UIC Law Review

Volume 21 | Issue 3 Article 10

Spring 1988

Duldulao v. St. Mary of Nazareth Hospital Center: Illinois Recognizes Handbook Exception to at Will Employment Relationship, 21 J. Marshall L. Rev. 657 (1988)

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*DULDULAO v. ST. MARY OF NAZARETH HOSPITAL CENTER:** ILLINOIS RECOGNIZES HANDBOOK EXCEPTION TO AT WILL EMPLOYMENT RELATIONSHIP

The at will employment doctrine creates a presumption that an employer may terminate an employee hired for an indefinite duration at any time, with or without cause.[1] This presumption may be

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* 115 Ill. 2d 482, 505 N.E.2d 314 (1987).

1. The employment at will doctrine was derived from the common law principles of master and servant. *See* W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 3-42 (1985) (discussion of the history of the at will employment doctrine); H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.3 (1984 & Supp. 1986) (development of at will rule); S. Abbasi, K. Hollman & J. Murrey, *Employment at Will: An Eroding Concept in Employment Relationships*, 38 LAB. L.J. 21, 22-24 (1987) (historical overview of at will doctrine and exceptions); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-19 (1967) (traditional at will rule and its foundation); De Giuseppe, *The Effect of the Employment at Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 3-10 (1981) (in-depth explanation of the doctrine); Lawless, *Wrongful Discharge: The Employer's Duty of Good Faith*, 18 TRIAL 54, 55-57 (Dec. 1982) (discussion of the at will doctrine); Note, *Employment at Will—The Implied Contract Limitation in Arizona*-Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984) 1985 ARIZ. ST. L.J. 783, 785-90 (legal background of master-servant relationship); Note, *Survey of New York Practice*, 57 ST. JOHN'S L. REV. 615, 641 n.112 (1983) (comparing English common law employment relationships to present employment relationships); Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335, 337-41 (1986) (background of the at will doctrine and its subsequent restrictions). English common law regarded an indefinite hiring to be a hiring for one year. *See* Davis v. Gorton, 16 N.Y. 255 (1857). Most American jurisdictions adhered to the British common law rule until the middle of the 19th century. Isbell-Sirotkin, *Defending the Abusively Discharged Employee: In Search of a Judicial Solution*, 12 N.M.L. REV. 711, 713 (1982). At that time, the *laissez faire* economic and governmental policies that favored self-reliance and economic individualism were developing. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1441 (1975) (at will doctrine reflected philosophy of *laissez faire*). As a result of the increased emphasis on self-reliance, fewer commitments between employers and employees existed. *See* M. Witmark & Sons v. Fred Fischer Music Co., 125 F.2d 949 (2d Cir. 1942) (Frank, J., dissenting), *aff'd*, 318 U.S. 643 (1943) ("men should have the greatest possible liberty to make such contracts as they please"). *Id.* at 962. Accordingly, American courts abandoned the English one-year concept for a view that provides that hirings for an indefinite period are presumed to be terminable at the will of either party. *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-27 (1976). This view became known as the at will doctrine. *Id.*

The at will doctrine was attributed to a treatise on master and servant relationships by H.G. Wood. Commentator Wood, in articulating the doctrine, stated:

With us the rule is inflexible that a general or indefinite hiring is prima facie a

rebutted, however, with evidence indicating that the parties contracted otherwise.[2] Under certain circumstances, an employee handbook may constitute such evidence.[3] In *Duldulao v. Saint Mary of Nazareth Hospital Center*,[4] the Illinois Supreme Court addressed the issue of whether an employee handbook may create enforceable contract rights for at will employees.[5] Finding the traditional requirements for contract formation[6] present, the court concluded that an employee handbook containing specific grounds for discharge can modify an otherwise at will employment relationship.[7] The effects of the *Duldulao* ruling may be limited, however, when

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

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 1, 265 (1877). For a modern view of the at will doctrine, see Annotation, *Modern Status of Rule that Employer May Discharge At Will Employee for Any Reason*, 12 A.L.R. 4th 544 (1982). The *Restatement of Agency* refers to the at will employment doctrine as follows: "Unless otherwise agreed mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening event." RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

The employment at will doctrine is currently in transition. *See generally* Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196, 205 [hereinafter Note, *Employee Handbooks*]; Note, Herbster v. North Am. Co. for Life & Health Ins.: *Attorney's Retaliatory Discharge Action Unjustly Dismissed*, 21 J. MARSHALL L. REV. 215 (1987). Recently, courts have departed from a strict adherence of the at will doctrine. *See* Blades, *supra* note 1, at 1408-13 (author attributes erosion of doctrine to technological, economic, and sociological changes); Heshizer, *The New Common Law of Employment: Changes in the Concept of Employment at Will*, 36 LAB. L.J. 95, 97-98 (1985) (recognizing that traditional rationale for doctrine is lacking); Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 204 (1985)(citing 1982 ABA report acknowledging departure). *Cf.* Carley, *At-Will Employees Still Vulnerable*, 73 A.B.A.J. 66 (1987) ("at-will doctrine is alive and well"). *But see* Decker, *Handbooks and Employment Policies Express or Implied Guarantees of Employment—Employer Beware!*, 5 J.L. & COM. 207, 208-09 n.3 (lengthy compilation of articles written with criticism of doctrine).

2. Courts, recognizing that the at will presumption may be overcome with evidence indicating that the parties contracted otherwise, treat the doctrine as a rule of construction. Note, *Reforming At Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 370, 391 (1983) [hereinafter *Reforming At Will Employment*]. More than ⅔ of American jurisdictions interpret the doctrine as a rule of construction rather than as an absolute bar to contractual enforceability. PERRITT, *supra* note 1, § 1.11 (Supp. 1986). For a further discussion of the at will doctrine as a rule of construction, see *infra* note 38 and accompanying text.

3. *See* Mullins, *Employers' right to fire employees disappearing*, Chi. D.L. Bull., June 4, 1987, at 2 (employer rights limited by own handbook). See also *infra* note 59 for a list of jurisdictions accepting the view that handbooks may rebut the at will presumption.

4. 115 Ill. 2d 482, 505 N.E.2d 314 (1987).

5. *Id.*

6. The traditional requirements for contract formation include offer, acceptance and consideration. *See* E. FARNSWORTH, CONTRACTS § 3.3 (1982).

7. *Duldulao*, 115 Ill. 2d at 490, 505 N.E.2d at 318.

an employer includes a disclaimer to negate the promises made in the handbook.[8]

In 1970, Nora E. Duldulao began working[9] at the Saint Mary of Nazareth Hospital Center ("Hospital") as a nurse.[10] Two years later, she was promoted to staff development coordinator.[11] Duldulao was hired indefinitely and never received a written employment contract.[12] In 1975, the Hospital issued Duldulao an employee handbook.[13] The handbook stated that in the absence of a serious offense,[14] a non-probationary employee[15] could only be discharged in

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8. *Id.* at 491, 505 N.E.2d at 319. For a discussion of the employer's ability to include disclaimers in order to avoid liability for handbooks, see *infra* notes 84-89 and accompanying text.

9. *Duldulao*, 115 Ill. 2d at 484, 505 N.E.2d at 315. Duldulao was initially hired in 1968, and left her job at the Hospital for a trip to the Phillipines. *Id.*

10. *Id.* Saint Mary of Nazareth Hospital Center is a 490 bed acute care general hospital in Chicago, Illinois. Brief for Appellee at 2, Duldulao v. Saint Mary of Nazareth Hosp., 115 Ill. 2d 482, 505 N.E.2d 314 (1987) (No. 84-2554).

11. *Duldulao*, 115 Ill. 2d at 484, 505 N.E.2d at 315. Duldulao retained her position as staff development coordinator until September 14, 1981. *Id.* At that time, the Hospital reorganized several departments and Duldulao became the human resources coordinator. *Id.* Duldulao claimed that her new position was identical to her previous position. *Id.* The Hospital, however, contended that Duldulao's new position included new duties and responsibilities. *Id.* at 484-85, 505 N.E.2d at 315.

12. Duldulao originally alleged that she entered into an employment contract with the Hospital on April 20, 1970. Brief for Appellee at 2, *Duldulao*, 115 Ill. 2d 482, 505 N.E.2d 314. (No. 84-2554). Duldulao later admitted, however, that she did not enter into a written contract and she was hired for an indefinite duration. *Id.*

13. *Duldulao*, 115 Ill. 2d at 485, 505 N.E.2d at 316. The Hospital first published an employee handbook in 1970. *Id.* Duldulao, however, did not receive a handbook until the Hospital revised the handbooks in 1975. *Id.* The revised handbook contained a provision for the dismissal of non-probationary employees. *Id.* at 486, 505 N.E.2d at 316. That provision stated in part: "[P]ermanent employees are *never* dismissed without prior written warnings and admonitions and/or investigations that have been properly documented . . . and three warning notices within a twelve-month period *are required* before an employee is dismissed, except in the case of immediate dismissal." *Id.* (emphasis added). See *infra* note 14 for a discussion of grounds that will constitute immediate dismissal.

14. The handbook contained a list of serious offenses that included mistreating a patient, fighting on hospital premises, unauthorized possession of weapons, and reporting to work under the influence of intoxicants. *See Duldulao*, 115 Ill. 2d at 491, 505 N.E.2d at 318.

15. The handbook contained a provision that stated: "[A]t the end of 90 calendar days since employment, the employee becomes a permanent employee". *Id.* at 490-91, 505 N.E.2d at 318. Thus, a non-probationary employee is someone who has been employed at the Hospital for more than 90 days. At the time of Duldulao's dismissal, she had been employed by the Hospital for over 11 years. *Id.* Duldulao, therefore, had completed her probationary period and was a permanent employee at the time of her termination. The Hospital, however, contended that when Duldulao was transferred to her new position she reverted to probationary status. *Id.* at 493, 505 N.E.2d at 319.

The court disagreed with the Hospital and found nothing in the handbook indicating that an employee may lose the right to progressive discipline policies that had vested after the initial probationary period. *Id.* See also *infra* note 16 for a discussion of the progressive discipline policy. Furthermore, because Duldulao was receiving all of the benefits of a permanent employee, the court rejected the Hospital's contention that Duldulao was a probationary employee. *Duldulao*, 115 Ill. 2d at 493, 505 N.E.2d

accordance with a progressive discipline policy.[16] Contrary to the progressive discipline policy, Duldulao was fired without notice on December 11, 1981.[17] Consequently, Duldulao sued the Hospital, asserting that the provisions of the handbook created an implied contract which the Hospital subsequently breached.[18]

The trial court denied Duldulao's motion for summary judgment and entered judgment in favor of the Hospital.[19] The court held that the statements made in the handbook did not rise to the level of contractual obligations.[20] Moreover, the court found that

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at 319.

16. *Id.* at 491, 505 N.E.2d at 318. As to the disciplinary action, the handbook issued to Duldulao by the Hospital stated:

DISCIPLINARY ACTION

Certain types of action or behavior on the part of an employee are considered unacceptable. Although a single instance in itself is not considered grounds for dismissal, repeated instances can lead to discharge. Saint Mary of Nazareth Hospital Center uses the following types of disciplinary action:

Admonishment

A formal warning in writing which clearly specifies the nature of the infraction.

Reprimand

A formal warning in writing given for a repeated infraction of the rules. The nature of the infraction must be clearly stated and the date of the admonition must also be given.

Suspension

A period of no more than five days during which an employee is to remain away from his job without pay.

Dismissal

Discharge, [it is] the Department head's decision to dismiss an employee because of repeated infractions of the rules.

Brief for Appellee at 6, *Duldulao*, 115 Ill. 2d 482, 505 N.E.2d 314 (No. 62737).

17. *Duldulao*, 115 Ill. 2d at 485, 505 N.E.2d at 315-16. At the start of the day on December 11, 1981, the Hospital gave Duldulao a "Probationary Evaluation" and a "Formal Notice" informing her of her termination. *Id.* Both of the notices listed the same infractions: "Unsatisfactory performance was demonstrated by the failure to properly monitor the legal implications of documentation seminar and the patient education seminar. Further unsatisfactory performance was demonstrated by failure to follow instructions regarding CPR recertification and monitoring of patient education seminar." *Id.* Besides the notices issued to Duldulao on the day that she was terminated, she did not receive any other indication that the Hospital was not satisfied with her job performance. *Id.*

18. *Id.* at 484, 505 N.E.2d at 315. Duldulao relied on the terms of the handbook for the basis of her contractual claim. *Id.* Duldulao alleged that the Hospital breached her employment contract by failing to afford her the benefit of the progressive discipline policy as set forth in the handbook before discharging her from her job. *Id.* at 485, 505 N.E.2d at 316.

19. Duldulao v. Saint Mary of Nazareth Hosp., 136 Ill. App. 3d 763, 483 N.E.2d 956 (1985).

20. *Id.* at 764, 483 N.E.2d at 957. The trial court found that the only issue was whether there was bargained for agreement in relation to the handbook. *Id.* at 764, 483 N.E.2d at 958. (relying on Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979)). See *infra* note 32 for a discussion of the *Sargent* case. Because there was no evidence that the Hospital and Duldulao bargained for the handbook, the court concluded that Duldulao did not obtain any special rights from the handbook. Brief for Appellee at Appendix A, *Duldulao*, 115 Ill. 2d 482, 505 N.E.2d 314. (No. 62737).

Duldulao was an at will employee and her dismissal was proper.[21] In reversing the trial court's decision, the Illinois Appellate Court for the First District held that the handbook created enforceable contract rights.[22] The appellate court thus modified the traditional rule that an employee at will could be fired at any time with or without cause.[23]

The Illinois Supreme Court affirmed the appellate court's decision.[24] The court specifically addressed the issue of whether an employee handbook could create enforceable contract rights for an otherwise at will employee.[25] The court unanimously concluded that handbooks may create enforceable contract rights for an at will employee if the contract formation principles of offer, acceptance and consideration are satisfied.[26]

The *Duldulao* court began its analysis by noting the conflict that existed among several Illinois appellate courts with respect to this issue.[27] For example, the *Duldulao* court noted that the fifth district[28] held that a handbook creating mutuality of obligations[29] on the parties is contractually enforceable.[30] Next, the *Duldulao* court noted that the first district[31] held that the promises made in an employee handbook were not binding unless they were "bargained for" and supported by "independent consideration."[32] The *Duldulao*

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21. *Duldulao*, 136 Ill. App. 3d at 763, 483 N.E.2d at 958.
22. *Id.*
23. *Id.*
24. *Duldulao*, 115 Ill. 2d at 494, 505 N.E.2d at 320.
25. *Id.* at 484, 505 N.E.2d at 315.
26. *Id.* at 490, 505 N.E.2d at 318.
27. *Id.* at 488, 505 N.E.2d at 317. *See also* Berendt, *Contracts for Employment at Will*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 8.9 (1983 & Supp. 1986) (discussing divergent views of contractual treatment of handbooks prior to *Duldulao*).
28. Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974).
29. For a discussion of mutuality of obligations, see *infra* note 67.
30. *Carter*, 24 Ill. App. 3d at 1059, 322 N.E.2d at 576. In *Carter*, the Illinois Appellate Court for the Fifth District held that an employee manual, adopted after the employee was hired, was an enforceable agreement. *Id.*

The employee in *Carter* had no written contract and there was no evidence of an oral agreement as to the duration of his employment. *Id.* at 1058, 322 N.E.2d at 576. Four years after the employee began working he was issued an employment manual. *Id.* The manual contained procedures for grievances, for disciplinary action, and for dismissal. *Id.* Because the employee was discharged from his job without the benefit of the dismissal procedures, the employee sued the employer alleging that he had been illegally discharged. *Id.* According to the *Carter* court, the manual was a modification of an existing at will employment contract. *Id.* at 1059, 322 N.E.2d at 576. The *Carter* court explained that when the employee continued to work after the modification of the contract, he assented to and formed the consideration that created the mutuality of obligation needed to bind both parties. *Id.*
31. Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979).
32. In *Sargent*, the first district held that a personnel manual issued by the employer to the employee was not part of the employment contract. *Id.* at 122, 397

court further observed that the second district was in direct conflict with these holdings.[33] The second district had reasoned that an employer who makes promises in an employee handbook should be bound to those promises regardless of whether the parties bargained for those promises.[34] Although the *Duldulao* court did not adopt any one of these views, it recognized the second district's decision as the "better reasoned approach."[35]

In addressing the issue of the contractual status of handbooks, the *Duldulao* court rejected the general rule that an employee hired for an indefinite duration is terminable at will with or without cause.[36] The *Duldulao* court did accept, however, the view that an indefinite hiring creates a presumption of an at will relationship.[37] Moreover, the *Duldulao* court added that the employee may rebut this presumption with evidence that indicates that the parties contracted otherwise.[38]

N.E.2d at 446. The *Sargent* court reasoned that the handbook was unenforceable because the handbook existed when the employee began working, and was not specifically bargained for. *Id.* at 121-22, 397 N.E.2d at 446. The *Sargent* court stated that an employee handbook is not part of an at will employment contract unless the handbook is a modification of the contract, is bargained for, and is supported by independent consideration. *Id.* Because the handbook in *Sargent* did not meet these requirements, the court held that the handbook was not an enforceable contract, but rather merely a code for the employee's conduct. *Id.*

33. *Duldulao*, 115 Ill. 2d at 488, 505 N.E.2d at 317.

34. Kaiser v. Dixon, 127 Ill. App. 3d 251, 468 N.E.2d 822 (1984). The *Kaiser* court rejected the *Sargent* decision. *Id.* at 263, 468 N.E.2d at 832. The *Kaiser* court held that an employee manual may be binding on the employer, notwithstanding the fact that it was not "bargained for." *Id.* at 263, 468 N.E.2d at 831-32. In *Kaiser*, the handbook was adopted after the employer began working for the employer. *Id.* at 263, 468 N.E.2d at 831. The *Kaiser* court reasoned that because the handbook imposed obligations on both parties, the best approach is to enforce the handbook as part of the employment contract. *Id.* The court stated that such a handbook "cannot be allowed to create rights for employees . . . which disintegrate when an employee attempts to exercise them." *Id.*

35. *Duldulao*, 115 Ill. 2d at 489, 505 N.E.2d at 317. See *supra* note 34 and accompanying text for a discussion of the second district's approach in *Kaiser*. The *Duldulao* court also noted that federal courts applying Illinois law have adopted the second district's approach. *Id. See, e.g.*, Pelizza v. Reader's Digest Sales & Services, Inc., 624 F. Supp. 806 (N.D. Ill. 1985) (specified procedure for termination and continued employee service binds employer); Kufalk v. Hart, 610 F. Supp. 1178 (N.D. Ill. 1985) (mutuality only requires parties be bound by some consideration); Pudil v. Smart Buy, Inc. 607 F. Supp. 440 (N.D. Ill. 1985) (private employer bound to handbook promises regardless of bargaining).

It should be noted, however, that at the time that the first district in *Duldulao* followed the second district's approach in *Kaiser*, the *Kaiser* approach was already being abandoned. Berendt, *supra* note 27, § 8.39. For example, in Johnson v. Figgie Int'l, Inc., 132 Ill. App. 3d 922, 477 N.E.2d 795 (1985), the second district held that an employee manual could only be enforceable if it was part of a "pre-existing employment agreement." *Id.* at 927, 477 N.E.2d at 799. Thus, the appellate court confined the previously expansive view it set forth in *Kaiser*.

36. *Duldulao*, 115 Ill. 2d at 489, 505 N.E.2d at 317-18.

37. *Id.* See *supra* notes 2 and 3 for a discussion of an indefinite hiring as a presumption of an at will relationship.

38. The *Duldulao* court interpreted the at will doctrine as a rule of construction

In determining whether the handbook was in fact a contract, the *Duldulao* court adopted the Minnesota Supreme Court's holding in *Pine River State Bank v. Mettille*.[39] In *Pine River*, the court held that an employee handbook creates a legally enforceable contract if three conditions are present.[40] First, the language of the handbook must contain a promise sufficiently clear that an employee would reasonably believe that the employer was making an offer.[41] Second, the promise must be communicated in such a way that the employee would reasonably believe it to be an offer.[42] Finally, the employee must accept the offer by continuing to work with knowledge of the handbook provisions.[43] According to the *Pine River* court, when all three conditions are present, a binding unilateral contract[44] is

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rather than an absolute bar to contractual enforceability. *Duldulao*, 115 Ill. 2d at 489, 505 N.E.2d at 318. The majority of jurisdictions dealing with employment relationships treat the at will doctrine as a rule of construction in order to preserve the parties' freedom to contract. *E.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984) (court's view that at will doctrine is rule of construction, rather than one of substance); Touissant v. Blue Cross-Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (doctrine of employment at will is a rule of construction); Pine River St. Bank v. Mettille, 333 N.W.2d 622 (Minn. 1982), (employment at will doctrine as rule of construction is justified on basis of parties' freedom to contract).

39. 333 N.W.2d 622 (1983). In *Pine River*, the employee alleged that the bank had breached his employment contract as it was modified by an employee handbook. *Id.* at 625. The bank distributed to the employee a handbook containing a provision entitled "Disciplinary Policy," which stated that "[i]f an employee has violated a company policy, the following procedure would apply . . ." *Id.* at 626. This was followed by a step-by-step process of progressive discipline. *Id.* The court held that this constituted a specific offer for a unilateral contract. *Id.* at 630. The court further held that by performing his job, the employee both accepted the contract and provided the necessary consideration for the contract. *Id.* Thus, the bank's dismissal of the employee without providing him the benefit of the progressive discipline procedure constituted a breach of the employment contract. *Id.* at 631.

For a critical view of the *Pine River* decision, see Note, *At-Will Employment—Contractual Limitation of an Employer's Right To Terminate: Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), 7 HAMLINE L. REV. 463 (1984).

40. *Pine River*, 333 N.W.2d at 626-27. The *Pine River* test requires an objective examination of the language of the handbook. For example, in Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853 (Minn. 1986), the court applied the *Pine River* analysis and held that when determining whether an offer for a unilateral contract was made, it must examine the outward manifestations of the parties. *Id.* at 857. The *Hunt* court stated that "subjective impressions and assumptions are not relevant for purposes of ascertaining contractual terms." *Id.*

41. *Pine River*, 333 N.W.2d at 626. *See also* J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS § 2-7 (2d ed. 1977) (distinguishing offers from statements of intention).

42. *Pine River*, 333 N.W.2d at 626.

43. *Id.*

44. A unilateral contract consists of a promise or a group of promises made by one contracting party that is assented to by performance. J. CALAMARI & J. PERRILLO, *supra* note 41, § 4-15. In a unilateral contract, the promisor seeks performance in exchange for his promise rather than a promise in exchange for his promise. *Id.* Thus, the contract is formed when the promisee completes his performance. *Id.* When the contract is formed, the promisee earns a right and the promisor is bound. *Id.* For example, in *Duldulao*, the Hospital made a promise to utilize specific pre-termination procedures in exchange for Duldulao's performance of her job. *Duldulao*, 115 Ill. 2d

formed.[45]

Applying the *Pine River* analysis to Duldulao's situation, the court found both a binding contract and the Hospital's subsequent breach.[46] In reviewing the termination provisions in the handbook, the court concluded that an employee could reasonably believe that she would not be terminated without prior warnings.[47] Furthermore, the court emphasized that the Hospital must have intended that Duldulao become familiar with the contents of the handbook because her supervisory duties included instructing new employees on the handbook provisions.[48] Finally, the court found that when Duldulao continued to work with knowledge of the contents of the handbook, she accepted the offer and provided the necessary consideration to form a valid unilateral contract.[49]

Upon reaching its conclusion that a contract was formed, the *Duldulao* court went one step further. The court took particular note of the fact that the handbook contained no disclaimer provisions.[50] Thus, implicit in the court's observation is the suggestion that an employer may protect himself from being contractually bound to the provisions of a handbook when he includes a phrase that disclaims all of the promises made.[51] In this case, however, the employer failed to include a disclaimer.[52] Consequently, the court concluded that an enforceable contract was formed between Duldulao and the Hospital.[53]

The *Duldulao* court justifiably concluded that an employee handbook, under proper circumstances, may be contractually binding and thus rebut the at will presumption. The decision is correct for three reasons. First, in adopting the reasoning of *Pine River*,[54]

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at 490, 505 N.E.2d at 318. At the time Duldulao performed her job, a valid unilateral contract was formed which bound the Hospital to its promise of the pre-termination procedures. *Id. See generally* Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 559-67 (1983) (discussing widespread use of unilateral contract analysis in employment cases).

45. *Pine River*, 333 N.W.2d at 627.

46. *Duldulao*, 115 Ill. 2d at 490, 505 N.E.2d at 318.

47. *Id.* at 491, 505 N.E.2d at 319.

48. *Id.* at 492, 505 N.E.2d at 320.

49. *Id.*

50. *Id.* at 491, 505 N.E.2d at 319. In fact, the court observed that the handbook stated the opposite of a disclaimer. *Id.* A note signed by the president of the Hospital appeared at the beginning of the handbook. *Id.* The note stated in part: "Please take the time to become familiar with these policies. *They are designed to clarify your rights and duties as employees.* Your observance of these policies will assure you a respected place in Saint Mary's family of employees." *Id.* (emphasis added).

51. For a discussion of the effectiveness of disclaimers in the context of employee handbooks, see *infra* notes 85-89 and accompanying text.

52. *Duldulao*, 115 Ill. 2d at 491, 505 N.E.2d at 319.

53. *Id.* at 490, 505 N.E.2d at 318.

54. See *supra* notes 39-45 and accompanying text for a discussion of the *Pine River* case.

the court appropriately applied a unilateral contract analysis in evaluating the legal sufficiency of the handbook as a contract. Through the judicial enforcement of handbooks as contracts, the courts may accommodate the expectations of both the employer and the employee. Second, many policy considerations support the *Duldulao* court's holding. In particular, the opinion indicates a significant retreat from the harshness of the at will doctrine. Finally, the decision is correct because it implies that an employer may avoid liability from handbook promises through the use of simple disclaimer provisions. As a result, the *Duldulao* holding will afford protections to employees without unduly burdening employers.

The Illinois Supreme Court justifiably concluded that an employee handbook with specific grounds for discharge may create enforceable contractual rights to those procedures.[55] In reaching this conclusion, the *Duldulao* court appropriately applied a unilateral contract analysis to determine the legal sufficiency of a handbook as a contract.[56] By adopting the principles enunciated in *Pine River,* the *Duldulao* court established a precise standard for Illinois courts to follow when determining whether representations made in an employee handbook provide a basis for a breach of contract action.[57] In so doing, the supreme court clarified an area of Illinois law wrought with confusion.[58] Moreover, Illinois joined the overwhelming majority of states that have adopted similar reasoning.[59] Applying the

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55. *Duldulao*, 115 Ill.2d at 490, 505 N.E.2d at 318.

56. Unilateral contract analysis can adequately describe the agreement between an employer and an employee. The employer-employee relationship is the result of an agreement between the employer and the employee regarding the terms and conditions of employment. 53 AM. JUR. 2D *Master and Servant* § 40 (1970). As such, it is contractual in nature. *Id.*

57. For the standard that the *Duldulao* court adopted from *Pine River* to determine whether a breach of contract action exists, see notes 39-45 and accompanying text.

58. For a discussion of three Illinois appellate courts with differing views on the contractual status of handbooks, see *supra* notes 28, 30, 31, 32 and 34 and accompanying text. *See also* Ennis v. Continental Ill. Nat'l Bank & Trust Co., 582 F. Supp. 876 (N.D. Ill. 1984) (employee handbook is not an enforceable contract but rather a mere gratuity), *aff'd*, 795 F.2d 40 (7th Cir. 1986); Piper v. Board of Trustees, 99 Ill. App. 3d 752, 426 N.E.2d 262 (1981) (employee handbooks will be part of an employment contract if the contract is executed by employee and employer and the written contract can be construed as subject to the policies of the employer); Note, *Employee Handbooks, supra* note 1, at 206 (Illinois is a "state that is a paradigm of the struggle with the contractual treatment of employee handbooks"); Note, *Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois*, 12 LOY. U. CHI. L.J. 861, 882 (1981) (discussing differing views of handbook enforceability).

59. *See, e.g.*, Vinyard v. King, 728 F.2d 428 (10th Cir. 1984) (personnel handbook becomes new employment contract when employee continues to perform during period that handbook was in effect); Lincoln Sterling Drug, Inc., 622 F. Supp. 66 (D.C. Conn. 1985) (handbook will bind private employer if supported by consideration of continued service of employee); Barger v. General Elec. Co., 599 F. Supp. 1154 (W.D. Va. 1984) (employee handbook provisions can be contractual surrender of

newly established standard, the *Duldulao* court correctly decided that a valid unilateral contract was formed when the Hospital issued its handbook and when Duldulao continued to work under its provisions.[60]

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power to terminate at will); Smith v. Teledyne Indus., Inc., 578 F. Supp. 353 (E.D. Mich. 1984) (employer contractually bound to documents that outline employment terms and conditions); Brooks v. Trans World Airlines, Inc., 574 F. Supp. 805 (D. Colo. 1983) (statements made in a manual give rise to enforceable contract rights where employee relies on manual and continues to work); Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984) (employer representations made in handbook construed as implied contract terms if employer encourages reliance); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employer's right to terminate not absolute but limited by implied promises); Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. Ct. App. 1984) (employer that distributes handbooks, if relied upon and supported with consideration by employee, becomes contractually bound); Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 479 A.2d 781 (1984) (representations may give rise to express or implied contract between the employer and the employee); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (contractual right to policy is vested when employee continues employment); Wyman v. Osteopathic Hosp. of Maine, Inc., 493 A.2d 330 (Me. 1985) (handbook can restrict employers' ability to discharge employee, absent good cause); Staggs v. Blue Cross of Maryland, Inc., 61 Md. App. 381, 486 A.2d 798 (1985) (termination standards contained in handbook can become contractual undertakings if properly expressed and communicated to employee); Touissant v. Blue Cross-Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (personnel manual that contained "just cause standard" gave rise to enforceable contract rights); Pine River State Bank v. Mettille, 333 N.W.2d (Minn. 1983) (court found definite offer by employer and acceptance by employee for termination procedure found in handbook); Enyeart v. Shelter Mut. Co., 693 S.W.2d 120 (Mo. App. 1985) (handbook gives rise to contractual rights without need for evidence that parties mutually agreed on such contract rights); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983) (employer bound to handbook because employer intended to receive benefit of better employee relations from the handbook); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983) (employee need only have knowledge of handbook to bind the employer); Wooley v. Hoffman-LaRouche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985) (implied promise that employee would only be fired for cause is enforceable where employee would otherwise be terminable at will); Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381 (1982) (discharge in violation of employer's policy constitutes breach of contract); Bolling v. Clevepak Corp., 20 Ohio App. 3d 113, 484 N.E.2d 1367 (1984) (employer promulgation of handbook creates contractual rights that employer may not abridge without incurring liability); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976) (employer is bound if employee relies on articulated personnel policy); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978) (handbook given after hiring establishes contractual rights and guarantees for employee); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983) ("corrective discipline" policy in handbook creates enforceable rights); Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. App. 1981) (court recognized handbook as part of employment contract); Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981) (personnel manual that can be unilaterally modified without notice obligates employer to observe termination procedures); Thompson v. Saint Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (absent disclaimer, employer creates expectation and obligation that employees will be treated in accordance with the policies in the handbook); Mobil Coal Prod., Inc. v. Parks, 704 P.2d 702 (Wyo. 1985) (representations made in employment handbook contractually enforceable). *See also* Decker, *Reinstatement as a Remedy for a Pennsylvania Employer's Breach of a Handbook or an Employment Policy*, 90 DICK. L. REV. 41, 47-52 (1985) (reviewing national status of employee handbooks).

60. *Duldulao*, 115 Ill. 2d at 490, 505 N.E.2d at 318.

Through the judicial enforcement of the provisions of employee handbooks, the reasonable expectations of both the employer and the employee may be accommodated.[61] An employer who distributes a handbook does so expecting that he will benefit.[62] Similarly, an employee who abides by the handbook expects that she will benefit.[63] The facts in *Duldulao* illustrate this point. The Hospital issued a handbook consisting of nearly fifty pages of dictated policies,[64] undoubtedly expecting that they would be followed.[65] Expecting that the handbook terms would govern her employment relationship, Duldulao conformed her conduct in accordance with its terms.[66] When the *Duldulao* court enforced the handbook as a contract, the Hospital received the expected benefit of regulating its work force in accordance with the handbook. At the same time, the court fulfilled Duldulao's expectation that she would be protected from arbitrary discharge.

The unilateral contract analysis is particularly appropriate in the context of handbooks because it relaxes the rigid requirements of mutuality of obligations[67] and consideration.[68] In essence, em-

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61. *See Reforming At Will Employment*, *supra* note 2, at 455; Note, *Continued Resistance to the Inclusion of Personnel Policies in Contracts of Employment: Griffin v. Housing Authority of Durham*, 62 N.C.L. REV. 1326, 1329 (1984) (recognizing abandonment of strict contract principles to accommodate expectations of parties).

62. *See* Touissant v. Blue Cross-Blue Shield, 408 Mich. 579, 613, 292 N.W.2d 880, 892 (1980), in which the court emphasized that employers who distribute handbooks presumably expect to benefit from them. *See also* Note, *Employee Handbooks*, *supra* note 1, at 214 ("employers do not issue handbooks out of altruistic impulses; they expect to receive some benefit").

63. "Employees do not read and comply with employee handbooks simply because they have warm feelings about their employers; they . . . expect to benefit." Note, *Employee Handbooks*, *supra* note 1, at 214.

64. Brief for Appellee at 11, Duldulao v. Saint Mary of Nazareth Hosp., 115 Ill. 2d 482, 505 N.E.2d 314 (1987) (No. 84-2554).

65. The Hospital contended that the handbook was not intended to create assurances of job security, but rather contained "gratuitous statements of general policy." Brief for Appellee at 8, *Duldulao*, 115 Ill. 2d 482, 505 N.E.2d 314 (No. 84-2554).

66. When Duldulao conformed her conduct in accordance with the handbook, she accepted the Hospital's offer. The *Second Restatement of Contracts* provides that "an intent to accept is presumed, in the absence of words or conduct to the contrary, when the act is done with knowledge of the offer." RESTATEMENT (SECOND) OF CONTRACTS § 53 comment c (1981).

67. The principle of mutuality of obligations requires that in order for an agreement to be binding, both promises must be binding. CALAMARI, *supra* note 41, § 4-14. *See also* J. MURRAY, MURRAY ON CONTRACTS § 90, at 191 (2d ed. 1974) (doctrine of mutuality is expressed in phrase "both parties are bound or neither is bound"). The principle of mutuality of obligations in the employment contract results in the conclusion that if an employee is not obligated to continue providing services to an employer, the employer should not be obligated to continue providing employment. *See generally* Mauk, *supra* note 1, at 211-13 (discussing role of mutuality in employment context).

The unilateral contract approach to employment contracts has abandoned the requirement of mutuality. This is best illustrated in the case of Touissant v. Blue Cross-Blue Shield, 408 Mich. 599, 292 N.W.2d 880 (1980). In *Touissant*, the Michigan Supreme Court rejected the employer's claim that because the handbook was lacking

ployment at will relationships create unilateral contracts for services that employees have already performed.[69] Consequently, it is not necessary that the employee do anything more than perform her job to bind the employer.[70] Thus, the *Duldulao* court correctly determined that the detriment an employee suffers by continuing to

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in mutuality, it was unenforceable. *Id.* at 630-31, 292 N.W.2d at 900. The court stated:

> While the defendant's analysis has validity with respect to bilateral contracts or agreements, we note that the typical employment agreement is unilateral in nature . . . . Generally, the employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based . . . . [T]here is no contractual requirement that the employee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor.

Id.

Courts that evaluate the contractual status of handbooks, according to a unilateral contract analysis, allow a finding of liability on the employer without the need for a mutual return promise by the employee. *See, e.g.*, Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 463, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 196 (1982) (consideration is essential to formation of a contract, but mutuality is not); Helle v. Landmark, Inc., 15 Ohio App. 321, 472 N.E.2d 765, 776 (1984) (mutuality of obligation lacking only when there is a failure of consideration).

68. Consideration is the inducement to a contract that must exist if a court is to enforce a promise as a contract. *See* FARNSWORTH, *supra* note 6, § 2.2. Simply stated, consideration is a "detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor." S. WILLISTON, WILLISTON ON CONTRACTS § 102 (1957).

In the context of unilateral contracts, courts have been critical of the rigid requirements of consideration. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In *Pugh*, the employee sought damages from being discharged after 32 years of service for his employer. *Id.* at 316, 171 Cal. Rptr. at 918. The employee received assurances that he would not be terminated without good cause. *Id.* at 317, 171 Cal. Rptr. at 919. The *Pugh* court stated that "there is no analytical reason why an employee's promise to render services, over a period of time may not support an employer's promise to refrain from arbitrary dismissal." *Id.* at 325-26, 171 Cal. Rptr. at 925. The court further noted that the requirement of independent consideration is contrary to the general principle that courts should not inquire into the adequacy of consideration. *Id.* Thus, the *Pugh* court concluded that the employee's service was sufficient consideration to bind the employer to the good cause policy. *Id.*

69. Comment, *Employee Manuals: Contract Rights for At-Will Employees*, 58 TEMPLE L.Q. 243, 259-60 (1985) (discussing Wagner v. Sperry Univac, 458 F. Supp 505, 520 (E.D. Pa. 1978)).

70. Various jurisdictions have held that the employee need only continue performing his job to provide the consideration necessary to bind the employer to the promises that he made in an employee handbook. *See, e.g.*, Gorrill v. Icelandair/Flugleider, 761 F.2d 847, 852 (2d Cir. 1983) (employee gave adequate consideration to make handbook binding by continuing to render services after the handbook was issued); Corbin v. Sinclair Mktg., Inc., 684 P.2d 265, 267 (Colo. Ct. App. 1984) (termination provisions in handbook becomes binding contract when the employee's service is the consideration); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (employee's continuation of job and refusal to accept employment elsewhere is sufficient consideration to bind employer to handbook terms). *See also* Note, *Continued Resistance to the Inclusion of Personnel Policies in Contracts of Employment: Griffin v. Housing Authority of Durham*, 62 N.C.L.R. 1326, 1332 (1984) [hereinafter Note, *Continued Resistance*] ("an employee has suffered a real detriment in the irretrievable loss of productive years," by continuing to work despite his freedom to leave)

work, though free to leave, is sufficient consideration to form a unilateral contract.[71]

In addition to contract principles, there are also many policy considerations that support the *Duldulao* decision. First, recognizing handbooks as enforceable contracts limits the harshness of the at will doctrine.[72] Typically, the high costs of negotiating for individual contract rights prevents parties from establishing specific employment contracts.[73] Consequently, employees accept standard at will contracts.[74] Although individual bargaining may be inefficient, at will contracts strip employees of their bargaining power.[75] When courts construe handbooks as contracts, the employee gains valuable contract rights and the expense of negotiation is eliminated.

In effect, the *Duldulao* decision will benefit employees because it will force employers to accurately define the terms and conditions of employment.[76] The employees, in turn, will be more satisfied in their jobs because they will have a clearer understanding of the terms of their employment.[77] Enhanced employee satisfaction results in increased productivity and a more effective work force.[78] Additionally, employee morale will improve if the employer is bound to handbook provisions because the perceptions of employer unfairness

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71. It is well established that forebearance in reliance on a unilateral promise is sufficient consideration to enforce a contract. 1 A. CORBIN, CORBIN ON CONTRACTS § 137, at 585 (1963); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 80 comment a (1981) (single performance sufficient consideration for number of promises).

72. The harshness of the at will doctrine has been the subject of much criticism recently. For a lengthy compilation of articles written with criticism towards the at will doctrine, see Decker, *supra* note 1, at 209 n.3. *See also* Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 331 (1984) (suggesting erosion of doctrine shifts costs to employees which results in lower wages and fewer employment opportunities); Wald & Wolf, *Recent Developments in Employment at Will*, 1 LAB. LAW. 533, 555-79 (1985) (state-by-state profile of exceptions to at will doctrine).

73. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1830 (1980) [hereinafter Note, *Duty to Terminate*].

74. *See* Note, *Continued Resistance*, *supra* note 70, at 1329 (discussion of the high costs of negotiation forcing employees to accept at will contracts).

75. *Compare* Marrinan, *Employment at Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155, 192 (1984) (author advocates judicial intervention to redress imbalance of bargaining power between an employer and employee) *with* Note, *Duty to Terminate*, *supra* note 73, at 1833-35 (author criticizes changing the parties' relative bargaining power through judicial intervention).

76. *See* Marrinan, *supra* note 75, at 200 (urging legislation to establish clear standards, uniformity, predictability and stability to employment relationships); Harrison, *supra* note 72, at 134 ("[a]chieving some measure of certainty with regard to employers' and employees' rights and duties is important").

77. *See* PERRITT, *supra* note 1, § 8.4 (system of rules needed to fully utilize energies of workforce).

78. *See* Touissant v. Blue Cross-Blue Shield, 408 Mich. 579, 591, 292 N.W.2d 880, 892 (1980), wherein the court stated that the employer "secures an orderly, cooperative and loyal work force" from an established set of work policies.

will be reduced.[79] Thus, the *Duldulao* decision may decrease the amount of litigation arising from employment terminations.[80]

The *Duldulao* decision also promotes fairness in the employment relationship. A successful employment relationship cannot be based on illusory promises[81] or unenforceable expectations. An employer should not make promises in an employee handbook unless he intends them to be binding.[82] Because Duldulao abided by the handbook, fairness dictates that the Hospital also must abide by the terms of the handbook.[83]

Finally, in addition to providing advantages for employees, the *Duldulao* decision does not unduly burden employers. The court suggested that it may have decided the case differently if the Hospital had included a disclaimer provision to negate the promises made in the handbook.[84] Consequently, despite an employer's increased vulnerability in the context of employee handbooks, an employer may limit his legal exposure merely by including a disclaimer.[85] Be-

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79. PERRITT, *supra* note 1, § 8.6. Perritt stated that handbook and employment policies may increase employee morale by reducing the opportunity for arbitrary supervisory action. *Id.*

80. *See generally* Meyerowitz, *Save Your Business Client From a Wrongful Discharge Suit*, 71 A.B.A. J. 66, 68 (1985) (advising employers on drafting handbooks to limit risk of potential wrongful discharge litigation); Note, *Reforming At Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 370, 393 (1983) (author suggests decrease in litigation through binding parties to handbook provisions).

81. "If performance of the promise is at the uncontrolled discretion of the promisor and the promisor cannot be said to have surrendered his free will, the promise is deemed to be illusory—a false obligation." M. CLOSEN, R. PERLMUTTER & J. WITTENBERG, CONTRACTS: CONTEMPORARY CASES, COMMENTS & PROBLEMS 1, 142 (1984) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 76 & 77 (1968)).

82. For a view that disagrees with this position, see Comment, *Judicial Limitation of the Employment at-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 573 (1980) (contending that contract cause of action is ineffective remedy for protecting employees).

83. *See* Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359, 361 (N.D. 1984) (because employment manuals are published by employers, employers must be accountable under the provisions established in the manual); DeFrank v. County of Greene, 412 A.2d 663, 667 (Pa. Commw. Ct. 1980) (fundamental fairness dictates that employer be bound to the handbook provisions); Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335, 374 (1986) ("the purpose of imposing contractual liability is not to create new rights for employees, but merely to ensure fairness in the employment relationship").

84. *Duldulao*, 115 Ill. 2d at 491, 505 N.E.2d at 319.

85. A disclaimer provision regarding job security provisions set forth in an employee handbook gains additional weight when determining whether a cause of action for wrongful discharge exists. Labor Letter, Wall St. J., July 30, 1985, at 1, col. 5. For examples of suggested disclaimers that an employer could use in handbooks, see J. BARBASH, J. FEERICK & J. KAUFF, UNJUST DISMISSAL AND AT WILL EMPLOYMENT 116-17 (1982); M. SAUTTER, EMPLOYMENT IN ILLINOIS—A GUIDE TO EMPLOYMENT PRACTICES AND REGULATIONS § 12-12, at 208 (1986); P. WEINER, S. BOMPEY & M. BRITTAIN, WRONGFUL DISCHARGE CLAIMS: A PREVENTIVE APPROACH 96-98, 138-141 (1986). *See also* DeGiuseppe, *The Effect of the Employment at Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 54 (1981). The author of the article stated that the crucial language of a disclaimer clearly indicates that "the

cause a handbook must contain a clear indication that a promise was made,[86] a handbook containing a disclaimer would not create an enforceable contract.[87] If an employer issued a handbook containing an explicit disclaimer, employees would have no reasonable expectation of a promise.[88] Furthermore, an employee could not reasonably rely on a handbook specifically stating that it was not meant to be relied upon.[89] The *Duldulao* decision, therefore, provides protections for employees without imposing any concomitant burdens on the employer.

In *Duldulao*,[90] the Illinois Supreme Court recognized an exception to the at will employment doctrine. The court held that the provisions of an employee handbook will create enforceable contract rights when the formation principles of a unilateral contract are met. The decision is well founded in principles of contract, as well as in various policy considerations. Through the judicial enforcement of handbook provisions, the employment relationship will achieve certainty and predictability, both of which are vital to the employment relationship. Additionally, the court's recognition that there is

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employer in question was not making an offer to contract, that the terms of the handbook in question could be changed at any time and for any reason with or without notice at the management's discretion, and that the employees under these policies did not have any vested rights." *Id.*

Employers should beware, however, that a disclaimer provision may be deemed unconscionable where the handbook imposes obligations on the employer, yet specifically states that the handbook is not to be construed as part of the employment contract. *See generally* J. WHITE & R. SUMMERS, UNIFORM COMMERICAL CODE § 4-2 (2d ed. 1980) (doctrine of unconscionability protects disadvantaged party in a one-sided bargain). For example, in Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981), the court disregarded a disclaimer that reserved the right to terminate the employee at any time because the handbook contained assurances of fair treatment in termination.

86. See *supra* notes 41-43 and accompanying text for a discussion of the requirements for the contractual enforceability of a handbook.

87. *E.g.*, Reid v. Sears, Roebuck & Co., 790 F.2d 453, 461 (6th Cir. 1986) (clear expression negating element of offer disposes of contract issue).

88. A handbook, which contains an express clause that an employee remains terminable at will, would arguably put the employee on notice that he may be terminated at any time, irrespective of contrary provisions in a handbook. Note, *Duty to Terminate*, *supra* note 73, at 1833 n.91. *See, e.g.*, Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 517 A.2d 786 (1986). Based on an express disclaimer clause contained in the handbook, the *Castiglione* court determined that there was no legally binding contract of employment. *Id.* at 340, 517 A.2d at 793. *Accord* Ward v. Berry & Assocs., Inc., 614 S.W. 2d 372, 374 (Tenn. App. 1981). *But cf.* Helle v. Landmark, Inc., 15 Ohio App. 3d 1, 8-9, 472 N.E.2d 765, 773 (1984) (oral promises can render disclaimer ineffective).

89. Another theory of recovery for employees is based on section 90 of the *Second Restatement of Contracts*. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Section 90 states that a promisor, who makes a promise that he should reasonably expect to induce action or forebearance on the part of the promisee, is bound by that promise if it does induce such action or forebearance. *Id.* The crucial element of section 90 is that the promisor reasonably expected to induce reliance. *See id.* A handbook displaying an express disclaimer would not induce such reliance.

90. 115 Ill. 2d 482, 505 N.E.2d 314 (1987).

a limitation to handbook enforceability when the employer includes a disclaimer decreases the potential for employer liability. The *Duldulao* decision thus provides a practical solution for protecting employees without imposing any undue burdens on employers. Future cases will determine whether *Duldulao* is truly an employee benefit.[91]

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91. While the *Duldulao* decision significantly clarifies this area of the law, there are many questions left unresolved. *See* Wilner & Sheehan, *Employment At Will Doctrine in Illinois: The Effect of Employee Handbooks*, 76 ILL. B.J. 268, 273 (1988). For example, the court did not specify whether Illinois courts would recognize an action for negligent performance of an employment contract. *Id.* In addition, it is unclear what type of recovery would be awarded based on breach of progressive discipline policies when there is just cause for the employee's termination. *Id.* Other such unresolved issues include whether the *Duldulao* decision would extend to situations where a recruiter may have made statements regarding job security to prospective employees. *See* Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 30 (1984) (advising use of disclaimer in recruiting situations).