1996

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Wyoming Employment Law

Kate M. Fox

The Wyoming Supreme Court has consistently adhered to the position that "[i]n Wyoming, employment is presumed to be at-will." However, the court's opinions since 1985 have carved out so many exceptions to that rule that very little of it remains. The law of wrongful termination in Wyoming continues to be in a state of flux; perhaps a reflection of the changing societal views toward the employment relationship. "The at-will rule has come under severe criticism from commentators who argue that the economic justifications for the development of the rule have changed dramatically and no longer support its harshness."

This article will review the development of the law of employment and wrongful termination in Wyoming in the last decade, and will suggest further refinements that might help eliminate some of the uncertainty that currently exists. The article will not address any of the federally-created protections against employment discrimination toward minorities, elderly workers, and workers with disabilities. Nor does the article address actions brought under 42 U.S.C. § 1983 for deprivation of property interests when the state is the employer. The practitioner should keep these federally-created causes of action in mind, as they frequently apply when the employment relationship goes bad (and they generally provide for the recovery of attorney fees).

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2. Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1237, 1260 (N.J.), modified, 499 A.2d 515 (N.J. 1985). Woolley was one of the earlier cases to adopt the rule that a policy manual or employment handbook would likely form the basis of a contract of employment with termination only for cause, unless it contained a conspicuous disclaimer of the employer's intent to maintain at-will employment regardless of statements in the handbook. It was relied on by the Wyoming Supreme Court in 1991 when it adopted the same rule in McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986, 989 (Wyo. 1991) (citing Woolley, 491 A.2d at 1271).


WYOMING FAIR EMPLOYMENT PRACTICES ACT

The Wyoming Fair Employment Practices Act\(^7\) provides a potential administrative remedy that satisfies the requirement of exhaustion of remedies for all the federal statutes mentioned above. While exhaustion of remedies may also take place at the federal level in the Equal Employment Opportunity Commission, the state agency typically moves faster than does the federal agency.\(^8\) Actual relief that can be obtained by employees in the state administrative forum is limited, however. The agency’s authority is limited to ordering the employer to cease unfair employment practices and to take affirmative action, which might include reinstatement and back pay.\(^9\) The one advantage the Wyoming Act may offer is that it applies to employers employing two or more employees,\(^10\) while most of the federal acts apply only to employers with at least 20 employees. For any relief beyond the “make-whole” remedy available under the Wyoming Fair Employment Practices Act, employees must take their contract or tort claims to the courts.

THE CONTRACT OF EMPLOYMENT

Every employment relationship creates a contract of employment,\(^11\) which may be employment at will, or employment which can be terminated only for cause (also referred to as “permanent employment”).\(^12\) Employment is presumed to be at will, which means that “either party may terminate a contract of employment, which is for an indefinite duration, at any time, for any reason or for no reason at all.”\(^13\) The presumption is

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8. Compare less than one year at the state level (Telephone Interview with Charles Rando, Acting Administrator of the Labor Standards Division, Wyoming Department of Employment (Feb. 13, 1996)), to between two and four years at the federal level (Telephone Conversation with Dave Simonton, Program Analyst for the Equal Employment Opportunity Commission, Denver District Office (Feb. 12, 1996)).
12. “Permanent employment has been defined as employment which continues ‘indefinitely, and until one or the other of the parties wish, for some good reason, to sever the relations.’” Leithead v. American Colloid Co., 721 P.2d 1059, 1063 (Wyo. 1986) (emphasis in original) (quoting Rompf v. Johns Q. Hammons Hotels, Inc., 685 P.2d 25, 28 n.2 (Wyo. 1984) (citations omitted)).
rebuttable, usually by evidence of written\textsuperscript{14} or oral\textsuperscript{15} assertions on the part of the employer that might lead employees to believe that their employment would be permanent.

Express Contract

An express contract of employment is a contract "in which the terms are declared by the parties either in writing or orally at the time the contract is formed."\textsuperscript{16} An oral contract is subject to the statute of frauds and therefore, by its terms, must be performed within one year.\textsuperscript{17} A written contract which satisfies the usual requirements of contract law\textsuperscript{18} and contains a definite duration can provide both employer and employee with a great degree of certainty regarding the employment relationship and its termination (in addition to stating a definite duration, an express contract may "contain specific language preserving the right to terminate at will by either party."\textsuperscript{19}) However, individually-negotiated contracts are not practical in cases where there are numerous and frequently unsophisticated employees or high turnover. Far more common in practice is the implied in fact contract.

Implied in Fact Contract, The Employment Handbook

An "implied in fact contract of employment arises from a mutual agreement and intent to promise which is found in the acts or conduct of the party sought to be bound."\textsuperscript{20} The implied in fact contract of employment has most frequently arisen in Wyoming cases dealing with employment handbooks.

The Wyoming Supreme Court's struggle with employment handbooks began with \textit{Mobil Coal Producing, Inc. v. Parks}\textsuperscript{21} in 1985. In that

\begin{itemize}
\item 14. Sanchez v. Life Care Ctrs. of Am., Inc., 855 P.2d 1256 (Wyo. 1993) (finding a disputed issue of material fact existed whether the employment handbook created a contract of permanent employment).
\item 15. \textit{Wilder}, 868 P.2d 211 (finding disputed question of fact existed regarding what oral promises had been made by the employer, and whether such promises constituted terms of a permanent employment contract).
\item 16. \textit{Id.} at 216 (citing 17 C.J.S. \textit{Contracts} § 3, at 522 (1963)).
\item 17. \textit{Id.} at 218 (citing WYO. STAT. § 1-23-105 (1988)).
\item 20. \textit{Wilder}, 868 P.2d at 216 (citing 17 C.J.S. \textit{Contracts} § 4, at 555; \textit{RESTATEMENT (SECOND) OF CONTRACTS} §§ 18-19 (1981)).
\end{itemize}
case, the district court granted partial summary judgment in favor of the employer in a wrongful termination action, finding that employment was at will. The district court also found that the employer had failed to comply with the provisions of the handbook, and awarded damages to the plaintiff. The supreme court held that, by finding the employer was liable for failing to comply with the handbook provisions, the district court "in effect . . . found [the employer] to be contractually bound by the provisions of the handbook."22 The handbook at issue contained more than a description of hours of work, pay scale, pension rights, and promotion policy. It listed unacceptable behavior that would subject the employee to discipline, it contained a progressive disciplinary procedure, and it contained assurances of fair treatment without the necessity for union representation.23 The court concluded that "such provisions create an expectation on the part of an employee that they will be followed, and they induced [the employee] to continue his employment with [the employer]."

To comply with the traditional requirements of contract formation, the court found consideration in the benefit to the employer of "'an orderly, cooperative and loyal work force.'"24

In Parks, the court stated that the existence of a handbook will not:

make employment other than at will 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.25

The practical effect of this holding has been that every employer with a handbook has potentially been subject to an action for breach of contract whenever it terminates an employee. Such an action is either unlikely to be disposed of on summary judgment (since questions of fact regarding the terms of the handbook will likely exist), or if summary judgment is granted to the employer, it is likely to be appealed. A review of the cases since Parks indicates that appeal of summary judgment granted to the employer in wrongful termination cases involving a handbook

22. Id. at 704.
23. Id. at 705-07.
24. Id. at 707 (quoting Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 892 (Mich. 1980)). The holding was restated the following year in Leithead v. American Colloid Co., 721 P.2d 1059, 1062-63 (Wyo. 1986).
has most often resulted in reversal.\textsuperscript{26} The number of cases that have been settled in the face of such extensive, expensive litigation is unknown.

In \textit{Parks} and the cases decided since, the court has identified certain provisions of an employment handbook that it will look to to find an enforceable right to be discharged only for cause. These include the identification of unacceptable conduct which will be subject to discipline,\textsuperscript{27} disciplinary procedures,\textsuperscript{28} a probationary period,\textsuperscript{29} and the absence of a conspicuous disclaimer.\textsuperscript{30}

After \textit{Parks} and its progeny, Wyoming employers who had adopted employee handbooks in order to communicate personnel policies and procedures to their employees discovered they may have a contract of permanent employment. Many employers attempted to maintain at will employment by including disclaimers in the handbook, stating that handbook provisions should not be construed to affect the at will status of the employment relationship.

The Wyoming Supreme Court addressed such an attempted disclaimer in \textit{McDonald v. Mobil Coal Producing, Inc.}.\textsuperscript{31} The application signed by the employee in \textit{McDonald I} stated in part:

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 applicable state and/or federal laws.\textsuperscript{32}

The handbook stated that “it was not a company ‘comprehensive policies and procedures manual, nor an employment contract.’”\textsuperscript{33} In a plurality opinion, the \textit{McDonald I} court held that “Mobil’s express disclaimer demonstrates that it had no intention to form a contract.”\textsuperscript{34} The court struggled with the basic tenet of contract law which requires that

\begin{itemize}
  \item 27. Sanchez v. Life Care Ctrs. of Am., Inc., 855 P.2d 1256, 1258 (Wyo. 1993).
  \item 28. \textit{Id.}
  \item 30. \textit{Sanchez}, 855 P.2d at 1259.
  \item 31. 789 P.2d 866 (Wyo. 1990) (\textit{McDonald I}), reh'g granted, 820 P.2d 986 (Wyo. 1991) (\textit{McDonald II}).
  \item 32. \textit{McDonald I}, 789 P.2d at 867-68.
  \item 33. \textit{Id.} at 868.
  \item 34. \textit{Id.} at 869.
\end{itemize}
there be a meeting of the minds in order for a contract to exist. Because the handbook disclaimer negated a finding of a meeting of the minds, the McDonald I plurality felt it could not find a contract of permanent employment existed. However, it held that “[o]ther provisions of the handbook require us to recognize another manner in which an employer can modify the at-will employment relationship.”

Relying on Restatement (Second) of Contracts § 90(1) (1981), a plurality of the court held the employee was entitled to enforce the promises contained in the handbook, based on the doctrine of promissory estoppel. Only Justice Urbigkit joined Justice Macy in the plurality opinion. Justice Golden specially concurred, disagreeing with the application of promissory estoppel and finding the disclaimer was ineffective as a matter of law because it was not conspicuous. Justices Cardine and Thomas dissented, Justice Thomas noting that he could not distinguish between the doctrine of promissory estoppel and “the effect of a contract.”

The Objective Theory of Contract Formation

On rehearing, another plurality, this time written by Justice Golden, adopted the “objective theory of contract formation.” Under that theory, “contractual obligation is imposed not on the basis of the subjective intent of the parties, but rather upon the outward manifestations of a party’s assent sufficient to create reasonable reliance by the other party.” The court reached the same result with the objective theory of contract formation as it did with promissory estoppel, relying on the same horse—reasonable reliance. Yet the objective theory fits more neatly into the framework of contract law that the court has adopted for addressing wrongful termination disputes.

Under the objective theory, an inconspicuous disclaimer does not defeat a finding of a contract of permanent employment. The subjective intent of the employer is irrelevant; the court’s focus is on whether the

35. Id.
36. Id.
37. Id. at 869-70 (quoting Hanna State & Sav. Bank v. Matson, 77 P.2d 621 (1938)).
38. Id. at 870-71 (Golden, J., concurring).
39. Id. at 872 (Thomas, J., dissenting).
40. McDonald II, 820 P.2d at 990 (citing R. Scott and D. Leslie, Contract Law and Theory 194-95 (1988)).
employer made "sufficient, intentional, objective manifestations of contractual assent to create reasonable reliance" on the part of the employee. \(^{41}\) The court adopted the rule from a decision of the Federal District Court of Wyoming \(^{42}\) "that disclaimers must be conspicuous to be effective against employees and that conspicuousness is a matter of law." \(^{43}\)

Any lack of certainty about the status of the "objective theory of contract formation" after the split in *McDonald II*, \(^{44}\) was resolved in *Sanchez v. Life Care Centers of America, Inc.* \(^{45}\) In a majority opinion written by Justice Brown, the court applied the objective theory of contract formation to find that the disclaimer in the handbook at issue was not conspicuous. The court held the handbook was ambiguous and reversed summary judgment granted in favor of the employer. \(^{46}\)

**A Conspicuous Disclaimer Can Maintain At Will Employment**

Finally in *Lincoln v. Wackenhut Corp.*, \(^{47}\) the court identified a handbook disclaimer sufficiently conspicuous to defeat a finding of a permanent contract of employment. The court, in a unanimous opinion, stated that "[e]mployers do have a means to avoid formation of an implied in fact contract of employment while still presenting the employee with useful information about required performance on the job." \(^{48}\) The court examined three factors to determine the conspicuousness of the disclaimer: The prominence of the text of the disclaimer, the placement of the disclaimer, and the language of the disclaimer. The Wackenhut handbook disclaimer passed the test because its lettering was twice the size of the type in the remainder of the handbook, it was capitalized, and in bold print. The disclaimer was placed on the first interior page of the handbook, and no other material was contained there. The language of the disclaimer was clear and unambiguous. \(^{49}\) Finally, the disclaimer preserved the employer’s right to alter the language of the handbook, thus permitting the employer "to terminate [the employee’s] employment without cause and without adhering to the discipline procedure of the Wackenhut

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41. *id.* at 990.
43. *McDonald II*, 820 P.2d at 988.
44. *McDonald II*, 820 P.2d 986 (Justice Golden was joined in the plurality by Justice Urbigkit, Justice Macy specially concurred, and Justices Cardine and Thomas dissented).
45. 855 P.2d 1256 (Wyo. 1993).
46. *id.* at 1259.
47. 867 P.2d 701 (Wyo. 1994).
48. *id.* at 703.
49. *id.* at 704-05.
handbook.” The court found another disclaimer sufficiently conspicuous to maintain at will employment in *Loghry v. Unicover Corp.*

An employer who wished to adopt an employee handbook, yet maintain at will employment, could do so with some measure of comfort if it included the Wackenhut disclaimer in its entirety. Employers with existing handbooks which may create a contract of permanent employment will have more difficulty in adopting an effective disclaimer, because the addition of such a disclaimer would be a contract modification requiring consideration in order to be effective. In *Wilder v. Cody Country Chamber of Commerce,* the court stated:

The traditional view recognizes that “a promise by an employer or an employee under a subsisting contract to do more or take less than that contract requires is invalid unless the other party gives or promises to give something capable of serving as consideration.”

The *Wilder* court gave no guidance regarding what consideration would be sufficient to effectuate a contract modification from permanent employment to at will employment. Whether and how much monetary consideration would suffice, and whether job benefits might be adequate consideration, are questions to be answered in future cases.

**The Oral Contract**

The *Wilder* court found there was a disputed issue of material fact regarding the status of the oral contract of employment. It based that holding on the employee’s statement that he had been promised his job “for ‘as long as I did the work that was required.’” The court’s conclu-

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50. *Id.* at 705.
51. 878 P.2d 510 (Wyo. 1994). In that case the disclaimer was contained on a “separate 8.5” x 11” page” which the employee was required to sign.
52. 868 P.2d 211 (Wyo. 1994).
53. *Id.* at 219 (quoting 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:37, at 605 (4th ed. 1992) (citing Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 541 (Wyo. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 89, at 237 (1981)). In a case decided before *Wilder*, the Tenth Circuit incorrectly predicted that Wyoming law would “permit an employer unilaterally to amend a handbook to reinstate the employment-at-will rule.” Durtsche v. American Colloid Co., 958 F.2d 1007, 1011 (10th Cir. 1992). It based that prediction on the assumption that, if Wyoming law permitted unilateral amendment, the Wyoming Supreme Court would have disposed of the disclaimer in *McDonald I* and *McDonald II* on the basis of failure of consideration to support a contract modification.
54. *Wilder*, 868 P.2d at 218. The Tenth Circuit, applying Wyoming law, held that “[v]erbal assurances of a term of employment cannot defeat [the at will] presumption unless accompanied by
sion that this vague and indefinite statement might conceivably form the basis of a contract of permanent employment is a significant set-back to the clarity that it has achieved in employment law in recent years. (What "work" is required? What is the standard of performance? Who decides? How is the decision communicated?) Any employee might recall such a statement, and thus create a disputed issue of fact regarding whether employment was permanent or at will.\(^55\)

In recognizing such a vague statement as a contract term, the court completely abandons the contract law requirement that a valid contract requires definite terms.

**Promissory Estoppel**

Plaintiffs in wrongful termination cases consistently bring claims for promissory estoppel, relying on the plurality opinion in *McDonald I*. That case, however, was superseded on rehearing by *McDonald II*,\(^56\) in which only one Justice, in a concurring opinion, applied the doctrine of promissory estoppel to a breach of employment contract case involving a handbook. Neither case offers any precedential authority for the application of promissory estoppel to such circumstances.

The doctrine of promissory estoppel serves no purpose in determining the status of the employment relationship in a handbook case not already served by the objective theory of contract formation now adopted by the court. Reasonable reliance by the employee is the cornerstone of either approach. Promissory estoppel is but an alternative method of finding an enforceable contract when the equities weigh in favor of doing so,\(^57\) and there is no need to call on the equities now that the court has come up with a basis in law for achieving the same result.\(^58\)

The court's current recognition that no reasonable reliance can exist when there is a conspicuous disclaimer provides the employer with some

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\(^{55}\) The existence of a conspicuous disclaimer is the only factor which might defeat such a claim.


\(^{57}\) The elements of promissory estoppel are:

1. a clear and definite agreement;
2. proof that the party urging the doctrine acted to its detriment in reasonable reliance on the agreement; and
3. a finding that the equities support the enforcement of the agreement.


\(^{58}\) Where there is an adequate remedy at law, resort to equity is precluded. Yellowstone Sheep Co. v. Ellis, 96 P.2d 895 (Wyo. 1939).
degree of certainty regarding the status of the employment relationship, while also providing the employee with protection against false promises of employment security. Promissory estoppel has nothing to contribute but confusion.59

The confusion will undoubtedly be augmented by the Wyoming Supreme Court’s opinion in Verschoor v. Mountain West Farm Bureau Mutual Insurance Co.60 Verschoor is not an employment case; it is a case against the insurance company of the plaintiff’s employer. After having been injured on the job, a ranch hand put off medical care until the employer’s insurance agent informed him that such care would be covered. When he obtained the medical care, coverage was denied. In spite of the Wyoming court’s well-established law that promissory estoppel could not apply “to create coverage which is not found within the contract of insurance,”61 the court found that promissory estoppel might be applied to create an entirely new contract between the insurance company and the insured’s employee. This fabrication may be an invitation for employees to allege that, notwithstanding a conspicuous disclaimer in a handbook, a separate contract is created under theories of promissory estoppel. The court should take the first opportunity to distinguish Verschoor on the basis that there existed no written contract between the plaintiff and the defendant; rather, the contract of insurance was between the plaintiff’s employer and the defendant.

THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In Wilder v. Cody Country Chamber of Commerce,62 the court addressed a number of unresolved employment law issues, raising more questions than it answered. One such issue is the applicability of the implied covenant of good faith and fair dealing to employment litigation. The covenant of good faith and fair dealing had been raised by employees for ten years, yet in every case the Wyoming Supreme Court had reserved decision.63 The Wilder court, frustrated with the delay, held “that all contracts of employment contain an implied covenant of good faith and fair dealing.”64

59. Promissory estoppel may have limited applicability in cases where no handbook exists.
60. 907 P.2d 1293 (Wyo. 1995).
61. Id. at 1298.
64. Wilder, 868 P.2d at 220.
In response to the criticism that the "concept of bad faith [is] 'amorphous,'" the court then attempted to set some parameters to its application. Although the covenant arises from contract, it is a tort. The duty which would give rise to such a tort is found only in "rare and exceptional cases," and only "when there are special relationships" between employer and employee.\textsuperscript{65} A "special relationship" is a relationship of "trust and reliance," which "may be found by the existence of separate consideration, common law, statutory rights, or rights accruing with longevity of service."\textsuperscript{66}

The \textit{Wilder} court held the three years' employment in that case was not "sufficient longevity" to establish the "special relationship" necessary to give rise to an action for the breach of the implied covenant of good faith and fair dealing.\textsuperscript{67} The court did not address the other bases it had mentioned—separate consideration, common law, or statutory rights. The court rejected application of the covenant in \textit{Drake v. Cheyenne Newspapers, Inc.},\textsuperscript{68} with little discussion. The court reasoned that, since the terminated employees had been told their actions would result in termination, reliance on a special relationship was misplaced. Future litigants will be left with the task of sorting out the applicability of any of those issues to a claim for breach of the covenant, as well as with determining what constitutes sufficient longevity.

\section*{Intentional Infliction of Emotional Distress}

Every wrongful termination action seems to contain a claim for the intentional infliction of emotional distress. The Wyoming Supreme Court recognized the viability of such a claim in \textit{Leithead v. American Colloid Co.}\textsuperscript{69} Yet the court in that case held that recognition of the claim would not "flood the courts with fraudulent claims and create potentially unlimited liability for every type of mental disturbance," because strict limits would be placed on it.\textsuperscript{70} First, there must be outrageous conduct on the part of the tortfeasor, defined as "conduct which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable,

\begin{itemize}
\item \textsuperscript{65} \textit{Wilder}, 868 P.2d at 221 (quoting K Mart Corp. v. Ponsock, 732 P.2d 1364, 1370 (Nev. 1987)).
\item \textsuperscript{67} \textit{Id.} at 222.
\item \textsuperscript{68} 891 P.2d 80 (Wyo. 1995).
\item \textsuperscript{69} 721 P.2d 1059 (Wyo. 1986).
\item \textsuperscript{70} \textit{Id.} at 1065.
\end{itemize}
ble in a civilized community." 71 Frivolous claims can often "be weeded out at the summary-judgment stage," 72 because "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so." 73 Only if reasonable men may differ on that question does it become a matter for the jury.

The second element of the tort is severe emotional distress suffered by the plaintiff. That element is not even considered if the discharge which is alleged to have caused the distress was permitted under the contract, or otherwise justified. If the emotional distress element is reached, it must be severe—that is, it must be "so severe that no reasonable man could be expected to endure it." 74 In Leithead, the plaintiff alleged he worried about his future and his ability to pay his bills, and had some sleepless nights as a result. The court held that his allegation did not rise to the level of severe emotional distress. 75

There are no published opinions since Leithead in the employment law area which deal with the intentional infliction of emotional distress, although in this author's experience that claim is always brought by plaintiffs in wrongful termination cases. This is perhaps a tribute to the clarity of the court's opinion in Leithead, which does have the desired effect of eliminating frivolous claims at the summary judgment stage.

REDUCTION IN FORCE, ECONOMIC NECESSITY

Only one Wyoming case, Rompf v. John Q. Hammons Hotels, Inc. 76 has addressed the issue of economic necessity as a defense in a wrongful termination action. In that case, the plaintiff employee was terminated for economic reasons after two months' employment. He brought an action for breach of contract, breach of the implied covenant of good faith and fair dealing, and malicious and intentional conduct on the part of his employers. 77 The court found neither oral nor written representations that employment would be permanent, and thus rejected the breach of contract claim. It further held that the alleged failure to follow disciplinary procedures set forth in the handbook was irrelevant in light of the fact that the

71. Id. at 1066 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).
72. Id.
73. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965)).
74. Id. at 1067 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).
75. Id.
77. Id. at 26.
termination was not a disciplinary matter, but rather a reduction in force.\textsuperscript{78} The court finally held that the facts surrounding the dismissal would not give rise to a claim for the breach of the implied covenant of good faith and fair dealing, given that the termination was prompted by legitimate economic concerns. The court quoted from a Massachusetts case, stating:

We do not question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer needs flexibility in the face of changing circumstances. We recognize the employer’s need for a large amount of control over its work force.\textsuperscript{79}

Although economic necessity continues to be a viable defense to wrongful termination actions, employers should not place too much reliance on it. \textit{Rompf} was decided in 1984, before \textit{Parks}, and before the Wyoming Supreme Court had developed the line of cases which have eroded the recognition of “the employer’s need for a large amount of control over its work force” and provided the employee numerous avenues for recovery for wrongful termination. The case might well be decided differently today. In \textit{Rompf}, employment was found to be at will in spite of the existence of a handbook, and the viability of the claim for breach of covenant of good faith and fair dealing was reserved “until a proper case is before us.”\textsuperscript{80} Even when economic necessity can be demonstrated, the employer should be prepared to defend its termination of some employees and not others.

\textbf{CONCLUSION}

Although the Wyoming Supreme Court has taken three steps forward in forming a coherent body of employment law in the last decade, in \textit{Wilder} it took two steps back. The \textit{Wilder} opinion not only invites protracted litigation on the breach of covenant of good faith and fair dealing, but its fuzzy discussion of an oral contract, based on the plaintiff's contention that he considered his employment to be “‘permanent’” for “‘as

\textsuperscript{78} Id. at 29.
\textsuperscript{79} Id. at 28 (quoting Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977)).
\textsuperscript{80} Id. at 28.
long as I did the work that was required" provides fertile ground for creating questions of fact that will defeat summary judgment, and provides no guidance for a jury.

Wyoming practitioners can find some solace in the clear lines the court has established regarding the effect of an employee handbook on the employment relationship. If there is an employee handbook, without a conspicuous disclaimer as identified in Wackenhut and Loghry, it is safe to assume that employment is not at will. If there is no handbook at all, it is not safe to assume that employment continues to be at will because after Wilder the employee can create a question of fact as to an oral contract with allegations of very vague statements regarding representations made by the employer (although oral contract recovery is limited by the statute of frauds). Promissory estoppel remains an unknown.

In future cases, the court will undoubtedly have the opportunity to set forth the same sort of clear parameters for some of these claims that it set for the intentional infliction of emotional distress in Leithead. Oral contract, while it certainly may have its place in the context of employment, cannot be based upon vague assurances of continued employment. A claim of oral contract of continued employment should be subject to the same scrutiny as any oral contract; that is, the requirement of definiteness. Courts are subject to the same constraints when considering an employment contract as they are when considering any other contract—that is, the contract must be "sufficiently definite to permit the court to determine within reasonable certainty the extent of the promissor's contractual duties." The court in future cases should raise the threshold of proof for an action for breach of the oral contract of employment to go forward, so that sufficient facts regarding the terms of any such contract are presented.

Promissory estoppel should be put to rest once and for all as redundant. The role of the conspicuous disclaimer should be clarified to establish that, if there exists an effective disclaimer, no claim of breach of contract, oral or written, or its step-sister, promissory estoppel, can survive.

Finally, the breach of the covenant of good faith and fair dealing cries out for definition, if not outright rejection. The claim may be attractive because it presents the courts with the opportunity to award damages when the employer's conduct is offensive in some respect that doesn't fit

81. 868 P.2d at 214.
82. 867 P.2d 701 (Wyo. 1994).
83. 878 P.2d 510 (Wyo. 1994).
into a previously defined cause of action. However, it provides neither employer nor employee with the certainty that defined conduct either is or is not actionable. At present, it is such an amorphous claim that its primary purpose is to increase the settlement value of a wrongful termination case. The sole function of the breach of the covenant of good faith and fair dealing appears to be to provide employees, whether at will or permanent, with an avenue for recovery from employers who have treated them so unjustly or with such improper motives that their conduct is outrageous. That function is already served by the tort claim for intentional infliction of emotional distress (so long as the plaintiff can demonstrate severe emotional distress). Further, as discussed above, the claim of emotional distress is well-defined, and provides much of the clarity that is absent from the covenant of good faith and fair dealing.

The court’s flirtation with promissory estoppel and the covenant of good faith and fair dealing appears to be driven by the temptation to pass judgment on the fairness of every challenged employment termination. While the result may be to achieve a fair result in the cases that reach the Wyoming Supreme Court, the effect is lack of certainty and unfairness in the many employment relationships which are never subjected to the court’s scrutiny. In future employment cases, the Wyoming Supreme Court should strive to eliminate the uncertainties that presently exist so that employers and employees can get on with business.