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I. Introduction

Wildebaldo Mendoza had worked for Reynolds Manufacturing Company for six years when he was summarily discharged.[1] Mendoza was dismissed when he refused to work overtime on a Saturday because he was needed at

1. *See* Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 537 (Tex. App.—Corpus Christi 1982, no writ). Mendoza worked various jobs for the Reynolds Company and was employed in the company's loading department. *See id.* at 538.

home to take care of his family.[2] His supervisors ignored this reason and fired him.[3] In the wrongful discharge action which followed, Mendoza argued that an employment manual, outlining dismissal procedures, was part of his employment contract with Reynolds.[4] Mendoza argued that by summarily firing him Reynolds clearly failed to heed the discharge procedures and thereby breached a contractual duty owed to the ex-employee.[5] The Texas appellate court refused to recognize the employment manual as a contract.[6] The court reasoned that Texas followed the employment at-will theory which meant that when an employment contract is for an indefinite period of time, either party can end the contract at will, with or without cause.[7] Wildebaldo Mendoza was out of a job, and the Reynolds Manufacturing Company owed him nothing.

Kenneth Thompson was discharged after seventeen years of satisfactory service as a manager with the St. Regis Paper Company.[8] The only reason

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2. *See id.* Mendoza was approached by his supervisor at approximately 4:00 p.m. and was asked to work his required overtime hours on the next day, Saturday. *See id.*

3. *See id.* After Mendoza had explained his situation to his supervisor, he met with the personnel manager. In this meeting Mendoza informed the manager that he could not work any other Saturdays until further notice. At this point Mendoza was fired by the personnel manager. *See id.*

4. *See id.* at 537.

5. *See id.* Mendoza argued that the discharge procedures set out in Reynolds' manual acted to contractually bind Reynolds to terminate employees only in a manner consistent with the handbook terms. *See id.* No written or oral notice was given to Mendoza that he violated any company rules. *See id.* at 538.

6. *See id.* at 539. The court did not discuss any rationale behind the employment at-will rule, but only acknowledged that the rule was precedent in Texas. *See id.* at 538. Under Texas law, the settled rule is that there can be no breach of an employment contract of indefinite length if either party decides to terminate the agreement. *See* NHA, Inc. v. Jones, 500 S.W.2d 940, 944 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (neither party to employment at-will contract is bound to continued service; therefore, each retains right to terminate). *But see* Mansell v. Texas & P. Ry., 135 Tex. 31, 36, 137 S.W.2d 997, 999-1000 (1940) (employment at-will rule may be modified by contract limiting employer's discretion in discharging employees); Hardison v. A. H. Belo Corp., 247 S.W.2d 167, 168 (Tex. Civ. App.—Dallas 1952, no writ) (employer must show good faith dissatisfaction with worker, thereby limiting his discretionary discharge power under employment at-will rule).

7. *See* Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538-39 (Tex. App.—Corpus Christi 1982, no writ) (court cites widespread adoption of rule in Texas case law). The appellate court cited two Texas cases which recognized exceptions to the general employment at-will rule, but distinguished these cases from the one at bar by noting the absence of an express agreement between Mendoza and Reynolds which would limit Reynolds' termination rights. Since the handbook in question only outlined general policy guidelines, the court reasoned that it could not constitute the express contract needed to create the exceptions to the at-will rule. *See id.* at 539.

8. *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1083 (Wash. 1984). Thompson was promoted into the management position after ten years of service. Throughout Thompson's tenure he received regular bonuses and no criticism or complaints from superiors. *See id.*

given to Thompson for his dismissal was that "he stepped on somebody's toes."[9] In the wrongful discharge action brought by Thompson, St. Regis argued that because Thompson's employment was terminable at will, no reason need be given for his discharge.[10] Thompson contended that the St. Regis employment handbook, which guarantees fair and equitable handling of terminations, was part of his employment contract and, therefore, was breached by the company's unfair dismissal action.[11] The Washington Supreme Court recognized the general rule that an employment agreement, indefinite in length as Thompson's was, is terminable at the will of either party.[12] The court then carved an exception to this rule: where an employer's representations of fair treatment and job security act to induce an employee to remain on the job, those promises of security are enforceable elements of the employment relationship.[13] Thus, the court held that the guarantee of fair and equitable termination as specified in St. Regis' employment handbook gave rise to contractual obligations owed to Thompson as an employee.[14] The result of the decision prevented St. Regis from completing

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9. *See id.* Thompson was asked by management to step down for the "benefit of himself and the company." Thompson was awarded his severance benefits by St. Regis as well as a ten thousand dollar bonus for his job performance in the last year of service. *See id.*

10. *See id.* St. Regis contended that in a case dealing with an employment at-will discharge, there could be no material fact issue presented before the court. *See id.* Such a strict interpretation of the at-will rule has been adopted in many jurisdictions. *See, e.g.*, White v. Chelsea Indus., Inc., 425 So. 2d 1090, 1091 (Ala. 1983) (no agreement of specific duration of employment automatically leaves employer and employee free to terminate contract under at-will rule); Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (court adopts rule stating when there is no contract for specific period of time, employment is at will and terminable by either party); Groves v. Anchor Wire Corp., 692 S.W.2d 420, 422 (Tenn. Ct. App. 1985) (contract of indefinite length establishes employment agreement which is terminable by either party without fear of liability).

11. *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1083-84 (Wash. 1984). The handbook language which Thompson claimed gave rise to a contractual obligation stated that St. Regis would make terminations that "will be processed in a manner which will at all times be fair, reasonable and just." *See id.* at 1084. Thompson coupled other information with the manual language to show he was performing his job in a satisfactory manner. *See id.*

12. *See id.* (court cites Washington case law supporting adoption of employment at-will rule).

13. *See id.* at 1088. The court rejected the theory which implies a covenant of good faith in termination practices because such a covenant would lead to "judicial incursions into the amorphous concept of bad faith." *See id.* at 1086 (quoting *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982)). The opinion agreed with the contractual analysis used in other jurisdictions which allowed handbooks to modify the general employment at-will rule. *See* Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984). Independent of the contractual justification, the court reasoned that a strong argument lies in equity to bind employers to the terms of the handbooks they issue. Since the employer controls and defines the work relationship, any representations made by management to an employee should be enforceable in order to prevent the manipulation of the employee. *See id.*

14. *See id.* at 1088. The court adopted the prevalent contractual approach which states

its unfounded and arbitrary dismissal practice.

These two scenarios contain similar fact patterns, yet each ends with a completely opposite result. Both cases are representative of the current schism existing in the labor law field.[15] Some jurisdictions hold that the employment at-will doctrine, which allows either party to discretionarily terminate employment, cannot be altered by an employment handbook.[16]

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that a personnel manual or handbook represents the necessary elements of offer, acceptance, and consideration to form a contract. *See id.* at 1087. The creation of a contractual duty meant that St. Regis was obligated to terminate its employees pursuant to the handbook procedures, thereby no longer basing its employment on at-will rights. *See id.* Other cases go into a clearer and more detailed examination of the contractual analysis as adopted by the Washington Supreme Court. *See, e.g.*, Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 808-10 (D. Colo. 1983) (discussion of how employment at-will rule can be modified through contract); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892-93 (Mich. 1980) (unilateral contract theory used to make handbook binding contract); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985) (offer, acceptance, and consideration all present to make handbook contractually binding).

15. *Compare* Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (exception to employment at-will rule denied) *and* Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (no exception worked upon traditional at-will theory by employment manual) *with* Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 808 (D. Colo. 1983) (discussion of judicial trend to allow policy statements in employment manuals to alter at-will doctrine) *and* Leikvold v. Valley View Community Hosp., 688 P.2d 201, 203 (Ariz. Ct. App. 1983) (case law trend leads away from strict adherence to employment at-will theory, thereby creating handbook exception to rule). A gradually increasing number of fact patterns are causing courts to create exceptions to the at-will rule. *See* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 727-29 (Ct. App. 1980) (court conducts survey of current case law outlining modifications to at-will rule); *see also* Staggs v. Blue Cross, Inc., 486 A.2d 798, 801 (Md. Ct. Spec. App. 1985) (court cites unstable conditions of United States case law on subject of employment at-will). *See generally* Note, *Employee Handbooks and Employment-at-Will Contracts*, 1985 DUKE L.J. 196, 200-04, 209-12 (analysis of traditional and progressive approaches to ruling upon contractual significance of employment handbooks); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1820-24 (1980) (discussion of less mechanical interpretation by courts of at-will doctrine).

16. *See, e.g.*, White v. Chelsea Indus., Inc., 425 So. 2d 1090, 1091 (Ala. 1983) (when employment is at-will, no issue of fact created by manual); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1097 (Del. 1982) (booklet cannot work exception to employment at-will rule); Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 671 (Ind. Ct. App. 1984) (employee handbooks incapable of altering at-will termination rights when employment is indefinite). Six other states in addition to Alabama, Delaware, and Indiana have refused to allow employment manuals, handbooks, booklets, or policies to limit an employer's discretion in firing afforded him under the at-will rule. *See* Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976); Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982); Williams v. Biscuitville, Inc., 253 S.E.2d 18, 20 (N.C. Ct. App. 1979); Graves v. Anchor Wire Corp., 692 S.W.2d 420, 422 (Tenn. Ct. App. 1985); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, no writ). Other jurisdictions not dealing directly with the handbook issue have held policy statements by an employer do not create any contractual

Other jurisdictions, however, subscribe to the view that an employment handbook can create an implied contract between an employer and employee, preventing the employer from firing an employee at will.[17]

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duty. *See, e.g.*, Sullivan v. Heritage Found., 399 A.2d 856, 860 (D.C. 1979) (corporation bylaws cannot act to alter employee's at-will status); Nelson v. M&M Prod. Co., 308 S.E.2d 607, 608 (Ga. Ct. App. 1983) (documents plaintiff relied upon to argue employment for definite term existed were too general to support allegation); Terrio v. Millinocket Community Hosp., 379 A.2d 135, 137 (Me. 1977) (policy statements by employer do not define length of employment; therefore, employee could be dismissed at will). *See generally* Murg & Scharmon, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 331 (1982) (pointing out dangers of allowing exceptions to at-will rule).

17. *See, e.g.*, Leikvold v. Valley View Community Hosp., 688 P.2d 201, 205 (Ariz. Ct. App. 1983) (handbook creates implied contract which prevents employer from discharging employee at will); Griffin v. Erickson, 642 S.W.2d 308, 311 (Ark. 1982) (policy manual terms apply to employee and must be substantially followed); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (when sufficient consideration provided by employee, employer can be contractually bound to follow handbook procedures). A total of twenty-two states have recognized the power of a handbook to alter the at-will rule through its incorporation into the employment contract. *See* Murray v. Bridgeport Hosp., 480 A.2d 610, 612 (Conn. Super. Ct. 1984); Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 58 (Idaho 1977); Kaiser v. Dixon, 468 N.E.2d 822, 831-32 (Ill. App. Ct. 1984); Staggs v. Blue Cross, Inc., 486 A.2d 798, 802-04 (Md. Ct. Spec. App. 1985); Garrity v. Valley View Nursing Home, Inc., 406 N.E.2d 423, 424 (Mass. App. Ct. 1980); 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, 628-29 (Minn. 1983); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 123 (Mo. Ct. App. 1985); Morris v. Lutheran Medical Center, 340 N.W.2d 388, 391 (Neb. 1983); Southwest Gas Corp. v. Ahmad, 668 P.2d 261, 261-62 (Nev. 1983); Forrester v. Parker, 606 P.2d 191, 192 (N.M. 1980); Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984); Langdon v. Saga Corp., 569 P.2d 524, 527-28 (Okla. Ct. App. 1976); Fleming v. Kids & Kin Head Start, 693 P.2d 1363, 1365-66 (Or. Ct. App. 1985); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275, 276-77 (S.D. 1983); Sherman v. Rutland Hosp., Inc., 500 A.2d 230, 232-33 (Vt. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984); Ferraro v. Koelsch, 368 N.W.2d 666, 673 (Wis. 1985); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985). Some courts that have not ruled directly upon the handbook issue have delivered opinions which appear favorable to the adoption of implied contract theory. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 926-27 (Ct. App. 1981) (termination of employee was held breach of implied promise of employer to discharge only for reason); Shad v. American Synthetic Rubber Corp., 655 S.W.2d 489, 490-91 (Ky. 1983) (employee held to corporate policies regarding dismissal procedures because such policies were express part of employment contract); Piacitelli v. South Utah State College, 636 P.2d 1063, 1066 (Utah 1981) (terms of teacher's employment governed by college personnel manual). Though some state law may be unsettled on the handbook issue, federal courts have supported the incorporation of handbook terms into labor contracts in these states. *See* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (whether parties intended handbook to be part of employment contract was issue of fact for jury); Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318, 320-21 (E.D. Va. 1983) (district court interprets state law to recognize possibility handbook constituted promise from employer not to terminate employee without good cause). One other state has split decisions on the handbook exception to the employment at-will rule. *Compare* Weiner v. McGraw-Hill, Inc., 457 N.Y.S.2d 193, 197-98, 443 N.E.2d 441, 445-46 (1982) (repeated

The purpose of this comment is to support the position that it is within the best interests of the employer-employee relationship that Texas courts loosen their hold upon the employment at-will doctrine and allow employment handbooks, when appropriate, to modify the at-will rule. Additionally, the comment elaborates upon the contractual analysis applied by both sides to this controversy. It also discusses the problem with Texas' refusal to adopt the handbook as an exception to the employment at-will doctrine. In conclusion, the comment offers instruction to employers and employees on how to surmount the many problems posed by the issuance of an employment handbook.

II. EXPLANATION OF DIVERSE DECISIONS

A. *Framing the Problem*

The traditional definition of the employment at-will doctrine states that employment contracts which are for an indefinite duration are terminable at the discretion of either party absent any contractual restrictions.[18] Courts have translated this definition into a rule which allows an employee to quit at will or an employer to fire at will without either party incurring liability to the other.[19] A prerequisite to the application of this rule, however, is the creation of an at-will labor contract between a worker and his company.[20]

The employment at-will situation arises when an individual gives a promise, either written or unwritten, to render services for an unspecified term.[21]

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use of handbook gives rise to contract) *with* Rizzo v. International Bhd. of Teamsters, Local 237, 486 N.Y.S.2d 220, 221 (N.Y. App. Div. 1985) (employee could not rely on handbook as part of contract when he had no original knowledge of handbook's existence).

18. *See, e.g.*, Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 851 (2d Cir. 1985) (cites rules as well as three exceptions to general employment at-will doctrine); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096 (Del. 1982) (plaintiff was not hired for any definite length of time so held position at will of employer); Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 239 (N.J. 1952) (rule acknowledged by court states contract for employment for indefinite length is presumed at will absent any express or implied stipulations). *See generally* Murg and Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 329, 332-35 (1982) (citing nationwide adoption of rule); Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 212-16 (1973) (brief historical development of employment at-will doctrine given).

19. *See, e.g.*, Garcia v. Aetna Fin. Co., 752 F.2d 488, 491 (10th Cir. 1984) (federal court applies general rule as adopted by Colorado); MacNeil v. Minidoka Memorial Hosp., 701 P.2d 208, 209 (Idaho 1985) (Idaho follows most states in country which apply employment at-will rule); Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 151 (Neb. 1980) (court adopts employment at-will doctrine stating that either party to labor contract can terminate without liability).

20. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (generally, any hiring for indefinite term gives rise to employment at-will labor contract).

21. *See, e.g.*, Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885-86 (10th Cir. 1985) (thirty-year employee deemed to be at-will worker absent written contract stipulating otherwise); Duldulao v. St. Mary's of Nazareth Hosp. Center, 483 N.E.2d 956, 957 (Ill. App. Ct.

The employer pays the individual in consideration for his work product but makes no additional promise of continued employment.[22] This mutual act creates an at-will labor contract. The parties have both agreed to exchange money for labor; yet, neither has obligated himself to continue the employment relationship.[23] Without any further promises by the employer to retain the worker for a definite period or by the employee to remain in the company's service, either party is free to terminate the labor contract at any time and for any reason.[24]

The employment at-will rule, allowing mutual termination rights, can be validly modified according to its definition.[25] If both parties to an at-will

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1985) (no written employment contract existed, rather employee held job pursuant to oral agreement); Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875, 877-79 (Minn. Ct. App. 1985) (employment at-will contract created by oral agreement of unspecified duration).

22. *See, e.g.*, Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (good consideration for employment at-will contract defined as "services contracted to be rendered"); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (handbook does not constitute consideration additional to that which was originally bargained for); Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 84 (N.C. Ct. App. 1985) (under employment at-will labor contract, employee's consideration for agreement is obligation of service to employer).

23. *See, e.g.*, Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318, 320 (E.D. Va. 1983) (no specific time limitation placed upon labor contract means employer not bound to keep employee); Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (absence of promises from either employer for definite term of service or from employee to continue service means both parties free to terminate labor contract at their discretion); St. Louis S. W. Ry. v. Griffin, 106 Tex. 477, 479, 171 S.W. 703, 704 (1914) (court recognizes allowing one party to terminate at will while denying right to second party violates liberty of contract notion).

24. *See, e.g.*, White v. Chelsea Indus., Inc., 425 So. 2d 1090, 1091 (Ala. 1983) (at-will rule permits employer to discharge for any reason including malicious or other improper reasons); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1262 (N.J. 1985) (absence of specified employment term held to create at-will arrangement); Maus v. National Living Center, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (when term of service left to discretion of either party employment can be ended at will by either party without cause).

25. *See* Leikvold v. Valley View Community Hosp., 688 P.2d 201, 205 (Ariz. Ct. App. 1983) (under basic contract principles, need not have express contract between parties but may imply contract by promisor's conduct or words); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1262 (N.J. 1985) (court holds pursuant to employment at-will rule; however, any long term employment agreement is subject to one restriction). The termination rights of both parties may be limited when a precise agreement exists which defines a term of employment and the duties enforceable upon both employer and employee. *See id.* at 1262; *see also* Morris v. Lutheran Medical Center, 340 N.W.2d 388, 390 (Neb. 1983). The Nebraska Supreme Court cited the at-will rule including its exceptions stating, "when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability." *See id.* (quoting *Alford v. Life Savers, Inc.*, 315 N.W.2d 260, 261 (Neb. 1982)); *see also* Murray v. Bridgeport Hosp., 480 A.2d 610, 611 (Conn. Super. Ct. 1984) (court recognizes "public policy limitation to at-will rule"); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 122 (Mo. Ct. App. 1985) (in addition to contractual limitation court recog-

labor contract expressly agree not to be bound by the employment at-will rule, then the rule's application is precluded.[26] An example of this type of modification occurs when an employee enters into a contract for a definite period of time.[27] The employer cannot terminate the employee at will without breaching the labor contract.[28] There are other exceptions to the employment at-will rule which deny an employer's discretionary right to terminate;[29] however, none has caused such judicial dissension as the employment handbook.[30]

When a worker begins his job with a company, the worker may be issued an employment manual. This manual may contain a range of subjects from

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nizes statutory limitation upon dismissal rights under employment at-will doctrine). *See generally* Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1446 (1975) (example of statutory restraints placed upon at-will labor arrangement).

26. *See* Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 150 (Neb. 1980) (express stipulation in labor contract alters employment at-will rights); Sherman v. Rutland Hosp., Inc., 500 A.2d 230, 232 (Vt. 1985) (employer and employee may contractually bind themselves to specific termination practices in absence of employment agreement for definite term). *But see* Duldulao v. St. Mary of Nazareth Hosp., 483 N.E.2d 956, 957 (Ill. App. Ct. 1985) (no express agreement between employer and employee but contract limiting at-will termination rights can be implied from case facts).

27. *See, e.g.*, Griffin v. Erickson, 642 S.W.2d 308, 310 (Ark. 1982) (contract for definite period of time not terminable by either party before end of specified term unless power reserved in contract); MacNeil v. Minidoka Memorial Hosp., 701 P.2d 208, 209 (Idaho 1985) (person hired for set duration is not employed at will); Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875, 879 (Minn. Ct. App. 1985) (job termination agreement between employer and employee precludes either party from terminating at will).

28. *See* Griffin v. Erickson, 642 S.W.2d 308, 310 (Ark. 1982) (when employment contract is for specific term, neither party may validly terminate prematurely unless for cause or by mutual assent); Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 726 (Ct. App. 1980) (employer liable for breach of contract damages if termination occurs in violation of specific agreement between employer and employee); *see also* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 924 (Ct. App. 1981) (discussion of contract limitations affecting termination rights under employment at-will doctrine).

29. *See, e.g.*, Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 726 (Ct. App. 1980) (public policy exception to at-will rule discussed); Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489, 491-92 (Ky. 1983) (company policy plus oral representations to employee altered employer's right to fire as he chooses); Arie v. Intertherm, Inc., 648 S.W.2d 142, 149 (Mo. Ct. App. 1983) (court recognizes plaintiff's right to bring retaliatory discharge action when plaintiff was fired for exercising rights under worker's compensation law). *See generally* Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 223-27 (1973) (cases discussed which gave rise to need for exceptions to employment at-will rule); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 369 (1974) (summing up factors which give rise to exceptions to general at-will rule).

30. *See* Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 808 (D. Colo. 1983) (federal court cites recent trend in law for labor contracts, by instruments such as handbooks, to be implied between employer and employee); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1263-64 (N.J. 1985) (court cites judicial schism on handbook issue as being caused by differing contractual analyses and divergent attitudes adopted by state courts).

vague policy statements to detailed provisions on severance pay, raise allowances, vacation and pension plans, or termination procedures.[31] In some cases, the manual is relied upon repeatedly throughout the course of employment,[32] but in other instances the handbook is shelved and seldom used.[33] Some employers require the employee's signature upon the manual.[34] There are also cases where the handbook is not distributed to the worker until well past his hiring date.[35] The manual's contents, language, time of distribution, and frequency and manner of use are the variables which courts review when determining the effect of a personnel manual on the employment at-will relationship.[36]

Judicial interpretation of a handbook exception to the at-will rule breaks down into two views. First, there are courts which apply a traditional form

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31. *See, e.g.*, Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (demotion procedures set out in company's policy manual); Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 59 (Idaho 1977) (pension plan and vacation provisions of employer contained in employment handbook); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275, 277 (S.D. 1983) (detailed termination practices set out in company handbook); *see also* Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 807 (D. Colo. 1983) (employment manual incorporates furlough provisions regarding employee's job placement); Ferraro v. Koelsch, 368 N.W.2d 666, 669 (Wis. 1985) (example of handbook provisions stipulating disciplinary procedures).

32. *See, e.g.*, MacNeil v. Minidoka Memorial Hosp., 701 P.2d 208, 208 (Idaho 1985) (hospital adopts handbook provisions as part of operations); Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (state agency holds handbook out as representation of procedure by which agency runs); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984) (handbook recognized as tool by which employer exercises substantial control over work force).

33. *See* Reynolds Mgf. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (court finds handbook provisions as general guidelines which do not contain sole method of company's operation).

34. *See* Ferraro v. Koelsch, 368 N.W.2d 666, 669 (Wis. 1985) (employee required to sign last paragraph of handbook). At the time of his hiring, plaintiff was instructed to read the forty-eight page employment manual and sign the statement which indicated he had read and understood the provisions within the manual. *See id.*

35. *See, e.g.*, Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 122 (Mo. Ct. App. 1985) (handbook issued after employee began work for employer); Southwest Gas Corp. v. Ahmad, 668 P.2d 261, 261 (Nev. 1983) (formal delivery of personnel manual takes place after employee commenced work); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 704 (Wyo. 1985) (mine employees received employment handbook six months after job begun).

36. *See* Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 852 (2d Cir. 1985) (court reviewed language of handbook and found provisions limited employer's right to terminate at will); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445-46, 457 N.Y.S.2d 193, 197 (1982) (court looks to assurances made in handbook, frequency with which handbook used and reliance by employee relative to handbook terms when determining manual's contractual status). *See generally* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 365-66 (1974) (advocates need to consider number of independent factors when deciding if handbook can create implied contract between employer and employee).

of analysis to the handbook problem[37] by dogmatically following the employment at-will rule.[38] Courts adhering to the at-will rule agree that if an employee is hired for an indefinite term then the employer may terminate the employee at will, no matter how contractual a handbook looks.[39] The second approach to the handbook dilemma is a re-appraisal of the traditional analysis. An increasing number of courts have adopted a progressive interpretation of employment at-will theory, thereby allowing a handbook to work an exception to the rule.[40] The exception has the effect of binding an employer to the provisions contained in the personnel manual.[41]

Progressive courts apply a different contractual review of the handbook.[42] A reformed use of contract principles justifies the incorporation of a personnel manual into the at-will labor contract.[43] To provide a clear discussion of

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37. *See, e.g.*, Sullivan v. Heritage Found., 399 A.2d 856, 860 (D.C. 1979) (no contract for definite term of employment means employee may be fired at election of employer); Nelson v. M & M Prod. Co., 308 S.E.2d 607, 608 (Ga. Ct. App. 1983) (documents relied upon by plaintiff in wrongful discharge action only general policies which did not define term of service; therefore, employee could be fired at will); Terrio v. Millinocket Community Hosp., 379 A.2d 135, 137 (Me. 1977) (employer's policy statement does not establish definite tenure of employment; therefore, plaintiff could be fired at employer's discretion). *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980) (discussion of development of traditional employment at-will rule).

38. *See* Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (plaintiff's failure to allege she was hired for specific period of time precluded recovery). The court not only prevented plaintiff from recovering damages, it went so far as to say plaintiff failed to state a viable cause of action. The opinion stated, "there is no wrongful discharge when an employee hired without a fixed term or other contractual prerequisite to termination is fired." *See id.*

39. *See* Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096-97 (Del. 1982) (despite fact that handbook contained provisions on numerous company policies and procedures, it did not define term of employment; therefore, employment at-will relationship unaltered).

40. *See, e.g.*, Staggs v. Blue Cross, Inc., 486 A.2d 798, 803 (Md. Ct. Spec. App. 1985) (provisions in handbook properly expressed and accepted by employee to become part of employment contract); Forrester v. Parker, 606 P.2d 191, 192 (N.M. 1980) (policy manual sufficiently governed employment relationship as to become part of labor contract); Flemming v. Kids & Kin Head Start, 693 P.2d 1363, 1365 (Or. Ct. App. 1985) (handbook may be incorporated into employment agreement as part of contract).

41. *See* Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984) (federal court, applying Oklahoma law, finds sufficient cause to bind employer to provisions contained in handbook).

42. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892-94 (Mich. 1980) (progressive contractual analysis developed by court). *But see* Johnson v. National Beef Packing Co., 551 P.2d 779, 782-83 (Kan. 1976) (traditional contractual analysis finds handbook nothing more than unbinding policy statement by employer to employee).

43. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 628-29 (Minn. 1983) (reformed method of contractual analysis holds sufficient consideration provided by employee to incorporate handbook into employment contract). *See generally* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351-56 (1974) (discussion of consideration element as it affects employment at-will rule).

the contractual analysis adopted by the two disparate views, however, it is important to understand the initial point of separation between traditional and progressive thought. This separation is best illustrated by the position both sides take over the issue: Is employment at-will a hard and fast rule or merely a rule of construction subject to amendment?[44]

B. *The Traditional Viewpoint: Employment At-Will Is a Substantive Rule of Law*

John Oppenheimer had a job with Mead Johnson & Company for ten years.[45] Oppenheimer was hired as a machinist for an indefinite length of time.[46] One day, while on the job, he cut out the thumb sections from a pair of company-owned work gloves.[47] Oppenheimer was suspended and later terminated because of this act.[48] In the wrongful discharge suit brought against his former employer, Oppenheimer alleged that Mead Johnson's employee handbook contained provisions which limited the company's right to fire him at will.[49] The Indiana appellate court, ruling on the case, summarily rejected Oppenheimer's argument because, under the employment at-will rule, any contract of unspecified length is terminable at the election of either party.[50] The court stated: "Employee handbooks are immaterial without an enforceable agreement between the employer and employee of employment for a definite duration."[51] Mead Johnson fired Oppenheimer after ten years of service without incurring any liability.[52]

This case illustrates the harshness inherent in the traditional employment at-will analysis. Many courts strictly adhere to the at-will rule which translates into cursory judicial review.[53] This judicial review focuses upon the

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44. *See* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (adoption of employment at-will rule creates a presumption either party can terminate at will but is rebuttable if evidence to the contrary present). *But see* White v. Chelsea Indus., Inc., 425 So. 2d 1090, 1091 (Ala. 1983) (strict adherence to at-will rule means if no limit placed upon duration of employment, employment is at will and terminable at either party's discretion).

45. *See* Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 669 (Ind. Ct. App. 1984).

46. *See id.*

47. *See id.* The gloves Oppenheimer cut up had been issued to a fellow employee. *See id.*

48. *See id.* Oppenheimer was suspended for one day without pay. The company charged him with destruction of company property. *See id.*

49. *See id.* at 671. Oppenheimer argued that his employee handbook included certain "expectations of the parties" which led him to believe his employment was not at will. *See id.*

50. *See id.*

51. *Id.*

52. *See id.* Due to Oppenheimer's at-will status, Mead Johnson could have discharged him at any time and for any reason, regardless of its triviality. *See id.*

53. *See, e.g.*, Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1097 (Del. 1982) (court's brief analysis of handbook concludes: "The *Booklet* does not grant to any employee a specific term of employment and does not, therefore, alter plaintiff's 'at-will' employment status.");

existence of a contract for an indefinite term of service.[54] If an employer has not obligated himself to retain an employee for a set time period, then there is no promise of continued employment.[55] Absent any such promise, the employer is free to terminate the employment at will, as may the employee.[56] Consequently, a handbook issued to a worker which does not define a term of service may not act to legally bind an employer, regardless of its contents.[57] The handbook cannot alter an employer's rights under the employment at-will rule.[58]

The rigid application of the rule, that contracts of indefinite duration are

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Sullivan v. Heritage Found., 399 A.2d 856, 860 (D.C. 1979) (handbook did not define term of employment; therefore, employee legitimately dismissed pursuant to at-will rule); Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (court's contractual analysis of handbook's effect on at-will termination rights centers solely upon whether handbook states fixed term of employment).

54. *See, e.g.*, Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (handbook did not fix term of employment; therefore, employment contract only represented indefinite general hiring); Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (plaintiff's failure to allege employment was for definite time period was fatal to her wrongful discharge action); Edwards v. Citibank, 418 N.Y.S.2d 269, 270 (N.Y. Sup. Ct. 1979) (employment manual did not contain definite duration of job; therefore, insufficient to constitute contract with employer).

55. *See* Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 151 (Neb. 1980) (absent employer's promise employment is for specific time; at-will contract only binds employer to pay for services rendered). The court held Mau's dismissal from his job of twenty-eight years was nonactionable because employment manuals did not act to obligate the employer in any way. *See id.*; *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 900 (Mich. 1980) (initial and only elements of contract are employer's promise to pay and employee's reliance upon this promise). The employee's reliance upon the employer's promise to pay for services rendered is sufficient consideration to create the employment at-will contract. *See id.*

56. *See* White v. Chelsea Indus., Inc., 425 So. 2d 1090, 1090-91 (Ala. 1983) (indefinite term of employment cannot alter the general common law rule that employee terminable at will); *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 900 (Mich. 1980) (without limitation upon at-will employment, employer does not relinquish discretionary right to terminate). The limitation discussed by the court was in the form of additional consideration supplied by the employee which in turn would make the manual binding upon the employer. *See id.*

57. *See* Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (court assumes handbook part of employment contract but still upholds employee's dismissal because handbook does not contain term defining duration of employment). The terminated employee's contention that the handbook created a unilateral contract with his employer was left unaddressed by the court because the employee had his job at will. *See id.*

58. *See* Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983) (court holds settled law that contract for indefinite length terminable by choice of either party). The court had "serious reservations as to the advisability of relaxing the requirement of definiteness in employment contracts;" thus, the judges believed that ample support existed to uphold the general at-will rule. *See id.*; *see also* Edwards v. Citibank, 418 N.Y.S.2d 269, 270 (N.Y. Sup. Ct. 1979) (court holds rule that contract of undetermined length is terminable at will by either party is "hornbook law.").

terminable at will, leads to one of three results, all of which deny the handbook any contractual significance.[59] First, the court may hold that the employer was at liberty to terminate the employee at any time and for any reason.[60] This finding is usually supported by the absence of a labor contract for a definite duration.[61] Second, state appellate courts may hold that it is not within their province to effectuate a change in the traditional employment at-will rule.[62] Finally, some state courts have found that there was sufficient compliance with handbook provisions so as to prevent employer liability from arising, thereby rendering the handbook issue moot.[63] Jurisdictions adopting any one of these positions uphold the precedent that employment at will is a substantive rule of law which should remain unmodified by personnel manuals.[64] The application of this rule has been under con-

59. *See, e.g.*, Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479, 1481-82 (11th Cir. 1984) (settled law in at-will area dictates that employment contracts of unspecified length can be ended by either party at any time and for any reason); Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981) (prerogative to alter employment at-will rule lies with legislature or supreme court, not lower courts); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (court holds employee was legitimately fired in compliance with handbook provisions).

60. *See* Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982) (contract for unspecified duration is terminable at will of either party).

61. *See id.* Court held that lack of contract provision defining term of employment prevents any action for wrongful discharge from arising. *See id.*

62. *See, e.g.*, Graves v. Anchor Wire Corp., 692 S.W.2d 420, 422 (Tenn. Ct. App. 1985) (incorporation of handbook into labor contract effects excessive change in at-will doctrine; therefore, such action should be left to higher judicial authority or state legislature) (citing *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981)); Whitaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981) (due to exception in at-will doctrine handbook would create if given contractual status, court decides prerogative to change law must lie with supreme court or legislature of state); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (policy considerations behind change in existing at-will law dictate deference to Texas Supreme Court on handbook issue).

63. *See* Wyman v. Osteopathic Hosp., 493 A.2d 330, 334 (Me. 1985) (three-step dismissal procedure contained in manual was validly circumvented in manner pursuant to other manual provision). The employer's manual provided that the process outlined for dismissal could be supplanted if "serious misconduct" was found on the part of an employee. Such behavior was present in the plaintiff's negligent act. Therefore, the discharge procedure could legitimately be ignored. *See id.*; *see also* Reynolds Mgf. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (court finds ex-employee's behavior to constitute "insubordination" as defined in handbook; therefore, circumvention of handbook's dismissal procedures valid).

64. *See, e.g.*, Sullivan v. Heritage Found., 399 A.2d 856, 860 (D.C. 1979) (summary judgment against employee upheld because manual insufficient to work exception to at-will doctrine); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 268 (Fla. Dist. Ct. App. 1983) (handbook argument creates no justification for departure from traditional principles that certainty and definiteness are required in terms of employment contract); Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (manual which does not define length of

stant debate.[65] Courts throughout the country have been reappraising the value of the employment at-will rule; however, some startling changes in the law have taken place.

C. *The Progressive Viewpoint: Employment At-Will Is Merely a Rule of Construction*

Charles Toussaint was hired for a middle-management position with Blue Cross & Blue Shield of Michigan.[66] There was no written contract and no specified term of employment.[67] After five years of work, Blue Cross fired Toussaint.[68] The ex-employee brought a wrongful discharge action against his former employer, alleging that specific discharge procedures contained in a personnel manual were not followed in his dismissal.[69] Toussaint contended that such procedures were part of his employment contract.[70] Blue Cross argued that Toussaint was hired for an indefinite period, and therefore, he could be released at his employer's discretion regardless of any handbook provision.[71]

The Michigan Supreme Court rejected this argument asserting that "the

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employment is unable to modify rights granted employer and employee under employment at-will rule).

65. *See, e.g.*, Staggs v. Blue Cross, Inc., 486 A.2d 798, 801 (Md. Ct. Spec. App. 1985) (court notes lack of uniformity in at-will labor law concerning handbook issue); Woolley v. Hoffman-LaRoche, Inc., 491 A.2d 1257, 1262-64 (N.J. 1985) (court cites cases on both sides of handbook issue); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1085 (Wash. 1984) (court recognizes a number of states have carved exceptions to traditional at-will rule). *Compare* Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J. L. REF. 449, 449 (1983) (author espouses theory that traditional employment at-will rule permits employers to manipulate employee's expectations of job security) *with* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 372 (1982) (author contends handbook exception severely undercuts at-will rule causing danger of instability to employer-employee relations). *See generally* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1444-46 (1975) (author discusses dangers presented by strict adherence to employment at-will doctrine).

66. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 883 (Mich. 1980) (Toussaint brought action against former employer in conjunction with second plaintiff similarly situated).

67. *See id.* at 890.

68. *See id.* at 883.

69. *See id.* at 884. Toussaint contended that his employer's assurance that he would remain employed as long as he did the job was not upheld when he was fired. *See id.*

70. *See id.* The manual given to Blue Cross employees stated that it was company policy to release tenured employees for " 'just cause only.' " Toussaint maintained he could only be fired, therefore, for just cause. *See id.*

71. *See id.* at 885. Blue Cross contended Toussaint provided no consideration to ripen the handbook provisions into enforceable contract terms. Blue Cross further alleged that to contractually hold itself to the handbook provisions would unfairly imbalance termination rights in favor of Toussaint. *See id.*

'general' rule . . . concerning the terminability of a hiring deemed to be for an indefinite term is not a substantive limitation on the enforceability of employment contract but merely a rule of 'construction.' "[72] The court was not disputing the employment at-will rule,[73] but rather stating that it should not be blindly applied regardless of the circumstances.[74] Though Toussaint was hired for an unspecified term, the manual he was given modified the employment at-will labor contract by restricting Blue Cross' discretion in terminating its employees.[75]

Courts which have abandoned the employment at-will doctrine refuse to mechanically apply the principle that a labor contract which states no duration is terminable at will by either party.[76] A number of jurisdictions hold that this assertion misstates the employment at-will rule.[77] These jurisdictions contend that the existence of a definite employment term is only one part of the analytical scheme to be used when construing the rights and obligations of both parties under a labor contract.[78] Additional elements of con-

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72. *See id.* at 884. The court cited an earlier Michigan case for the proposition that the at-will rule was a rule of construction. *See id.* (citing *Lynds v. Maxwell Farms*, 273 N.W. 315, 317 (Mich. 1937)).

73. *See id.* at 894-95 (traditional employment at-will rule operates when no reasonable expectation of performance instilled in employee through personnel policies).

74. *See id.* at 885. The court finds the at-will rule to be helpful as a rule of construction when determining the intentions of contracting parties when they first entered the contract. *See id.*

75. *See id.* at 885, 892. The court concluded: "Blue Cross had established a company policy to discharge for just cause only, pursuant to certain procedures, had made that policy known to Toussaint, and thereby had committed itself to discharge him only for just cause in compliance with the procedures." *Id.* at 892.

76. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 924 (Ct. App. 1981) (court questions fundamental at-will rule). The California appellate court took a progressive position when it stated, "[a] contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit. . . ." *Id.*; *see also* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1264 (N.J. 1985) (court replaces traditional at-will analysis with examination focusing upon reasonable expectations of employee). Both of these views undercut the rule adopted by courts applying a traditional at-will analysis. *See* Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344, 345 (E.D. Mich. 1980) (both parties to employment at-will contract must share equal right to discretionary termination).

77. *See, e.g.*, Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 727 (Ct. App. 1980) (when implied condition exists in contract, mutual termination rights of parties to at-will agreement can be limited); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 884 (Mich. 1980) (terminability of employee hired under at-will agreement is not employer's absolute right merely by virtue of contract); Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983) (traditional interpretation of employment at-will theory is overly mechanical to point it misapplies function of rule).

78. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (court surpasses analysis based solely upon existence of definite term provision to look at totality of parties' employment relationship). The relevant facts cited by the court included: the promo-

sideration and reliance must also be examined when passing upon the contractual status of an employment handbook.[79]

The progressive view does not accept the employment at-will rule as substantive law which must be followed.[80] On the contrary, courts which allow handbooks to be incorporated into the labor contract warn against the danger of overemphasizing the requirement of a definite term of service.[81] Basing the entire decision in a wrongful discharge case upon the fact that an employee was hired for an unspecified length of time leads to inequitable results.[82]

To avoid the unfair nature of a mechanical application of the employment at-will rule, progressive courts have emphasized the need to effectuate the intent of parties who enter into a labor contract.[83] In the midst of this

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tions and commendations the employee received, the lack of criticism of the employee's work product, assurance made to the worker, and the employer's approved policies. *See id.*; *see also* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197-98 (1982) (inducement, reliance, and assurance are areas warranting examination besides provision for specific period of employment).

79. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1265 (N.J. 1985) (when evaluating handbook status in light of common law rules, court emphasizes reasonable expectations of employee concerning manual's effect on at-will situation); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (handbook acts as inducement for laborer to continue work, thereby creating consideration to make handbook provisions binding).

80. *See* Drzewiecki v. H & R Block, Inc., 101 Cal. Rptr. 169, 174 (Ct. App. 1972) (possibility employer and employee contracted to limit employment rights means general at-will rule is not substantive, only constructive); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980) (employment at-will rule helpful as rule of construction, but its application goes no further).

81. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925 (Ct. App. 1981) (mechanical application of at-will contract rules may eclipse intention of parties). The court negotiated the danger of a formalistic approach to the handbook issue by embracing the view that independent consideration is a rule of construction, not of substance. *See id.*; *see also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983) (simply because agreement is of unspecified duration does not preclude limitation of employers' discretion to terminate).

82. *See, e.g.*, Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479, 1481 (11th Cir. 1984) (plaintiff's discharge after sixteen years with same company upheld); Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 669 (Ind. Ct. App. 1984) (dismissal of employee upheld for cutting thumbs out of company-owned work gloves); Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 238, 241 (N.J. 1952) (employee induced by employer to play baseball on company team resulting in injury and knee cap amputation, yet employee's discharge upheld under employment at-will rule).

83. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (agreement of parties to employment contract is shaped by understanding each receives by other's action); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 893 (Mich. 1980) (Blue Cross Manual makes promises which are justifiably relied upon by employees); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1264 (N.J. 1985) (manuals distributed providing certain benefits as incident to employment should be construed in accordance with legitimate expectations of employees).

change in direction of judicial analysis there exists a reassessment of contract issues which have long dominated the employment at-will theory.[84] To appreciate the changes implemented by contemporary thought in at-will employment law, the first task is to understand the contract principles which underlie a traditional analysis of the effect an employment manual has upon the employer-employee relationship.

III. CONTRACTUAL ANALYSIS UNDER THE TRADITIONAL VIEWPOINT

A. *Lack of Consideration Is Fatal to Handbook*

The traditional interpretation of a handbook's effect upon at-will employment focuses upon the principle of consideration.[85] The distribution of a personnel manual from an employer to an employee can only become a binding contract if the employee furnishes some type of consideration independent from that of his job performance.[86] The initial consideration involved in an employment at-will situation is represented by the compensation paid to the employee in exchange for the services rendered to the employer.[87] The parties both receive a benefit from the arrangement, yet neither is legally bound by it.[88] The issuance of a manual outlining termination practices

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84. *See* Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 808 (D. Colo. 1983) (reassessment of traditional at-will analysis evidenced by courts' increased willingness to regulate, but not dominate, employer-employee relationship). As courts begin getting more involved in the work relationship, the traditional rules behind at-will theory require modification. *See id.*; *see also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983) (court attacks "indefinite duration" rule as arbitrary and mechanical).

85. *See, e.g.*, Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (employment at-will doctrine requires additional good consideration for manual to be legally binding (citing 53 AM. JUR. 2D *Master and Servant* § 32 (1970)); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (new consideration required to modify employment agreement to include policies contained in manual); Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 84 (N.C. Ct. App. 1985) (when additional consideration supplied by employee, contract for indefinite term may be changed to restrict terminability of employee).

86. *See* Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (traditional interpretation of employment at-will doctrine requires consideration other than that originally contracted for to make handbook part of labor agreement).

87. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 900 (Mich. 1980) (employee's reliance upon employer's promise constitutes sufficient consideration to create enforceable contractual duty); Bussard v. College of St. Thomas, Inc., 200 N.W.2d 155, 161 (Minn. 1972) (original consideration for employment contract evidenced by agreement to render service); Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 150 (Neb. 1980) (contracted labor represents consideration making initial employment agreement binding (citing 53 AM. JUR. 2D *Master and Servant* § 32 (1970)).

88. *See* Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 150 (Neb. 1980) (labor contract provides employer with work product and employee with remuneration, yet either party can terminate agreement (citing 53 AM. JUR. 2D *Master and Servant* § 32 (1970)).

should in no way imbalance this relationship.[89] If a handbook is held to be part of the labor agreement, then additional consideration from the employee is necessary.[90]

To make a handbook part of an at-will labor contract without such independent consideration would result in obligating the employer to follow dismissal policies set out in the manual while the employee retained full discretion in his right to terminate employment.[91] If a manual were allowed to work this inequity upon the labor relationship, one would be hard-pressed to find an employer willing to issue handbooks which would bind him to follow specific dismissal procedures while the employee could quit at will without any breach of contract liability.[92] Thus, the need for some additional or independent consideration has been the major impediment preventing the incorporation of policy manuals into the employment contract.[93]

B. *Lack of Mutuality Is Fatal to Handbook*

Courts adopting the traditional approach further support their analysis of the consideration issue by stressing the unilateral nature of employment handbooks.[94] An employer who issues a manual to his employees has made

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89. *See* Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 84-85 (N.C. Ct. App. 1985) (no additional consideration present to make dismissal procedures contained in employment manual obligatory upon management); Richardson v. Charles Cole Memorial Hosp., 466 A.2d 1084, 1085 (Pa. Super. Ct. 1983) (absence of bargaining for handbook terms makes handbook mere gratuity on part of employer). *But see* Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (additional consideration found in employment relationship, thereby binding employer to dismissal procedure established in manual).

90. *See* Rabago-Alvarez v. Dart Indus., Inc., 127 Cal. Rptr. 222, 225 (Ct. App. 1976) (consideration of work for payment is insufficient to support binding employer to additional promises he may make).

91. *See* Edwards v. Citibank, 425 N.Y.S.2d 327, 328-29 (App. Div. 1980) (distribution of employment manual cannot restrict one party's right to terminate while leaving other party total discretion to terminate); *see also* Note, *Employee Handbooks and Employment At-Will Contracts*, 1985 DUKE L.J. 196, 202 (mutuality of obligation requirement for valid contract is method which should prevent inequity in termination rights).

92. *See* Edwards v. Citibank, 425 N.Y.S.2d 327, 328-29 (App. Div. 1980) (if handbook incorporated into labor contract then right to terminate at-will is no longer mutual); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 906 (Mich. 1980) (Ryan, J., dissenting) (company cannot be obligated to policies contained in employment manual simply because copy of manual was distributed to plaintiff).

93. *See* Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (lack of employer's promise to keep employee for set term evidences want of consideration for binding employment agreement); Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (failure to meet requirement of additional good consideration prevents handbook from restricting employer's discretion to fire employee). *See generally* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 337-38 (1982) (discussing importance of consideration in handbook context).

94. *See, e.g.*, Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (hand-

a unilateral statement of company policy.[95] The company did not seek employee input or ratification of the terms nor did it restrict its discretion in modifying or withdrawing the policy statement.[96] Since all formulation and control is on the side of management, it is difficult to interpret handbooks as embodying any mutual obligation or as an express agreement with the employee.[97] The traditional analysis concludes that it is impossible for a handbook to ripen into a binding commitment when no meeting of the minds or mutuality of obligation exists.[98]

The traditional contract analysis was universally accepted by Texas courts until a few years ago.[99] Before continuing with a discussion of how the progressive viewpoint has reevaluated the traditional contract principles of consideration and mutuality, it is first helpful to understand how Texas adopted the at-will rule and what the current state of the case law is in the area.

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book represents unilateral statement of management policies because its provisions were not negotiated with employee); Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 150 (Neb. 1980) (no bargaining over manual's terms; therefore, employee benefits contained in it are mere gratuities); Walker v. Westinghouse Elec. Corp., 335 S.E.2d 79, 84 (N.C. Ct. App. 1985) (handbook only contains general guidelines to aid in administration of company policy).

95. *See* Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (distribution of manual after employee began work plus fact terms unbargained for is evidence manual represented unilateral policy statement); Williams v. Biscuitville, Inc., 253 S.E.2d 18, 20 (N.C. Ct. App. 1979) (unilaterally implemented handbook represents part of company policy which could be altered at employer's will).

96. *See, e.g.*, Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096-97 (Del. 1982) (contents of manual and its discretionary distribution are two elements evidencing its unilateral nature); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (policies of handbook could be changed at any time and for any reason by management); Williams v. Biscuitville, Inc., 253 S.W.2d 18, 20 (N.C. Ct. App. 1979) (policy in handbook amendable by employer).

97. *See, e.g.*, Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (unilateral nature of manual did not require employee consultation for modification); Edwards v. Citibank, 425 N.Y.S.2d 327, 329 (App. Div. 1980) (Kupferman, J., dissenting) (employer bank issued policy statements independent from employee approval); Richardson v. Charles Cole Memorial Hosp., 466 A.2d 1084, 1085 (Pa. 1983) (employer's unilateral act of issuing handbook did not satisfy "meeting of the minds" element needed for contract).

98. *See, e.g.*, Lieber v. Union Carbide Corp., 577 F. Supp. 562, 564 (E.D. Tenn. 1983) (conduct of parties and language of policy statement do not combine to constitute requisite meeting of the minds for allowing handbook contractual status); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983) (employer's policy statements do not normally give rise to contract rights absent explicit mutual assent of parties); Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (lack of mutually binding promises between employer and employee prevents handbook from becoming enforceable contract). *But see* Arie v. Intertherm, Inc., 648 S.W.2d 142, 153 (Mo. Ct. App. 1983) (handbook creates contractual rights in employee without evidence employer agreed to such effect).

99. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (court applies traditional at-will rule but notes possibility that exception to rule may exist).

IV. THE EVOLUTION OF THE TRADITIONAL EMPLOYMENT AT-WILL DOCTRINE IN TEXAS

The development of Texas case law applying the employment at-will rule is marked by a long and stable history.[100] In 1888, the Texas Supreme Court first adopted the general rule that a labor contract of unspecified length was terminable at the discretion of either the employer or employee.[101] The rule was later applied by numerous Texas courts.[102]

A Texas appellate court further defined the general rule by holding that inquiry into the motive behind an employee's discharge was irrelevant.[103] Pursuant to the employment at-will rule, the court held that both parties had the right to end the labor contract regardless of the reason for such termination.[104] The most recent Texas Supreme Court case utilizing a strict application of the at-will rule specifically spelled out the operative state law with language reminiscent of that used by the court ninety years earlier: "The rule which we regard as controlling is that contracts . . . which are indefinite in duration can be terminated at the will of either party."[105]

Since 1979, support for the uniform application of the employment at-will rule has been eroding. Appellate courts which once espoused the at-will rule are now handing down decisions which contain scant explanation for its

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100. *See, e.g.*, Watson v. Zep Mfg. Co., 582 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (court upholds employment at-will rule); Scruggs v. George A. Hormel & Co., 464 S.W.2d 730, 731 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (court applies at-will rule); Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 158-59 (Tex. Civ. App.—Austin 1935, writ ref'd) (employer not liable for damages for discharge when employee holds job pursuant to at-will rule).

101. *See* East Line & R. R. R. v. Scott, 72 Tex. 70, 73, 10 S.W. 99, 102 (1888). The court stated: "It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause." *Id.*

102. *See, e.g.*, Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (cites 93 year recognition of traditional at-will rule); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675-76 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (court cites cases consistently following employment at-will rule); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1982, no writ) (court recognizes at-will rule "well settled in Texas").

103. *See* Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 158-59 (Tex. Civ. App.—Austin 1935, writ ref'd) (court reasoned that motive behind employer's action immaterial when determining if cause of action exists).

104. *See id.* at 159. The court went as far as to say that even if the motive behind the discharge was evil the employee would still have no legal remedy. *See id.*

105. Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 390 (Tex. 1977) (court's opinion did not concern challenge to employment at-will rule directly; rather, case involved land deal). A more recent supreme court case exists which addresses the employment at-will rule; however, its treatment of the rule is quite different from this earlier case. *See* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

use.[106] Several Texas courts have delivered decisions which appear to follow the general rule only because judicial comity binds them to do so.[107] On a federal level, the United States Court of Appeals for the Fifth Circuit refused to create an exception to the rule; however, the court found that the policy considerations behind employment at will were "arguably outmoded."[108]

From 1983 to 1985, a series of three court decisions evolved from this state of judicial unrest which marked the end of the traditional application of the employment at-will rule in Texas.[109] In *Sabine Pilot Service, Inc. v. Hauck*,[110] the Texas Supreme Court recognized a public policy exception to the at-will rule.[111] In *Hauck*, an employee was discharged for refusing to comply with his employer's order despite the fact that such compliance would have violated federal law.[112] In the wrongful termination action brought by the fired employee, the court held that the plaintiff alleged a viable cause of action because the employer violated public policy by ordering the illegal act to be done.[113] Under *Hauck*, a valid legal remedy had been acknowledged in Texas which, for the first time, effectively limited an

106. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (court applies rule solely because past courts have); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675-76 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (court cites history of rule then applies it to case).

107. *See, e.g.*, Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676-77 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (court concludes that it is not in position to create new cause of action which would constitute exception to general rule); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (due to policy considerations involved, court abstains from modifying employment at-will rule); Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (court reasons it is improper forum in which to handle cause of action that may modify traditional at-will rule).

108. *See* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1056 (5th Cir. 1981) (maintenance of at-will rule penalizes individual for telling the truth). An employee of Goodyear was terminated after he refused to perjure himself in support of his employer's pending antitrust case. *See id.* at 1053.

109. *See, e.g.*, Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (court holds exception to at-will rule is possible); Johnson v. Ford Motor Co., 690 S.W.2d 90, 93 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (modification of general employment at-will rule possible); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (exception to at-will rule recognized in Texas).

110. 687 S.W.2d 733 (Tex. 1985).

111. *See id.* at 735. The court cited "changes in American society" as the cause behind the need to create a narrow public policy exception to the traditional employment at-will rule. *See id.*

112. *See id.* at 734. Michael Hauck was a deckhand for Sabine. Hauck was instructed by his employers to pump the bilges of a ship into surrounding water. When Hauck became aware that pumping the bilges into the water was illegal, he refused to continue the job. Sabine discharged Hauck for reasons it alleged were unrelated to the employee's refusal to pump out the bilge-water. *See id.*

113. *See id.* at 735. The court stated that public policy, as evidenced by criminal statutes, required an exception to the at-will rule. *See id.*

employer's termination rights under the employment at-will rule.[114]

The court's decision in *Johnson v. Ford Motor Co.*[115] created another exception to the general rule.[116] An ex-employee brought a wrongful discharge action against his former employer alleging that certain oral agreements made to him by the management acted to modify his employment at-will status.[117] The Eastland Court of Appeals accepted the former employee's argument and held that policy statements by an employer regarding its termination practices could be incorporated into the labor contract.[118] This incorporation effectively restricted the discharge power of the employer by allowing termination only for good cause.[119]

The third, and arguably most controversial, exception to the at-will rule was recognized in *Smith v. Kerrville Bus Co.*[120] The United States Court of Appeals for the Fifth Circuit held that a triable fact issue existed as to whether a worker's rule book could be deemed part of his employment agreement.[121] This holding meant that if a jury found an employment manual to be incorporated into an employee's labor contract, the provisions of such a manual would bind the employer.[122] In *Smith*, the rule book in question outlined certain proscribed conduct which, if violated, would be grounds for termination.[123] The court found that sufficient consideration

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114. *See id.* The court stressed that the public policy exception it created must be read very narrowly. A narrow interpretation meant that, at trial, the plaintiff must carry the burden to prove his discharge was the direct result of his refusal to commit an illegal act. *See id.*

115. 690 S.W.2d 90 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

116. *See id.* at 93. The court held oral promises from an employer to an employee could be contractually binding upon the employer. *See id.*

117. *See id.* at 92. Ford management personnel allegedly made statements to the plaintiff which assured him that dismissal would only be for good reason and that any disciplinary procedures implemented would be progressive in nature. *See id.* Plaintiff contended these representations expressly modified his at-will status and that Ford could only fire him with good cause. *See id.* at 92-93.

118. *See id.* at 93. The court held that if the former employee could show that oral agreements had modified his at-will employment contract then, despite a contract of indefinite service, he could obligate Ford to those representations. The opinion did not refute the general at-will rule but, rather, stated that the oral agreements made by Ford constituted specific contract terms which altered Ford's termination rights under employment at will. *See id.*

119. *See id.*

120. 709 F.2d 914 (5th Cir. 1983). Smith was discharged from his bus driving job with Kerrville for not reporting cash fares he received. *See id.* at 915. Though a collective bargaining agreement existed between the bus company and the drivers' committee, the court focused its attention upon the Drivers' Rule Book because it referred specifically to discharge and discipline topics. *See id.* at 919-20.

121. *See id.* at 920. Whether or not the parties to the employment contract intended the rule book to become part of the employment agreement was a question for the jury. *See id.*

122. *See id.* The court stated that the manual could cause an employee to reasonably expect his discharge would be for cause. *See id.*

123. *See id.* at 919-20. The provisions designating the proscribed behavior were held to

inured to the benefit of the Kerrville Bus Company through the distribution of its rule book.[124] Since employee consideration existed for the manual, the court held that, despite a contract of indefinite length, the bus company could not dismiss its employees at will but rather may be bound by the termination practices outlined in its rule book.[125] The controversy surrounding the Fifth Circuit's opinion in *Smith* is not due solely to the fact that the court altered the long standing at-will rule in Texas, but also because the federal court's position was totally incongruous with state case law.[126]

Three Texas appellate court cases have dealt with actions brought by at-will employees who alleged an employment manual could give rise to contractually enforceable duties upon an employer.[127] The opinions were uniform in their dismissal of the handbook action.[128]

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impart fair notice to Kerrville employees that violation of the term would be sufficient cause for discharge. *See id.*

124. *See id.* at 920. The driver's compliance with handbook provisions helped maintain peaceful labor relations between Kerrville and its employees. *See id.* In other jurisdictions, a benefit to the employer which is embodied in a work manual has been held as part of the consideration which makes a handbook binding upon an employer. *See, e.g.*, Leikvold v. Valley View Community Hosp., 688 P.2d 201, 205 (Ariz. Ct. App. 1983) (stability in work force created by issuing manual is ample consideration to support contract); Arie v. Intertherm, Inc., 648 S.W.2d 142, 153 (Mo. Ct. App. 1983) (handbook enhances employment relationship to point where it is reasonable to expect handbook is part of labor arrangement); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (benefits to employer when issuing manual can be sufficient consideration for contract formation).

125. *See* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (court's focus upon reasonable expectations and intent of parties involved gave rise to factors which created triable fact issue).

126. *Compare* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (opinion cites "industrial common law" as evidence employment manual binding upon labor and management) *with* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (without specific contract term in handbook, employment manual not binding upon employer or employee).

127. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (employee contended benefit booklets he received from employer created implied contract for employment); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1982, no writ) (plaintiff argues disciplinary provisions contained in manual are evidence of employer's intent to limit cause for firing employees); Hurt v. Standard Oil Co., 444 S.W.2d 342, 346 (Tex. Civ. App.—El Paso 1969, no writ) (ex-employee contended employment booklet provisions limited employer's right to fire under at-will rule).

128. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (employment booklet impliedly too general to become restriction on employer's right to fire at will); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (handbook does not represent express contract provision to original labor agreement; therefore, general at-will rule still applicable); Hurt v. Standard Oil Co., 444 S.W.2d 342, 346 (Tex. Civ. App.—El Paso 1969, no writ) (offer set out in employment booklet unintended as contract provision of set employment but rather inducement to work which does not alter at-will relationship).

In *Molder v. Southwestern Bell Telephone Co.*,[129] the most recent of the three cases, the plaintiff brought a wrongful discharge action against his former employer.[130] Dudley Molder was hired at the age of eighteen on the basis of an oral agreement specifying no definite term of employment.[131] After twenty-eight years of service he was discharged without notice or cause.[132] Molder asserted that he was given employment booklets which outlined resignation and retirement policies and that these booklets became an implied part of his labor contract with Southwestern Bell.[133] He contended that representations made to him through the manuals acted to limit the right of his employer to fire him at will.[134] The court reasoned that the booklets' contents were too general in scope to represent contract terms and the provision in question clearly implied a discretionary dismissal arrangement.[135] The opinion held that the handbook was insufficient to constitute a contract to modify the traditional at-will relationship.[136]

While the *Molder* decision fell within the long line of Texas cases applying the traditional at-will rule,[137] the court's holding in *Smith* recognized a handbook exception on the federal level to the at-will rule in Texas.[138] The

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129. 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

130. *See id.* at 176. In addition to a wrongful discharge suit, the plaintiff also brought actions against his former employer alleging breach of employment contract, fraud, and misrepresentation. *See id.*

131. *See id.* Though no term of employment was defined in Molder's labor agreement, he alleged that on several occasions he received assurances from his superiors that he would be retained as long as his duties were performed satisfactorily. *See id.*

132. *See id.* at 176-77. Molder filed suit two years after his discharge in which a summary judgment to Southwestern Bell was granted. *See id.* at 176.

133. *See id.* at 176-77. Molder also contended that the lower court erred in automatically applying the at-will rule when the booklets presented the possibility of an exception to the rule. *See id.* at 177.

134. *See id.* at 176-77. Molder cited many cases to the court which recognized exceptions to the traditional employment at-will rule. *See id.* at 177. The case law used by Molder, however, was in out-of-state jurisdictions. *See id.*

135. *See id.* Since the handbook terms could not represent a contractual duty imposed upon Southwestern Bell, the court held that Molder submitted insufficient evidence to combat summary judgment. *See id.*

136. *See id.* The court did recognize that it was powerless to hold other than it did due to precedent established in Texas law concerning the employment at-will rule. *See id.*

137. *See, e.g.*, Watson v. Zep Mfg. Co., 582 S.W.2d 178, 179 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (employment at-will rule held to be supportive of statutes, public policy, and common law of state); Hurt v. Standard Oil Co., 444 S.W.2d 342, 346 (Tex. Civ. App.—El Paso 1969, no writ) (issuance of employment booklets ineffective to modify traditional at-will rule); Advance Aluminum Castings Corp. v. Schulkins, 267 S.W.2d 174, 180-81 (Tex. Civ. App.—Beaumont 1954, no writ) (plaintiff could not prove employment was for specific duration; therefore, job held at employer's will).

138. *See* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (employment handbook has potential of limiting termination rights of employer under traditional at-will rule); *see also* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1056 (5th Cir. 1981)

opposing positions can be explained by the reformed contract analysis adopted by the Fifth Circuit in *Smith*.[139] This new interpretation has been gaining widespread acceptance throughout the United States by courts which are facing the handbook issue, and now is filtering into the Texas legal arena for the first time.

V. CONTRACTUAL ANALYSIS UNDER THE PROGRESSIVE VIEWPOINT

A. *Additional Consideration Exists to Support the Handbook as a Contract*

A progressive view of the contract principles underlying the handbook issue can be defined as one which maintains that an employee's continued service after a manual has been issued constitutes ample consideration to make the document binding.[140] The progressive position is reformatory in nature because it has found the additional consideration the traditional approach believed to be lacking and has reevaluated its contract analysis accordingly.[141] An employee was originally thought to be getting something for nothing if he could bind his employer to termination procedures set out in a handbook while remaining free to quit at will.[142] A reassessment of this

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(second federal case which suggests potential need to permit exceptions to general employment at-will rule).

139. *See* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (evidence of mutuality present to give rise to contractual obligation through handbook). *But see* Molder v. Southwestern Bell Tel. Co., 665 S.W. 2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (despite handbook language concerning dismissal procedures, employment manual cannot be express contract which is required to alter at-will rule).

140. *See, e.g.*, Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 852 (2d Cir. 1985) (employees give good consideration to make handbook binding contract by continuing to render services after handbook issued); Corbin v. Sinclair Mktg., Inc., 684 P.2d 265, 267 (Colo. Ct. App. 1984) (termination provisions in handbook become binding contract with employee when supported by consideration of employee's continued service); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (employee's refusal to accept employment elsewhere is sufficient reliance to constitute consideration for handbook). *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1819-20 (1980) (continued work by employee is ample consideration to make handbook part of employment contract); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351-56 (1974) (discussion of various ways employee can provide independent consideration to create contract out of handbook).

141. *Compare* Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (good consideration for job security handbook provisions is employee's continued service despite freedom to leave) *with* Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (contract to give definite period of employment must be supported by consideration in addition to services rendered; but handbook does not meet this contract requirement).

142. *See* Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (requirement that employer and employee give mutual promises to bind one another to contract). *See generally* Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract The-*

logic shows that an employer secures an "orderly, cooperative and loyal work force"[143] when distributing and encouraging employee compliance with manual provisions.[144] This benefit is evidenced by a worker's continued service pursuant to handbook guidelines.[145] The anticipated result of issuing a handbook is a smooth-running and organized business operation.[146] Under the progressive view, it is no longer true to say an employer receives no consideration for the promises he may make in an employment handbook.[147]

Once a court recognizes the existence of independent consideration, a binding contract can be found under unilateral,[148] bilateral[149] or estoppel[150]

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ory, 16 U. MICH. J.L. REF. 449, 457-59 (1983) (pointing out traditional courts focus upon finding sufficient consideration to support handbook as contract).

143. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (court reasons employee receives benefit just as employer does through reassurance contained in handbook that employee will be treated fairly).

144. *See, e.g.*, Leikvold v. Valley View Community Hosp., 688 P.2d 201, 205 (Ariz. Ct. App. 1983) (employer's representations in handbook return benefit to issuer of smoother business operation); Kaiser v. Dixon, 468 N.E.2d 822, 831 (Ill. Ct. App. 1984) (employer intends to better personal business when distributing policy manual to worker); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (employer benefitted by issuance of handbook to work force).

145. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (continued service benefit to employer because employee has right to quit after handbook distributed); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985) (employee who intends continued employment after handbook delivered to act as consideration has better chance of making handbook contract).

146. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (employer not obligated to establish personnel policies, but when employer does make policies known to workers, it is done in hopes of enhancing business relationship).

147. *See* Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (policies contained in handbook act as inducement for employee to continue work; therefore, benefit accrues to employer). Once the court reasoned that there was some type of beneficial interest accruing to an employer through a handbook, this constituted "sufficient consideration for a contract." *See id.* (citing *Laibly v. Halseth*, 345 P.2d 796, 799 (Wyo. 1959) and *Houghton v. Thompson*, 115 P.2d 654, 658 (Wyo. 1941)); *see also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (court states adequacy or amount of consideration provided to employer unimportant). The main issue for resolution was whether any consideration actually existed to make the handbook contractually binding. *See id.* at 628-29. *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1819-20 (1980) (arguing earlier case law addressing handbook issue used "one-sided and confused application of the consideration doctrine"); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 351-56 (1974) (discussing types of added benefits to employer constitute independent consideration for handbook).

148. *See* Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (personnel manual constitutes offer of unilateral employment contract to employee). *But see* Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 886 (10th Cir. 1985) (holding terms of handbook too indefinite to be part of employment contract).

149. *See* Ferraro v. Koelsch, 368 N.W.2d 666, 671-72 (Wis. 1985) (mutual promises with

contract principles. To create a unilateral contract out of the handbook, there must be language within it which conveys an offer of job security to the employee or language which can be legitimately interpreted as extending such an offer.[151] The type of job security most often referred to deals with the termination practices adopted by a company.[152] The handbook offer becomes binding when an employee accepts the offer by his continued job performance when he is under no obligation to remain.[153] Once an offer and acceptance is found, courts have enforced the provisions of an employment manual as terms of a unilateral contract.[154]

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handbook, representing employer's promise, are sufficient to create bilateral contract between parties).

150. *See* Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (provisions set out in employer's manual must be used by employer); *see also* Mers v. Dispatch Printing Co., 483 N.E.2d 150, 155 (Ohio 1985) (oral promises made from employer to employee regarding job security found binding upon employer).

151. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (applying unilateral contract analysis court held: "An employer's offer of a unilateral contract may very well appear in a personnel handbook"); Staggs v. Blue Cross, Inc., 486 A.2d 798, 803-04 (Md. Ct. Spec. App. 1985) (employer's policy statements, when properly expressed to employee create contractual duties); *cf.* Tobias v. Montgomery Ward & Co., 362 N.W.2d 380, 382 (Minn. Ct. App. 1985) (recognizing possible effect of proper communication of offer to employee, although no such communication occurred in case); Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875, 879 (Minn. Ct. App. 1985) (offer could be directly communicated to employee through handbook).

152. *See, e.g.*, Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984) (handbook states policy that employee cannot be discharged without cause); Staggs v. Blue Cross, Inc., 486 A.2d 798, 799-800 (Md. Ct. Spec. App. 1985) (memorandum sent out to employees outlined rule to be followed when terminating worker); Arie v. Intertherm, Inc., 648 S.W.2d 142, 153 (Mo. Ct. App. 1983) (handbook contains job security provisions in form of "Probationary Period" language).

153. *See* Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976). A contract offer contained in an employment manual is sufficiently accepted by the employee when the worker foregoes his option to quit and continues the performance of his duties. *See id.*; *see also* Wagner v. Sperry Univac, 458 F. Supp. 505, 520 (E.D. Pa. 1978). The Wagner court utilized an instructive hypothetical explaining how continued service constitutes acceptance of a unilateral contract. *See id.* The idea that continued job performance can act as acceptance of a unilateral contract is not a new idea to employment contract construction. *See* Dahl v. Brunswick Corp., 356 A.2d 221, 224 (Md. Ct. App. 1976) (citing numerous authorities for "acceptance" concept).

154. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 893 (Mich. 1980) (adopting approach that acceptance of unilateral employment contract can be evidenced by continued job performance); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (once requirements for unilateral contract met, handbook can modify original employment contract); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1087 (Wash. 1984) (when contract principles of offer, acceptance, and consideration present handbook can be incorporated into employment agreement). *See generally* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 367-72 (1982) (discussion of judicial trend to recognize handbooks as creating contractual duties).

A handbook has been held to create a bilateral contract when the employee expressly acknowledges the handbook policies to be a condition of his continued employment.[155] In *Ferraro v. Koelsch*,[156] a hotel issued a manual to its employees which contained promises of termination procedures.[157] The management's intent was to elicit a reciprocal promise of compliance from the employee.[158] The Wisconsin Supreme Court held that once a worker's express return promise of obedience to handbook provisions was given, a bilateral contract arose between the employer and employee.[159] The court reasoned that a promise for a promise was sufficient consideration to support a bilateral contract.[160]

A few states which have applied the progressive contract approach have held handbook terms to be binding upon an employer under the theory of promissory estoppel.[161] For a manual to create a contractual relationship under the estoppel theory, an employer must hold the handbook out as an embodiment of its policy.[162] Once it has been determined that the specific manual provisions were distributed as representations of company procedure, the next step is to decide whether an employee's reliance upon these

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155. *See* Ferraro v. Koelsch, 368 N.W.2d 666, 671-72 (Wis. 1985). The employee signs an acknowledgment that handbook policies are part of his employment contract. *See id.* at 669.

156. 368 N.W.2d 666 (Wis. 1985).

157. *See id.* at 669-70. The manual contained sections entitled "Disciplinary Action" and "Just Causes for Dismissal" which listed behavior prohibited by the management. *See id.*

158. *See id.* at 672. At trial, the Hyatt management defined the handbook as an instrument by which each party conveyed promises to the other with the expectation the promises would be binding. *See id.*

159. *See id.* at 671-72. The court held that it was "black letter law" that an exchange of promises could constitute sufficient consideration to support a bilateral contract. *See id.* at 672.

160. *See id.* The ruling allowed the handbook to act as a bilateral contract which had the effect of abrogating the employment at-will rule. *See id.*

161. *See* Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (estoppel action prevents employer from refusing to comply with handbook provisions); De Frank v. County of Greene, 412 A.2d 663, 666 (Pa. Commw. Ct. 1980) (estoppel viable cause of action to make handbook terms enforceable upon employer); *see also* Mers v. Dispatch Printing Co., 483 N.E.2d 150, 154-55 (Ohio 1985) (oral promises made to employee are binding under promissory estoppel theory). *See generally* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 359 (1982) (discussing how estoppel can replace need for consideration in creating contract); Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 231-35 (1973) (discussing effect estoppel can have on employment contracts).

162. *See* De Frank v. County of Greene, 412 A.2d 663, 666 (Pa. Commw. Ct. 1980) (document held out by state agency as operational policy). *But see* Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (regardless whether terms promulgated in handbook represent valid rules, manual can be cause to estop employer from refusing to abide by terms).

provisions was legitimate.[163] If it is reasonable for a worker to assume that the handbook terms are the sole means by which the company intends to operate, then enforcement of these terms is only fair.[164] As one court phrased the estoppel logic: "To allow [an] . . . entity to represent to its employees . . . an assurance of 'job security,' and then to permit that entity to disavow those words of entitlement when an employee takes those words at their face value, would violate any conception of fundamental fairness."[165] When an employee has acted or has forborne from acting in response to policies contained in a handbook, the issuer can be equitably estopped from refusing to apply the handbook terms.[166]

B. *Mutuality Is Present to Support the Handbook as a Contract*

The reworked contractual analysis applied by progressive courts recognizes the mutuality of obligation which the traditional analysis considers absent.[167] Traditional courts interpret the unilateral nature of an employment manual to reflect an absence of any mutual obligation or bargaining between the parties and, therefore, a contractual relationship is prevented from devel-

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163. *See* Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985) (rules promulgated by employer create reasonable expectation in employee that such rules will be implemented).

164. *See* Arie v. Intertherm, Inc., 648 S.W.2d 142, 153-54 (Mo. Ct. App. 1983) (employee being given handbook and told to read it creates legitimate expectation in employee that company intends to use handbook as rules of operation); *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980) (legitimate expectations grounded in employer's handbook that provisions are part of employment contract). *But see* Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 589 (Wis. 1967) (employer's representations to employee not binding under estoppel theory because employee held job for indefinite term and could be discharged at will).

165. De Frank v. County of Greene, 412 A.2d 663, 666-67 (Pa. Commw. Ct. 1980). The court stated that denying the estoppel action would be sanctioning the unfair manipulation of employee's legitimate expectations. *See id.* at 667.

166. *See* Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (since employment manual published by employer, employer must follow standards as established in manual); De Frank v. County of Greene, 412 A.2d 663, 666-67 (Pa. Commw. Ct. 1980) (fundamental fairness dictates that if employer issues manual to employees, employer must be bound by manual's provision); *see also* Edwards v. Citibank, 425 N.Y.S.2d 327, 329 (App. Div. 1980) (Kupferman, J., dissenting) (Judge Kupferman contending that voluntary issuance of employment handbooks can create contractual duties which employer equitably estopped from ignoring). Pudil v. Smart Buy, Inc., 607 F. Supp. 440, 444-45 (N.D. Ill. 1985) (holding plaintiff showed insufficient harm to self from reliance upon promise where plaintiff alleged employer's promise of job security altered her at-will employment status).

167. *See* Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 444 (N.Y. 1982) (valid consideration satisfies mutuality requirement); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (requirement of mutuality is met). *See generally* Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J. L. REF. 449, 456 (1983) (discussion of why mutuality is required to make handbook contract).

oping.[168] A more progressive analysis of the problem considers this mutuality requirement satisfied by consideration offered from the employee.[169] Though there was no meeting of the minds or bargaining over the handbook terms, this was not the behavior sought by an employer.[170] A handbook is issued with the intent to gain compliance.[171] Once this is manifested through an employee's continued service, the concept of mutuality is satisfied.[172] Under this progressive view to contract formation, mutuality poses no bar to incorporating handbook terms into the employment contract.[173]

VI. Reasons Supporting the Adoption of the Progressive Viewpoint in Texas

A. *The Fallacy of Appealing to Tradition*

The courts in Texas currently have rejected the progressive view of handbook analysis for only one reason: adherence to precedent.[174] The danger of sustaining a traditionally accepted rule is that times and circumstances

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168. *See, e.g.*, Shaw v. S. S. Kresge Co., 328 N.E.2d 775, 779 (Ind. Ct. App. 1975) (court holds handbook insufficient to create binding contract for want of mutuality); Johnson v. National Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976) (lack of bargaining between parties makes handbook gratuity rather than contract); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) (handbook terms not bargained for; therefore, terms do not constitute binding contract).

169. *See* Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (employee's job performance meets mutuality requirement). Some courts hold that mutuality need not even be present if employee consideration is given. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (once consideration supplied there is no additional requirement of mutuality); Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 123 (Mo. Ct. App. 1985) (contractual effect of handbook does not depend on express mutual agreement).

170. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985) (issuer of handbook does not seek return promise of compliance from employee).

171. *See id.* (issuance of manual seeks continued job performance from employees).

172. *See, e.g.*, Wagner v. Sperry Univac, 458 F. Supp. 505, 520-21 (E.D. Pa. 1978) (plaintiff continues work in reliance upon handbook provisions); Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983) (continued work despite right to quit is ample consideration for handbook); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (employee's continued service represents performance satisfying mutuality requirement).

173. *See* Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (mutuality requirement of contract formation met; therefore, handbook outlines contractually binding duties); *see also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (mutuality cannot prevent manual from becoming contract because mutuality not essential part of contract formation).

174. *See, e.g.*, Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (court has "obligation of self restraint" to follow precedent on handbook issue); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538-39 (Tex. App.—Corpus Christi 1982, no writ) (focuses on adherence to precedent set in Texas case law); Hurt v. Standard Oil Co., 444 S.W.2d 342, 346-47 (Tex. Civ. App.—El Paso 1969, no writ) (strictly follows precedent as set in state).

change.[175] The need for which the at-will rule was originally created has changed, and therefore, the general rule no longer provides a satisfactory resolution to current employment problems such as the handbook or public policy considerations.[176] The danger of upholding outdated precedent is evidenced by the inequitable decisions emerging from jurisdictions which still follow a traditional interpretation of the employment at-will rule.[177]

A response to this sensitive condition in the law has already been formulated by courts applying a progressive analysis to the handbook issue. Adopting reformed contract theory allows a court to legitimately modify the traditional at-will rule in order to compensate for changing circumstances.[178] The progressive approach broadens the rule to create a handbook exception without uprooting the sound contractual base upon which it is founded.[179] This assures that modification will be worked with the same contract principles upon which the rule is based, thereby avoiding any radical departure from established contract theory.[180]

B. *The Progressive Viewpoint Does Not Abolish the Employment At-Will Doctrine*

Modification of the general at-will rule has gained widespread support throughout the country.[181] A majority of states dealing with the handbook

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175. *See* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (cites change in state of law as requiring modification to traditional at-will rule). *But see* Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983) (reasoning it is inadvisable to relax standards at-will rule imposes because of uncertainty in employer-employee relationship which would result).

176. *See* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (changing social factors necessitate second look at usefulness of traditional employment at-will rule); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1260-62 (N.J. 1985) (discussing changes in twentieth century which require reassessment of at-will rule).

177. *See, e.g.*, Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 669 (Ind. Ct. App. 1984) (worker fired for cutting out thumbs of work glove has no recourse); Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 238 (N.J. 1952) (worker promised job security fired after severe injury sustained while playing for company team); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 538 (Tex. App.—Corpus Christi 1982, no writ) (employee who needed to be home to tend to family was fired for not working overtime without employer liability).

178. *See* Wagner v. Sperry Univac, 458 F. Supp. 505, 520-21 (E.D. Pa. 1978) (unilateral contract theory diagrammed by court showing how handbook creates contractual situation).

179. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985) (contract principles of consideration and mutuality sufficiently explained in progressive approach); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (progressive analysis explaining use of consideration and mutuality principles in scheme of its theory).

180. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985) (progressive contractual analysis technically correct in application of contract principles).

181. *See, e.g.*, Brooks v. Transworld Airlines, Inc., 574 F. Supp. 805, 808 (D. Colo. 1983) (increasing number of courts find exceptions to employment at-will rule, including handbook exception); Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 727 (Ct. App. 1980) (citing

issue has allowed the employment manual to become part of the labor contract, thereby obligating employers to abide by manual provisions.[182] It must be clearly understood, however, that these progressive states have not abolished the at-will rule but, rather, have interpreted a handbook's effect upon the rule.[183]

Employment manuals may reserve the employer's right to terminate an employee at will despite language of specific dismissal provisions contained in the manual.[184] In such a case, an employee would be hard-pressed to argue the handbook altered his at-will status when in the same handbook the employer retained his right to terminate the employee at will.[185] In another situation, the handbook may plainly state that it should not be construed as part of the employment contract.[186] This notice alerts an employee not to expect the handbook's provisions to be the sole means by which his employer intends to operate.[187] These cases illustrate how traditional rights under the employment at-will rule can be maintained in jurisdictions applying a progressive analysis.

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recent trend in case law preventing employer from firing at will without being liable to employee); Whitaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981) (citing trend in case law which modifies traditional at-will rule).

182. *See, e.g.*, Salimi v. Farmers Ins. Group. 684 P.2d 264, 265 (Colo. Ct. App. 1984) (distribution of employment handbook results in employer being contractually bound by its termination provisions); Garrity v. Valley View Nursing Home, Inc., 406 N.E.2d 423, 424 (Mass. App. Ct. 1980) (handbook terms formed part of employees' labor contract); Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875, 879-80 (Minn. Ct. App. 1985) (handbook policy contains terms binding employer to specific termination procedures).

183. *See* Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120, 122 (Mo. Ct. App. 1985) (general employment at-will rule still stands while handbook is only exception to rule); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 446 (N.Y. 1982) (at-will rule presumption stands until validly rebutted).

184. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 906 (Mich. 1980) (if manual does not create contract by provisions, right to fire employee at will is retained by employer); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627-30 (Minn. 1983) (handbook language may reserve employer's right to discharge employee at discretion).

185. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985) (where handbook gives fair notice to employee that it should not be considered as part of labor contract, employer should not be reluctant in issuing handbooks).

186. *See* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (handbook provisions may preclude employee from claiming handbook altered at-will status); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985) (employer may prevent handbook from being incorporated into employment contract by placing language in prominent position stating handbook contains no promises by employer regarding employment).

187. *See* Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1271 (N.J. 1985) (manual provisions stating no contract embodied in handbook provisions gives fair notice to employee not to believe manual makes binding promises).

VII. CONCLUSION

Currently, Texas is stemming the tide of nationwide reform of the employment at-will rule. The Texas Supreme Court created one narrow exception to the general rule and, in so doing, recognized the need to amend employment at-will theory pursuant to present social and economic forces. These same forces have changed significantly within the last ninety-five years. Consequently, the original contract theory which supported adoption of the employment at-will rule is no longer adequate to fairly treat the employer and employee in their work relationship.

The situation in Texas is ripe for the handbook exception. The Texas Supreme Court has declared the employment at-will rule to be amendable. A majority of states apply a progressive contractual analysis which validly allows a handbook to amend the rule. All that remains now is for a case to arise where the courts may adopt the majority view and establish new precedent: a handbook exception to the employment at-will rule.