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Contract Law - Employee Handbooks: At-Will or Not At-Will - A Question of Form over Substance - McDonald v. Mobil Coal Producing, Inc.

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**CONTRACT LAW—Employee Handbooks: At-Will or Not At-Will?
A Question of Form Over Substance. *McDonald v. Mobil Coal
Producing, Inc.*, 820 P.2d 986 (Wyo. 1991).**

In my opinion, [McDonald II] strikes the death knell for
employment at-will in Wyoming. —JUSTICE THOMAS¹

Craig McDonald (McDonald) became aware that his employment with Mobil Coal Producing, Inc. (Mobil) would be terminable at-will when he signed his employment application in August of 1987.² McDonald was subsequently hired, began working and soon thereafter received an employee handbook, the purpose of which was explained in a general welcoming section.³ The intention of the handbook was stated to be a “guide . . . to help . . . [the employees] understand

1. *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 992 (Wyo. 1991) (Thomas, J., dissenting). [Hereinafter *McDonald II*]. This was the second time this case was heard by the Wyoming Supreme Court. The first case, *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990) [hereinafter *McDonald I*], resulted in a decision of which there was no majority reasoning. Mobil petitioned for a rehearing, which was granted by the court. The court reaffirmed the previous decision in the second case, *McDonald II*, but again, with no majority opinion.

2. *McDonald I*, 789 P.2d at 867-68. The application stated in part:
READ CAREFULLY BEFORE
SIGNING

I agree that any offer of employment, and acceptance thereof, does not constitute a binding contract of any length, and that such employment is terminable at the will of either party, subject to appropriate state and/or federal laws.
McDonald II, 820 P.2d at 988.

3. The general welcoming section in Mobil's handbook read:
WELCOME

Mobil Coal Producing, Inc., Caballo Rojo Mine, is proud to welcome you as an employee. We believe you will find safety, opportunity and satisfaction while making your contribution to Mobil's growth as a major supplier of coal. This handbook is intended to be used as a guide for our nonexempt mine technicians and salaried support personnel, to help you understand and explain to you Mobil's policies and procedures. It is not a comprehensive policies and procedures manual, nor an employment contract. More detailed policies and procedures are maintained by the Employee Relations supervisor and your supervisor. While we intend to continue policies, benefits and rules contained in this handbook, changes or improvements may be made from time to time by the company. If you have any questions, please feel free to discuss them with your supervisor, a member of our Employee Relations staff, and/or any member of Caballo Rojo's Management. We urge you to read your handbook carefully and keep it in a safe and readily available place for future reference. Sections will be revised as conditions affecting your employment or benefits change.

Sincerely,
/s/
R.J. Kovacich

Mine Manager
Caballo Rojo Mine
McDonald II, 820 P.2d at 989.

... Mobil's policies and procedures."⁴ To further that intention, the handbook contained a "Fair Treatment Procedure,"⁵ a progressive discipline schedule,⁶ and a listing of "fundamental obligations" that Mobil was to fulfil.⁷ The handbook stated in its welcoming section that Mobil intended to continue the policies, benefits, and rules in the handbook. However, it stated in the same section that it was not a "comprehensive policies and procedures manual, nor an employment contract,"⁸ and stated that changes could be made by the company "from time to time."⁹

McDonald worked in the Caballo Rojo mine in Campbell County, Wyoming for 10 months. In the first week of June, 1988, McDonald heard rumors that a co-employee was asserting that McDonald sexually harassed her.¹⁰ Concerned about possible problems, McDonald reported these rumors to his supervisor,¹¹ and the supervisor told him not to worry about it.¹² On June 9th, 1988, McDonald was ordered to meet with his supervisor, the mine superintendent and the supervisor of employee relations, who told him that he had the choice of resigning or being fired.¹³

After resigning, McDonald filed suit in the Campbell County District Court against Mobil and others,¹⁴ claiming breach of contract, breach of the covenant of good faith and fair dealing, negligence and

4. *Id.*

5. The Fair Treatment Procedure was a procedure consisting of an employee's opportunity to talk with a supervisor about a problem. If the problem was not resolved to the liking of the employee, the employee could take the matter up with other supervisors. *McDonald I*, 789 P.2d at 868. The employee had "an opportunity to be heard, without fear of reprisal." *McDonald II*, 820 P.2d at 990.

6. The handbook detailed a progressive discipline schedule, along with a list of behaviors Mobil would not tolerate. *McDonald I*, 789 P.2d at 868. The list was noninclusive, however. *Id.* The steps in the progressive discipline schedule Mobil was to follow began with counselling on the first offense. After the second offense came a written reprimand. The third offense resulted in suspension and on the fourth offense, the employee would be discharged. *Id.*

7. *McDonald I*, 789 P.2d at 868. Seven fundamental obligations were detailed in the handbook. *Id.* The court in *McDonald I* cited three of them:

(2) To train and guide employees, allow them to develop their job abilities and regularly keep them informed of their progress.

(3) To invite constructive suggestions and criticism and guarantee the right to be heard without fear of reprisal.

(4) To give helpful consideration when an employee makes a mistake or has a personal problem with which we asked to help.

Id.

8. *McDonald II*, 820 P.2d at 989.

9. *Id.*

10. *McDonald I*, 789 P.2d at 867.

11. Brief of Appellant at 3, *McDonald I*, 789 P.2d 866 (Wyo. 1990) (No. 89-146) [hereinafter Brief of Appellant].

12. *McDonald II*, 820 P.2d at 991.

13. Brief of Appellant, *supra* note 11, at 3-4.

14. *McDonald I*, P.2d at 868. The parties in the action are listed as follows: Craig McDonald v. Mobil Coal Producing, Inc.; Brad Hanson, the mine superintendent; Peter Totin, the mine supervisor of employee relations; and Bert Gustafson, the preparation plant supervisor.

defamation.¹⁵ The district court granted summary judgment in favor of Mobil, stating that the disclaimers in the handbook preserved the at-will employment relationship.¹⁶ The lower court noted that despite the "tenor" of the handbook which could cause it to be construed as a contract, McDonald's employment remained at-will.¹⁷

On appeal, the Supreme Court of Wyoming reversed summary judgment and remanded the case to the trial court.¹⁸ Relying on the theory of promissory estoppel, a plurality held that an employee may be able to enforce representations made by an employer in an employee handbook.¹⁹ Mobil subsequently filed a Petition for Rehearing and Clarification, due to the conflicting nature of the *McDonald I* opinions.²⁰

The Wyoming Supreme Court granted Mobil's petition for rehearing "to review and clarify" its prior decision.²¹ On rehearing, the court reaffirmed its earlier decision to reverse summary judgment. This time, however, a different plurality found ambiguity as to whether Mobil intended to modify McDonald's employment status from at-will to an employment that could only be terminated for cause.²² The plurality further held that Mobil's disclaimer which indicated the handbook was not a contract was insufficiently conspicuous to bind McDonald.²³ Finally, the court remanded to the trial court for a determination of whether the employee handbook and Mobil's course

15. *Id.* Mobil and the other named defendants moved to dismiss the suit. The district court treated the motions to dismiss as motions for summary judgment, due to extraneous materials filed along with the defendant's motion. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 867. The negligence and defamation claims were not the subject of McDonald's appeal. *Id.* at 868. The good faith and fair dealing claim was discussed briefly, the court holding that either party may terminate at-will employment without breaching the duty of good faith and fair dealing. *Id.* This casenote does not consider the defamation, negligence or good faith and fair dealing claims. For an excellent discussion of the concept of good faith and fair dealing as applied to employment contracts in Wyoming, see Kelley H. Anderson, Casenote, *The Covenant of Good Faith and Fair Dealing-Does it Apply to Employment Contracts?* Hatfield v. Rochelle Coal Co., 813 P.2d 1308 (Wyo. 1991), 26 LAND & WATER L. REV. 173 (1992).

19. *McDonald I*, 789 P.2d at 870. If the employer should reasonably have expected the employee to consider the representations as a commitment from the employer, the employee reasonably relied upon the representations to his detriment, and injustice can be avoided only by enforcement of representation, then the employee may enforce the representations. *Id.* Justice Golden's concurrence, however, explicitly rejected the application of promissory estoppel, and stated that the provisions in the handbook "juxtaposed against the disclaimer," created ambiguity as to the intent of the parties concerning the employment terms. *Id.* at 870-71.

20. Appellee's Brief on Rehearing at 6, *McDonald II*, 820 P.2d 986 (Wyo. 1991) (No. 89-146).

21. *McDonald II*, 820 P.2d 986, 987 (Wyo. 1991).

22. *Id.* at 991.

23. *Id.* at 989. The court followed *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977 (D. Wyo. 1988) in finding that if a disclaimer is not set off from the other provisions, is not capitalized or in larger print, or contained only under a general welcoming section, then the disclaimer is not conspicuous. *McDonald II*, P.2d at 989.

of dealing with McDonald modified the terms of the at-will employment relationship.²⁴

This casenote examines the law surrounding at-will employment in Wyoming and the effect employee handbooks have on this arrangement. It analyzes the Wyoming Supreme Court's opinions in both *McDonald I* and *McDonald II* in order to clarify the present state of the law. It argues that the law set forth by the plurality in *McDonald II* correctly follows Wyoming precedent, and is therefore controlling law. Finally, this casenote presents several guidelines employers may follow in order to preserve the at-will employment status of its employees.

BACKGROUND

At-will employment in America began its climb to prominence with an 1877 treatise written by American legal theorist H.G. Wood.²⁵ Wood proposed that, absent an understanding between employer and employee, a presumption existed that employment has no duration, and either party could terminate the employment at any time.²⁶ At-will employment was first acknowledged by the United States Supreme Court in *Adair v. United States*.²⁷ The Court found that it was "not within the functions of government," absent a contract, to compel a person to retain services of another, or compel a person to perform services for another against their will.²⁸

In 1937, the Wyoming Supreme Court acknowledged at-will employment in *Casper National Bank v. Curry*.²⁹ The court stated that unless a definite period of time was specified in the contract regarding the employment term, the employment was at-will and the employee or employer could terminate the employment at any time.³⁰ Many later Wyoming cases also support the at-will employment rule³¹ and

24. *Id.* at 991.

25. PAUL I. WEINER ET AL., *WRONGFUL DISCHARGE CLAIMS: A PREVENTATIVE APPROACH* 6-7 (1986).

26. H.G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 272-73 (1877). Prior to this treatise, American courts followed the English rule, where a presumption existed that employment consisted of one year blocks. WEINER, *supra* note 25, at 5.

27. 208 U.S. 161 (1908). The United States Supreme Court stated that in the absence of a contract, the employer and employee have the right to terminate employment at any time. *Id.* at 175-76.

28. *Id.* at 174.

29. 65 P.2d 1116 (Wyo. 1937). In that case, no definite period of time was set for the duration of an employment contract. The employer claimed that since there was no contract of any specified length, then he was not obligated to pay the employee for his services. *Id.* at 1120. The court found that even though no contract existed, the employment was deemed at-will, and the employee was entitled to wages for the time he had worked. *Id.* at 1121.

30. *Id.* at 1120, 1121 (citing *Watson v. Gugino*, 98 N.E. 18, 20 (N.Y. 1912)).

31. See, e.g., *Long v. Forbes*, 136 P.2d 242 (Wyo. 1943); *Lukens v. Goit*, 430 P.2d 607 (Wyo. 1967); *Carlson v. Bratton*, 681 P.2d 1333 (Wyo. 1984); *Siebkens v. Town of Wheatland*, 700 P.2d 1236 (Wyo. 1985).

the rule has recently been reaffirmed by the Wyoming Supreme Court.³²

Modification of At-Will Employment

Early efforts to modify at-will employment relationships were met with disapproval.³³ In time, however, courts began to acknowledge that exceptions to the at-will rule exist. Federal and state statutes have limited the at-will rule,³⁴ and courts have found exceptions to the rule based on public policy,³⁵ contract,³⁶ and tort claims.³⁷

In 1984, the Wyoming Supreme Court considered contract based exceptions to at-will employment in *Carlson v. Bratton*.³⁸ In *Carlson*, the court stated the general rule that "[a]bsent a discrimination amounting to a violation of civil rights, a person does not have tenure in employment unless such tenure is established by statute or by con-

32. *Lankford v. True Ranches, Inc.*, 822 P.2d 868 (Wyo. 1991).

33. Michael A. Chagares, *Utilization Of The Disclaimer As An Effective Means To Define The Employment Relationship*, 17 HOFSTRA L. REV. 365, 367, (1989). Courts have held that modifications to the at-will employment contract were unenforceable because of indefiniteness, lack of mutuality of obligation, and lack of independent consideration. *Id.* at 368-69.

34. See, e.g., The Civil Service Reform Act, 5 U.S.C. § 7513(a) (1978), (allowing discharge only for "such case as will promote the efficiency of the service"); Title VII of The 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (prohibiting discharge due to "race, color, religion, sex, or national origin").

35. See *Griess v. Consolidated Freightways Corp. of Delaware*, 776 P.2d. 752 (Wyo. 1989) (holding that an employer cannot discharge employee for filing workers compensation claim). Similar to the public policy exception is the covenant of good faith and fair dealing claim exception. See *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) (holding that discharge made in "bad faith or malice or based on retaliation" is against public policy). In Wyoming, the Wyoming Supreme Court has not recognized a good faith and fair dealing exception to the at-will doctrine. See *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308, 1309 (Wyo. 1991). But see *Anderson*, *supra* note 18 (arguing that there should be a good faith and fair dealing exception).

36. Two theories have been advanced: implied unilateral contract and promissory estoppel. See *Mobil Coal Producing, Inc., v. Parks* 704 P.2d 702 (Wyo. 1985) for an example of how the unilateral contract theory has been applied. See *McDonald I*, 789 P.2d 866 (Wyo. 1990) for the application of promissory estoppel as an exception to the at-will doctrine. See also *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987) (recognizing both theories).

37. See IRA MICHAEL SHEPARD, ET AL., *WITHOUT JUST CAUSE: AN EMPLOYERS PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE* 127 (1989) (discussing the tort claims of intentional and negligent infliction of emotional distress, tortious interference with an existing business relationship, fraud and negligent misrepresentation, defamation, and invasion of privacy). This casenote considers only the contract based exceptions to employment at-will.

38. 681 P.2d 1333 (Wyo. 1984). In *Carlson*, the Mayor of Newcastle, Wyoming, discharged Snyder, the Newcastle chief of police, from his position. The City Council ordered the Mayor to specify the reasons for the discharge, and directed him to reinstate Snyder. The Council also ordered a hearing to ascertain whether there was cause for discharge. *Id.* at 1335. The court found that there was no right to continue the position as chief of police. *Id.* at 1338. The court also decided whether the Administrative Procedure Act limited the Mayor's ability to discharge the chief of police by requiring a hearing. The court found that the Act only required a hearing when a person was "removed from office for incompetency, neglect of duty, or otherwise for cause." *Id.* The Wyoming Supreme Court found that this did not occur, and held that the Mayor had authority to discharge the chief of police without a hearing. *Id.*

tract or by rules and regulations pursuant to statute or by rules and regulations having the force of a contract."³⁹

Modification of At-Will Employment Through Employee Handbooks

The theory that an employer's rules and regulations included in employee handbooks may modify at-will employment was set firmly in Wyoming law with the Wyoming Supreme Court decision in *Mobil Coal Producing, Inc. v. Parks*.⁴⁰ The court addressed the question of whether Mobil's handbook, which set forth policies, procedures, rules and regulations, created legally binding terms of employment.⁴¹ The court found the handbook "[c]hanged [Mobil's] unfettered right to discharge [Parks] at any time and without cause."⁴² The court stated, however, that a handbook would not alter at-will employment in all cases: "Each case must be considered on its own merits. Some handbooks or manuals may not contain provisions which negate the employment at-will. Some handbooks or manuals may be ambiguous or may not have apparent meaning, making the determination of their effect on at-will employment a question of fact."⁴³ The court went on to state that if a contract is ambiguous, evidence outside the contract is needed in order to determine the intention of the parties.⁴⁴

The Wyoming Supreme Court followed *Parks* in *Alexander v. Phillips Oil Co.*,⁴⁵ and *Leithead v. American Colloid Co.*,⁴⁶ the Fed-

39. *Id.* at 1339 (emphasis added). Since the Administrative Procedures Act did not require a hearing, it did *not* set out rules and regulations amounting to a contract. *Id.* at 1338-39.

40. 704 P.2d 702 (Wyo. 1985). *Parks* was the first case where Mobil's handbook was found to modify the at-will employment status of one of its employees. Parks' employment was terminated, and he claimed that Mobil did not follow its handbook procedures in the termination process. The court found that the evidence supported the finding that Mobil did not comply with the procedures outlined in the manual, and therefore, Parks was wrongfully terminated. *Id.* at 708.

41. *Id.* at 704. The court found Mobil's employee handbook modified Parks' at-will status. The court stated that an employee handbook may become part of the employment contract by listing more than just the hours of work, pay scale, pension rights, promotion policy, etc., and that such a handbook addressed the right of an employer to discharge its employees at any time. *Id.* at 706. After the case had been decided, Mobil revised its handbook, the revision being the handbook at issue in *McDonald I* and *McDonald II*. *McDonald I*, 789 P.2d 866, 869 (Wyo. 1990).

42. *Parks*, 704 P.2d at 707. The provisions the court found which changed the at-will employment were the progressive discipline procedures, which were preceded by the statement that "[d]isciplinary suspension subject to termination will be imposed when the seriousness of an individual offense or the employee's record of prior rule infractions warrants [sic] such action." *Id.* at 706. The court stated that "[n]ot only does the tenor of the foregoing reflect the necessity . . . of cause for discharge, but specifically requires such. *Id.*

43. *Id.* at 706.

44. *Id.*

45. 707 P.2d 1385 (Wyo. 1985). An employee brought a wrongful termination suit against his employer claiming the handbook and manual he received created enforceable contract terms which were not complied with by the employer. *Id.*

46. 721 P.2d 1059 (Wyo. 1986). An employee brought a wrongful termination suit against his employer claiming the two handbooks he received created enforceable contract terms which were not complied with by the employer. *Id.*

eral District Court of Wyoming also followed *Parks* in *Jimenez v. Colorado Interstate Gas Co.*⁴⁷ In each of these cases, the courts found that the employer's procedures outlined in a handbook or other employee materials became part of the employment contract. In *Alexander*, the Wyoming Supreme Court found that by considering the handbook as a whole⁴⁸ and looking at the surrounding facts of that case,⁴⁹ the handbook modified the at-will relationship by creating enforceable contract terms.⁵⁰ In *Leithead*, the court stated that benefits extended to the employee in the employee handbook constituted enforceable contract terms, thus requiring cause for discharge.⁵¹ The Federal District Court of Wyoming followed these Wyoming Supreme Court cases in *Jimenez*, finding that Colorado Interstate Gas' standard operating procedures created implied contract rights, which led the court to hold that the procedures required cause for discharge.⁵²

The Wyoming Supreme Court disregarded the *Parks* line of cases in *McDonald I*, and took a new approach in analyzing an employee handbook's effect on at-will employment.⁵³ A plurality, consisting of Justices Macy and Urbigkit, found that Mobil's handbook did not become part of the employment contract since the express disclaimer

47. 690 F. Supp. 977 (D. Wyo. 1988). An employee brought a wrongful termination suit against his employer claiming the standard operating procedures that were posted in the employee's coffee room created enforceable contract terms which were not complied with by the employer. *Id.*

48. The court found inconsistency in the handbook as to whether cause was needed for discharge. The court stated that although the handbook provided that "any employee service can be terminated, with or without cause," it implied that cause was necessary by listing conduct that would result in discharge. *Alexander*, 707 P.2d at 1388.

49. *Id.* The court gave weight to the fact that the employer "used extreme methods to establish the existence of a cause for discharge," by placing the employee under surveillance in order to determine if the employee was in fact violating the rules of the company. *Id.* at 1389. The court stated that these circumstances can be used to interpret the ambiguous handbook. *Id.* at 1388-89.

50. *Id.* at 1389.

51. *Leithead v. American Colloid*, 721 P.2d 1059, 1063 (Wyo. 1986). The employee handbook contrasted probationary and permanent employees, stating that probationary employees could be discharged at-will. Thus, the handbook "strongly impl[ie]d" that permanent employees can only be discharged for cause. *Id.* The court continued, stating that the listing of misconduct that could lead to discharge implies that cause is required for discharge. *Id.*

52. *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977, 980 (D. Wyo. 1988). The court found that Colorado Interstate Gas' language in its standard operating procedures (SOP's), regarding the causes of termination was similar to the employee handbook language in *Parks*, *Leithead* and *Alexander*. The court stated that the same conclusion as in those cases should be reached - that the tenor of the SOP's requires cause for discharge. *Id.*

53. *McDonald I*, 789 P.2d 866 (Wyo. 1990). The handbook in *McDonald I* was a modified version of the handbook in *Parks*, with the most significant revision being the addition of the express disclaimer that stated the handbook was not a contract. *Id.* at 869. See also Brief of Appellee at 18, *McDonald I*, 789 P.2d (Wyo. 1990) (No. 89-146). Attachment "A" of the brief shows the provisions of the *Parks* decision where Mobil's handbook was cited, indicating the changes that were made by Mobil after *Parks* was decided. *Id.*

The same day that *McDonald I* was decided, the court decided *Ware v. Converse County School District No. 2*, 789 P.2d 872 (Wyo. 1990), in which it relied on the *McDonald I* opinion to decide whether *Ware* was wrongfully discharged. *Id.* at 875, 876.

demonstrated Mobil's intent not to create a contract.⁵⁴ The plurality then held that an employee may enforce terms in an employee handbook by using a promissory estoppel theory when no contract can be found.⁵⁵ The promissory estoppel theory, however, was rejected by the other members of the court, including Justice Golden in his concurring opinion.⁵⁶ Justice Golden's opinion followed the law set out in the *Parks* line of cases, finding that the handbook was ambiguous and this ambiguity created issues of material fact as to the intent of the parties' terms of employment.⁵⁷ The two dissenters, Justices Thomas and Cardine, argued that the disclaimers included in Mobil's handbook and in McDonald's employment application were completely effective in preserving the at-will relationship.⁵⁸

Because the Wyoming Supreme Court rendered four conflicting opinions, the law regarding the effect of handbooks on at-will employment after *McDonald I* was unclear. Upon Mobil's petition for rehearing asserting confusion, the Wyoming Supreme Court granted a rehearing to "review and clarify [its] earlier decision."⁵⁹

PRINCIPAL CASE

In *McDonald II*, a different plurality, consisting of Justices Golden and Urbigkit, held that issues of material fact existed as to whether Mobil's handbook modified the at-will employment relationship.⁶⁰ This plurality relied primarily on *Parks*⁶¹ in discussing whether Mobil manifested an intent to modify the at-will employment of McDonald; to bolster its reasoning, the plurality relied on sections 19 and 21 of the Restatement (Second) of Contracts which addresses the conduct and intention of parties to a contract.⁶²

54. *McDonald I*, 789 P.2d at 869.

55. *Id.* at 870. The theory, set out in the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), led the court to hold that an employee is entitled to enforce a representation in an employee handbook by demonstrating that "[t]he employer should have reasonably expected the employee to consider the representation as a commitment from the employer; the employee reasonably relied upon the representation to his detriment; and injustice can be avoided only by enforcement of the representation." *McDonald I*, 789 P.2d at 870.

56. *McDonald I*, 789 P.2d at 870. The concurring opinion by Justice Golden expressly rejected the application of promissory estoppel to this case. *Id.*

57. *Id.* at 870-71.

58. *Id.* at 871-72 (Thomas, J., dissenting; Cardine, J., dissenting).

59. *McDonald II*, 820 P.2d 986, 987 (Wyo. 1991).

60. *Id.* at 988.

61. See *supra* notes 40-44 and accompanying text.

62. RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 21 (1981). Section 19 reads in part:

(1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.

(2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other

The plurality found that Mobil's "numerous statements" in the handbook could be "construed as promises", and Mobil's "course of conduct" could lead McDonald to believe that Mobil would follow the procedures in the handbook.⁶³ "[T]hese manifestations," the plurality reasoned, "could suggest to a reasonable person that Mobil intended to make legally binding promises."⁶⁴

After finding that the procedures in Mobil's handbook and Mobil's course of conduct created ambiguity,⁶⁵ the plurality quoted *Parks* stating that "[i]f the meaning of a contract is ambiguous, or not apparent, it may be necessary to determine the intention of the parties from evidence other than the contract itself, and interpretation becomes a mixed question of law and fact."⁶⁶

The plurality followed *Jimenez v. Colorado Interstate Gas Co.*,⁶⁷ requiring that disclaimers must be conspicuous in order to be effective, and concluded that the trial court erred when it stated that conspicuous disclaimers are not required.⁶⁸ The plurality found that the disclaimer Mobil used in its handbook, which attempted to eliminate Mobil's contractual liability, was not conspicuous and therefore not binding on McDonald.⁶⁹ The plurality continued, stating that the disclaimer's effect on the employment relationship was unclear to the employee.⁷⁰

party may infer from his conduct that he assents.

Id.

Section 21 reads: "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract." *Id.*

These sections enabled the court to conclude that Mobil's subjective intent to contract, (shown by its express disclaimer which stated that the handbook did not create a contract), was "irrelevant, provided that Mobil made . . . intentional, objective manifestations of contractual assent." *McDonald II*, 820 P.2d at 990. The court relied on the "objective theory" of contract embodied in these sections, to conclude that "contractual obligation is imposed . . . upon the outward manifestations of a party's assent sufficient to create reasonable reliance by the other party." *Id.*

63. *McDonald II*, 820 P.2d at 991. The court gave weight to the general welcoming section, which stated that Mobil intended to continue its policies, benefits and rules. *See supra* note 3. The court also gave weight to Mobil's provisions that discouraged unionization and promised job security, as well as the provisions that stated Mobil recognized fundamental obligations to its employees. *McDonald II*, 820 P.2d at 990. The court gave further weight to Mobil's progressive disciplinary schedule outlined in the handbook. *Id.*

64. *McDonald II*, 820 P.2d at 991.

65. *Id.*

66. *Id.* (quoting *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706 (Wyo. 1985)).

67. 690 F. Supp. 977 (D. Wyo. 1988). *See supra* text accompanying note 52.

68. *McDonald II*, 820 P.2d at 988.

69. *Id.* at 989. The plurality stated that "the circumstances surrounding [Mobil's] disclaimer are nearly identical to those of the *Jimenez* case," stating that Mobil's disclaimer was "contained in a general welcoming section," was "not set off by a border or larger print," and was not capitalized. *Id.*

70. *Id.*

Relying on *Woolley v. Hoffman-La Roche, Inc.*,⁷¹ the plurality held that because employees are untutored in contract law, a clear explanation of the effect handbook language has on the employment relationship is essential.⁷² The plurality reasoned that McDonald was led to infer from the handbook language that Mobil was bound by its terms since the disclaimer was not clear and because the handbook language stated that Mobil intended to continue policies set out in its handbook.⁷³ Oddly, the plurality made no mention of the promissory estoppel theory set forth in the *McDonald I* plurality opinion. Justice Macy's specially concurring opinion in *McDonald II*, however, relied upon the *McDonald I* plurality opinion⁷⁴ (which he authored) and urged that the only question to be resolved on remand was whether Mobil's termination procedures should have been enforced to avoid an injustice.⁷⁵

Justices Thomas and Cardine dissented.⁷⁶ In his dissent, Justice Thomas stated that he did not know what more Mobil could have done to make it clear to McDonald that his employment was at-will.⁷⁷ Thomas gave weight to the employment application McDonald signed,⁷⁸ and stated that the plurality did not take into account that McDonald and Mobil entered into a specific at-will relationship as evidenced by McDonald's employment application.⁷⁹ Thomas stated

71. 491 A.2d 1257 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985). In that case, the court found that an unfair situation arises when an employer distributes a manual that creates a belief in the employees that the policies and procedures contained in that manual will be followed, and the employer is then allowed to "renege on those promises" and disregard the policies and procedures. *Id.* at 1271.

72. *McDonald II*, 820 P.2d at 989 (citing *Woolley*, 491 A.2d 1257 (N.J. 1985) *modified*, 499 A.2d 515 (N.J. 1985)). The *Woolley* court stated that "[w]hat is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be . . . construed by the court as a binding contract, there are simple ways to attain that goal." *Woolley*, A.2d 491 at 1271. The *Woolley* court then stated that what was needed was a "very prominent" provision, stating that no promises are made by the employer in the manual, and that the employer may fire anyone with or without good cause. *Id.*

73. *McDonald II*, 820 P.2d at 989.

74. *Id.* at 991.

75. *Id.* at 991-92. Justice Macy found that Mobil's course of conduct clearly demonstrated Mobil intended to be legally bound by its handbook procedures, and that Mobil led McDonald to rely on those procedures. *Id.* at 991.

76. Continuing his dissent in *McDonald I*, Justice Cardine argued that all the plurality opinion in this case does is set out additional requirements for effective disclaimers. *Id.* at 992-93 (Cardine, J., dissenting). Justice Cardine criticized the plurality opinion in this case for using language that implied that "the making of a promise alone reasonably relied upon by another creates an enforceable contract." *Id.* at 993. To the contrary, he argued that there must be a meeting of the minds, and that because of Mobil's disclaimer, there was neither intent, nor any such meeting of the minds, nor was there consideration to support a contract. *Id.* He stated therefore that "[t]here was no contract," and "[t]hat is why this court in *McDonald I* [used] promissory estoppel" in its decision to reverse summary judgment. *Id.*

77. *Id.* at 992 (Thomas, J., dissenting).

78. *Id.* See *supra* note 2.

79. *Id.* Justice Thomas attempted to distinguish *Jimenez* and *Alexander* on this fact as well as the fact that Mobil's handbook was adopted and issued before McDonald was employed.

that this case "strikes the death knell for employment at-will in Wyoming."⁸⁰ He argued that there can no longer be communication between employer and employee about the conditions and circumstances of employment, and "if any such dialogue occurs, it will be considered to have amended the arrangement."⁸¹ He then concluded by saying that "it is hereafter impossible to have an employment at-will in Wyoming."⁸²

ANALYSIS

By rendering four conflicting opinions in *McDonald I*,⁸³ and four conflicting opinions in *McDonald II*,⁸⁴ the Wyoming Supreme Court has thoroughly confused the law surrounding the effect employee handbooks have on at-will employment. The court declared in *McDonald II* that it granted Mobil's petition for rehearing in order to clarify its *McDonald I* decision.⁸⁵ Yet, the court's attempt at clarity resulted only in continued confusion.

The Wyoming Supreme Court's confusion was clearly unnecessary; the effect of employee handbooks on employment at-will has been well established in Wyoming law. Had the court in *McDonald I* followed *Parks*, *Alexander*, *Leithead* and *Jimenez*, it would have concluded that Mobil's handbook created contract terms which necessitated the existence of cause for the termination of McDonald's employment, making the *McDonald II* rehearing superfluous.

Erroneous Application of Promissory Estoppel

Promissory estoppel is used only when consideration cannot be found.⁸⁶ In examining the handbook in *McDonald I*, the plurality's finding that the employee handbook was not part of McDonald's employment contract because of Mobil's subjective intent was erroneous. Under the objective theory of assent, Mobil's subjective intent was irrelevant because of Mobil's sufficient, intentional objective manifestations of contractual assent.⁸⁷ McDonald's reasonable belief that Mobil had the intention of creating an agreement was enough

Thomas could not understand how this could amend or change the employment at-will relationship, especially after McDonald had signed a statement that provided his employment was terminable at-will. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See *supra* notes 53-59 and accompanying text.

84. See *supra* notes 60-82 and accompanying text.

85. *McDonald II*, 820 P.2d at 987.

86. E. ALLAN FARNSWORTH, *CONTRACTS* § 2.19, at 92 (2d ed. 1990). Promissory estoppel is a substitute for consideration. *Id.*

87. *McDonald II*, 820 P.2d at 990.

to override Mobil's subjective intent.⁸⁸ The plurality did not state that consideration was lacking,⁸⁹ and even if it had, it would have been incorrect;⁹⁰ therefore, the Wyoming Supreme Court's application of promissory estoppel was erroneous. The Wyoming Supreme Court was merely faced with a contract interpretation problem - whether Mobil's handbook was in fact part of the employment contract, and what effect it had on the employment relationship.⁹¹

The Parks Line of Cases: What the Court Should Have Done

Whether an employee handbook may become part of an employment contract, thereby limiting an employer's right to terminate employees at-will, was resolved by the Wyoming Supreme Court in *Mobil Coal Producing, Inc. v. Parks*.⁹² In *Parks*, the court found that certain language included in an employee handbook can become part of the employment contract, thereby changing an employer's right to discharge its employees at-will.⁹³ The Wyoming Supreme Court

88. FARNSWORTH, *supra* note 86, § 3.7, at 122. "[A]s long as one intended to engage in [certain] actions, there is no further requirement that the actions were done with the intention of assenting to an agreement." *Id.* § 3.6, at 119-20. In finding there was no "meeting of the minds", Justice Cardine advocated the outmoded subjective theory of assent. *McDonald II*, 820 P.2d at 992-93 (Cardine, J., dissenting). This theory has since yielded to the objective theory of assent. FARNSWORTH, *supra* note 86, § 3.6, at 119. The plurality in *McDonald II* recognized that its earlier decision in *McDonald I* was too subjective, and subsequently decided that the objective theory of assent was the proper theory to apply in that case. *McDonald II*, 820 P.2d at 990.

89. However, Justice Cardine in his *McDonald II* dissent stated there was no consideration to support the finding that there was a contract. *McDonald II*, 820 P.2d at 993 (Cardine, J., dissenting).

90. See *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1062 (Wyo. 1986). In *Leithead*, the trial court found that the handbook was not supported by consideration so as to create a contract. The Wyoming Supreme Court rejected this finding, stating that "[t]he rule of additional consideration . . . is directly contrary to established Wyoming authority. . . . The benefits extended to the employee in the handbook are enforceable contract terms, because they are supported by consideration flowing to the employer. *That consideration consists of the benefit of an orderly, cooperative and loyal workforce.*" *Id.* at 1062-63 (emphasis added).

91. Even if the handbook was not part of the contract, promissory estoppel should not be applied in wrongful termination cases. In Wyoming, promissory estoppel has been used generally as a defense, and not as a substantive claim for relief. See Gay Johnson's Wyo. Automotive Serv. Co. v. City of Cheyenne, 369 P.2d 863 (Wyo. 1962) ("Estoppel generally may be asserted as a matter of defense or for the protection of a right but not for the 'creation of a right.'"). When the plurality in *McDonald I* did not accept McDonald's breach of contract claim, the court subsequently raised promissory estoppel as a substantive claim for McDonald. Thus, the court erroneously departed from established Wyoming law. *McDonald I*, 789 P.2d 866 (Wyo. 1990).

This argument was advanced by Mobil in Appellee's Brief on Rehearing, *supra* note 20, at 23-26.

92. 704 P.2d 702 (Wyo. 1985). The court cited *Carlson v. Bratton*, 681 P.2d 1333 (Wyo. 1984) for the principle that rules and regulations may have the force of a contract. See *supra* text accompanying note 39. •

93. *Parks*, 704 P.2d at 706. The *Parks* court stated that the question to be resolved was whether or not Mobil's handbook provisions created contractual terms. *Id.* at 704. The court found that it did. *Id.* at 707. The court in *Parks* also cited many cases from other jurisdictions

followed *Parks* in *Alexander*,⁹⁴ and *Leithead*.⁹⁵ In both of these cases, the court found that the handbooks created contract terms that were binding on the employer.

How an employee handbook may limit an employer's right to terminate its employees at-will has been a settled question in Wyoming law as well. The Wyoming Supreme Court has established several factors⁹⁶ which are relevant to this inquiry.

First, the specific language in the employment handbook should be analyzed. In *Parks*, Mobil's handbook language changed the at-will status of the employee by setting out specific conduct that could result in termination.⁹⁷ Likewise, in *Leithead*, the Wyoming Supreme Court found that "[w]ithout the handbooks, the employment was at will. . . . By listing misconduct that could result in discharge, the handbooks imply that cause is required."⁹⁸ The Federal District Court of Wyoming applied the same principle in *Jimenez v. Colorado Interstate Gas Co.*⁹⁹ The District Court found that the employer's standard operating procedures, which contained language that was substantially the same as in *Leithead*, implied that cause was required for discharge.¹⁰⁰ Finally, in *Alexander*, the Wyoming Supreme Court found that the handbook's listing of causes in which discharge would occur, contrasted with the handbook's statements that discharge could occur with or without cause, created an inconsistency with respect to whether the employer "represented that discharge can only be for cause."¹⁰¹ Consequently, by listing behaviors Mobil would not con-

which held an employee handbook may become part of the employment contract. *Id.* The court declared, however, that the existence of a handbook would not alter the at-will status of a company's employees in every case. *Id.* at 706. The court found that some handbooks may not contain language that changes the employment at will, and others may contain provisions that make the handbook and the employment contract ambiguous, and therefore require contract interpretation. *Id.* Justice Thomas' statement that at-will employment is impossible in Wyoming is squarely in contradiction with the findings of the *Parks* majority. *McDonald II*, 820 P.2d at 992 (Thomas, J., dissenting). Hence, Justice Thomas' statement is perplexing, since he himself was a member of the *Parks* majority.

94. The court in *Alexander* cited *Parks* extensively, and concluded that by considering the handbook as a whole, and examining the circumstances of the case, the at-will employment was changed to an employment where cause was required, thus becoming a contract. *Alexander v. Phillips Oil Co.*, 707 P.2d 1385, 1386 (Wyo. 1985). The *Alexander* court acknowledged that the Wyoming Supreme Court has allowed handbooks to become part of the employment contract. *Id.* at 1389 n.4 (referring to the Wyoming Supreme Court's holding in *Parks*).

95. In *Leithead v. American Colloid Co.*, the court stated that "[t]he benefits extended to the employee in the handbook are enforceable contract terms" 721 P.2d 1059, 1062 (Wyo. 1986). See *supra* note 90 for the court's explanation as to why the terms were enforceable.

96. The Federal District Court of Wyoming also contributed to these factors in *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977 (D. Wyo. 1988).

97. *Parks*, 704 P.2d at 705.

98. *Leithead*, 721 P.2d at 1062-63.

99. 690 F. Supp. 977 (D. Wyo. 1985).

100. *Id.* at 980.

101. *Alexander v. Phillips Oil Co.*, 707 P.2d 1385, 1388 (Wyo. 1985). The ambiguity in the handbook made it necessary for the court to look at circumstances outside the handbook.

done, combined with a detailed discipline procedure, Mobil's handbook in *McDonald II* should have been found to imply that cause was necessary for discharge.

Second, the general "tenor" of a handbook should be examined. In *Parks*, *Alexander*, and *Leithead*, the "tenor" of the handbooks reflected the necessity of cause for discharge. In finding such "tenor", the Wyoming Supreme Court looked to the specific provisions in the handbooks to conclude that the handbooks reflected necessity of cause for discharge.¹⁰² By containing language that is substantially similar to the handbooks in *Alexander*, *Leithead*, and *Parks*, the "tenor" of Mobil's handbook is thus substantially the same; Mobil's handbook reflects the necessity of cause for discharge.¹⁰³

Third, when a handbook contains language that creates ambiguity, the court may examine circumstances outside the handbook to determine its effect on the employment relationship.¹⁰⁴ The Wyoming Supreme Court in *Alexander* found inconsistency in the language of the handbooks,¹⁰⁵ and therefore it combined the handbook's language with the circumstances surrounding the discharge, and concluded that the employment was not at-will.¹⁰⁶ Mobil's handbook in *McDonald II* presented a similar inconsistency, wherein Mobil's handbook contained language that implied cause was necessary for discharge;¹⁰⁷ however, McDonald's employment application stated his employment was terminable at-will.¹⁰⁸ Accordingly, the plurality correctly examined the circumstances surrounding McDonald's discharge.¹⁰⁹

Finally, any disclaimers that are included in an employee handbook should be analyzed. The disclaimer in *Jimenez* stated that the

Id. at 1389. See *infra* notes 105-06 and accompanying text. The court found that the language and circumstances surrounding the handbook were sufficient to find that the employment was not at-will. *Id.*

102. See *Alexander*, 707 P.2d at 1388. The court found that "except for the recitation . . . that termination can be with or without cause, the tenor of the [handbooks] reflect necessity of cause for discharge." *Id.*; see also *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706 (Wyo. 1985); *Leithead*, 721 P.2d at 1063.

103. Mobil's assertions that union representation was not necessary for job security, the existence of a fair treatment procedure, the list of seven fundamental obligations Mobil was to fulfill, along with the progressive discipline policy and listing of misconduct Mobil would not condone, establishes a "tenor" which strongly implies that cause is needed for discharge. See *supra* notes 3-7 and accompanying text.

104. *Parks*, 704 P.2d at 706.

105. *Alexander*, 707 P.2d at 1388. On one hand, the handbook contained language which implied that cause was necessary for discharge. On the other hand, the handbook stated that employees could be terminated at any time, with or without cause. *Id.*

106. *Id.* at 1389.

107. See *supra* note 103 and accompanying text.

108. See *supra* note 2.

109. *McDonald II*, 820 P.2d 986, 991 (Wyo. 1991). The court, however, left to the trial court the determination as to whether the handbook became a part of the employment contract. *Id.*

standard operating procedures did not constitute terms of an employment contract.¹¹⁰ The *Jimenez* court held that this disclaimer was not conspicuous.¹¹¹ Hence, the standard operating procedures became part of the contract, and limited the employer's right to terminate its employees at-will.¹¹² The plurality in *McDonald II*, in nearly the same situation as *Jimenez*, correctly held that the disclaimer contained in Mobil's handbook was not conspicuous, and therefore not binding on McDonald.¹¹³

The application of these factors set out by established Wyoming precedent confirms the plurality's finding in *McDonald II* that Mobil's handbook may well have become part of the employment contract, thereby restricting Mobil's right to terminate its employees at-will. In analyzing Mobil's handbook in *McDonald II*, Justices Thomas, Cardine and Macy should have also examined these factors closely. Had they done so, they would have supported the plurality opinion, and followed the precedent set by the *Parks* line of cases.¹¹⁴

The outcome of *McDonald II*, however, does not have the catastrophic consequences that Justice Thomas claims it has. By applying the foregoing factors, a court may still decide that a handbook does not become part of the employment contract, or that the provisions in the handbook do not have an effect on the at-will terminability of its employees.¹¹⁵ At-will employment is vulnerable, however, when an employer includes in its employee handbooks language of the sort found in the *Parks* line of cases. Certain guidelines must therefore be followed by employers so that employees cannot claim handbooks create legally binding obligations which are unintended.

110. *Jimenez*, 690 F. Supp. at 980.

111. See *supra* text accompanying notes 67-70.

112. *Jimenez*, 690 F. Supp. at 980.

113. *McDonald II*, 820 P.2d at 989.

114. Justice Thomas' attempts to distinguish *Alexander* and *Jimenez* in *McDonald II* are unpersuasive. Thomas argues that by "invoking these authorities, the majority . . . fails to recognize the actual employment-at-will arrangement . . . entered into between McDonald and Mobil . . ." *McDonald II*, 820 P.2d at 992. What Thomas must mean, then, is that in *Alexander* and *Jimenez*, there was no actual at-will employment arrangement. This conclusion is erroneous. Since *Alexander* did not have an employment contract that stated a specified duration of employment, his employment would therefore be deemed at-will. See *Casper Nat'l Bank v. Curry*, 65 P.2d 1116 (Wyo. 1937). In addition, the handbook in *Alexander* expressed the at-will arrangement: "[A]ny employee service can be terminated, with or without cause, at any time, at the option of either the company or the employee." *Alexander*, 707 P.2d at 1387. There was an at-will arrangement in *Alexander*, though it was subsequently altered by *Alexander's* receipt of his handbook. Likewise in *Jimenez*, since the employee did not have an employment contract that stated a specified duration of employment, his employment would therefore be deemed at-will. See *Casper Nat'l Bank v. Curry*, 65 P.2d 1116 (Wyo. 1937). Thus, an at-will employment arrangement existed in *Jimenez*, which was subsequently altered by the language in the employer's standard operating procedures. See *supra* text accompanying notes 67-70.

115. *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 706 (Wyo. 1985).

Guidelines for Employers

Justice Thomas' alarmist pronouncement of the impossibility of at-will employment in Wyoming may send employers scurrying in an effort to burn, shred or otherwise destroy employee handbooks in order to preserve the at-will status of its employees. Employee handbooks however, are much too beneficial to discard. When a company has a large workforce that is widely dispersed, the importance of employee manuals becomes obvious.¹¹⁶ An employee manual would facilitate the dissemination of important policies and rules that would be too time consuming and costly to convey by any other means. Even in smaller companies, the importance of handbooks becomes great when the industry is highly regulated.¹¹⁷ Handbooks are also important to employers if they wish to prevent unionization,¹¹⁸ and they also play an important role in ensuring consistent application of policies.¹¹⁹ Handbooks need not be discarded, but they need to be drafted in such a way so as to avoid imposing liability on an employer in a wrongful termination suit.

Provisions That Imply Cause is Required For Termination

All language in an employee manual indicating that cause is required for discharge must be removed. A listing of misconduct for which discharge is possible has the effect of implying that an employee must engage in such misconduct in order to be terminated, even if the list is noninclusive.¹²⁰ Progressive discipline policies have this same effect. Not only do they imply that cause is needed for discharge, but they suggest as well that the employer will follow the procedure.¹²¹ At the least, progressive discipline policies create ambiguity in the handbook as to whether cause is needed for termination.¹²²

116. WEINER, *supra* note 25, at 75.

117. *Id.*

118. *Id.*

119. *Id.* at 75-76.

120. See *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 705 (Wyo. 1985). Mobil's handbook stated "[a]ny employee who violates these rules subjects himself/ herself to degrees of disciplinary action, up to and including termination. . . . The above general rules cannot possibly cover all situations that arise."); In *Alexander v. Phillips Oil Co.*, the handbook read: "Employee's may be discharged for cause. This includes *among other things*" 707 P.2d 1385, 1387 (Wyo. 1985) (emphasis added).

121. See *Parks*, 704 P.2d at 706. The progressive discipline schedule was preceded by the statement, "The nature of discipline will depend on the nature of the offense and/or the employee's cumulative record." *Id.*; *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983). The disciplinary policy language in the employee handbook was an offer of unilateral contract for procedures to be followed in job termination. The handbook language stated, "[i]f an employee has violated a company policy, the following procedure will apply." *Id.* at 626 n.3.

122. See *McDonald II*, 820 P.2d 986 (Wyo. 1991). The court found that Mobil's statements regarding communication and Mobil's discipline procedures, among other statements, created ambiguity as to Mobil's intent to modify the at-will arrangement to an employment terminable only for cause. *Id.*

Employee handbooks should never be drafted to include any representations of employment security beyond what employment at-will provides.¹²³ For example, language that states union representation is unnecessary for job security has the effect of implying that cause is required for termination.¹²⁴ However, other courts have found that statements about job security are merely general statements of policy.¹²⁵ Other language may also limit an employer's right to discharge its employees at-will as well. Stating that the company intends to follow its policies creates an inference that the company will in fact follow its policies.¹²⁶ The existence of grievance procedures may also contribute to limiting an employer's right to terminate employees at-will.¹²⁷ Thus, direct or indirect statements about job security should always be avoided.¹²⁸

Disclaimers Preserving At-Will Employment

Employers have attempted to preserve the at-will status of its employees through the use of adequate disclaimers with mixed results.¹²⁹ In Wyoming, the courts have been wary of such disclaimers, and have looked beyond them in order to find binding terms in an employee handbook. The Wyoming Supreme Court in *McDonald II* has established that simply stating in an employment application that the employment is at-will does not effectively preserve an employer's right to terminate its employees at any time.¹³⁰ A statement in the handbook itself declaring the employment is at-will has also been found not to dissuade a finding that the employment was other than

123. JAMES R. REDEKER, *EMPLOYEE DISCIPLINE: POLICIES AND PRACTICES* 99 (1989).

124. See *McDonald II*, 820 P.2d at 990. Mobil's handbook stated that giving individual consideration was the best method of fulfilling employee and employer needs, and could not be improved by union representation. *Id.* The handbook also stated "union representation is unnecessary for . . . job security." *Id.*

125. See, e.g., *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 630 (Minn. 1983).

126. See, e.g., *McDonald II*, 820 P.2d at 991. The court stated that "[t]he inference favorable to McDonald is that Mobil would follow the rules unless changed, and that since they had not been changed, Mobil was bound by them." *Id.*

127. *Id.* at 990. Mobil's fair treatment procedure "affords an employee the opportunity to be heard, without fear of reprisal." *Id.*

128. See *Alexander v. Phillips Oil Co.*, 707 P.2d 1385 (Wyo. 1985). The employee handbook stated, "[t]he company normally expects to furnish continuous employment to its employees." *Id.* at 1387; see also *Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1986). The handbook contrasted probationary and permanent employees and defined a probationary employee to be one that could be discharged at-will. This strongly implied that a permanent employee could only be terminated for cause. *Id.* at 1061; *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980). The handbook expressly stated that the company would "release employees for just cause only." *Id.* at 893.

129. *WEINER*, *supra* note 25, at 87.

130. *McDonald II*, 820 P.2d 986 (Wyo. 1991). See *supra* note 2. But see, *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1985) (holding that the employment application, which specifically stated that the employment was at-will and the employee could be discharged at any time, was effective in maintaining an at-will employment).

at-will.¹³¹ However, the Wyoming Supreme Court has accepted the findings in *Jimenez*, holding that a disclaimer may be adequate if it is both clear and conspicuous.¹³² To be clear, a handbook must state who the disclaimer applies to, and should reserve the right of an employer to change or modify the handbook at any time.¹³³ The disclaimer should also "confirm the terminable at-will status of the employees."¹³⁴ To be conspicuous in Wyoming, a disclaimer should conform to the guidelines set forth in *Jimenez*: the disclaimer must be set off in some way from the other provisions of the handbook, either by a border, larger print, or capitalization, and the disclaimer should not be included under a general heading.¹³⁵

Even though the Wyoming Supreme Court has found that disclaimers may adequately preserve at-will employment if they are conspicuous, handbooks may become ambiguous when there are both promissory statements and disclaimers included in a handbook.¹³⁶ If an employer is in doubt about whether a handbook which includes a disclaimer may be deemed ambiguous, the employer should ask: Why is this disclaimer in the handbook? If the answer is that the disclaimer is intended to negate provisions in the handbook, such a handbook is a candidate for ambiguity. Thus, the provisions that the employer is attempting to negate should be deleted, thereby avoiding the possibility of ambiguity.¹³⁷

The Wyoming Supreme Court has not been persuaded by Wyoming employers' "form over substance" arguments regarding employee handbooks. Though *McDonald II* does not in any way make employment at-will impossible in Wyoming, the persistence of Wyoming employers in including in their employee handbooks procedures that imply anything but at-will employment will place at-will employment in a perilous position. Consequently, employers who wish to preserve at-will employment in Wyoming must avoid handbook language that implies anything but an at-will relationship. Inserting into a handbook

131. See, e.g., *Alexander*, 707 P.2d at 1387. The handbook stated that "any employee service can be terminated, with or without cause, at any time, at the option of either the company or the employee." *Id.* The court found the handbook limited the employer's right to discharge its employees at-will. *Id.* at 1389.

132. See *McDonald II*, 820 P.2d at 988-89 (adopting the rule set forth in *Jimenez v. Colorado Interstate Gas Co.* 690 F. Supp. 977 (D. Wyo. 1988)). See *supra* text accompanying notes 67-70. See also *Woolley v. Hoffman La-Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984).

133. Chagares, *supra* note 33, at 381.

134. *Id.* at 382. In confirming the at-will status, the disclaimer should state that employment is terminable at the will of either party, that an employee may be terminated without cause, and that termination can occur without prior notice. *Id.* at 384.

135. *Jimenez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977, 980 (D. Wyo. 1988).

136. See, e.g., *McDonald II*, 820 P.2d at 991; *Alexander v. Phillips Oil Co.*, 707 P.2d 1385, 1388 (Wyo. 1985).

137. Chagares, *supra* note 33, at 393.

a statement indicating the handbook does not create a contract is merely an attempt by employers to disguise the true substance of the employment handbook. The Wyoming Supreme Court has not been fooled by this masquerade.

CONCLUSION

The Wyoming Supreme Court has not struck the death knell for at-will employment in Wyoming. On the contrary, the court has breathed life into contract rules which employers have failed to heed. The plurality's *McDonald II* decision, following established Wyoming law, requires employers to recognize that statements made in employee handbooks may bind an employer contractually, despite the intention of the employer to the contrary. However, the other members of the court have failed to follow this established law, creating pointless uncertainty for employers and employees alike, leaving them to guess as to what the court will do next.

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