New Jersey's Recent Employment Manual Decisions: Traditional Contract Law Abandoned in Favor of an Employee's Unreasonable Expectations

INTRODUCTION

Despite protestations to the contrary, the New Jersey judiciary has seriously eroded the doctrine of at-will employment.[1] With each exercise of judicial activism, the New Jersey Supreme Court has steadily expanded the rights of employees while restricting the freedom of employers to terminate employees on a discretionary basis.[2] Perhaps the most cogent example of this trend is the

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[1] *See generally* Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 397, 643 A.2d 546, 552 (1994) (citing English v. College of Medicine & Dentistry, 73 N.J. 20, 23, 372 A.2d 295, 297 (1977) (stating that in New Jersey an employer may terminate an employee for any reason at all under the at-will doctrine)); Erickson v. Marsh & McLennan Co., 117 N.J. 539, 561, 569 A.2d 793, 804 (1990) (claiming that although it may be "unfair," the firing of an at-will employee without cause is lawful). *See also* McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 520, 499 A.2d 526, 529 (App. Div. 1985) (contending that *Woolley v. Hoffmann-La Roche, Inc.* is not a deviation from the employment at-will rule); Kevin C. Donovan & David J. Reilly, *Employment "By the Book" in New Jersey:* Woolley *and Its Progeny*, 22 SETON HALL L. REV. 814, 816 (1992) (asserting that *Woolley*, a landmark case that for the first time in New Jersey found an implied contract in an employment handbook, thus limiting the at-will doctrine, was "not an abrogation of the employment at-will presumption"). *But see Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 290, 491 A.2d 1257, 1260 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (declaring the New Jersey Supreme Court's rejection of an adherence to rules that uphold the employment at-will presumption). For a complete discussion of the *Woolley* decision, see *infra* notes 31-36 and accompanying text. Practitioners who litigate under these decisions, however, have a different view. *See, e.g.*, Rosemary Alito, *Employment Law*, 138 N.J. L.J. SUPP. 71, 71 (1994) (observing that the court has "raised serious questions for employers as to how much real ability they have left to exercise the employment-at-will rights the [c]ourt continues to say they have").

The broadest interpretation of the doctrine of at-will employment allows for the dismissal of employees at any time "for good cause, for no cause or even for cause morally wrong." Kelly McWilliams, Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335, 335 n.1 (1986) (quotation omitted). Various judicial and statutory limitations on the doctrine, however, render this interpretation an inaccurate reflection of its current status. *See generally infra* notes 31-92 and accompanying text (discussing the contractual enforcement of employment manuals and the public policy and implied covenant of good faith and fair dealing exceptions to the at-will rule). A concise definition of the doctrine can be found in the California Labor Code, which states: "[a]n employment, having no specified term, may be terminated *at the will of either party* on notice to the other." CAL. LAB. CODE § 2922 (West 1989) (emphasis added). Accordingly, the employee is free to terminate the employment relationship at any time and for any reason. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 966 (1984).

[2] Alito, *supra* note 1, at 71; *see infra* notes 27-92 and accompanying text (discussing judicially-created restrictions on an employer's powers of arbitrary termination).

court's expansive treatment of employee handbooks[3] as binding unilateral contracts between employer and employee.[4] These interpretations transform the status of employment at-will to that of employment terminable only for cause.[5] Two recent supreme court decisions, *Witkowski v. Thomas J. Lipton, Inc.*[6] and its companion case, *Nicosia v. Wakefern Food Corp.*,[7] embody the judiciary's latest liberal interpretation of employment manuals.[8]

Existing exceptions to the employment at-will doctrine[9] demonstrate that courts need not resort to imaginative contract analysis to provide legal recourse for plaintiffs claiming wrongful discharge.[10] For example, public policy based considerations provide a broad range of causes of action for employees challenging discretionary termination.[11] In addition, an employee may bring suit under a theory of the employer's breach of an implied covenant of good faith and fair dealing, inherent in all employment

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3 Throughout this Comment, the terms employee handbook, policy manual, and employment manual are used interchangeably.

4 *See infra* notes 31-72 and accompanying text (discussing the judiciary's enforcement of policy manuals as binding promises against the employer). A unilateral contract is an agreement in which only one party promises performance. Friedman v. Tappan Dev. Corp., 22 N.J. 523, 533, 126 A.2d 646, 651 (1956). In contrast, the parties to a bilateral contract each undertake a promise for a promise. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:17, at 41 (4th ed. 1990).

5 *See Woolley*, 99 N.J. at 285-86, 491 A.2d at 1258 (holding that implied promises found in employment manuals may modify a formerly at-will relationship into one that may be terminated only for cause); *cf. Witkowski*, 136 N.J. at 399, 643 A.2d at 553 (enunciating circumstances that will rebut the at-will presumption); *see also* Nicosia v. Wakefern Food Corp., 136 N.J. 401, 412, 643 A.2d 554, 559-60 (1994) (quoting *Woolley*, 99 N.J. at 309, 491 A.2d at 1271) (demonstrating that an effective disclaimer may negate the provisions of a manual that alter an employee's at-will status); Donovan & Reilly, *supra* note 1, at 814 (observing that *Woolley* significantly altered the employment relationship).

6 136 N.J. 385, 643 A.2d 546 (1994).

7 136 N.J. 401, 643 A.2d 554 (1994).

8 *Witkowski*, 136 N.J. 385, 643 A.2d 546; *Nicosia*, 136 N.J. 401, 643 A.2d 554; *see infra* notes 37-66 and accompanying text (discussing the *Witkowski* and *Nicosia* decisions).

9 *See infra* notes 73-92 (articulating both decisional and statutory deviations from the employment at-will rule that rest on a sounder jurisprudential base than the contractual enforcement of employee handbooks).

10 Glenn Harris, Comment, 17 RUTGERS L.J. 715, 728-32 (1986) (noting that the New Jersey Supreme Court's contract analysis in *Woolley* ignores basic elements of contract law); *see also id.* at 728 n.26 (offering alternative bases for the court's decision other than contrived contract analysis).

11 *See infra* notes 73-86 and accompanying text (discussing the New Jersey judiciary's adoption of the public policy exception to at-will employment).

contracts.[12]

This Comment examines the current status of the at-will employment doctrine in New Jersey in light of recent decisions interpreting employment manuals as enforceable contracts. Part I provides a brief historical overview of the employment at-will doctrine and its treatment in New Jersey. Part II focuses on the evolution of New Jersey decisional law as it pertains to unilateral contract analysis of employee handbooks and the ramifications of the *Witkowski* and *Nicosia* decisions. Part III suggests alternative rights of action available to an employee who believes that he or she was wrongfully discharged. Part IV concludes that the recent handbook decisions result in increased contractual liability for employers due to a virtual abandonment of fundamental principles of contract law.

I. WHEN "AT-WILL" MEANT AT WILL[13]

Contemporary employment contract jurisprudence is rooted in the aftermath of the Black Plague in fourteenth century England.[14] The decimation of the populace turned an able-bodied worker into a very marketable commodity.[15] This demand led to an almost one-sided distribution of bargaining power in favor of the working class.[16] In an effort to balance this new distribution of power, King Edward enacted the Statutes of Labourers in 1349,

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12 *See infra* notes 87-92 and accompanying text (discussing the implied covenant of good faith and fair dealing as a wrongful discharge cause of action).

13 Professor Richard Epstein captured the essence of the doctrine best by explaining that "the phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less." Epstein, *supra* note 1, at 955.

14 CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS § 1.1, at 3 (2d ed. Supp. 1993).

15 *Id.* This is not hard to imagine, considering that the Black Death had claimed nearly half the population. 2 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 460 (4th ed. 1936).

16 2 HOLDSWORTH, *supra* note 15, at 460. Feudal landlords were hard pressed to find laborers to cultivate the land or to perform tenant services for money rents. *Id.* England's evolving manufacturing industry was also victimized by the labor shortage. 3 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 204 (4th ed. 1936). Thus, any available free laborer was able to command any wage he pleased. 2 HOLDSWORTH, *supra* note 15, at 460. Villeins, however, received no such benefit from the spread of the Plague. *See generally* 2 *id.* at 464-65 (distinguishing between the different societal classes of the Middle Ages). A villein, under feudal law, was "a person attached to a manor, who was substantially in the condition of a slave, who performed the base and servile work upon the manor for the lord, and was, in most respects, a subject of property belonging to him." BLACK'S LAW DICTIONARY 1569 (6th ed. 1990). The increased appreciation of human resources caused many villeins to desert the manor and seek paid employment, thus precipitating the demise of villeinage in medieval English society. 3 HOLDSWORTH, *supra*, at 500-01.

which imposed the threat of criminal prosecution upon those able to work, but who refused to do so.[17] This series of enactments engendered the "English view" of employment contracts, establishing a yearly presumption of the contract term.[18] Early New Jersey deci-

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[17] BAKALY & GROSSMAN, *supra* note 14, § 1.1, at 3. The original statutes were continually amended over the next 200 years. Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187, 188 n.5 (1990). The Statutes of Labourers formed the basis of the law of master and servant. 2 HOLDSWORTH, *supra* note 15, at 460. Holdsworth articulated four principles underlying the Statutes of Labourers:

> (i) All persons coming within the statutes and able to work, must do so. (ii) They must work at a reasonable rate. Later statutes recognized that this reasonable rate could not be absolutely fixed, but must vary with the price of the necessaries of life. But both the wages of labour and the price of necessaries must be fixed at a reasonable rate. (iii) A refusal to work for this reasonable wage by those who were able to do so was a criminal offence. It was also an offence to give more wages than those fixed by law; and proceedings, which, like the writ of trespass, partook both of a criminal and of a civil character, could be taken against a servant who left his master's service and against a person who enticed him away. (iv) Only the impotent poor were allowed to solicit alms.

Id. (footnotes omitted).

The statutes applied only to hired servants; tenant laborers in possession of the land were not subject to its provisions. *Id.* The Statutes of Labourers made it a crime for any capable worker not to work, thereby virtually eliminating the advantages gained by the laborers. BAKALY & GROSSMAN, *supra* note 14, § 1.1, at 3. The statutes also criminalized any payment of wages that exceeded a reasonable rate. *Id.* Under the statutes, hirings were for terms of one year, and a worker could be terminated only for just cause during that term of employment. Massingale, *supra*, at 188. Conversely, the law required the worker to serve the entire year, or become subject to criminal penalties. Bernard v. IMI Sys., Inc., 131 N.J. 91, 99, 618 A.2d 338, 342 (1993). The agrarian economy of feudal England formed the basis of these yearly cycles. *Id.* at 97, 618 A.2d at 341. Thus, despite its draconian measures and oppressive tone, the law achieved somewhat of a balance—laborers were assured employment during the long winter months, when farming activity was at it lowest, and labor shortages were prevented during peak seasons. *Id.* at 98, 618 A.2d at 342. Colonial law adopted a similar philosophy. BAKALY & GROSSMAN, *supra* note 14, § 1.1, at 3.

The underlying principles of the Statutes of Labourers are still adhered to in modern English jurisprudence, notwithstanding the repeal of the law over 130 years ago. Massingale, *supra* at 188. The inception of the Statutes of Laborers brought with it a marked shift in employment law—the evolution of the employment relationship premised upon feudal status to that based on contract. BAKALY & GROSSMAN, *supra* note 14, § 1.1, at 4; 2 HOLDSWORTH, *supra* note 15, at 461 (noting that prior to fourteenth century legislation recognizing the employment relationship as contractual, the master-servant relationship had been regulated by status). *See generally* 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.3-1.4, at 8-12 (3d ed. 1992) (discussing the employment relationship prior to the Industrial Revolution and the genesis of the at-will doctrine).

[18] 1 WILLIAM BLACKSTONE, COMMENTARIES *425 (footnotes omitted). Sir William Blackstone, a justice of His Majesty's Court of Common Pleas, enunciated the English view in 1765:

> The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra moenia*, or domestics. The contract between them and their masters arises upon the hiring. If

sional law partially adopted this view.[19]

> the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.

Id. (footnotes omitted).

Commentators cite this selection as support for the proposition that early English jurisprudence established and secured the yearly presumption of employment contracts. *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, 470 n.30 (1986); *see also Bernard*, 131 N.J. at 98, 618 A.2d at 342 (observing that Blackstone's writings "entrenched" this contractual interpretation of the employment relationship into the laws of England). A closer perusal of Blackstone's *Commentaries*, however, suggests that this presumption was not firmly rooted in English law. *See* 1 BLACKSTONE, *supra*, at *426-27. The aforequoted passage applies only to "domestics," a class of workers who lived with families. 1 *id.* at *425. Blackstone discusses further subdivisions of the working class, namely "[a] third species of servants are *labourers*, who are hired only by the day or the week, and do not live *intra moenia*, as part of the family." 1 *id.* at *426-27 (footnote omitted). Other historical accounts of English law support this proposition. *See, e.g.*, 4 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 382-83 (4th ed. 1936) (stating, "the [Elizabethan Statutes of Labourers] followed earlier precedents by prescribing that, in a large number of specified employments, the hiring must be for one year . . . but these rules did not apply in the case of workmen hired by the day or week, or to do a particular piece of work") (footnotes omitted). Thus, a more complete reading of Blackstone rebuts the argument that the English view provided substantially greater job security than the American view embodied in Wood's Rule. *See* 1 BLACKSTONE, *supra*, at *426-27. Wood's Rule established the employment at-will doctrine in the United States. J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1973-74).

[19] Robert B. Gidding, Comment, Pierce v. Ortho Pharmaceutical Corp.: *Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L. REV. 1187, 1189 (1981); *see, e.g.*, Willis v. Wyllys Corp., 98 N.J.L. 180, 181, 119 A. 24, 24 (1922), *overruled by* Bernard v. IMI Sys., Inc., 131 N.J. 91, 618 A.2d 338 (1993). The *Willis* court noted that previous New Jersey decisions favored such an interpretation. *Id.* It is of some significance, however, that the analyses of the *Willis* opinion and the authorities upon which it relied were somewhat limited in scope. *Id.* at 182, 119 A. at 24-25.

The yearly durations found by the courts had been based solely upon the scheduled salary disbursements stipulated in offer letters, which were treated as contracts. *Id.*; *see also* Dennis v. Thermoid Co., 128 N.J.L. 303, 304-05, 25 A.2d 886, 887 (1942) (explaining that employment continued past the first yearly term is presumed not to be terminable until expiration of the next yearly term). Other states utilized similar reasoning to find that employment at a specific price for a specific duration constituted definite employment for that period, notwithstanding any express language in the agreement to the contrary. Lary S. Larson, *Why We Should Not Abandon the Presumption that Employment is Terminable At-Will*, 23 IDAHO L. REV. 219, 221-22 (1987). Nevertheless, this remained the minority view in the United States. *Id.*

The New Jersey Supreme Court essentially removed wage stipulations as a determinant of at-will employment status by expressly overruling *Willis* in 1993. *Bernard*, 131 N.J. at 96, 618 A.2d at 341 ("We agree that in the absence of a contrary agree-

Although some fora accepted the English rule, the majority of jurisdictions embraced a different perspective—the presumption that the term of employment was for an indefinite duration and could be terminated at the will of either party.[20] A vast majority of commentators credit an 1877 treatise by Professor Horace G. Wood as establishing this doctrine of at-will employment, also known as the "American view."[21] The national economic growth of

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ment, an employee is hired at-will, regardless of the way in which the salary is quoted in an offer letter.").

20 1 PERRITT, *supra* note 17, § 1.4, at 13. The American judiciary overwhelmingly accepted this interpretation, soundly rejecting the English view. *Id.* at nn.58-59 (citing Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895); Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983)) (other citations omitted). The pervasiveness of the English view is evidenced by cases wherein the employment contract was not the main issue under consideration. Shapiro & Tune, *supra* note 18, at 346 n.82.

21 *See, e.g.*, Shapiro & Tune, *supra* note 18, at 341; Chagares, *supra* note 18, at 469; Harris, *supra* note 10, at 718; McWilliams, *supra* note 1, at 337; *see also Bernard*, 131 N.J. at 100, 618 A.2d at 343. "Wood's Rule" expressly repudiates the concepts governing a general hiring as enunciated by Blackstone:

> With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877) (footnote omitted).

Commentators and jurists alike have attacked this proposition as having little or no support in the American case law cited by Wood to justify his position. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1030 (Ariz. 1985) (observing that both courts and commentators condemn the rule as bereft of precedential foundation); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 886-90 (Mich. 1980) (presenting a condensed analysis of Wood's citations and the initial cases adopting Wood's Rule); 1 PERRITT, *supra* note 17, § 1.4, at 13 n.62 (briefly discussing the authorities cited by Wood and finding no support in three out of the four) (citing Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd*, 80 U.S. 254 (1872); DeBriar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871)); Shapiro & Tune, *supra* note 18, at 341-45 (harshly criticizing Wood's analysis and early judicial applications of the rule).

At least one commentator, however, suggested that such criticism is misplaced due to a common misinterpretation of the rule. Larson, *supra* note 19, at 220-21. Still others assert that the at-will doctrine was not developed by Wood at all, citing *Hathaway v. Bennett*, a New York Court of Appeals decision utilizing the doctrine 20 years prior to the publication of Wood's treatise. BAKALY & GROSSMAN, *supra* note 14, § 1.5, at 10-11 (citing Hathaway v. Bennett, 10 N.Y. 108, 113 (1854)).

Post-1887 decisions transformed the rebuttable presumption of Wood's Rule, that an indefinite hiring constituted at-will employment, into an absolute presumption. McWilliams, *supra* note 1, at 338-39. Thus, a discharged employee seeking redress for breach of an implied contract term was forced to overcome a higher burden of proof. *See* 1 PERRITT, *supra* note 17, § 1.4, at 14. Most courts went even further, construing permanent employment contracts as having an indefinite duration, and

the Industrial Revolution and the accompanying laissez-faire philosophy precipitated the almost universal adoption of Wood's Rule as governing employment duration.[22] In fact, the at-will doctrine had become so firmly entrenched in American jurisprudence that it enjoyed brief constitutional status in the early part of the century.[23]

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accordingly characterizing the contract as terminable at will. *Id.*; *see also* Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 600-01, 89 A.2d 237, 239-40 (1952) (quoting Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 55-56, 83 A.2d 817, 818 (Law Div. 1951)) (stating the general prevailing rule that permanent employment contracts are of indefinite duration).

[22] Charles A. Brake, Jr., Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 207-08 (1982); *see also* PERRITT, *supra* note 17, § 1.4, at 10-12 (focusing on the change in the employment relationship and the emergence of "freedom of contract"); Shapiro & Tune, *supra* note 18, at 342-43; McWilliams, *supra* note 1, at 339. *But see* Larson, *supra* note 19, at 227 (observing the lack of judicial authority to support economic development theory).

[23] BAKALY & GROSSMAN, *supra* note 14, § 1.5, at 11. The United States Supreme Court first addressed the issue in *Adair v. United States*. 208 U.S. 161, 174-76 (1908). The Court focused on the constitutionality of § 10 of the Erdman Act, which made the termination of an employee based upon his membership in a labor union a misdemeanor, punishable by fines up to but not exceeding $1000. *Id.* at 168-69. The Court held § 10 to be an unconstitutional violation of the Due Process Clause of the Fifth Amendment. *Id.* at 172. The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Court concluded that the power to contract for the purchase and sale of labor fell within the liberties granted by the Fifth Amendment. *Adair*, 208 U.S. at 172. In so doing, the Court found an employer's discretionary termination of an employee to be an exercise of rights inherent to personal liberty and the right to property. *Id.*

In *Coppage v. Kansas*, the Supreme Court was presented with a Kansas statute nearly identical to that of *Adair*. Coppage v. Kansas, 236 U.S. 1, 6 (1915). The plaintiff in *Coppage* was discharged for refusing to withdraw from a railroad labor organization. *Id.* at 7. Relying heavily on the reasoning of *Adair*, the Court declared the statute violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 26. The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

Only 15 years later, the Supreme Court withdrew the constitutional protection of the at-will doctrine. BAKALY & GROSSMAN, *supra* note 14, § 1.5, at 12 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)). In *NLRB v. Jones & Laughlin Steel Corp.*, the Court considered the National Labor Relations Act of 1935, which characterized the prevention of employees from engaging in union activities as an unlawful obstruction of interstate commerce. *Id.* at 22. In upholding the Act, the Court reaffirmed the employer's right to "organize its business and select its own officers and agents." *Id.* at 33. More importantly, the Court recognized for the first time the fundamental right of employees to unionize. *Id.* The New Jersey State Constitution expressly protects this right by stating that "persons in private employment shall have the right to organize and bargain collectively." N. J. CONST. art. I, § 19. As a result of *Jones & Laughlin Steel*, the United States Supreme Court granted Congress and state legislatures leave to restrict the previously uninhibited freedom enjoyed by an employer in terminating its workers. BAKALY & GROSSMAN, *supra* note 14, § 1.5 at

New Jersey first embraced the employment at-will doctrine in *Bird v. J.L. Prescott Co.*,[24] which involved a dispute arising from an alleged contract for lifetime employment.[25] Recognizing such agreements as attempts to limit the employer's powers of termination, courts rarely enforced lifetime employment contracts.[26] More

12. The National Labor Relations Act, coupled with the *Jones & Laughlin Steel* decision, constituted the earliest limitation to the at-will doctrine. Gidding, *supra* note 19, at 1189 & n.13.

24 89 N.J.L. 591, 99 A. 380 (1916).

25 *Id.* at 591-92, 99 A. at 381. The plaintiff in *Bird* threatened to bring suit against his employer after he was injured on the job. *Id.* To dissuade him from doing so, the employer offered him lifetime employment, and reduced this offer to writing. *Id.* at 592, 99 A. at 381. Relying on an appellate decision, the court held that this promise of permanent employment and its surrounding circumstances constituted little more than a "friendly assurance of employment" that was too indefinite to amount to an enforceable contract. *Id.* (citing Shaw v. Woodbury Glass Works, 52 N.J.L. 7, 9, 18 A. 696, 697 (1889)).

26 Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 601, 89 A.2d 237, 240 (1952); *see also* Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 945 (D.N.J. 1991) (noting the apparent reluctance by the courts to enforce lifetime employment contracts) (citing *Savarese*, 9 N.J. at 601, 89 A.2d at 240) (other citations omitted). For a brief discussion of the *Savarese* decision, see *infra* note 34 and accompanying text. While a promise of just cause termination protects an employee from arbitrary termination, a lifetime employment contract prohibits *any termination*. *Fregara*, 764 F.Supp. at 946 (citing Shebar v. Sanyo Business Sys. Corp., 111 N.J. 276, 287, 544 A.2d 377, 382 (1988)). Courts judged most contracts of this nature as too vague to be enforceable. *Savarese*, 9 N.J. at 601, 89 A.2d at 240 (quotations omitted). To be enforceable, the terms of a contract must be such that performance may be ascertained with reasonable certainty. Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531, 126 A.2d 646, 650 (1956) (citing *Savarese*, 9 N.J. at 599, 89 A.2d at 239); *see also* Alter v. Resorts Int'l, Inc., 234 N.J. Super. 409, 414-15, 560 A.2d 1290, 1293 (Ch. Div. 1989) (refusing to enforce an alleged lifetime employment contract due in part to indefiniteness of terms).

An excellent argument against the contractual enforcement of policy manuals is that such contracts are unilateral undertakings on the part of the employer to provide lifetime employment, for which no corresponding obligation is imposed upon the employee. *See Savarese*, 9 N.J. at 601, 89 A.2d at 240. Thus, the burden of performance is clearly unequal. *See id.* It is for this reason that an enforceable lifetime employment contract requires additional consideration beyond pre-existing employment duties on the part of the employee. *Id.* (quoting Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 56, 83 A.2d 817, 818 (Law Div. 1951) (terming such consideration "a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract.")); *Alter*, 234 N.J. Super. at 415, 560 A.2d at 1293 (citing *Savarese*, 9 N.J. at 602, 89 A.2d at 240); *see also* Piechowski v. Matarese, 54 N.J. Super. 333, 344, 148 A.2d 872, 878 (App. Div. 1959) (describing additional consideration as a judicially-created test of the parties' intention to enter into a lifetime employment contract); *cf.* Carney v. Dexter Shoe Co., 701 F. Supp. 1093 (D.N.J. 1988) (explaining that "long term" employment commitments are enforceable only if supported by consideration ancillary to the employee's continued work) (citations omitted).

In more recent decisions, courts were less reluctant to enforce lifetime employment contracts. *See, e.g.*, Shebar v. Sanyo Business Systems Corp., 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). *Shebar* involved an oral promise of lifetime employment, given to

than forty years after *Bird*, the New Jersey judiciary imposed its initial restriction on employment at-will in *Anthony v. Jersey Central Power & Light Co.*[27] At issue was the enforceability of a severance pay provision in the defendant company's "General Rules."[28] The *Anthony* court held that the provision constituted an enforceable promise by the employer, despite the at-will status of the employees.[29] This decision laid the groundwork for the contractual enforcement of employee handbooks in *Woolley* and its progeny, in that the employment manuals in both cases were similar in distribution and content.[30]

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prevent Mr. Shebar from accepting employment with a competitor. *See id.* at 115-16, 526 A.2d at 1146. He was fired four months later. *Id.* at 116, 526 A.2d at 1146. Relying heavily on *Woolley v. Hoffmann-La Roche, Inc.*, the court upheld the oral employment contract, noting that contemporary interpretations of lifetime employment more accurately describe it as employment terminable only for cause. *Id.* at 119-20, 526 A.2d at 1148 (citing *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 301 n.8, 491 A.2d 1257, 1266 n.8 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985)).

The New Jersey Supreme Court unanimously rejected this interpretation, finding the *Woolley* analysis inapplicable and concluding that *Savarese* did indeed govern. *See Shebar*, 111 N.J. at 288, 544 A.2d at 383; *see also* Brunner v. Abex Corp., 661 F. Supp. 1351, 1356 (D.N.J. 1986) (recognizing that *Woolley* is "unmistakably limited, even in its broadest interpretation," to written communications, and does not apply to oral assurances of job security). Nevertheless, the *Shebar* court upheld the contract, finding the requisite additional consideration in Mr. Shebar's relinquishment of the competing job offer. *Shebar*, 111 N.J. at 289, 544 A.2d at 383.

27 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958).

28 *Id.* at 142, 143 A.2d at 763. The defendant company in *Anthony* had issued its "General Rules" to the entire work force of Jersey Central. *Id.* This packet of employment information was very similar to modern employment manuals. *See Woolley*, 99 N.J. at 294 n.4, 491 A.2d at 1262 n.4. The General Rules included the union's provision for severance pay, covering both union and non-union employees. *Anthony*, 51 N.J. Super. at 142, 143 A.2d at 763. The plaintiffs, non-union, at-will employees, sought the specified severance pay benefits after termination following the sale of the company. *Id.*, 143 A.2d at 763-64.

29 *See Anthony*, 51 N.J. Super. at 143, 143 A.2d at 764. The court refuted defendant's argument that the provision was a mere gratuitous promise unsupported by consideration, ruling instead that the provision constituted a unilateral offer that the plaintiffs accepted by their continuation of employment. *Id.* at 143-47, 143 A.2d at 764-66. The court found consideration in the benefit bestowed upon the employer from the increased productivity and employee morale flowing from the availability of severance pay. *Id.* at 144, 143 A.2d at 764. Although the basis for the finding is unclear, the court also ruled that the employee suffered a detriment. *See id.* at 144-45, 143 A.2d at 764-65.

30 Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 117, 570 A.2d 903, 917 (1990) (acknowledging that *Anthony* formed a foundation for the *Woolley* opinion) (citation omitted). In both instances, the manual was widely distributed to the work force. *Woolley*, 99 N.J. at 298, 491 A.2d at 1265; *Anthony*, 51 N.J. Super. at 142, 143 A.2d at 763. Additionally, both cases presumed the reliance of the employee upon the manual. *Woolley*, 99 N.J. at 304, 491 A.2d at 1268; *Anthony*, 51 N.J. Super. at 145-46, 143 A.2d at 765. The *Anthony* court's analysis closely mirrors that of *Woolley*, both decisions addressing and rebutting similar arguments. *See Woolley*, 99 N.J. at 304, 491

II. THE EROSION OF AT-WILL EMPLOYMENT VIA THE EMPLOYEE HANDBOOK

The New Jersey Supreme Court's landmark decision in *Woolley v. Hoffmann-La Roche, Inc.*[31] irrevocably transformed the employment policy manual into an enforceable unilateral contract, forever altering the at-will employment relationship in New Jersey.[32] The *Woolley* court held that absent an adequate disclaimer, an employer may be bound to the "promises" made in an employee handbook, regardless of an employee's at-will status.[33] The court stressed the significance of the broad distribution of the employ-

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A.2d at 1268 (noting that the *Anthony* decision had conclusively disposed of "practically every contractual objection that could be made").

31 99 N.J. 284, 491 A.2d 1257 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

32 *Grigoletti*, 118 N.J. at 116-17, 570 A.2d at 916-17 (describing the "quantum leap" taken by *Woolley* as permanently altering the basic structure of the employment at-will relationship); *see also* Donovan & Reilly, *supra* note 1, at 816 (explaining that *Woolley* "broke new ground" in employment law); Marvin M. Goldstein, *Current Status of Employment-At-Will Doctrine*, N.J. LAW., Nov. 1984, at 12, 13 (accurately predicting the New Jersey Supreme Court's decision to be a "radical departure" from existing law); Chagares, *supra* note 18, at 490 (anticipating the significance of *Woolley* on employment relations); Harris, *supra* note 10, at 727-28 (postulating that the decision will result in a considerable reevaluation of the employment relationship). *But see* Brunner v. Abex Corp., 661 F. Supp. 1351, 1356 (D.N.J. 1986) (denying the assertion that *Woolley* was a "revolution" in the field of at-will employment). At the time of the *Woolley* decision, the public policy exception was New Jersey's only judicially created limitation on an employer's right of arbitrary termination. M. Joan Foster, *In the Aftermath of* Woolley v. Hoffmann-La Roche, N.J. LAW., Aug. 1985, at 9, 9 (footnote omitted); *see infra* notes 73-86 and accompanying text (discussing the public policy exception to the employment at-will doctrine). *Woolley* was the first New Jersey case to hold that an employment manual could be enforced as a legally binding contract. KENNETH J. MCCULLOCH, TERMINATION OF EMPLOYMENT: EMPLOYER AND EMPLOYEE RIGHTS ¶ 20,032 (1994).

33 *Woolley*, 99 N.J. at 285-86, 491 A.2d at 1258. The defendant fired Woolley, an at-will employee, after he refused to submit his resignation. *Id.* at 286, 491 A.2d at 1258. Woolley's supervisors had twice requested his resignation, citing as cause a loss of confidence in his work. *Id.* Although no written contract of employment existed between the plaintiff and Hoffmann-La Roche, Woolley filed a claim for breach of contract, relying on the defendant's "Personnel Policy Manual." *Id.* at 286-87, 491 A.2d at 1258. The employment manual contained five categories of employee termination, in addition to termination procedures to be followed in the event of a termination for cause. *Id.* at 287 n.2, 491 A.2d at 1259 n.2. The termination classifications included: "'layoff,' 'discharge due to performance,' 'discharge, disciplinary,' 'retirement' and 'resignation.'" *Id.* No category in the manual addressed discharges without cause. *Id.* The manual also stated that all employees who performed their duties "efficiently and effectively" would be retained. *Id.* The court concluded that this language created an implied promise that Woolley could be fired only for cause, despite his employment at-will status. *Id.* at 285-86, 491 A.2d at 1258. The court then restricted the employer's powers of termination even further, directing that even if good cause existed, an employee could not be released until all the termination procedures in the manual were satisfied. *Id.* at 307-08, 491 A.2d at 1270.

ment manual among employees.[34] Chief Justice Wilentz, writing for a unanimous court, acknowledged that the opinion placed New Jersey in the minority of jurisdictions on the issue of whether representations in employment manuals have a binding effect on employers.[35] In a strained attempt to carve an exception to at-will

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[34] *Id.* at 298-99, 491 A.2d at 1265. The court noted that although the manual had *not* been distributed to all employees, the determinative factor of its distribution was that it covered all employees by its terms. *Id.* at 298, 491 A.2d at 1265 (emphasis added). The court used this factor to distinguish employment manual cases from those arising in the context of lifetime employment contracts. *See id.* at 293-96, 491 A.2d at 1262-64.

The appellate division, as well as the trial court, construed Woolley's claim as one for lifetime employment, and accordingly found for the defendant under the strict requirements of *Savarese*. *Woolley*, 99 N.J. at 289, 491 A.2d at 1259-60. See *supra* note 26 and accompanying text for a discussion of the requirements of an enforceable lifetime employment contract.

Savarese involved an alleged breach of a lifetime employment contract. Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 597, 89 A.2d 237, 237 (1952). Mr. Savarese was employed as a labor foreman. *Id.*, 89 A.2d at 238. Twelve years after joining Pyrene Manufacturing, he was asked to play catcher on the company baseball team. *Id.* After voicing concerns regarding injuries, a company vice-president orally guaranteed Savarese a job for life. *Id.* Later that season, he sustained serious knee injuries, resulting in the amputation of his knee cap. *Id.* at 598, 89 A.2d at 238. Nevertheless, he continued working until he was terminated 21 years later. *Id.*

The *Woolley* court distinguished *Savarese*, claiming that the latter pertained only to individual implied promises to terminate for cause, while the facts of *Woolley* extended these promises to all employees. *See generally Woolley*, 99 N.J. at 292-300, 491 A.2d at 1262-66. Thus, the elements of additional consideration and clear and definite terms were abandoned for purposes of analyzing employee handbooks. *Id.* at 294-95, 491 A.2d at 1263. The court decisively concluded that Hoffmann-La Roche intended for the entire work force to be advised of the promises contained in the policy manual. *Id.* at 298, 491 A.2d at 1265. Perhaps in an attempt to make the opinion's analysis more palatable, the court arrived at this determination despite the fact that the manual's distribution had been limited to supervisory personnel. *Id.*

[35] *Wooley*, 99 N.J. at 294, 491 A.2d at 1262. *See generally* Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983) (expressing "serious reservations" as to the prudence of finding enforceability in vague implied employment contracts); Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978) (holding that an action for breach of contract does not lie in an employer's failure to adhere to the provisions of a personnel policy manual), *aff'd*, 609 F.2d 500 (3d Cir. 1979); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982) (concluding that the unilateral statement of company policies in an employee information booklet did not alter the plaintiff's at-will status); Johnson v. National Beef Packing Co., 551 P.2d 779 (Kan. 1976) (finding the employment manual to be a mere non-bargained for unilateral expression of company policy); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982) (ruling that a requirement contained in an employee handbook that the employer give notice prior to terminating an employee does not rise to the level of an enforceable contract right); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 446 (N.Y. 1982) (Wachtler, J., dissenting) (observing that the court's determination that the manual constituted an enforceable implied contract was against the clear weight of a century of New York authority). *Cf.* Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983) (refusing to modify the at-will rule under facts similar to *Woolley*, preferring instead to reserve such drastic changes in the law to the province of the legisla-

employment, the court abandoned the fundamental contract principles of offer, acceptance, and consideration, relying instead upon assumptions of fact.[36] The recent decisions of *Witkowski v. Thomas*

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ture); Rizzo v. International Bhd. of Teamsters, Local 237, 486 N.Y.S.2d 220 (App. Div. 1985) (deciding that a handbook is not a contract if the employee does not know of its existence).

The *Woolley* court opined that the majority of other jurisdictions declined to find enforceable implied employment contracts in handbooks due to a confusion of the issues and a misapplication of the law. *Woolley*, 99 N.J. at 294, 491 A.2d at 1263. This argument was not without persuasive authority. *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984) (en banc) (announcing that the issuance of an employee handbook may give rise to contractual obligations); Pine River State Bank v. Mettille, 333 N.W.2d 622, 629-30 (Minn. 1983) (declaring that the employer was bound by the employment manual); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (upholding statements in a manual as enforceable contract promises). Contemporary jurisprudence has noted a shift of the principles and rationale of *Woolley* from the minority to the prevailing view. Chagares, *supra* note 18, at 477 n.98; Harris, *supra* note 10, at 728, 728 n.128. At least 33 states now accept this interpretation. Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197, 208 n.76 (1990) (listing cases embracing the now prevailing view of handbook interpretation).

[36] *See* Harris, *supra* note 10, at 728-32 (discussing the *Woolley* court's "unnecessarily strained" contract analysis); *see also* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.15a, at 244 (1990) (observing that results such as the holding of *Woolley* are a "radical departure" from traditional contract jurisprudence). The New Jersey Supreme Court departs from one of the most essential elements of contract law: knowledge of the offer upon which a party's acceptance is premised. *See* Harris, *supra* note 10, at 729. "An offer is not effective until it reaches the offeree." 1 FARNSWORTH, *supra*, §3.10, at 212. The offer contained in the manual, which presumably modified the at-will status of the employees in *Woolley*, never reached all of the intended offerees. *Woolley*, 99 N.J. at 298, 491 A.2d at 1265. In fact, the manual had only been distributed to a mere 10% of Hoffmann-La Roche's 3000 member work force. Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 395, 643 A.2d 546, 551 (1994) (citing *Woolley*, 99 N.J. at 298, 491 A.2d at 1265). Breaking away from traditional contract analysis, the court relied upon a 4-3 decision by the Michigan Supreme Court, rather than the settled law of its own jurisdiction. *Woolley*, 99 N.J. at 303-04, 491 A.2d at 1267-68 (citing *Toussaint*, 292 N.W.2d 880, 892 (Mich. 1980)); *see, e.g.*, Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 145-46, 143 A.2d 762, 765 (App. Div. 1958) (requiring that the employee be apprised of the contract terms). Other decisions relied upon by *Woolley* require that the employee have knowledge of the manual's provisions. *See, e.g., Pine River State Bank*, 333 N.W.2d at 626 ("The offer must be definite in form and must be communicated to the offeree."). It is of some significance that the *Toussaint* court cited no authority to support the proposition that the employee's knowledge of the stated policies is unnecessary to form a binding contract. *Toussaint*, 292 N.W.2d at 892. One commentator suggested that the court in *Woolley* "artfully presented" the facts in an attempt to support the reasoning concerning offer and acceptance. Harris, *supra* note 10, at 730.

Additionally, the court addressed whether the employees gave consideration to support the promise. *Woolley*, 99 N.J. at 301-02, 491 A.2d at 1266-67. Contemplating the fact that an at-will employee is free to quit at any time, the court found the employee's continuance of work in reliance upon the employer's promise to terminate only for cause to be sufficient consideration. *Id.* at 302, 491 A.2d at 1267. However,

J. Lipton, Inc.[37] and *Nicosia v. Wakefern Food Corp.*[38] further perpetuate these undeniable deviations from traditional contract analysis.[39]

In *Witkowski*, the New Jersey Supreme Court continued the crusade against the at-will doctrine by expanding the scope of enforceable policy manuals.[40] The plaintiff in *Witkowski* claimed that his employer dismissed him in violation of the termination procedures outlined in the Lipton handbook.[41] The court held that due

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an attempt to apply this conclusion to an employee who never receives notification of this promise results in an additional deviation from accepted contract principles. *See* Harris, *supra* note 10, at 731. The court stated that under this scenario reliance will be presumed, thus judicially creating consideration where none exists. *Woolley*, 99 N.J. at 304, 491 A.2d at 1268. This presumption of reliance far surpassed the contemporaneous endeavors of other jurisdictions to fashion an enforceable promise from an employee handbook. McWilliams, *supra* note 1, at 356-57 n.98. Moreover, it is simply unrealistic: even those individuals who actually receive the manual will probably not read it until *after* they have been terminated. Roger B. Jacobs, *Court Sets Limits on Handbook Disclaimers*, 138 N.J. L.J. 1086, 1110 (1994) (emphasis added). Seeking to justify this position, Chief Justice Wilentz acknowledged that unless reliance is presumed, the court's attempt at restricting the at-will doctrine will be somewhat limited. *Woolley*, 99 N.J. at 304 n.10, 491 A.2d at 1268 n.10.

It is somewhat encouraging to note, however, that the federal fora in New Jersey have not completely acquiesced to the flawed reasoning of the state courts. *See, e.g.*, Labus v. Navistar Int'l Transp. Corp., 740 F. Supp. 1053, 1062 (D.N.J. 1990). The plaintiff in *Labus* did not read the manual until three years following his termination. *Id.* The court wisely ruled that an employee cannot reasonably rely on a manual that he had never seen. *Id.*; *cf.* House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 55, 556 A.2d 353, 360 (App. Div.) (noting that an employee cannot base a reasonable expectation of job security on a manual that he had not received) (citation omitted), *certif. denied*, 117 N.J. 154, 564 A.2d 874 (1989).

37 136 N.J. 385, 643 A.2d 546 (1994).

38 136 N.J. 401, 643 A.2d 554 (1994).

39 *See Witkowski*, 136 N.J. 385, 643 A.2d 546; *Nicosia*, 136 N.J. 401, 643 A.2d 554.

40 Alito, *supra* note 1, at 72.

41 *Witkowski*, 136 N.J. at 388, 643 A.2d at 548. Mr. Witkowski, an at-will employee of nine years, was employed by Lipton as a maintenance mechanic. *Id.* at 390, 643 A.2d at 548. A routine government inspection uncovered a can of industrial lubricating oil in Witkowski's locker. *Id.* Lipton dismissed Witkowski for the alleged theft of the oil, notwithstanding his protestations that he had been given permission to keep the oil in his locker. *Id.* Witkowski subsequently brought suit against Lipton, claiming, *inter alia*, that he was wrongfully discharged under the provisions of Lipton's employment manual. *Id.* at 389, 643 A.2d at 548. The trial court ruled that the manual's provisions concerning termination were not comprehensive enough to constitute an enforceable contract under New Jersey law. *Id.*; *see Woolley*, 99 N.J. at 287 n.2, 306, 491 A.2d at 1259 n.2, 1269 (denoting the termination clauses under review as a "fairly detailed procedure" which was "explicit and clear"); *see also* Radwan v. Beecham Labs., 850 F.2d 147, 151 (3d Cir. 1988) (postulating in dicta that it is unlikely that *Woolley* would apply to manuals that do not contain disciplinary measures); Kane v. Milikowsky, 224 N.J. Super. 613, 616, 541 A.2d 233, 235 (App. Div. 1988) (explaining that the memoranda in question did not provide comprehensive coverage of termination); Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 146, 531 A.2d 757, 762 (App. Div. 1987) (finding no limitation on an employer's power of arbitrary termination where

to the manual's comprehensive job security provisions and extensive distribution, an employee could reasonably believe that the manual created a binding implied contract of employment.[42] In contrast to the court's seminal decision in *Woolley*, the circumstances underlying *Witkowski* were more aptly suited to a unilateral contract analysis, by virtue of the fact that the plaintiff actually received the manual.[43] The court's interpretation of the manual's provisions, however, reflected a continuance of the judicial activism embodied in the *Woolley* opinion.[44]

Witkowski principally focused on whether an employee could reasonably expect to be terminated only for cause, based upon language contained in the employment manual.[45] While acknowledging the absence of any bright-line test of reasonableness, the court provided certain relevant factors to consider in determining whether statements in an employment manual give rise to enforce-

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manual did not address causes for removal beyond poor performance), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988). *But see* Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81, 86-87, 555 A.2d 12, 15 (App. Div. 1989) (enforcing manual containing representations of "maximum job security" coupled with graduated disciplinary procedures).

42 *Witkowski*, 136 N.J. at 399, 643 A.2d at 553.

43 *See id.* at 388-91, 643 A.2d at 548-49 (detailing the factual circumstances of the case and content of the manual). Unlike the manual in *Woolley*, the manual in *Witkowski* was distributed to *all* Lipton employees. *Id.* at 395, 643 A.2d 551 (emphasis added). Thus, there was no need for Justice Handler, speaking for a unanimous court, to create new law based upon faulty applications of contract doctrine. *See supra* notes 34-36 and accompanying text (illustrating the *Woolley* court's abandonment of traditional contract principles). In addition, the analysis of *Witkowski* does not suffer from an unprecedented presumption of reliance to establish consideration. *See supra* note 36 and accompanying text (noting that the authority that forms the basis for the *Woolley* opinion retained the basic requirement that the offeree receive the offer). Edward Witkowski had received the Lipton manual when he was hired. *Witkowski*, 136 N.J. at 390, 643 A.2d at 549. More importantly, the manual itself expressly substantiates a claim of reliance by a discharged employee by providing that "[w]e likewise try to inform applicants about the job and company requirements and benefits in order that they may decide whether or not they wish to accept employment." *See id.*

44 *See infra* notes 45-66 and accompanying text (demonstrating the court's willingness to impose an employee's unfounded expectations upon the employer in the *Witkowski* and *Nicosia* decisions).

45 *Witkowski*, 136 N.J. at 392, 643 A.2d at 550 (quoting *Woolley*, 99 N.J. at 297-98, 491 A.2d at 1264-65). Under *Woolley*, when the employer of a large work force circulates a manual that may be reasonably interpreted as providing incidental employment benefits, particularly job security, the courts are to construe them in view of the reasonable expectations of the employee. *Woolley*, 99 N.J. at 297-98, 491 A.2d at 1264. The court instructed that this standard is to be applied due to the fact that most workers have little knowledge of contract law. *Id.* at 300, 491 A.2d at 1266. Thus, the intent or true meaning underlying the statements in the manual are irrelevant; all that matters is what the employee reasonably believed under the circumstances. *See id.*

able promises.[46] These factors include the definiteness and comprehensive scope of the termination and/or job security procedures, as well as the context in which the manual was prepared and distributed.[47] Applying these inquires to the Lipton manual,[48] the court agreed with the appellate division that the manual's provisions did indeed guarantee termination only for cause.[49] Accordingly, the court established permissive criteria for

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46 *Witkowski*, 136 N.J. at 392-93, 643 A.2d at 550.

47 *Id.* at 393, 643 A.2d at 550.

48 The pertinent portion of the manual, entitled "Warning Notices," provided:

> In fairness to both employees and the company we have a system of warning notices for violation of company policies or rules. Employees with poor records for lateness, absence, infringement of company rules or sanitation and safety regulations will be spoken to by their supervisor. A second infraction will mean a written warning, a copy of which is filed with the Personnel Department.
>
> If the employee's record does not improve sufficiently, he or she will receive a second written warning notice. The third written warning notice constitutes grounds for dismissal. In some situations, depending on the seriousness of the rules' infraction, a suspension from work may be given in addition to the first or second notice.
>
> Some violations of company policies are grounds for immediate dismissal. *Some examples* of these include:
>
> 1. Being unfit for work because of excessive use of intoxicants
> 2. Consuming intoxicants on the premises
> 3. Professional gambling on company premises
> 4. Fighting, wrestling and "horseplay" on premises
> 5. Clocking the time card of another employee
> 6. Insubordination
> 7. *Stealing or unauthorized possession of Company property*

Id. at 391, 643 A.2d at 549 (emphasis added).

49 *Id.* Based upon the company-wide circulation of the manual, coupled with what the court found to be definite and comprehensive job security provisions, the court reasoned that Lipton intended to be bound by these statements. *Id.* at 396, 643 A.2d at 552 (citation omitted). It bears mentioning that the court judged the termination procedures to be sufficiently comprehensive despite the fact that the handbook provided only seven grounds for immediate dismissal, expressly characterized as non-inclusive. *See supra* note 41 and accompanying text (citing authority declining contractual enforcement of policy manuals due to lack of comprehensive termination procedures).

This result is inconsistent with lower courts' application of *Woolley*, declining to find enforceable contracts on grounds that the manual merely provided a non-exhaustive list of prohibited activity. Donovan & Reilly, *supra* note 1, at 829-32 (citations omitted). For instance, a federal appeals court found no contract in a manual distributed by Beecham Laboratories that expressly stated that dismissal for cause would not be limited to the six enumerated violations. Radwan v. Beecham Labs., 850 F.2d 147, 151 (3d Cir. 1988) (citations omitted). A similar result followed from 27 causes for disciplinary action listed in memoranda entitled 'Company Rules.' Kane v. Milikowski, 224 N.J. Super. 613, 616, 617-18 app., 541 A.2d 233, 235, 235-36 app. (App. Div. 1988); *see also* Brunner v. Abex Corp., 661 F. Supp. 1351, 1355 (D.N.J. 1986) (declining enforcement of employment manual as an implied contract due to absence of enumerated termination proceedings). *But see* Schwartz v. Leasametric, Inc., 224 N.J.

what may constitute comprehensive termination procedures under *Woolley*.[50] The court also postulated that continuing employment beyond a probationary period could elevate an individual's at-will status to that of an employee terminable only for cause.[51] As a result of the *Witkowski* decision, employers must be very cautious about what they include in company policy manuals, lest they become contractually bound by general information contained in the manual.[52]

Prior to 1994, however, employers could take solace in the fact that contractual liability for employee handbooks might be avoided through the incorporation of an appropriate disclaimer.[53] Post-

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Super. 21, 24, 31-32, 539 A.2d 744, 745, 749-50 (App. Div. 1988) (finding an enforceable contract despite the express representation that the list provided was non-exclusive).

50 *See Witkowski*, 136 N.J. at 393-97, 643 A.2d at 551-52. In an analysis of the Lipton manual, the court concluded that the selected examples for immediate dismissal gave rise to the negative implication that an employee could reasonably expect continued employment unless he committed one of the listed offenses. Alito, *supra* note 1, at 72. As a consequence, the employer may be bound by something that was never stated nor intended, but by subjective understandings imputed to those statements by an employee. *Id.* at 73. A comparison of the single page treatment of the job security provisions in the Lipton manual, *supra* note 48, to the exhaustive coverage of the termination, disciplinary, and employee counseling procedures contained in the Hoffmann-La Roche manual, clearly illustrates the extent of the opinion's expansion of *Woolley*. *See Woolley*, 99 N.J. at 310 app., 491 A.2d at 1271 app.

51 *Witkowski*, 136 N.J. at 396, 643 A.2d at 552. In dicta, the court intimated that successful completion of a probationary period which resulted in promotion to a "regular employee" may shield that employee from arbitrary termination. *Id.* (citing Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 950 (D.N.J. 1991)). In *Fregara*, the district court ruled that when a company reserves the right of arbitrary termination during an employee's trial period, then the employee who "survives" does so with the protection of termination for just cause only. *Id.*

52 *See* Jacobs, *supra* note 36, at 1110.

53 *See Witkowski*, 136 N.J. at 400, 643 A.2d at 554 (noting that an employee handbook that constituted an implied employment contract could be negated by a proper disclaimer under *Woolley*). The *Woolley* court stated that the inclusion of an adequate disclaimer in the manual effectively prevents an employee from reasonably believing that the employer had any intent to be bound to any statements contained therein. *Woolley*, 99 N.J. at 309, 491 A.2d at 1271. A valid disclaimer eliminates the contractual interpretation of the handbook as an offer capable of being accepted. Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 378 (1989). Furthermore, it puts the employee on notice that he remains in an at-will relationship and thus may be terminated without cause. *New Jersey Supreme Court Strengthens Employee Handbook Exception to Employment-at-Will*, EMPLOYEE REL. NEWSL. (Grotta, Glassman & Hoffman, Roseland, N.J.), Summer 1994, at 1, 1 [hereinafter Grotta, Glassman & Hoffman]. Accordingly, the courts will not construe the manual as an enforceable contract. *Woolley*, 99 N.J. at 309, 491 A.2d at 1271. A "clear and prominent" disclaimer as defined by *Woolley* may be evidenced by:

> 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

Woolley decisions are helpful in determining the judicial acceptability of handbook disclaimers.[54] Unfortunately, the New Jersey Supreme Court's continued attack on the at-will doctrine has assured that the simple inclusion of a disclaimer offers little security in today's employment relationships.[55] *Nicosia v. Wakefern Food*

> 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.

Id.

54 *See, e.g.*, Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81, 87-88, 555 A.2d 12, 15-16 (App. Div. 1989) (denying the effectiveness of a disclaimer contained in a revised handbook). The disclaimer in *Preston* stated:

> 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. Apparently, Claridge provided no disclaimer in the first handbook, which stipulated that maximum job security would be provided throughout the duration of employment. *Id.* at 86, 555 A.2d at 15. The court conceded that the above disclaimer contained in the revised handbook unequivocally denied the existence of any contract, and pointedly informed the reader that the handbook had been distributed for informational purposes only. *Id.* at 87, 555 A.2d at 15. The *Preston* court focused on the fact that the disclaimer did not specifically address the provision concerning job security. *Id.* The court minimized the fact that every employee was instructed to read the second handbook, as well as sign a form acknowledging its receipt. *Id.* at 87-88, 555 A.2d at 16. It is unclear how any employee could read the disclaimer in *Preston* and reasonably expect that Claridge had any intent to be bound. Donovan & Reilly, *supra* note 1, at 846.

The district court took a more conservative approach in *Weber v. LDC/Milton Roy.* 42 Fair Empl. Prac. Cas. (BNA) 1507 (D.N.J. 1986). The Milton Roy handbook merely proclaimed that "'the statements (in the handbook) are in no way intended to restrict management's obligation for final interpretation of its policies and procedures.'" *Id.* at 1518 (quotation omitted). The court found that no implied contract existed. *Id.*

55 *See* Alito, *supra* note 1, at 74 (observing that an employer will have increased difficulty complying with the disclaimer standards of *Nicosia*); Jacobs, *supra* note 36, at 1110 (predicting that courts will expect an employer to follow the terms of a policy manual regardless of any disclaimer provided). New Jersey is not alone in this regard. *See generally* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326 app. at 382-85 (1993). At least 45 opinions nationwide have denied recognition of the preclusive effect of a disclaimer contained in an employment manual. *Id.* at 328.

An employer may overcome this problem by executing a written agreement of at-will employment with the employee. *See* D'Alessandro v. Variable Annuity Life Ins. Co., No. 89-2052 (CSF), 1990 WL 191914, at *5 (D.N.J. Nov. 20, 1990) (noting that legal authority indicates that an implied contract will not be found where a written at-will contract exists); *see also* Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 143, 531 A.2d 757, 760-61 (App. Div. 1987), *certif. denied*, 113 N.J. 335, 550 A.2d 450 (1988). Prudential Insurance Company employed the plaintiff in *Ware* as a district manager.

Corp.[56] greatly expanded the disclaimer requirements set forth in *Woolley*, thereby limiting the disclaimer's effectiveness.[57]

Nicosia, like *Witkowski*, involved allegations of misappropriated company property.[58] Wakefern Food Corporation employed Mr.

Id. at 136, 531 A.2d at 757. Upon his promotion to district manager, he signed a written employment agreement. *Id.* at 138, 531 A.2d at 758. The contract established that Mr. Ware was an at-will employee, subject to arbitrary termination. *Id.* He was discharged for engaging in improper sales practices that were contrary to company policy. *Id.* at 141, 531 A.2d at 759-60.

Ware brought suit for wrongful termination, asserting breach of contract premised upon a personnel manual entitled "Guide for Vice Presidents, Regional Marketing." *Id.* at 137, 139, 531 A.2d at 757, 758. Neither he nor any other district manager received the manual. *Id.* at 139, 531 A.2d at 758-59. Ware contended that his employment relationship was governed by the manual coupled with oral assurances of job security. *Id.* at 140, 531 A.2d at 759.

Relying on *Woolley*, the court rejected this argument, stating:

> Since an employer may avoid any legally binding effect being given to personnel policies set forth in a policy manual by a unilateral statement [disclaimer] in the manual, it follows *a fortiori* that this effect may be avoided by the execution of a written employment contract by which the employee expressly agrees to an at will employment status. . . . Furthermore, plaintiff may not avoid the explicit terms of his written employment contract by asserting that oral assurances of job security, inconsistent with the contract, were given to him when it was executed.

Id. at 144, 531 A.2d at 761 (citations omitted).

56 136 N.J. 401, 643 A.2d 554 (1994).

57 *See infra* notes 60-65 and accompanying text (discussing the increased disclaimer requirements dictated by *Nicosia*).

58 *Nicosia*, 136 N.J. at 405, 643 A.2d at 556. Anthony Nicosia had been an employee of Wakefern for over 18 years, and had received several promotions during that time. *Id.* Merchandise had twice been unlawfully removed from a warehouse that was under Nicosia's supervision. *Id.* Although never directly accusing him of the theft, Wakefern dismissed Nicosia for failing to maintain the security of the goods and for neglecting to follow company reporting procedures. *Id.* at 405-06, 643 A.2d at 556. Nicosia denied all allegations. *Id.* at 406, 643 A.2d at 556. Subsequent to his termination, Wakefern discovered evidence which strongly implicated Nicosia in the offenses. *Id.*

Nicosia brought suit for wrongful discharge, claiming that Wakefern had breached its implied obligation to terminate only for cause. *Id.* at 405, 643 A.2d at 556. This assertion was premised upon 11 pages of Wakefern's employment manual. *Id.* at 406, 643 A.2d at 556-57. In partial defense, Wakefern argued that the discovery of the after-acquired evidence justified its actions by satisfying any "for cause" requirement asserted by the plaintiff. *Id.* at 417, 643 A.2d at 562.

The after-acquired evidence rule stems from a decision by the United States Court of Appeals for the Tenth Circuit. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 704-08 (10th Cir. 1988). The rule states that after-acquired evidence precludes an employee's recovery for wrongful discharge. *Id.*, 864 F.2d at 708; *Nicosia*, 136 N.J. at 418, 643 A.2d at 562. This was a "novel and controversial" issue in New Jersey in the context of employment manual cases. *Id.* at 418, 643 A.2d at 563. Because it was not directly presented under the circumstances of *Nicosia*, the court accordingly left its proper resolution for another day. *Id.* at 421, 643 A.2d at 564. This decision was supported by the jury's determination that Nicosia had not been guilty of conversion. *Id.* at 420, 643 A.2d at 564. Although there are no New Jersey

Nicosia as a warehouse shift supervisor.[59] During the course of his employment, he claimed never to have received the portion of the Wakefern manual containing the disclaimer.[60] Nevertheless, the court found that the extensive distribution of the Wakefern manual and its comprehensive termination policy satisfied the *Woolley* prerequisites for the existence of an implied contract.[61]

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state court decisions addressing this doctrine as applied to employment manual disputes, a recent opinion by the federal district court may provide some guidance. *See* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 324-25 (D.N.J. 1993).

An employer typically attempts to use after-acquired evidence to later justify the unlawful termination of an employee on discriminatory grounds. *Nicosia*, 136 N.J at 418, 643 A.2d at 562. The United States Supreme Court has recently ruled on the admissibility of the after-acquired evidence rule in this context. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). Christine McKennon had been an employee of Nashville Banner Publishing Company (Banner) for over 30 years when Banner allegedly discharged her in violation of the Age Discrimination Employment Act of 1967 (ADEA). *Id.* at 882-83. The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (1988). New Jersey's Law Against Discrimination contains a similar provision, stating that "[i]t shall be . . . an unlawful discrimination: (a) For an employer, because of . . . age . . . to refuse to hire or employ or to bar or to discharge or to require to retire, unless justified by lawful considerations other than age, [an individual] from employment." N.J. STAT. ANN. § 10:5-12 (West 1988). Banner sought to defend its actions by arguing that evidence of McKennon's misconduct discovered at her deposition would have resulted in her termination, notwithstanding. *McKennon*, 115 S. Ct. at 883. The *McKennon* Court held that the after-acquired evidence would not bar the employee's claim under the ADEA and effectively excuse the employer's unlawful conduct. *Id.* at 883-84. Such evidence may, however, be considered when assessing remedies such as back pay and reinstatement. *Id.* at 886. The Court stipulated that if an employer wishes to rely on after-acquired evidence, it must first establish that this evidence, standing alone, would have justified the employee's termination. *Id.* at 886-87.

59 *Nicosia*, 136 N.J. at 405, 643 A.2d at 556.

60 *Id.* at 406, 643 A.2d at 556-57. Nicosia had received only the 11 page section of the manual containing disciplinary procedures. *Id.* The entire manual consisted of 160 pages, with the disclaimer appearing in the first paragraph of the first page. *Id.*, A.2d at 557. Although the manual had been disseminated to only 10% of the work force, the court noted that approximately half of the Wakefern employees were unionized, and thus were covered by collective bargaining agreements. *Id.* at 408, 643 A.2d at 558. Generally, provisions of employment manuals do not apply to employees under collective bargaining agreements. Ware v. Prudential Ins. Co., 220 N.J. Super. 135, 143, 531 A.2d 757, 761 (App. Div. 1987).

61 *Nicosia*, 136 N.J. at 408, 643 A.2d at 557-58. The court pronounced that a substantial number of employees had received the manual, thereby satisfying the first *Woolley* inquiry. *Id.*, 643 A.2d at 558. *See supra* note 34 and accompanying text (discussing the extensive distribution requirement of a *Woolley* contract). The court also found the scope of the termination policy to be sufficient. *Nicosia*, 136 N.J. at 409, 643 A.2d at 558. In sum, the court determined that the manual justified an employee's reasonable belief that an implied contract had been formed. *Id.* The court dismissed the defendant's argument that the trial court committed reversible error in evaluating only 11 pages of the manual. *Id.* at 410-12, 643 A.2d at 558-59. While conceding that *Woolley* dictates an examination of the entire manual, the court elaborated that such

Embarking upon a discussion of the handbook's disclaimer,[62] the court's analysis relied heavily upon the decision of a Wyoming trial court in adopting more stringent requirements for disclaimers.[63] The court invalidated the disclaimer, largely upon the ground that the Wakefern manual did not meet the *Nicosia* court's newly articulated heightened disclaimer requirements.[64] Remarka-

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analysis would yield the same result. *Id.*; *see also* Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 953 (D.N.J. 1991) (submitting that a plaintiff must base a *Woolley* claim on the entire manual, not solely on those provisions beneficial to him).

62 *Nicosia*, 136 N.J. at 412-17, 643 A.2d at 559-62. The Wakefern disclaimer provided:

> A. *Introduction*
>
> This manual contains statements of Wakefern Food Corp. and its subsidiaries' Human Resource policies and procedures. (Hereafter referred to as "the Company"). The terms and procedures contained therein are not contractual and are subject to change and interpretation at the sole discretion of the Company, and without prior notice or consideration to any employee.

Id. at 413, 643 A.2d at 560.

63 *Id.* at 414-16, 643 A.2d at 561-62. In addition to obvious reliance on *Woolley*, the court cited approvingly to *Jimenez v. Colorado Interstate Gas Co.* throughout the disclaimer analysis. *Nicosia*, 136 N.J. at 415-16, 643 A.2d at 561-62 (citing Jimenez v. Colorado Interstate Gas Co., 690 F. Supp. 977, 980 (D. Wyo. 1988)). *Jimenez* promulgated specific disclaimer standards beyond the "clear and prominent" requirement of *Woolley*. *Jimenez*, 690 F. Supp. at 980; *see also supra* note 53 (quoting the *Woolley* disclaimer requirements). Under *Jimenez*, a disclaimer must be conspicuous as a matter of law to be effective. *Jimenez*, 690 F. Supp. at 980 (citations omitted). It must be capitalized, enlarged, surrounded by a border, or set off in some other way to attract the reader's attention. *Id.* *Nicosia* adopts this standard. *Nicosia*, 136 N.J. at 415, 643 A.2d at 561. New Jersey's adoption of the Uniform Commercial Code states that a term is "conspicuous" when:

> it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. . . . Whether a term or clause is 'conspicuous' or not is for decision by the court.

N.J. STAT. ANN. § 12A:1-201(10) (West 1962).

The Wyoming Supreme Court also accepted the *Jimenez* requirements of prominence. McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866, 870-71 (Wyo. 1990) (Golden, J., specially concurring), *aff'd on reh'g*, 820 P.2d 986 (Wyo. 1991). The *Nicosia* court relied upon the *McDonald* case as well. *Nicosia*, 136 N.J. at 414-15, 643 A.2d at 561 (citing *McDonald*, 820 P.2d at 989). The plaintiff in *McDonald* signed a statement acknowledging that his employment was terminable at the will of either party. *McDonald*, 789 P.2d at 867-68. The Mobil handbook reinforced this notion, explicitly stating that it was not an employment contract. *Id.* at 868. Despite these blatantly clear indications of Mobil's intent not to be bound, the court found the disclaimer to be insufficient in preventing enforceable promises. *Id.* at 869-70. In a succinct dissent worthy of notice, the chief justice attempted to assert a more rational analysis: "Mobil did all it could by its disclaimer to assure that there was not a contract of employment. Parties are free to contract or not as they choose. Mobil chose not to contract with its employee, and, like it or not, we should accept that decision." *Id.* at 871 (Cardine, C.J., dissenting).

64 *Nicosia*, 136 N.J. at 415-16, 643 A.2d at 561. The court did not cite any New

bly, the court also found that the disclaimer phraseology contained "confusing legalese."[65] The court rationalized the paternalistic stance taken towards employees as furthering the stability of employment relations.[66]

In light of the foregoing decisions, it is clear upon which side the New Jersey judiciary will fall in disputes concerning employment manuals.[67] Employers, notwithstanding express and unequivocal denials, are now bound by statements never communicated[68] and clearly never intended to have a binding effect.[69] One way by

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Jersey authority that previously elevated the *Woolley* disclaimer requirements to this level. *See id.* at 412-417, 643 A.2d at 559-62; *see also* Donovan & Reilly, *supra* note 1, at 846 (observing that New Jersey law does not require a distinguishing print type to be used; prominence is attained merely by placing the disclaimer on the first page of text). Thus, in view of the judicial standards prior to the *Nicosia* decision, as illustrated by Donovan & Reilly, the Wakefern disclaimer clearly complied with existing state law. *See id.*

65 *Nicosia*, 136 N.J. at 414, 643 A.2d at 560-61 (citations omitted); *see supra* note 62 (providing the text of the disclaimer in *Nicosia*). The court characterized the terms "not contractual" and "subject to change and interpretation at the sole discretion of the Company" as being beyond the comprehension of a reasonable employee. *Nicosia*, 136 N.J. at 414, 643 A.2d at 560-61.

Under *Woolley*, an effective disclaimer should contain the phrase "with or without good cause." Woolley v. Hoffmann-La Roche, 99 N.J. 284, 309, 491 A.2d 1257, 1271 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985). A strict reading of the "confusing legalese" standard as applied by the *Nicosia* court, however, might invalidate a disclaimer utilizing this mundane term. *See generally* BLACK'S LAW DICTIONARY 692 (6th ed. 1990) (defining good cause as generally meaning "a substantial reason *amounting in law to a legal excuse* for failing to perform an act *required by law*") (citation omitted) (emphasis added). The *Nicosia* court further cautioned against the use of terms that are "manifestly unclear," because "clarity is essential" to the layman employee reading the disclaimer. *Nicosia*, 136 N.J. at 414-15, 643 A.2d at 561 (citations omitted). The court explained that the employee must not be burdened by the need to infer a disclaimer's meaning from the text of the handbook. *Id.* at 415, 643 A.2d at 561 (citation omitted). It must be noted, however, that the phrase "good cause" is defined as "a relative and *highly abstract* term" whose meaning must be derived from the context in which it is used. BLACK'S LAW DICTIONARY 692 (6th ed. 1990) (citation omitted) (emphasis added).

66 *Nicosia*, 136 N.J. at 419-20, 643 A.2d at 563 (quoting Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66, 417 A.2d 505, 509 (1980)). See *infra* notes 74-81 and accompanying text for a discussion of the *Pierce* decision. Commentators, however, argue to the contrary, inasmuch as the *Nicosia* and *Witkowski* decisions will undermine private employment relations as never before. *See* Jacobs, *supra* note 36, at 1110.

67 *See supra* notes 31-66 and accompanying text (discussing the disproportionate weight of recent handbook decisions in favor of employee interests).

68 *See supra* notes 31-52 and accompanying text (discussing the judiciary's imposition of implied interpretations upon otherwise unambiguous explicit statements contained in policy manuals).

69 *See* BAKALY & GROSSMAN, *supra* note 14, at 48. The true intent of the employer in creating and distributing a policy manual is simply to provide information about the company to the employee and to establish positive morale. *Id.* Presuming an employer's intent to be bound by statements made in an employment manual is a "fatal

which an employer may minimize potential liability under the "handbook exception" to employment at-will is to include arbitration provisions in the employment manual.[70] In fact, arbitration of policy manual disputes is advantageous to employers and employ-

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flaw" undertaken by the courts. Larson, *supra* note 19, at 232; *see also* Befort, *supra* note 55, at 343 (acknowledging that "most employers have no intention of extending a contractual offer when issuing an employee handbook") (citation omitted); Massingale, *supra* note 17, at 209 (observing that "[t]he courts are finding implied contracts where no contract was intended"). This is because employers produce policy manuals for reasons other than to obtain the loyalty and productivity of their workers, such as to change existing inadequate management-employee communications and to promulgate disciplinary matters. *See* Larson, *supra* note 19, at 232. As one editor of the *Restatement (Second) of Contracts* concisely stated, "[c]ourts frequently pretend that parties actually intended to be bound by what really are rules of law not ever considered by the parties." Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 355 n.133 (1986).

70 *See* Grotta, Glassman & Hoffman, *supra* note 53, at 2 (advocating the use of alternative dispute resolution (ADR) as a means to resolve wrongful termination claims); John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-*Gilmer *Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 115 (1992) (postulating that employers will impose mandatory arbitration as a condition of employment); Jacobs, *supra* note 36, at 1110 (suggesting such means as a method for limiting judicial participation in employment disputes).

The inclusion of arbitration provisions in a employment manual may be particularly beneficial to an employer in a state such as New Jersey, where the law of wrongful termination is adverse to the employer. Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment- Related Disputes*, 19 EMPLOYEE REL. L.J. 205, 211 (1993). The incorporation of arbitration clauses in an employment handbook serves to diminish the likelihood of judicial review of employment decisions. Jacobs, *supra* note 36, at 1110. In 1984, in a dissenting opinion, the state's highest court articulated the three principles of arbitration as: "(1) It is the *voluntary* reference of a dispute by the parties to (2) an arbitrator or arbitrators *chosen* by the parties who (3) agree the decision will be final and *binding*." Levine v. Wiss & Co., 97 N.J. 242, 257, 478 A.2d 397, 404-05 (1984) (O'Hern, J., dissenting) (citation omitted) (footnote omitted).

In *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, the New Jersey Supreme Court explained that "arbitration is 'a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law,' and its object is 'the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties.'" 86 N.J. 179, 187, 430 A.2d 214, 217-18 (1981) (citations omitted). The underlying purpose of arbitration is to minimize, even eliminate, judicial interference in the dispute resolution process. Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 519, 610 A.2d 364, 384 (1992) (Wilentz, C.J., concurring). New Jersey has long recognized arbitration as a permissible way to solve disputes. *Id.* at 489, 610 A.2d at 369; *Barcon*, 86 N.J. at 186, 430 A.2d at 217. Accordingly, New Jersey courts will engage in judicial review of an arbitrator's decision only where it "may be characterized on its face as gross, unmistakable, undebatable, or in manifest disregard of the applicable law and leading to an unjust result." *Perini*, 129 N.J. at 496, 610 A.2d at 372-73. *See generally* Cheryl Aptowitzer, Note, 24 SETON HALL L. REV. 998 (1993) (providing an extensive discussion of the *Perini* decision and of the judiciary's "policy of great deference" to arbitration, resulting in limited judicial review of arbitration awards).

ees alike.[71] Concerns regarding the enforceability of these arbitration clauses are unfounded because both New Jersey common and statutory law dictate that these provisions be followed.[72]

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[71] *See* Massingale, *supra* note 17, at 187 (advocating the benefits of arbitration for both parties to the employment relationship); Thomas J. Piskorski & David B. Ross, *supra* note 70, at 209-10 (listing and discussing the "pros and cons" of private arbitration). Under the current judicial system, employers are subject to excessive damages that are disproportionate to the pecuniary harm suffered by the discharged employee. Massingale, *supra* note 17, at 187. The employee, on the other hand, is frequently unable to enforce his legal rights due to the high costs of litigation. *Id.* Accordingly, the foremost benefit of arbitration is the reduced litigation costs of each party. Thomas K. Plofchan, Jr., *Coming Home to Contract: Loosening the Death-Grip of Statutorily Created Rights on Arbitration in the Non-Union World*, 6 OHIO ST. J. ON DISP. RESOL. 243, 244 (1991).

Arbitration of employment manual disputes would center upon the singular issue of whether the employer discharged the employee in accordance with the manual's provisions; peripheral issues are thus discarded, resulting in lower legal fees to both parties. *Id.* at 246. Litigation costs are further reduced due to the speedy disposition of arbitration proceedings, as compared with the lengthy and arduous adversarial court system. *See id.* at 247 & n.21 (citing a report from Deloitte, Haskins & Sells, indicating that, of 420 cases surveyed, arbitration resulted in dispute resolution averaging 443 days, while litigation proceedings encompassed 599 days) (citation omitted). Moreover, arbitration may provide remedies that are unavailable in the courts; an arbitrator generally can reinstate the employee, whereas a court cannot. BAKALY & GROSSMAN, *supra* note 14, § 14.1, at 267.

One may argue that arbitration clauses in employment manuals might result in an employee's unwilling sacrifice of the judiciary's protection. Gray, *supra* note 70, at 116. It is conceded that available punitive damages may be somewhat reduced by arbitration. BAKALY & GROSSMAN, *supra* note 14, § 14.1, at 268. It must be noted, however, that an employee will not forego any substantive rights by the inclusion of arbitration provisions. Gray, *supra* note 70, at 117 n.14. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). The United States Supreme Court has recognized this postulate with regard to statutory wrongful discharge claims. *See Mitsubishi Motors Corp.*, 473 U.S. at 628. Arbitration also accelerates the demise of what the employee surely perceives as an unhappy relationship, rather than prolonging its existence through extensive litigation. Plofchan, *supra*, at 244. It is also possible that arbitration provisions may be interpreted as a token of goodwill towards the employee, as it provides a disgruntled employee an opportunity to settle any disputes at the expense of the employer. *Id.* at 247.

[72] *See* Thompson v. Joseph Cory Warehouses, Inc., 215 N.J. Super. 217, 220, 521 A.2d 881, 882 (App. Div. 1987) (per curiam) (applying the general rule that an employee seeking legal redress must first utilize the contractual grievance procedures) (citation omitted).

As *Nicosia* illustrates, a manual rising to the level of an implied contract must be taken as a whole. Nicosia v. Wakefern Food Corp., 136 N.J. 401, 411, 643 A.2d 554, 559 (1994). While the state courts of New Jersey have yet to address this issue directly as applied to handbooks, a 1991 district court decision strongly supports this plenary approach. *See* Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 950-53 (D.N.J. 1991). The *Fregara* court observed that other jurisdictions have barred breach of contract claims arising from policy manuals where the complainant did not complete all the enumerated grievance procedures. *Id.* at 951. The state judiciary, although limited to controversies involving collective bargaining agreements, has reached similar results. Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 557-58, 138 A.2d 24, 34 (1958).

III. OTHER ALTERNATIVES

The law provides other, more logical causes of action for an employee wishing to bring suit for wrongful discharge without resort to flawed applications of implied contract theory.[73] One avenue of legal recourse is the public policy exception,[74] adopted in

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In *Jorgensen v. Pennsylvania R.R.*, the New Jersey Supreme Court specifically held that a plaintiff must exhaust all contractual remedies prior to commencing litigation. *Id.* at 560-61, 138 A.2d at 36. The *Fregara* court examined New Jersey cases dealing with the arbitration provisions of collective bargaining agreements and found these cases indistinguishable from handbook disputes. *Fregara*, 764 F. Supp. at 951.

The New Jersey Legislature has also encouraged the use of arbitration as a means of dispute resolution. *Barcon*, 86 N.J. at 186, 430 A.2d at 217. This is evidenced by Chapter 24 of the New Jersey Statutes Annotated, entitled "Arbitration and Award," which states that:

> A provision in a written contract to settle by arbitration a controversy that may arise therefrom or a refusal to perform the whole or a part thereof or a written agreement to submit, pursuant to section 2A:24-2 of this title, any existing controversy to arbitration, whether the controversy arise out of contract or otherwise, shall be valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of a contract.

N.J. STAT. ANN. § 2A:24-1 (West 1987). Section 2A:24-2 sets forth the parties who may submit to arbitration:

> Two or more persons by their agreement in writing may submit to arbitration a controversy existing between them at the time of the agreement, whether the controversy arises out of a contract or the refusal to perform the whole or a part thereof or out of any other matter. They may also agree in writing that a judgment of a court of record, chosen by them shall be rendered upon the award made pursuant to the submission.

N.J. STAT. ANN. § 2A:24-2 (West Supp. 1994).

[73] *See infra* notes 74-92 and accompanying text (discussing alternative theories that may be utilized by an employee who believes that he was wrongfully discharged); *see also* Larson, *supra* note 19, at 230 (asserting that it is "entirely unnatural to torture traditional contract law principles" to arrive at results better achieved by a public policy exception to the at-will doctrine); Linzer, *supra* note 69, at 356 (recognizing that there are indisputable "serious conceptual objections" to a unilateral contract analysis of employment manuals).

[74] This is the prevailing tort theory of wrongful discharge cases. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1031 (Ariz. 1985); *see also* Befort, *supra* note 55, at 332 (noting that the public policy exception is the most widely accepted judge-made limitation on the employment at-will doctrine); Goldstein, *supra* note 32, at 13 (listing, *inter alia*, "discharge for refusal to commit perjury, discharge for refusing to participate in a price-fixing scheme, discharge because of union membership and activity, serving on a jury, discharge for filing a worker's compensation claim, [and] discharge for reporting consumer protection laws" as examples of terminations that violate public policy) (endnotes omitted); McWilliams, *supra* note 1, at 345 (distinguishing the "public policy tort" from contractual restrictions of the employment at-will rule). In fact, only six states have failed to recognize this exception to employment at-will. Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683, 687 (1990). Prior to the adoption of the public policy tort theory, a discharged employee seeking redress was limited to more traditional tort claims, such

1980 by the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical Corp.*.[75] This exception is available to an employee who refuses to violate a law or the public interest and is consequently fired.[76]

Pierce established that a right of action exists when an employer terminates an employee in violation of a "clear mandate" of public policy.[77] Acceptable sources for determining public policy are legislation, administrative rules and decisions, and judicial opinions.[78] Various opinions by the New Jersey judiciary have de-

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as intentional interference with contractual relationships, fraudulent misrepresentation, defamation, intentional infliction of emotional distress, or invasion of privacy. *Id.* None of the foregoing causes of action allowed recovery for the wrongful termination itself. *Id.* at 687-88.

[75] 84 N.J. 58, 417 A.2d 505 (1980). *Pierce* constituted New Jersey's initial limitation on the employment at-will rule. *Id.* at 77, 417 A.2d at 515 (Pashman, J., dissenting). Pierce was a medical doctor involved in drug testing and research at Ortho Pharmaceutical Corp. (Ortho). *Id.* at 62, 417 A.2d at 506. Pierce, an at-will employee, became involved in a medical and ethical dispute with her colleagues over research of the drug loperamide. *Id.* at 62-63, 417 A.2d at 507-08. The doctor felt that Ortho should cease testing the drug on children or elderly persons, due to the high levels of saccharin it contained. *Id.* at 63, 417 A.2d at 507. She claimed that continued research of the drug violated her interpretation of the Hippocratic oath. *Id.* at 64, 417 A.2d at 508. Pierce was subsequently removed from the project. *Id.* at 63, 417 at 507. Viewing this as a demotion, Pierce resigned and initiated a suit for wrongful discharge against Ortho, claiming that Ortho's actions induced her to resign, and that she was thus constructively discharged. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338-39, 399 A.2d 1023, 1025 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980). A "constructive discharge" occurs when an employee resigns due to the wrongful acts of the employer. *Id.*

[76] Chagares, *supra* note 18, at 471-72. The public policy exception provides for a right of action when the grounds for termination violate established mandates of public policy. Befort, *supra* note 55, at 333.

[77] *Pierce*, 84 N.J. at 72, 417 A.2d at 512. This action may sound either in tort or contract law or both. *Id.* The court supplied the caveat that the plaintiff's suit will fail absent a clear expression of public policy, thus imposing only a limited restriction on the employer's powers of termination. *Id.* The determination of whether this burden has been met is a question of law, not fact. Warthen v. Toms River Community Memorial Hosp., 199 N.J. Super. 18, 24, 488 A.2d 229, 232 (App. Div.), *certif. denied*, 101 N.J. 255, 501 A.2d 926 (1985) (citations omitted). While this exception cannot be criticized as unfair or unreasonable, it demonstrates the court's penchant for judicial activism. *See Pierce*, 84 N.J. at 87-88, 417 A.2d at 521 (Pashman, J., dissenting) (arguing that the court has disregarded a "sound principle of judicial administration" by resolving a controversy involving extensive public policy concerns on a summary judgment motion).

[78] *Pierce*, 84 N.J. at 72, 417 A.2d at 512. Legislative enactments are the principal sources of public policy. Citizens State Bank v. Libertelli, 215 N.J. Super. 190, 195, 521 A.2d 867, 869 (App. Div. 1987) (citing *Pierce*, 84 N.J. at 72, 417 A.2d at 512). The *Pierce* court indicated that absent legislation, case-by-case determinations must be made to determine viable rights of action under public policy theories. *Pierce*, 84 N.J. at 72, 417 A.2d at 512. The court also identified rules of professional conduct as clear expressions of public policy under the appropriate circumstances. *Id.* The court noted, however, that a code of ethics serving only the technical purposes of an industry will ordinarily not suffice to establish a "clear mandate of public policy." Because

fined the parameters of a *Pierce* public policy claim.[79] In addition, an employee may bring suit under the Conscientious Employee Protection Act (CEPA),[80] a codification of the *Pierce* doctrine.[81]

Dr. Pierce had relied on her own conscience as the source of public policy, the court found that her claim failed. *Id.* at 75, 417 A.2d at 514.

[79] *See* Lally v. Copygraphics, 85 N.J. 668, 670, 428 A.2d 1317, 1318 (1981) (per curiam) (involving a retaliatory discharge for filing workmen's compensation claims); Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 436-37, 538 A.2d 1292, 1293 (App. Div. 1988) (pertaining to an employee termination in violation of OSHA); Lepore v. National Tool & Mfg. Co., 224 N.J. Super. 463, 466, 540 A.2d 1296, 1297 (App. Div. 1988) (involving a union member termination in retaliation for compliance with reporting alleged OSHA violations), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (1989), *cert. denied*, 493 U.S. 954 (1989); Kalman v. Grand Union Co., 183 N.J. Super. 153, 158-59, 443 A.2d 728, 730 (App. Div. 1982) (concerning public policy stemming in part from professional code of ethics governing pharmacists). *But see* House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 49, 556 A.2d 353, 357 (App. Div. 1989) (finding no violation of public policy where employer terminated salesman for voicing opposition to corporate policy), *certif. denied*, 117 N.J. 154, 564 A.2d 874 (1989). Significantly, an employer does not violate public policy when retaliatory actions are taken against an employee for exercising his individual legal rights. Erickson v. Marsh & McLennan Co., 117 N.J. 539, 560, 569 A.2d 793, 804 (1990). Courts have also held that firing an employee to avoid the payment of sales commissions does not constitute a violation of public policy. Schwartz v. Leasametric, Inc., 224 N.J. Super. 21, 30, 539 A.2d 744, 749 (App. Div. 1988).

[80] N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (West 1988). The legislative intent of the statute was to protect employees from the retaliatory actions of their employers. Moody v. Township of Marlboro, 855 F. Supp. 685, 689 (D.N.J. 1994). CEPA expanded the scope of retaliatory discharge claims available to an employee under common law. Young v. Schering Corp., 275 N.J. Super. 221, 223, 645 A.2d 1238, 1244 (App. Div. 1994) (citing Littman v. Firestone Tire & Rubber Co., 709 F. Supp. 461, 470 (S.D.N.Y. 1989)). Accordingly, the statute is commonly referred to as the "Whistleblower's Act." Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451, 452, 566 A.2d 215, 216 (App. Div. 1989). The statute does not, however, provide a remedy for the wrongful termination of an employee merely because the employee disagrees with a *lawful* decision of his employer. *Young*, 275 N.J. Super. at 237, 645 A.2d at 1246 (emphasis added). Under CEPA, an employer may not take retaliatory action against an employee who:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer; or
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
> (2) is fraudulent or criminal; or
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.

N.J. STAT. ANN. § 34:19-3 (West 1988). The *Young* court enunciated the factors that the plaintiff must prove to prevail on a CEPA claim:

A recent decision, however, has increased the difficulty in ascertaining legitimate dictates of public policy.[82] In *Hennessey v. Coastal Eagle Point Oil Co.*,[83] the state's highest tribunal blurred the lines of what constitutes a clear mandate of public policy by significantly expanding the public policy exception.[84] The *Hennessey* court extended *Pierce* to include expressions of public policy found in the state constitution.[85] Justice Pollock, although concurring in

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> First, he must show that his belief that illegal conduct was occurring had an objectively *reasonable* basis in fact—in other words that, given the circumstantial evidence, a reasonable lay person would conclude that illegal activity was going on. . . . Second, plaintiff must show that he disclosed or threaten[ed] to disclose the activity to a supervisor or public body; that he was fired; and that there is a "causal connection between [his whistle-blowing and his termination], that is, a retaliatory motive played a part in the adverse employment [action]."

Young, 275 N.J. Super. at 233, 645 A.2d at 1244 (citation omitted).

81 Fineman v. New Jersey Dep't of Human Servs., 272 N.J. Super. 606, 617, 640 A.2d 1161, 1167 (App. Div. 1994). An employee claiming wrongful discharge under CEPA is barred from asserting other wrongful discharge theories arising from the same activity or event. N.J. STAT. ANN. § 34:19-8 (West 1988); Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 492-93, 638 A.2d 1341, 1349-50 (App. Div. 1994); *see also* Casper v. Paine Webber Group, Inc., 787 F. Supp. 1480, 1508-09 (D.N.J. 1992) (ruling that the assertion of a CEPA violation waived a retaliatory discharge claim under the New Jersey Racketeer Influenced and Corrupt Organizations Act). A CEPA claim will not, however, prevent a companion wrongful discharge allegation arising from the alleged violation of a handbook provision. Flaherty v. Enclave, 255 N.J. Super. 407, 413, 605 A.2d 301, 304 (Law Div. 1992).

82 Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 111-12, 609 A.2d 11, 25-26 (1992) (Pollock, J., concurring) (noting that a public policy violation stemming from a constitutional privacy interest is not as easily identifiable as a discharge that violates more traditional sources of public policy); *see also* Alito, *supra* note 1, at 72 (observing that *Hennessey* expands *Pierce* "beyond clearly stated and presumably easily discernible policies of which employers are generally aware").

83 129 N.J. 81, 609 A.2d 11 (1992).

84 Alito, *supra* note 1, at 72. The plaintiff in *Hennessey* was an at-will employee in a safety-sensitive position. *Hennessey*, 129 N.J. at 85, 107, 609 A.2d at 12, 23. Coastal Eagle instituted random drug testing in 1986, without notifying its employees. *Id.* at 86, 609 A.2d at 13. Coastal Eagle fired Hennessey that same year after traces of marijuana and valium were detected in his urine. *Id.* at 87, 609 A.2d at 13. In his claim for wrongful discharge, he alleged, *inter alia*, a violation of public policy arising from the right to privacy guaranteed under article I of the New Jersey Constitution. *Id.*; *see* N.J. CONST. art. I, ¶¶ 1, 7.

The state judiciary previously recognized the New Jersey Constitution as a source of public policy in disputes concerning sex discrimination in the work place. Erickson v. Marsh & McLennan Co., 227 N.J. Super. 78, 84, 545 A.2d 812, 815 (App. Div. 1988) (proclaiming that public policy emanates from the fundamental liberties of the state constitution) (citing Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79-80, 389 A.2d 465, 477-78 (1978)), *aff'd in part, rev'd in part*, 117 N.J. 539, 567, 569 A.2d 793, 807 (1990).

85 *Hennessey*, 129 N.J. at 99, 609 A.2d at 19. In so doing, the court engaged in a balancing test between the constitutional right to privacy and the public's interest in safety. *See id.* at 99-108, 609 A.2d at 19-24. The court found that the safety-demanding

the majority's decision, cautioned against the complexities of applying this latest restriction of at-will employment.[86]

The implied covenant of good faith and fair dealing is also a more practical method for limiting an employer's powers of termination by more conclusively enforcing an employee's "reasonable expectations."[87] This covenant, a fundamental tenet of both tradi-

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nature of Hennessey's job and its vast potential for public injury outweighed any public policy concerns of an individual right to privacy. *Id.* at 107, 609 A.2d at 23.

86 *Id.* at 116-17, 609 A.2d at 28-29 (Pollock, J., concurring). Justice Pollock viewed the common law of privacy rights as better suited for a clear mandate of public policy than the constitution. *Id.* at 108, 609 A.2d at 24 (Pollock, J., concurring). The concurrence identified a distinction between the public policy underlying the right to privacy and the public policy preventing other wrongful discharges. *Id.* at 111, 609 A.2d at 25-26 (Pollock, J., concurring). The crux of this dissimilarity, the concurrence stated, is that neither the state constitution nor the legislature has expressly recognized a right to privacy, thus rendering any privacy-based violation of public policy anything but "clear." *Id.* at 111-12, 609 A.2d at 25-26 (Pollack, J., concurring). Justice Pollack advocated the more workable standard of public policy stemming from common tort law or from New Jersey's mandate against the illegal use of drugs, rather than the exploration of "an uncharted constitutional right." *Id.* at 115-17, 609 A.2d at 27-29 (Pollock, J., concurring).

87 *See generally* Perritt, *supra* note 74, at 713-18 (suggesting that the implied covenant of good faith is a prominent reflection of the relational contract school, and is thus consistent with the expectations of both parties). The relational contract school focuses on the ongoing relationship between the parties, rather than upon strict adherence to classical contract doctrine. *Id.* at 713. Professor Perritt argued that the obligation of good faith and fair dealing, as an integral concept of the relational theory, may serve to promote the "reasonable expectations" of the employees. *Id.* at 717.

Courts have utilized an implied covenant of good faith and fair dealing as an exception to the employment at-will doctrine. MCCULLOCH, *supra* note 32, ¶ 40,011. The rationale underlying this exception is that the employment relationship has created an obligation to discharge only for cause. *Id.* This covenant provided the foundation for the earliest encroachments upon the employment at-will doctrine. Perritt, *supra* note 74, at 684. The duty of good faith prevents either party from acting in such a manner that would impair the right of the other party to receive the benefits of the contract. Palisades Properties, Inc., v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522, 531 (1965) (quoting 5 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 670, at 159-60 (3d ed. 1961)). It is breached when either party denies those benefits to the other. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985). An employer who does not act in good faith may be held liable in tort for bad faith. Massingale, *supra* note 17, at 198. *But see* Noye v. Hoffmann-La Roche, 238 N.J. Super. 430, 436, 570 A.2d 12, 15 (App. Div. 1990) (concluding that in New Jersey, tort damages are not available for breach of the covenant as applied to the employment relationship), *certif. denied*, 122 N.J. 146, 584 A.2d 218 (1990).

The covenant is an implied-in-law promise, and is substituted for an implied-in-fact promise of the employer. Perritt, *supra* note 74, at 690-01. Thus, the covenant of good faith and fair dealing can be used to imply assurances of job security which cannot be effectively proven under implied-in-fact contracts, such as in *Woolley* and its progeny. *See id.* at 702; *see also id.* at 686 (identifying handbook provisions as establishing implied-in-fact contracts). Accordingly, this theory of wrongful discharge does not require the broad judicial assumptions inherent to the unilateral contract analysis

tional and contemporary contract doctrine,[88] has advantages to both employer and employee.[89] While the New Jersey Supreme Court has never directly ruled on the covenant's application to the employment relationship, the court has recognized that a covenant of good faith and fair dealing is implied in every contract.[90] Nevertheless, the state judiciary has been somewhat reluctant to apply this precept to the employment scenario.[91] New Jersey courts have

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of employee handbooks. *See supra* notes 31-69 and accompanying text (explaining the New Jersey judiciary's strained attempts to apply unilateral contract analysis to employment manuals). Utilizing the most liberal interpretation of the covenant, a discharged employee wishing to assert this theory of wrongful discharge need not even prove the existence of a contract. Perritt, *supra* note 74, at 690. The employee must merely show that an employment relationship existed and that it was terminated in a manner which was either unfair or in bad faith. *Id.* The implied covenant of good faith and fair dealing has received less recognition than any other limitation on the employment at-will doctrine. Chagares, *supra* note 53, at 372.

88 Jeffrey M. Judd, *The Implied Covenant of Good Faith and Fair Dealing: Examining Employees' Good Faith Duties*, 39 HASTINGS L.J. 483, 483 (1987). As explained by Professor Williston:

> The underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.

5 WILLISTON & JAEGER, *supra* note 87, § 670, at 159 (footnote omitted). The *Restatement (Second) of Contracts* contains a similar proviso: "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *see also* N.J. STAT. ANN. § 12A:1-203 (West 1962) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). "Good faith" is defined in the Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned." N.J. STAT. ANN. § 12A:1-201(19) (West 1962).

89 *See* Massingale, *supra* note 17, at 200 (noting that a disclaimer has no effect on the employer's duty to exercise good faith); Perritt, *supra* note 74, at 691 (explaining that when bringing suit for breach of the implied covenant of good faith, an employee must overcome a higher burden of proof; he must establish bad faith or ulterior motivation on the part of the employer). At least one commentator has proposed that the employer should have a tort claim against the employee for breach of the covenant of good faith and fair dealing implied in the employment contract. *See generally* Judd, *supra* note 88 (advocating this theory). Judd also asserted that, at the very least, the covenant should be used as a defense to a wrongful discharge claim. *Id.* at 513.

90 Onderdonk v. Presbyterian Homes, 85 N.J. 171, 182, 425 A.2d 1057, 1062 (1981) (citations omitted); Association Group Life, Inc. v. Catholic War Veterans, 61 N.J. 150, 153, 293 A.2d 382, 384 (1972) (per curiam); Palisades Properties Inc., v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522, 531 (1965) (quotation omitted).

91 *See* McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 519-20, 499 A.2d 526, 529 (App. Div. 1985). In *McQuitty*, the plaintiff attempted to assert that his expired labor contract and the defendant's alleged practice of terminating only for cause had created an implied covenant of good faith and fair dealing. *Id.* at 518, 499 A.2d at 528. The court rejected the contention that *Woolley* supported this assertion, ruling instead that *Woolley* was limited to unilaterally adopted, published employment

only recently accepted this theory as a limitation on employment at-will.[92]

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policies. *Id.* at 519-20, 499 A.2d at 529; *accord* House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 55, 556 A.2d 353, 360 (App. Div. 1989) (quotation omitted); Citizens State Bank v. Libertelli, 215 N.J. Super. 190, 194, 521 A.2d 867, 869 (App. Div. 1987); *see also* Labus v. Navistar Int'l Transp. Corp., 740 F. Supp. 1053, 1063 (D.N.J. 1990) ("New Jersey law does not recognize an implied covenant of good faith in employment contracts.") (citations omitted); D'Alessandro v. Variable Annuity Life Ins. Co., No. 89-2052 (CSF), 1990 WL 191914, at *5 (D.N.J. Nov. 20, 1990) (asserting that New Jersey has uniformly renounced the argument that an implied covenant of good faith and fair dealing exists in an employment at-will relationship) (citations omitted); Carney v. Dexter Shoe Co., 701 F. Supp. 1093, 1103 (D.N.J. 1988) (noting the *McQuitty* court's rejection of same); Brunner v. Abex Corp., 661 F. Supp. 1351, 1356 (D.N.J. 1986) (same).

Courts have generally declined to attribute an obligation of good faith and fair dealing to the employment relationship, voicing concerns of undue restrictions on managerial discretion. *Wagenseller*, 710 P.2d at 1039; *see also* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1086 (Wash. 1984) (refusing to adopt the covenant as a restriction on employment at-will, stating that "[a]n employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and this exception does not strike the proper balance") (citations omitted). As late as 1989, only 13 states had recognized the covenant as applied to employment law. *See* Jaclin v. Sea-Land Corp., No. 86-2791 (AMW), 1989 WL 200943, at *4 n.1 (D.N.J. Aug. 23, 1989) (listing the cases that have recognized implied covenants in employment manuals as enforceable).

92 *See* Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 953 (D.N.J. 1991) (observing that the implied covenant of good faith and fair dealing applies to the employment context). The court noted that under New Jersey law, an employer may be liable for breach of an implied covenant of good faith and fair dealing if the employee is terminated without an "honest belief that good cause for discharge in fact exists." *Id.* (citing Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 431-32, 570 A.2d 12, 13 (App. Div. 1990), *cert. denied*, 122 N.J. 146, 584 A.2d 218 (1990); Nolan v. Control Data Corp., 243 N.J. Super. 420, 421-22, 579 A.2d 1252, 1253 (App. Div. 1990)). *See also Jaclin*, No. 86-2791 (AMW), 1989 WL 200943, at *3 (stating that New Jersey has clearly recognized an implied covenant of good faith and fair dealing in employment contracts).

In *Noye v. Hoffmann-La Roche, Inc.*, the court concluded that "[i]t is undoubted that a *Woolley* contract, like any other contract, contains an implied covenant of good faith and fair dealing." *Noye*, 238 N.J. Super. at 432, 570 A.2d at 13. Hoffman-La Roche terminated Noye for allegedly sexually harassing a female co-worker. *Id.* at 431, 570 A.2d at 13. Noye denied this, contending that Hoffmann-La Roche fired him without the opportunity to rebut the allegations and in violation of the disciplinary procedures outlined in the "Employee Policies & Procedures" manual. *Id.* The court ruled that an implied covenant of good faith and fair dealing was created when the plaintiff accepted, through continued employment, the terms of employment as outlined in the manual. *Id.* at 432, 570 A.2d at 13.

Judge Stein, concurring with the majority, offered a definition of the covenant as applied to the employment context: "an action for breach of the implied covenant of good faith and fair dealing will lie where the employer, without an honest belief that good cause for discharge in fact exists, attempts to deprive the employee of the benefit of the employment agreement." *Id.* at 442, 570 A.2d at 18 (Stein, J., concurring). The court further explained that a reasonable belief that good cause existed for the termination will bar claims for breach of the covenant. *See id.* at 433, 570 A.2d at 13. The court stipulated, however, that the covenant does not apply to purely at-will rela-

IV. CONCLUSION

In an effort to balance the distribution of power in the employment relationship, the New Jersey judiciary has sacrificed fundamental principles of common law[93] and common sense.[94] Subject to constant attack, the employment at-will doctrine essentially exists in name only in the state of New Jersey. The recent extensions of *Woolley* in *Witkowski* and *Nicosia* will continue to chill the assertion of an employer's discretionary rights.[95] These decisions have created an environment wherein an employer is severely restricted from taking disciplinary action, regardless of the legitimacy of doing so. Due to the ease with which a discharged employee may bring suit, an employer is justified in fearing that litigation will result from routine managerial decisions.[96] Furthermore, an employee may claim to have been "constructively fired"

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tionships, where there is no contract express or implied. *Id.* at 434, 570 A.2d at 14 (citations omitted). The court also held that tort damages were not available for breach of the covenant of good faith and fair dealing implied in employment contracts. *Id.* at 436, 570 A.2d at 15.

93 This is most clearly evidenced by the *Woolley* decision, in which the traditional prerequisites to contract formation were abandoned. *See supra* notes 31-36 and accompanying text (detailing the *Woolley* court's departure from common law principles).

94 For example, consider *Woolley*, in which the court presumed that an employee could rely upon a document that he never knew existed. *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 304, 491 A.2d 1257, 1268 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985). *Nicosia* is also illustrative of the absence of clear reasoning on the part of the court with respect to termination clauses in employment handbooks. *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 643 A.2d 554 (1994). The New Jersey Supreme Court announced a need "to protect the stability of employment relations and to encourage certainty with respect to employment rights and obligations." *Id.* at 419, 643 A.2d at 563. The *Witkowski* and *Nicosia* decisions, however, do little to "stabilize" or inject "certainty" into the employment arena. Jacobs, *supra* note 36, at 1110. The only result of these decisions that employers may be "certain" of is that nearly every termination decision made may be the subject of judicial review. *Id.*

95 *See* Massingale, *supra* note 17, at 208-09 (noting that the threat of court action and the assessment of punitive damages may chill business decision making practices). Employers must now balance the merits of even the most routine termination decision against the possibility of potential litigation. *Id.* at 202. Thus, an employer is prevented from running a business in the most efficient manner possible, for fear of civil prosecution. *Id.* In fact, common business decisions, particularly those pertaining to employee dismissal, have effectively been taken from the employer and given to the unidentified members of an uncontemplated jury. Roger B. Jacobs, *Court Rulings' Result: Manuals Are Contracts*, 138 N.J. L.J. 974, 1000 (1994). Apprehension of judicial reversal may effectively "paralyze" the human resource departments of many companies. *Id.*

96 *See* Alfred W. Blumrosen, *Why Employers Should Arbitrate Individual Employment Claims*, N.J. LAW., Nov. 1984, at 39, 40 (observing that virtually any discharged employee may bring a claim that would subject an employer's decisions to judicial review).

by a demotion or other disciplinary action and may bring suit under exaggerated breach of contract theories or ill-defined public policy exceptions.[97]

In a one-sided analysis, the court has absolutely abandoned the reasonable expectations of the employer.[98] *Nicosia* and *Witkowski* effectively eliminate any chance for an employer to successfully insulate himself from contractual liability when firing an otherwise at-will employee.[99] Moreover, the decisions are riddled with inconsistencies. For instance, an employee is given wide latitude to "reasonably expect" virtually any binding obligation from the employer, while the employer is not permitted to "reasonably expect" an employee to understand common English.[100] The court, in characterizing a simple disclaimer as "confusing legalese," judges that the average employee does not possess the cognitive ability to identify a disclaimer as such. Nonetheless, the same court infuses the average employee with the knowledge to ascertain when the unwritten word creates implied contractual obligations.

The court cited the need for both stability in the employment relationship and certainty regarding employment rights and obligations as justification for the recent handbook decisions. The court achieves neither objective. Stability in the employment relationship is compromised by the unbounded contestability of em-

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97 Epstein, *supra* note 1, at 972. As Professor Epstein stated:

> Now the employer will have to reconsider every aspect of personnel relations. If it is improper to dismiss at will, then it becomes improper to demote or to transfer at will, for an employee will be able to assert with perfect propriety that the employer had made work so unattractive to him that his conduct should amount to a "constructive dismissal" for which either damages or reinstatement is appropriate. Thus a rule that starts with modest ambitions will in the end regulate each and every aspect of the employment relationship.

Id. The plaintiff in *Pierce* is an excellent example of a situation where an employee may plead constructive dismissal as basis for a wrongful termination claim. *See supra* note 75 and accompanying text (detailing the facts of *Pierce*).

98 *See generally* Brake, *supra* note 22, at 223-34 (arguing that the "legitimate countervailing interests" of the employer must be considered when analyzing employee discharge cases); *see also* Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (noting that "[i]n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two").

99 Jacobs, *supra* note 36, at 1110. As a result of these decisions, employers will be unsure as to whether or not they have satisfied the judiciary's requirements until they are litigating the issue. *Id; see also supra* note 64 and accompanying text (illustrating that the *Nicosia* court retroactively applied its own newly created standards to invalidate the disclaimer at issue).

100 Alito, *supra* note 1, at 73.

ployment rights resulting in judicial review of employment decisions years after the fact.[101] Moreover, as the appellate division observed, any expansions of employee rights are more appropriately addressed to the legislature, and not to the judiciary.[102]

It is uncontroverted that some employers will abuse their positions of authority, resulting in unconscionable employee terminations that must be redressed by the courts.[103] Misapplication of fundamental contract law, however, does not adequately address or rectify such injustices.[104] The court grants a right of action premised upon statements in a manual never read by the discharged employee, yet incongruously denies the legitimacy of disclaimers that do not sufficiently draw the reader's attention. Such a skewed

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101 *See* Massingale, *supra* note 17, at 187 (contending that the current status of the doctrine of at-will employment "offers little certainty as to whether a particular dismissal decision will result in liability for wrongful termination").

102 Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 437, 570 A.2d 12, 16 (App. Div. 1990). The court propounded that "if a need exists for an expansion of employees' rights, it should be done by our legislature, which has never been reluctant to protect workers and is better equipped to study the matter and consider its broad implications." *Id.*

103 Massingale, *supra* note 17, at 200; *see id.* (noting the disparity of bargaining power in the employer/employee relationship).

104 McWilliams, *supra* note 1, at 371 (explaining that only a strict application of unilateral contract analysis justifies the restriction of employment at-will). McWilliams stressed that a strict contract analysis ensures that only where an employee is aware of the manual's terms will the manual be enforced against the employer. *Id.* at 371 n.194; *see also supra* note 36 and accompanying text (citing authority for the proposition that the offeree must receive the offer for the offeror to be contractually bound).

dichotomy of reasoning not only undermines the jurisprudential foundation of the decisions, it compromises the integrity of the law.[105]

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105 *See* Bankey v. Storer Broadcasting Co. (*In re* Certified Question), 443 N.W.2d 112, 116-17 (Mich. 1989) (noting that "[w]hile a majority of jurisdictions now recognize some type of 'handbook exception' to the employment-at-will doctrine, there is no clear consensus as to either the legal theory supporting the handbook exception or the scope of the exception") (citing Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983); Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 285, 491 A.2d 1257, 1258 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 447 (N.Y. 1982) (Wachtler, J., dissenting)) (other citations omitted); Befort, *supra* note 55, at 342-43 (recognizing that a unilateral contract analysis is inappropriate for handbook analysis because the contractual elements are "implied by the court rather than intended by the parties"); Linzer, *supra* note 69, at 345 (contending that courts find binding promises in employment manuals "under circumstances that would probably garner a first-year Contracts student an F for saying that a contract was formed at all"); McWilliams, *supra* note 1, at 372 (criticizing the *Woolley* court's presumption of reliance as undermining "the very justification upon which the employer's promise is enforced").