N.J. Super. at 120, 526 A.2d at 1148. To the same extent that the focus of the appellate division in *Shebar* was upon whether the alleged company policy was somehow "expressed"—in the sense of whether such a policy merely existed—its discussion misapplied, and clearly ran counter to, the supreme court's requirement in *Woolley* that the employer's policy must be "widely distributed" throughout the workforce. Indeed, the supreme court, in its own opinion in *Shebar*, explicitly refocused the discussion to the issue of whether the company had "orally communicated an established company-wide policy to its employees," as opposed

other grounds, however, and declined to consider whether *Woolley* applied to widespread oral communications of established corporate policies.[118]

In *Shebar*, the plaintiff alleged that after attempting to resign from Sanyo after accepting a position offered by a competitor, his superior took Shebar's "resignation letter and dramatically ripped it to shreds." The superior allegedly told Shebar that "I will not accept your resignation. We will solve your problems." Shebar further asserted that he was told that he had a job for the rest of his life, and that "Sanyo had never fired, and never intended to fire, a corporate employee whose rank was manager or above."

In reliance on these statements, Shebar agreed not to resign, and rescinded his acceptance of the competitor's job offer. When Shebar advised the executive recruiter, who had contacted him concerning the competitor's job offer, of these reasons for his decision to remain with Sanyo, the recruiter expressed surprise, and stated that he had information that Sanyo was attempting to replace Shebar. When Shebar advised his superior of the recruiter's statements, his superior denied their accuracy and claimed that the recruiter was merely trying to encourage Shebar to change jobs so that the recruiter would receive a placement fee. Shebar accepted this explanation. Four months later, however, "Sanyo's president summoned Shebar to his office at the end of the business day, fired him, handed him a check for severance benefits, and instructed him to clean out his desk and to leave the premises forthwith." Shebar subsequently brought suit against Sanyo, alleging, *inter alia*, breach of contract.

The trial court, citing *Savarese*, granted Sanyo's motion for summary judgment on Shebar's breach of contract claim, construing "Sanyo's alleged promises as an unenforceable 'friendly

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to an individual employee. *Shebar*, 111 N.J. at 288, 544 A.2d at 383. Again, the mere existence of an internal company policy of limited distribution—be that distribution written or oral—will not suffice to establish a *Woolley* claim. Indeed, judicial approval of *Woolley* claims based upon alleged widely-distributed oral policy statements for mischief (e.g., selective recall of alleged conversations) could be avoided by adhering to the present requirement that *Woolley* claims be based upon a widely-distributed writing.

118 111 N.J. at 288, 544 A.2d at 383. *See also* Maietta v. United Parcel Service, 749 F. Supp. at 1344, 1366 (D.N.J. 1990), *aff'd*, 932 F.2d 960 (3d Cir. 1991) ("[t]he precedential value of the opinion of the appellate division in *Shebar* has been mooted by the New Jersey Supreme Court opinion"). *But see* Labus v. Navistar Int'l Transportation Corp., 740 F. Supp. 1053, 1062-63 (D.N.J. 1990) (predicting that New Jersey would extend *Woolley* to certain oral representations of company policy).

assurance' of lifetime employment." The appellate division reversed, holding that the oral statements made to Shebar might be probative of a *Woolley* contract, although "only if plaintiff is able to prove that their statements constituted an accurate representation of policy which they were authorized to make."

The New Jersey Supreme Court affirmed, but for different reasons. The court held that *Woolley* was inapplicable to the *Shebar* case because there was "no basis in this record for finding an established company-wide termaintion policy."[119] The court also reaffirmed the vitality of *Savarese*, which the appellate division erroneously assumed had been abrogated by *Woolley*. Noting that *Savarese* had recognized that "lifetime" employment contracts were "at variance with general usage and sound policy," the Supreme Court in *Shebar* stated that "[t]his is still so today, given the unlikelihood of an employer promising to protect an employee from any termination of employment, and the difficulty of determining the terms and enforcing such an agreement."

The court affirmed the appellate division decision, however, on the ground that plaintiff had raised a genuine issue of material fact with respect to the existence of "a special contract with a particular employee" to discharge only for cause. The court held that the representations made to Shebar "were obviously intended to induce plaintiff to remain with Sanyo as Sanyo's computer sales manager and revoke his acceptance of Sony's employment offer." The court further noted that plaintiff relied upon these representations by giving up the Sony job opportunity, and that he gave valuable consideration for the promise of continued employment by foregoing the Sony offer.[120]

The appellate court's opinion in *Shebar* reflects a fundamental misunderstanding of the *Woolley* decision. The dispute in *Woolley* was not over whether the company had a policy of providing job security, but whether a detailed, fully comprehensive and thoroughly prepared company policy statement had been widely distributed throughout a large employer's workforce. An alleged oral description to a particular employee, or even several em-

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[119] 111 N.J. at 288, 544 A.2d at 383. The supreme court's statement is curious, given that Shebar testified that his superior told him that the company *never* terminated managerial employees, that such was company policy. The supreme court's refusal to rely upon that expression of Sanyo's practice is further evidence that, in considering *Woolley* claims, the supreme court focuses upon a widely-communicated policy, not simply the existence of a policy.

[120] *Id.* at 288-89, 544 A.2d at 383.

ployees, is the antithesis of those prerequisites required by *Woolley* and its progeny.[121]

IV. DEFENSES TO A *WOOLLEY* CLAIM

Usually an employer will defend against a *Woolley* employment contract claim by arguing that the manual does not meet the requisites of a *Woolley* claim. Thus, the employer will argue that: (1) the document does not contain a comprehensive treatment of the subject of termination; (2) it was not widely distributed throughout a large workforce; (3) it does not contain provisions that could be reasonably construed by an employee as binding; (4) the document is not, by its nature, the type to which *Woolley* applies; and/or (5) that there was just cause for the discharge. Even if these arguments are unavailable or unavailing and the court finds that the manual does create a promise, other defenses are available.

A. Disclaimers

The supreme court suggested the primary defense to a *Woolley* claim when the court asserted:

> [I]f the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.[122]

Such a "disclaimer" will be enforced, as a matter of law, despite whatever promises are contained in the manual.[123] Arguments over whether a disclaimer satisfies the *Woolley* requirements focus on (1)

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[121] The *Shebar* decision has been retroactively applied. Smith v. Squibb Corp., 254 N.J. Super. 69, 603 A.2d 75 (App. Div. 1992), *pet. for certif. filed*, Docket No. 34945.

[122] Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 309, 491 A.2d 1257, 1271 (1985).

[123] *See* Hedrick v. Merck & Co., No. A5720-8973 (N.J. Super. Ct. App. Div. Feb. 7, 1991), *certif. denied*, No. 33299 (April 30, 1991).

the sufficiency of the language and (2) its placement or "prominence."

The disclaimer language in the handbook need not, of course, exactly parrot the language suggested by *Woolley*.[124] In *Morrison v. Prudential Insurance Co. of America*,[125] the disclaimer provided that "[b]oth the Company and an employee have the right to terminate the employment relationship at any time and for any reason, with or without prior notice."[126] The plaintiff argued, *inter alia*, that the disclaimer was ineffective because it did not include an "unequivocal statement" that the employer continued to have the "absolute power to fire anyone with or without good cause."[127] The court rejected that argument and held that the manual's language providing for termination "at any time and for any reason" was sufficient under *Woolley*.[128]

By contrast, the disclaimer provision in *Preston v. Claridge Hotel & Casino*,[129] was deemed insufficient. In *Preston*, the employer issued and widely distributed a handbook and personnel policy manual that the court found included detailed provisions concerning termination. The handbook also provided that "[w]hile you work for the [employer]. . . [y]ou will receive maximum job security."[130] The handbook did not contain a statement that the terms were not to be considered promises.

Approximately one year after the handbook was issued, the employer issued a "revised" handbook that was identical to the first

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[124] For example, in *Hedrick*, the appellate court held the following disclaimer to be effective:

> However, none of our policies, procedures or practices are to be viewed as creating any promises or any contractual rights to employment or to the benefits of employment. Rather, they are guidelines for effective management which are subject to change by the Company in its discretion.
>
> It is our hope that each of our employees will find the company to be a fulfilling place to work. Nevertheless, employment with [the Company] is not guaranteed. This means that either the employee or the Company may terminate the employment relationship at any time and for any reason.

Id., slip op. at 2.

[125] Civ. No. 90-1017 (D.N.J. Apr. 9, 1991).

[126] *Morrison*, Civ. No. 90-1017, slip op. at 9.

[127] *See id.*, slip op. at 18.

[128] *Id.* Indeed, the fact that the supreme court in *Woolley* stated that there are "simple ways" to avoid contractual claims based on a manual suggests that the court's immediately-following description of offered language is intended to be read in the disjunctive, and that an employer need not utilize each of the suggestive phrases to create an effective disclaimer.

[129] 231 N.J. Super. 81, 555 A.2d 12 (App. Div. 1989).

[130] *Id.* at 86, 555 A.2d at 15.

except for the addition of a disclaimer that the handbook was not to be considered a contract.[131] The court found that the disclaimer did not indicate that the employees were subject to discharge at will and held:

> However unequivocal this language may be in informing employees that the second handbook was not to be construed as a contract, it fails to explain the impact of the disclaimer upon the "maximum job security" provisions contained in both handbooks and the [personnel policy manual]. If [the employer] wished to advise its employees that they could be discharged at will, such a warning should have been set forth expressly.[132]

In dicta, the *Preston* court noted that the necessity of providing a disclaimer consistent with *Woolley* was "particularly compelling" because of the manner in which the second revised handbook was issued to the employees. The court observed that the first handbook—without the disclaimer—was distributed at an orientation meeting at which all employees were told what they could expect in terms of employment and what was expected of them. The employees were required to read the handbook and sign a form acknowledging that they could be terminated for violating the terms in the handbook. When the revised handbook was issued, however, the employees were not "reoriented" as to the significance of the disclaimer.[133] The court stated that because the employer did not use straightforward language similar to that suggested in *Woolley*, the employer should have explained to the employees what the disclaimer meant.[134]

Preston suggests that the disclaimer would have been upheld if there had not been such a contrast between the manner in which the

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131 The disclaimer provided:

> It is the policy of the Company that this handbook and the items contained, referred to, or mentioned herein, are not intended to create, nor should be construed to constitute, a contract of employment between the Company and any one or all of its personnel. This handbook and its items are presented only as a matter of information and direction regarding Company policy, benefits and other useful information.

Id. at 87, 555 A.2d at 15.

132 *Id.*

133 *Id.* at 87-88, 555 A.2d at 16. When the second handbook was issued, the employees were simply asked to read the handbook and sign an acknowledgement form.

134 *Id.* at 88, 555 A.2d at 16. The court failed to note that both handbooks were issued prior to the decision in *Woolley*. Moreover, the plaintiff was terminated prior to the *Woolley* decision and the employer could not have followed the court's suggestion in *Woolley*.

first and second handbooks were issued to the same employees.[135] Indeed, the *Preston* court's refusal to enforce the disclaimer is highly questionable because the court held that the handbook created an implied contract despite the express disclaimer that neither the handbook nor any item "contained, referred to, or mentioned [therein was] intended to create or should be construed to constitute, a contract of employment. . . ."[136] No reasonable employee could read that disclaimer and reasonably believe that the handbook constituted a contract. Furthermore, the *Preston* court failed to acknowledge *Woolley*'s directive that a manual should not be considered binding if there is "proof of the employer's intent not to be bound."[137]

The second element of an effective disclaimer—that it be placed in a "very prominent position"[138]—is also an issue that may be decided by the court as a matter of law. *Woolley* does not mandate where the disclaimer should appear in the manual. "Prominence" is clearly achieved, however, when the disclaimer appears on the first page of text of a handbook, even if it is not the very first paragraph of text.[139] A disclaimer may also be effective to rebut an employee's reliance on particular termination procedures if the disclaimer is included within the same section discussing those procedures.[140] There is no requirement, however, that the print type for the disclaimer be larger than that used for other text or that the language be placed on its own separate page.[141]

Woolley did *not* hold that its suggested disclaimer language was

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135 *See* McKeown-Brand v. Trump Castle Hotel and Casino, No. A-4057-90T1, slip op. at 3, 5 (N.J. Super. Ct. App. Div. Jan. 17, 1992) (acknowledgment form, signed by plaintiff, simply stating that nothing in the handbook created an express or implied contract of employment was sufficient to defeat *Woolley* claim).

136 *Preston*, 231 N.J. Super. at 87, 555 A.2d at 15.

137 *Woolley*, 99 N.J. at 307, 491 A.2d at 1270. The *Preston* court quoted this passage from *Woolley* but failed to enforce it. *Preston*, 231 N.J. Super. at 86, 555 A.2d at 15.

138 *Woolley*, 99 N.J. at 309, 491 A.2d at 1271.

139 Hedrick v. Merck & Co., No. A-5720-89T3 (N.J. Super. Ct. App. Div. Feb. 7, 1991), *certif. denied*, No. 33299 (N.J. Apr. 30, 1991). In *Hedrick*, there were five separate paragraphs on the first page of the manual. The disclaimer appeared in the third paragraph and in the second sentence of the fourth paragraph. *See* Transcript of Oral Argument, Hedrick v. Merck & Co., No. A-5720-89T3, at 9 (June 22, 1990). The plaintiff argued that placement was not sufficiently prominent and that the language was intertwined with language describing the benefits of working for the company. Plaintiff suggested that the disclaimer should have been in bold print on the cover of the manual or placed in a special "box."

140 *See* Morrison v. Prudential Ins. Co. of Am., Civ. No. 90-1017, slip op. at 18 n.10 (D.N.J. Apr. 9, 1991).

141 *Id.*

the only means by which an employer can avoid being bound by statements in a manual. To the contrary, the court's language suggested quite the opposite. The court asserted that what is desired is "basic honesty," and that there were "simple ways" to make a handbook or manual non-binding.[142] Certainly, one way is a clear and prominent disclaimer within the handbook itself. The court's endorsement of the use of "other similar proof of the employer's intent not to be bound, however" suggests broader options for the employer.[143]

This aspect of *Woolley*, which has not been developed in the courts to date, is of great significance because the *Woolley* court spoke of the *employer's* intent, rather than the reasonable expectations of the *employee*. Presumably, the reasonable expectations of the employee are relevant only after the manual has been construed to be a binding contract. If the employer has indicated an intent not to be bound by the manual's provisions, however, then the employee's reasonable expectations should not be considered. Assume, for example, that the manual states that its provisions are only policy guidelines that are to be applied in the employer's discretion. Even in the absence of an explicit disclaimer, that "discretionary" language should, per *Woolley*, rebut the inference that the provisions of the manual constitute a binding contract.

The *Woolley* court did not elaborate on what "other" proof might negate promises in a manual. Other courts, following *Woolley*, have utilized statements in other documents given to the employees as supplying the necessary negation proof. Thus, a statement in an application for employment precluded the plaintiff from arguing that an implied contract existed based upon a subsequently issued handbook.[144] Similarly, where an employee signs a written employment agreement stating that the employment may be terminated at any time, the employee cannot then rely upon a manual allegedly promising job security.[145]

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142 *Woolley*, 99 N.J. at 309, 491 A.2d at 1271.

143 *Id.* at 307, 491 A.2d at 1270. *See also* Weber v. LDC/Milton Roy, 42 FEP Cases 1507, 1518 (D.N.J. 1986) (manual contained disclaimer that "the [manual's] statements are in no way intended to restrict management's obligation for final interpretation of its policies and procedures").

144 Radwan v. Beecham Lab., 850 F.2d 147, 150 (3d Cir. 1988).

145 *See* Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 138, 531 A.2d 757, 758 (App. Div. 1987), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988); *see also* Jevic v. The Coca Cola Bottling Co. of New York, Inc., Civ. No. 89-4431, slip op. at 6-7 (D.N.J. June 6, 1991) (no implied contract can arise when plaintiff signed pre-employment statement acknowledging his at-will status).

B. *"Substantial Compliance"*

Several courts have suggested that an employer's "substantial compliance" with the procedures in a manual is sufficient to meet its obligations under a *Woolley* contract. In *Ware v. Prudential Insurance Co.*,[146] for example, the employee argued that, per the employee manual, the employer was required to formally place him on six months' probation prior to termination. The court noted that the plaintiff's superior twice discussed the employee's unsatisfactory conduct with the employee and subsequently gave him a written warning that the conduct would not be tolerated. The plaintiff was terminated almost nine months after the written warning was given. The court noted, in dicta, that the meetings and warning letter might have "constituted substantial compliance with" any pre-termination probationary requirement.

Similarly, in *Mills v. Thomas & Betts Corp.*,[147] the court found that the employer had "substantially followed" provisions in a manual requiring a formal "coaching" process prior to the termination of an employee for poor performance when the employee's problems were identified in several meetings with his superiors.[148]

These decisions reflect a common sense approach to the enforcement of binding manual provisions. So long as the general purpose of the manual's provisions is satisfied, an employee cannot recover simply because the manual's precise "forms" were not observed. Again, as previously discussed, a *Woolley* promise only restricts an employer from arbitrary action; employees will not prevail because of technical breaches of an employer's provisions.

C. *Exhaustion of Internal Remedies*

Where an employer manual provides for an internal grievance procedure, any *Woolley* claim brought pursuant to that manual may be barred if the employee has failed to invoke or exhaust

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146 220 N.J. Super. 135, 531 A.2d 757 (App. Div. 1987), *certif. denied*, 113 N.J. 355, 550 A.2d. 450 (1988).

147 Civ. No. 87-983 (D.N.J. Sept. 14, 1987), *aff'd*, No. 87-5731 (3d Cir. Mar. 11, 1988).

148 *See also* Vitale v. Bally's Park Place, Inc., No. A228-88T5, 1989 LEXIS 475, slip op. at 2 (N.J. Super. App. Div. May 5, 1989) ("An examination of the record persuades us that defendant . . . substantially followed its own rules."); Schwartz v. Leasametric, Inc., 224 N.J. Super. 21, 32, 539 A.2d 744, 750 (App. Div. 1988) (issue is "whether [employer] adequately followed the manual's prescription.").

that procedure.[149] Arguably, where the grievance procedure is the exclusive remedy for breach of the manual's promises, any court action, at least based upon breach of contract, would seemingly be barred, even after those procedures are exhausted.

D. Revising the Handbook

An employer can defend against a *Woolley* claim by establishing that the handbook has been revised, in part or in whole.[150] Despite the *Woolley* court's refusal to express an opinion on whether an employer can change a "binding" job security provision, it would seem obvious that, if an employee may "accept" the provisions of the first manual—containing the job security provisions—merely by continuing to work,[151] the same employee similarly accepts the second manual by continuing in the employment.

Moreover, *Woolley* did not resolve whether a replacement manual, distributed among the workforce and containing a disclaimer or other evidence of the employer's intent not to be bound, is automatically binding on an employee who claims that he or she never received, nor even knew of, the new manual. *Woolley* does not, however, require that the employer establish that the employee *in fact* received a revised handbook containing disclaimer language for the handbook to be controlling. Indeed, the New Jersey Supreme Court in *Woolley* found that although the widely distributed manual had not been given to all employees, it "covered" all of them. Further, the court found that the record indicated that the employer intended that all the employees be advised of its contents.[152] Thus, because the manual was widely distributed among the workforce, its provisions were enforceable

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149 Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 953 (D.N.J. 1991) ("If the provisions governing job security are binding, then so too is the language concerning utilization of the grievance procedures.").

150 The *Woolley* court asserted:

> We are aware that problems that do not ordinarily exist when collective bargaining agreements are involved may arise from the enforcement of employment manuals . . . . [P]roblems may result from the employer's explicitly reserved right unilaterally to change the manual. We have no doubt that, generally, changes in such a manual, including changes in terms and conditions of employment, are permitted. We express no opinion, however, on whether or to what extent they are permitted when they adversely affect a binding job security provision.

Woolley, 99 N.J. at 308-09, 491 A.2d at 1270-71.

151 *Id.* at 302, 491 A.2d at 1267.

152 *Id.* at 298, 491 A.2d at 1265.

even if an employee never saw the document.[153]

Therefore, under the *Woolley* court's reasoning, where an employer widely distributes a new manual containing a disclaimer, although allegedly not to a particular employee who is otherwise within the intended distribution group, the provisions of the manual, including the disclaimer, should be enforceable against that employee. Similarly, where the employer widely distributes replacement pages or "updates" containing disclaimer language for an existing manual, the disclaimer should be enforceable as to all employees within the intended distribution group, even if a particular employee claims non-receipt of the updates.[154]

CONCLUSION

The *Woolley* court expressed the hope that its opinion would not make employers reluctant to use handbooks, which the court noted were "very helpful [labor relations] tools."[155] The court summarized that:

> All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty. . . .[156]

The court's admonition provides the best guidance for the employers issuing manuals, and for the employees receiving them. The unilateral contract analysis adopted by *Woolley* means that the employer remains the master of its offer contained in a manual that is widely distributed to the workforce. So long as employers carefully consider the language utilized in the employers' manuals, both employers and employees will know their respective responsibilities.

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153 *See id.* at 302-04, 304 n.10, 491 A.2d at 1267-68, 1268 n.10 (employee need not prove reliance upon the manual).

154 The *Preston* decision is not to the contrary because the *Preston* court held that the disclaimer was not, under the specific circumstances of the case sufficient under *Woolley*. Preston v. Claridge Hotel & Casino, 231 N.J. Super. 81, 85-87, 555 A.2d 12, 14-15 (App. Div. 1989). *See also* Morrison v. Prudential Ins. Co. of Am., Civ. No. 90-1017, slip op. at 17-18 (D.N.J. Apr. 9, 1991)("We do not read either *Wooley* or *Preston* as requiring an employer to specifically instruct employees as to the existence and significance of a disclaimer [in a revised manual] where the disclaimer is clear on its face and sufficiently conspicuous.").

155 *Woolley*, 99 N.J. at 309, 491 A.2d at 1271.

156 *Id.*