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IN THE WAKE OF HURRICANE *ASMUS*:¹

A LOST OPPORTUNITY IN OUR STRUGGLE WITH EMPLOYMENT HANDBOOKS

I. INTRODUCTION

A. The Story of Benjamin Phired²

Ben Phired used to be a happy man. As his family's sole source of income, Ben was once able to provide his wife and two children with a comfortable life. His oldest son, Avery, had just been admitted to a local private university. Avery would be the first person in Ben's family to attend college, and Ben was very proud when he handed his son a check to cover his first semester at school.

This happy life had been possible because of Ben's position as Chief Superintendent at XYZ Widgets, Inc. ("XYZ"). Ben began working part-time for XYZ while he was still in high school. By the time he was ready to graduate from high school in 1981, Ben was well-liked by everyone at XYZ. Upon graduation, XYZ offered Ben an entry-level factory position. Ben eagerly accepted XYZ's offer and began working one week after graduation. Like most XYZ employees, Ben did not sign or receive a written employment contract.³

XYZ makes three kinds of widgets: the X, Y, and Z models. XYZ's factory is divided into three distinct divisions, each of which

1. *Asmus v. Pac. Bell*, 23 Cal. 4th 1, 999 P.2d 71, 96 Cal. Rptr. 2d 179 (2000).

2. This story is a creation of the author and is not intended to depict any real person or case. However, the unfairness in this story does highlight a recurring injustice in employment.

3. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 1019 (Robert C. Clark et al. eds., 5th ed. 2003) (explaining that, "most employees have no individual written contract which sets out specific terms of employment or the parties' understandings").

produces a specific widget model. In his first four years at XYZ, Ben worked on the production lines for all three widget models.

In 1985, XYZ Widgets issued an employment handbook to all of its employees. In a section entitled "EMPLOYMENT SECURITY," the XYZ handbook articulated the following policy:

(a) Management employees will only be terminated for just cause.⁴

(b) If XYZ Widgets' changing business needs should require the dissolution of a given managerial position, XYZ will preserve the manager's job security by offering reassignment to a comparable position.

(c) *This policy shall be maintained until the company abandons production of one or more widget models.*

Since 1985, the company has implemented a policy of providing all new employees with a copy of the XYZ Employment Handbook when they are hired.

Later in 1985, Ben was promoted to Superintendent of the Z model division of XYZ. Ben was ecstatic because this promotion meant that he was now part of management. Ben believed he was entitled to enjoy the peace of mind that the handbook's employment security provisions promised.

In 1990, XYZ promoted Ben a second time, this time to Chief Superintendent of the Z model division. Ben was to be in charge of the division's entire labor force, including two subordinate superintendents, Jack and Jill. By the late 1980s, Ben had become quite an authority on the production of Z model widgets. Several other widget companies tried to entice Ben to work for them with a higher salary. Yet, Ben turned the offers down because he felt secure in his position at XYZ.

4. See *id.* at 987. "Just cause" is a term of great legal significance that essentially makes an employment arrangement, which would otherwise be presumed terminable for any or no reason, terminable by the employer only if "cause" exists. Now, as Rothstein and Liebman admit, "The definition of just cause has been the subject of considerable debate. The seeming simplicity of the phrase . . . mask[s] the problem of applying the concept to individual circumstances. [T]he true test . . . is whether a reasonable man . . . would find sufficient justification in the conduct of the employee to warrant discharge." *Id.* (citations omitted).

His was a false sense of security, however. In November 2002, after having worked for XYZ for over twenty-one years, Ben found a thin leaflet in his office mailbox entitled:

XYZ WIDGETS, INC.
NEW EMPLOYEE HANDBOOK:
Provisions to Take Effect January 1, 2003

Ben opened the pamphlet and read the first page. Provision 1 read as follows: "Employment with XYZ Widgets, Inc. is understood to be on an at-will basis." Though he did not know what the provision meant, Ben was not overly concerned by the pamphlet. He filed the pamphlet away and subsequently forgot about it.

In January 2003, Ben returned to work after his winter vacation to find his division in great turmoil. After meeting with XYZ's upper management, Ben learned that XYZ had purchased brand-new, state-of-the-art WidgetmakerPlus machines which had been delivered to the floor of his factory and needed assembly. This disturbance had forced Ben's subsidiary superintendents, Jack and Jill, to suspend Z model widget production until the new machines were assembled and brought back on line. Although Ben was upset about not being consulted about the decision to modernize his division, he rallied his subordinates to accept the technology, assemble the new Widgetmakers, and get back to production.

By February 2003, the new machines were up and running and XYZ's Z model division was producing more widgets than ever before. On a Friday in mid-February, Ben received an office memo requesting his attendance at an Upper Management Meeting dubbed "Profit Maximization and XYZ." That afternoon, Ben Phired walked into the XYZ boardroom totally oblivious to what was about to happen to him.

Once inside, Ben knew something was amiss. The CEO of XYZ began, "Mr. Phired, the widget business has changed dramatically over the last 20 years . . ." Ben could hardly react; his world crumbled in a matter of minutes. The CEO told him that the new machines enabled the Z division to be more productive than before, with a labor force one-third its current size. Accordingly, upper management had decided to downsize the Z division and eliminate two superintendent positions. The remaining superintendent position

was to go to Ben's current subordinate, Jill, because she had a college degree and was more familiar with Z division's new technology. Ben was to be "let go."

Ben tried to argue that since XYZ was still producing the Z model, he was entitled to reassignment. The XYZ CEO simply responded, "That was our old policy. You did get a copy of our new handbook, didn't you?"

B. *Asmus and Employee Handbook Law*

If the hypothetical character Ben Phired were to sue his employer under a breach of implied contract theory⁵ in California, not only would he lose, but his suit would likely be dismissed on summary judgment.⁶ At first impression, this outcome seems wholly unfair and hard to justify. However, this is the rule the California Supreme Court has chosen to apply to the modification of implied contractual terms in employment handbooks: No matter what the original provision provides for, the employer is free to amend or abolish any self-imposed handbook policy by merely issuing another handbook.⁷

On June 1, 2000, in *Asmus v. Pacific Bell*, California failed to set a sound precedent in a turbulent field of employment law.⁸ The evolution of American jurisprudence regarding the enforceability of employment handbooks has been anything but graceful.⁹ A review of the history of the employment arrangement in the United States is useful for understanding how California missed its opportunity. Accordingly, Part II of this Note will discuss the "at-will" history of employment arrangements in the United States, and Part III will explore the evolution of the handbook exception to the at-will

5. Handbook terms, though *expressly* set down within the handbook, can only be incorporated into the employment contract as *implied* terms of the contract unless the original employment agreement expressly refers to the handbook and intends to include its terms. See *infra* Part III. Since most original employment contracts contain very few terms other than salary and job title, and are usually settled over a handshake (like Ben Phired's original agreement in 1981), handbook provisions are normally incorporated via implied contract theory. See ROTHSTEIN & LIEBMAN, *supra* note 3, at 1019.

6. *Asmus*, 23 Cal. 4th at 10.

7. *Id.*

8. *Id.*

9. See *infra* Parts III-IV.

presumption. Then, Part IV will discuss the jurisprudence surrounding the modification of handbook provisions. After painting the landscape of precedent, Part V will explore two provocative perspectives on handbook modification that have inspired an equitable, practicable remedy to the handbook modification dilemma. Part VI of this Note will announce a solution, apply it to Ben Phired's unfortunate circumstances, and discuss how California fumbled an opportunity for progress with its decision in *Asmus*.¹⁰

American jurisprudence needs to tweak its approach to handbook modification. Four hundred years ago, Shakespeare's *Shylock* accurately portrayed the significance of sustained employment for all of humanity with his proclamation: "You take my life / When you . . . take the means whereby I live."¹¹ These words have not lost their potency with the passage of time. For reasons that will be discussed in Part II, however, the law has struggled to protect an employer's right to revoke employment at virtually any time and for any reason.¹² Moreover, even if the employer expressly surrenders this right, the law provides the employer with the freedom to reclaim its abandoned right to fire at will.¹³ It is this Note's position, however, that where employers voluntarily create employment handbooks bearing job security provisions that (1) purport to surrender the right to terminate at-will and (2) make additional assurances that the provisions will not be withdrawn until specified times or until the occurrence of specified conditions, they should be held to honor such assurances.

II. THE AT-WILL EMPLOYMENT DOCTRINE

Most American employers hire employees for an indefinite period of time.¹⁴ In the early years of United States jurisprudence, many American courts applied the common law "English Rule" to employment agreements for an indefinite duration.¹⁵ Accordingly,

10. 23 Cal. 4th 1.

11. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

12. *See infra* Part II.

13. *See infra* Part IV (explaining that an employer can promise that an employee will not be fired at-will, and can later say that the employment has assumed at-will status once again).

14. *See* ROTHSTEIN & LIEBMAN, *supra* note 3, at 1019.

15. Stephen Carey Sullivan, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261, 263 (1995).

most courts presumed that employment contracts not expressly addressing duration were to remain in effect for a one-year term.¹⁶

However, under the English Rule parties could avoid the one-year presumption if they could show that the customary practice in their given field treated duration differently.¹⁷ As a result of this glaring loophole in the English Rule, American courts were stymied by conflicting, yet equally zealous arguments as to what the customary practices in obscure fields were.¹⁸

After struggling to distinguish various spheres of employment and finding themselves ill-equipped to choose between equally compelling historical interpretations concerning the duration of employment, many courts determined that the English Rule was tiresome and unworkable.¹⁹ As a result, many began to assert that *all* employees “belonged to a single category.”²⁰ Creating a single category of employment necessitated the creation of general rules to apply with equal force to all employees.

In 1877, Horace G. Wood articulated the first expression of the modern approach to indefinite employment contracts, stating, “[T]he rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring *at-will*, and if the [employee] seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.”²¹ “A hiring *at-will*” was terminable by the employer or the employee at any time.²² Wood’s treatise stated a clear rule of practical application that “spread across the nation until it was generally adopted.”²³

16. See 1 WILLIAM BLACKSTONE, COMMENTARIES *425 (“If the hiring be general, . . . the law construes it to be a hiring for a year; upon a principle of equity, that the servant shall serve, and the master [shall] maintain him.”).

17. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 123–24 (1976) (discussing the then-common attempts to distinguish domestic fields from commercial fields).

18. *Id.*

19. *Id.*

20. *Id.* at 124.

21. *Id.* at 126 (quoting HORACE GRAY WOOD, MASTER AND SERVANT § 134 (1877)) (emphasis added). Remarkably, Wood “offered no policy grounds for the rule he proclaimed” and cases he cited in support “were in fact far off the mark.” Feinman, *supra* note 17, at 126.

22. See Feinman, *supra* note 17, at 126.

23. *Id.* (citing 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT, § 159, at 519 n.4 (1913)).

Today, United States courts generally presume employment arrangements to be at-will.²⁴ Generally, both employers and employees are allowed to terminate their relationship “at any time [and] for any reason.”²⁵ However, it is a matter of absolute certainty that employers and employees may *expressly* alter the nature of their agreements. Accordingly, written individual employment contracts and collective bargaining agreements regularly aim to restrict or supersede the at-will presumption.²⁶ Furthermore, modern developments in the law governing labor and employment have yielded several *implied* exceptions to the at-will presumption.²⁷ Most “jurisdictions have been willing to depart from the . . . rule of terminability at will and to impose an implied . . . duty not to discharge an employee for reasons . . . violative of public policy [and] to recognize the tortious nature of a discharge violative of public policy.”²⁸

One of the implied exceptions most widely recognized across all jurisdictions is “the promulgation of *corporate employment policies* specifying the procedures or grounds for discharge” (“corporate

24. This presumption echoes Wood’s discussion of the employee’s “burden.” See *supra* note 21 and accompanying text.

25. Jason A. Walters, Comment, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree’s Assent*, 32 CUMB. L. REV. 375, 375 (2002). This Note does acknowledge the common law tort for wrongful termination in violation of public policy and the various statutory restraints on an employer’s right to terminate. However, for the purpose of this argument, all terminations are assumed to be in compliance with these areas of the law.

26. See Rebecca Hanner White, *Section 301’s Preemption of State Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377 (1990).

27. For a more complete discussion of these exceptions to the at-will employment doctrine, see Maureen S. Binetti et al., *The Employment-at-Will Doctrine: Have Its Exceptions Swallowed the Rule? Common Law Limitations Upon an Employer’s Control over Employees-At-Will*, in 1 PRACTICING LAW INST., HANDLING WRONGFUL TERMINATION CLAIMS: WHAT PLAINTIFFS AND DEFENDANTS HAVE TO KNOW 577 (2001) (addressing handbooks, oral promises, bonuses, course of dealing, fear of litigation, and more).

28. Theresa Ludwig Kruk, Annotation, *Right to Discharge Allegedly ‘At-Will’ Employee as Affected by Employer’s Promulgation of Employment Policies as to Discharge*, 33 A.L.R. 4TH 120, 123 (1984 & Supp. 2001) (discussing the tort for wrongful discharge and its effect on the at-will doctrine).

policy exception").²⁹ These policies can restrict "employer[s'] traditional freedom in employment matters" by binding them to their own self-inflicted policies.³⁰

III. THE HANDBOOK EXCEPTION

The employee handbook is arguably the most established and important illustration of the corporate policy exception to at-will employment. The proliferation of employment handbook jurisprudence has revolutionized the nature of American employment law.³¹ Chief Justice Wilentz explains the exception genre as a situation where an employee:

[h]aving been employed . . . without any individual employment contract, by an employer whose good reputation made [the employment] so attractive . . . is given this one document [the handbook] that purports to set forth the terms and conditions of his employment, a document obviously carefully prepared by the [employer] company with all of the appearances of corporate legitimacy that one could imagine.³²

Consider Ben Phired.³³ Upon his graduation from high school, Ben began working for XYZ in 1981 without any written employment contract. Thus, at that point his employment should have been considered terminable at-will. However, once Ben was promoted to management and XYZ issued its first handbook promising that management would "only be terminated for just cause," most courts would hold that the at-will presumption no longer applied and that Ben's employment could only be terminated for cause.³⁴

Yet, there are opponents to the employee handbook exception who contend that employment contracts without duration provisions are, by definition, indefinite contracts.³⁵ They argue that even when

29. *Id.* (emphasis added).

30. *Id.* at 124.

31. *See Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1265 (N.J. 1985).

32. *Id.*

33. *See supra* Part I.A.

34. *See infra* text accompanying notes 39-40.

35. *See generally* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990) (discussing how courts

implied discharge provisions (like those that exist in employment handbooks) are incorporated in the employment contract, the agreement remains indefinite.³⁶ These opponents emphasize the general rule that *all* contracts of indefinite duration are terminable at will.³⁷ They therefore conclude that indefinite employment contracts with implied discharge provisions are also terminable at will.³⁸

Appreciating, however, that employees rely on the job security provisions within the handbooks that their employers issue, “virtually all states recognize *some* form of handbook exception to the presumption of employment at-will.”³⁹ Still, considerable dispute exists regarding how legal theory supports the handbook exception.⁴⁰

Some state jurisdictions cite public policy concerns as the basis for incorporating handbook provisions into otherwise indefinite employment contracts.⁴¹ The Michigan Supreme Court was the harbinger of this rationale and remains its most fervent devotee.⁴² In 1980 the Michigan Supreme Court was confronted “with the question of whether a discharge-for-cause policy contained in a personnel manual was binding on [an employer,] Blue Cross & Blue Shield of Michigan.”⁴³ The court held that because the discharge policy caused the employee to develop “legitimate expectations

determine which commitments parties intended to make legally enforceable when they enforce non-legal sanctions).

36. *Id.*

37. *Id.*

38. *Id.*

39. Walters, *supra* note 25, at 379 (emphasis added). It appears that Missouri is the only state to have expressly rejected the handbook exception to employment at-will. See, e.g., *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 661–62 (Mo. 1988) (“Transfer was granted to decide whether there is a ‘handbook exception’ to the employment at will doctrine in Missouri. This Court declines to adopt such an exception and recognizes the continued validity of employment at will.”)

40. Walters, *supra* note 25, at 379.

41. For opinions relying on public policy as their basis for incorporating handbook provisions, see *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814, 816 (Ala. 1984) (Beatty, J., dissenting) (opinion later adopted by majority); *Bankey v. Storer Broad. Co. (In re Certified Question)*, 443 N.W.2d 112 (Mich. 1989); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

42. See *Bankey*, 443 N.W.2d 112; *Toussaint*, 292 N.W.2d 880.

43. Walters, *supra* note 25, at 380.

grounded in [the] employer's written policy statements set forth in the manual of personnel policies," the employer was bound by the policy.⁴⁴ The court concluded that employers would be unduly advantaged if the law did not honor "a policy to dismiss for cause only."⁴⁵ The "employer may not depart from [a] policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy . . . with a view to obtaining [its] benefit . . . the employer may not treat its promise as illusory."⁴⁶ The Michigan Supreme Court found that balancing legitimate employee expectations against the theory of indefinite contracts tips in favor of enforcing the employee's reasonable expectation.⁴⁷ Although few courts find this analysis determinative, the public policy rationale is regularly a key aspect of other handbook-related arguments.⁴⁸

In contrast, most states apply some form of unilateral contract theory to justify the incorporation of handbook provisions into indefinite employment contracts.⁴⁹ "[A] promise that is given in exchange for performance is a 'unilateral contract.'"⁵⁰ Performance by the party to whom the offer is made constitutes both acceptance

44. *Toussaint*, 292 N.W.2d at 885.

45. *Id.* at 895.

46. *Id.* (The court explains that the potential "benefit[s]" to the employer include "improved employee attitudes and behavior and improved quality of the work force").

47. *Id.* (holding that disappointing the employee's reasonable expectations violated public policy).

48. *See infra* Part IV.

49. *See, e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs., Inc.*, 19 F.3d 359 (7th Cir. 1994); *Ex parte Amoco Fabrics & Fibers Co.*, 729 So. 2d 336 (Ala. 1998); *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987); *Demasse v. IIT Corp.*, 984 P.2d 1138 (Ariz. 1999); *Ferrera v. Nielsen*, 799 P.2d 458 (Colo. Ct. App. 1990); *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 662 A.2d 89 (Conn. 1995); *Parker v. Boise Telco Fed. Credit Union*, 923 P.2d 493 (Idaho Ct. App. 1996); *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140 (Ill. 1999); *Elliott v. Bd. of Trs.*, 655 A.2d 46 (Md. Ct. Spec. App. 1995); *Hanly v. Riverside Methodist Hosp.*, 603 N.E.2d 1126 (Ohio Ct. App. 1991); *Fleming v. Borden, Inc.*, 450 S.E.2d 589 (S.C. 1994); *Trombley v. Southwestern Vt. Med. Ctr.*, 738 A.2d 103 (Vt. 1999); *Gaglidari v. Denny's Rests., Inc.*, 815 P.2d 1362 (Wash. 1991); *Hogue v. Cecil I. Walker Mach. Co.*, 431 S.E.2d 687 (W. Va. 1993); *Brodie v. Gen. Chem. Corp.*, 934 P.2d 1263 (Wyo. 1997).

50. WILLIAM MCGOVERN ET AL., *CONTRACTS AND SALES: CONTEMPORARY CASES AND PROBLEMS* § 3.01, at 64 (2d ed. 2002).

and consideration for a unilateral contract.⁵¹ Once a party has *fully performed*, the offering party is bound to its promise.⁵² Most jurisdictions characterize “[a]t-will employment contracts [as] unilateral . . . typically start[ing] with an employer’s offer of a wage in exchange for work performed.”⁵³

When an employer introduces a personnel handbook containing provisions for dismissal or assurances of job security,⁵⁴ jurisdictions basing the handbook exception on unilateral contract theory recognize that “it is a question of fact whether that promise [i.e., the handbook provision] was reasonably understood by the employee to create a contractual obligation.”⁵⁵ These courts apply “traditional contract formation [analysis], including issues regarding offer, acceptance and consideration,” when analyzing handbook provisions.⁵⁶ To form a contractual obligation, the handbook provision must be “definite in form and must be communicated to the offeree . . . [W]here an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation.”⁵⁷ Therefore, the employer circulating the handbook is bound.

IV. VARIED APPROACHES ACROSS JURISDICTIONS REGARDING THE MODIFICATION OF HANDBOOK PROVISIONS

As the handbook exception to the doctrine of at-will employment began to gain general acceptance in the 1980s, employers began “examining the handbooks they issued to their

51. See ROTHSTEIN & LEIBMAN, *supra* note 3, at 1032–33 n.3.

52. See E. ALAN FARNSWORTH, *CONTRACTS* § 3.4 (3d ed. 1999). Note that when an employee has “fully performed” is an unclear, if not an impossible question. It is a question often addressed by opponents of the handbook exception, though to little avail. See Walters, *supra* note 25, at 383–84. However, this fact plays an additional role in the debate surrounding modification of handbook provisions. See *infra* Part IV.

53. *Demasse*, 984 P.2d at 1142–43.

54. For example, such provisions often state that an employee will only be dismissed for good cause or that an employee with five or more years tenure will not be released before an employee with less than five years tenure.

55. *Scott v. Pac. Gas & Elec. Co.*, 11 Cal. 4th 454, 464, 904 P.2d 834, 839, 46 Cal. Rptr. 2d 427, 433 (1995).

56. Walters, *supra* note 25, at 383.

57. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626–27 (Minn. 1983).

employees . . . [M]any employers . . . began issuing new or revised handbooks which both deleted all passages capable of being interpreted as sufficient to constitute an offer for just cause employment and inserted an 'at-will disclaimer' in their place."⁵⁸ The legal analysis applied in the resulting litigation has been inconsistent at best.⁵⁹ While the modern trend has largely embraced the handbook exception to at-will employment as a consistent application of unilateral contract theory,⁶⁰ no legal consensus has been reached regarding the modification of these contracts.⁶¹

A. Requiring Explicit Acceptance for Handbook Modification

One modification theory requires a heightened manifestation of employee assent before an attempted modification of handbook provisions can take legal effect. In these jurisdictions, continued employment does not constitute approval of the handbook modification.⁶² The United States District Court for the Eastern District of Virginia reached this conclusion in *Thompson v. Kings Entertainment Co.*⁶³ In 1980 an amusement park issued a handbook to its employees indicating that they would only be dismissed "for cause."⁶⁴ The park employed Thompson.⁶⁵ In July of 1985, the park, now under new ownership, issued a new employment handbook indicating that all park employees were terminable at will.⁶⁶ One month later, Thompson was dismissed; subsequently, he brought an action for breach of his employment contract.⁶⁷ Thompson presented the court with the task of determining whether "the handbook issued in 1985 superseded the handbook issued in

58. Sullivan, *supra* note 15, at 281. Although considerable disagreement exists regarding the enforceability of such disclaimers in the face of job security provisions within the same handbook, the focus of this Note will address what effect, if any, the new handbook should have on the validity of the old handbook.

59. *See supra* notes 24–28.

60. *See supra* notes 27–30 (binding the employer).

61. *See Walters, supra* note 25, at 384–400.

62. *See Thompson v. Kings Entm't Co.*, 674 F. Supp. 1194 (E.D. Va. 1987).

63. *Id.*

64. *Id.* at 1195.

65. *Id.*

66. *Id.*

67. *Id.*

1980, thus making Mr. Thompson an at-will employee regardless of the effect of the earlier handbook's provisions."⁶⁸

The *Thompson* court decided that the 1985 handbook did not supersede the 1980 version.⁶⁹ The court rationalized that there was "no basis for treating the two documents differently. [Just] as with the 1980 Manual, the 1985 Handbook will be construed as an offer of employment terms which Thompson could accept or reject."⁷⁰ The court concluded that Thompson had, in fact, *rejected* the terms in the new handbook.⁷¹ Accordingly, the court ruled in favor of Thompson under the terms of the first handbook.⁷²

It is difficult, however, to support the court's claim that the two handbooks were not treated differently. The court deemed Thompson to have accepted the first handbook by way of his continued employment after its introduction.⁷³ Yet, he was deemed not to have accepted the terms of the second handbook when he continued to work for the amusement park after its introduction.⁷⁴ Instead, the court required the park to "demonstrate that Thompson was aware of the [1985] Handbook, that he understood that its terms governed his employment, and that he worked according to those terms" for the attempted modification of the terms of the first handbook to be binding.⁷⁵ The court's stricter standard of acceptance for the provisions of the second handbook could be explained by an underlying sympathy for Thompson's position and an unwritten concurrence with the public policy sentiments expressed by the Michigan courts.⁷⁶ However, this kind of judicial sympathy, though admirable and arguably justifiable when the particular facts of this case are considered, fails to articulate a clear and consistent rule for employers to follow when attempting to modify their handbooks. The *Thompson* court seems to conclude

68. Sullivan, *supra* note 15, at 282-83.

69. *Thompson*, 674 F. Supp at 1198.

70. *Id.*

71. *Id.* at 1198-99. The court summarily concluded that Thompson necessarily rejected the 1985 handbook because he did not expressly assent to it. *See id.*

72. *Id.*

73. *Id.* at 1197.

74. *Id.* at 1198-99.

75. *Id.* at 1198.

76. *See supra* text accompanying notes 41-48.

that continued employment will constitute an employee's acceptance of a handbook's terms only if judicial whim favors such an interpretation.

B. Requiring Additional Consideration for Handbook Modification

Some jurisdictions have held that employers must provide additional consideration and obtain the employee's express assent in order to modify an employment handbook.⁷⁷ In 1994 the Seventh Circuit articulated this theory in *Robinson v. Ada S. McKinley Community Services, Inc.*⁷⁸ In that case, Robinson had been employed by McKinley as the director of a foster care facility.⁷⁹ Her employment had been subject to the terms of "McKinley's 1978 Personnel Policies Manual (the '1978 Manual')."⁸⁰ The 1978 Manual provided: [p]ermanent employment status is attained upon successful completion of the [six month] tenure probation period with the Agency."⁸¹ Robinson had been director of the foster care facility for over seven years when she received a new 1986 Personnel Policies Manual.⁸² The new handbook expressly expunged the job security provisions of the 1978 Manual.⁸³ McKinley fired Robinson three years after introducing the 1986 Manual.⁸⁴

After determining that "the language" of the 1978 job security provision contained "a promise clear enough that an employee would reasonably believe that an offer has been made,"⁸⁵ the Seventh Circuit determined that McKinley must provide additional "consideration to support this purported modification, there must be some benefit to Robinson, detriment to McKinley, or Robinson's

77. Alabama, Arizona, and Illinois have adopted this approach. See Walters, *supra* note 25, at 390-98.

78. 19 F.3d 359 (7th Cir. 1994).

79. *Id.* at 360.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 361 (quoting *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E. 2d 314, 318 (1987)). This factual inquiry is a complicated determination as acknowledged by the court in *Scott v. Pac. Gas & Elec. Co.*, 11 Cal. 4th 454 (1995). See *supra* text accompanying notes 31-33. However, for the purposes of this Note, it is assumed that handbook provisions are sufficiently clear.

continued work under the 1986 Manual must have been a bargained for exchange.”⁸⁶ “The court found McKinley’s argument that Robinson assented to the modification when she continued to work under the terms of the 1986 Manual to be unpersuasive”⁸⁷ and “contrary to basic contract principles and notions of fairness.”⁸⁸ Still, *Robinson* does not expressly clarify why Robinson’s assent to the 1978 Manual by way of continued employment can be distinguished from her continued employment after the introduction of the 1986 modification.⁸⁹

C. Allowing Unilateral Modification

Conversely, some jurisdictions hold that an employer may unilaterally modify its handbook provisions. In *Sadler v. Basin Electric Power Cooperative*,⁹⁰ the Supreme Court of North Dakota adopted this perspective.⁹¹ Sadler worked for Basin Electric for four years before receiving the first in a series of four handbooks, all stating, “[P]ermanent employees cannot be terminated without a *just cause*.”⁹² The third handbook defined “just cause” for termination as “referring to insubordination, theft, etcetera.”⁹³ The fourth handbook included “lack of work or a continued need for the position” in its definition of just cause.⁹⁴ Basin discharged Sadler pursuant to the fourth handbook’s standards for just cause termination when its business plan called for “reduction[s]-in-force.”⁹⁵ The court seems to adopt the language of a Washington state court to articulate its canon in this area:

86. *Robinson*, 19 F.2d at 364.

87. Walters, *supra* note 25, at 393.

88. *Robinson*, 19 F.3d at 363.

89. And although a palatable argument could be made on the facts of this case because the first handbook did provide Robinson with some benefit and the second did not, would this court really have honored the 1986 manual if it had conferred to Robinson a new benefit, like a cafeteria per diem, while revoking her job security?

90. 431 N.W. 2d 296 (N.D. 1988).

91. *Id.* at 300.

92. *Id.* at 297 (emphasis added) (quoting the 1980 employee handbook). Sadler received handbooks in 1980, 1982, 1983, and 1985. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

[T]he employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, unilateral acts of the employer are binding on his employees and both parties should understand this rule.⁹⁶

D. Reasonable Notice

Many jurisdictions,⁹⁷ joined most recently by the California Supreme Court in *Asmus v. Pacific Bell*, allow unilateral modification of handbook provisions provided that employers “reasonably and timely” warn their employees of a looming handbook modification before it takes effect.⁹⁸ This perspective attempts to blend *Sadler* (allowing the employer to “define” the employment arrangement) with the philosophical bedrock of those jurisdictions that justify the very existence of the handbook exception with public policy, i.e., preserving the reasonable expectations of the employee. These jurisdictions follow unilateral contract theory, believing that the same reliance that made the first handbook enforceable, as manifested by the employee’s continued work, should function as reasonable acceptance of the second handbook/modification as long as the employee is forewarned of its terms.⁹⁹ Accordingly, the modification terms are enforceable if employers provide employees with a “reasonable amount of time” with which to consider the new terms and make a rational decision as to whether they want to accept the terms and continue working or quit.¹⁰⁰

The facts surrounding *Asmus* are particularly interesting.¹⁰¹ In 1986 Pacific Bell issued its “Management Employment Security Policy” (MESP) which promised job security to its management

96. *Id.* at 300 (citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984)).

97. *See, e.g.*, *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

98. *See Asmus v. Pac. Bell*, 23 Cal. 4th 1 (2000).

99. *See, e.g., id.* at 15; *Sadler*, 431 N.W.2d at 300; *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998).

100. *Asmus*, 23 Cal. 4th at 14.

101. *See infra* Part VI.

employees “through reassignment to, and retraining for, other management positions, even if their present jobs [were] eliminated.”¹⁰² The MESP also promised that the job security policies it contained would, “be maintained so long as there [was] no change that [would] materially affect Pacific Bell’s business plan achievement.”¹⁰³ In 1990 Pacific Bell announced that it “*could* . . . discontinue its MESP.”¹⁰⁴ Sure enough, in October 1991, Pacific Bell notified its managers that it was withdrawing its MESP policies.¹⁰⁵ Predictably, in April 1992, Pacific Bell began its “new layoff policy (the Management Force *Adjustment Program*)” for management employees.¹⁰⁶ Eight former Pacific Bell Management Employees sought redress from Pacific Bell for what they believed constituted a contractual breach of the MESP policies.¹⁰⁷ During the course of the trial, the parties entered into a stipulation “providing in part that Pacific Bell ‘elected not to present any further evidence . . . with respect to the question of whether there has been “a change that will materially alter Pacific Bell’s business plan achievement.”’”¹⁰⁸ Thus, the lower court assumed, for the purpose of its analysis, that Pacific Bell’s written condition for the termination of its MESP policies had not occurred.¹⁰⁹

As the litigation progressed, the California Supreme Court attempted to answer the following certified question as posed by the United States Court of Appeals for the Ninth Circuit: “Once an employer’s unilaterally adopted policy—which *requires* employees to be retained so long as a specified condition *does not occur*—has become a part of the employment contract, may the employer thereafter unilaterally [*terminate*]¹¹⁰ the policy, even though the

102. *Asmus*, 23 Cal. 4th at 7.

103. *Id.*

104. *Id.* (emphasis added). The court deemed this announcement to satisfy the reasonable notice requirement.

105. *Id.*

106. *Id.* at 7–8 (emphasis added).

107. *Id.* at 8.

108. *Id.* at 9 (quoting the stipulation (quoting MESP)).

109. See generally *Asmus v. Pac. Bell*, 23 Cal. 4th 1 (2001). In other words, no condition or change occurred that “materially affect[ed] Pacific Bell’s business plan achievement.” *Id.* at 7.

110. The Ninth Circuit originally used the term “rescind,” however, Justice Chin restated the question using the term “terminate” because the legal definition of “rescission” indicates “a statutorily governed event that

specified condition *has not occurred?*"¹¹¹ If the court had answered with a resounding "no," the former Pacific Bell employees would likely have prevailed on their claim.

Unfortunately, the court did not answer "no" to the certified question; but nor did it exactly answer, "yes." The court wrenched itself into a position that highlights the jurisprudential anguish experienced by many modern courts. The result of the *Asmus* decision is a body of law unsuccessfully struggling to reconcile the *Sadler*-esque notion of unilateral contract freedom with the public policy rationale that supports the enforcement of the handbook provisions: the legitimate expectations of employees.¹¹²

In an unnatural effort to appease the conflicting mandates of its own precedent, the *Asmus* court first sought to extensively criticize the purportedly vague nature of the specified condition.¹¹³ Even though MESP did expressly define "changes [as conditions] that would have a significant negative effect on the company's rate of return, earnings, and, 'ultimately the viability of [its] business,'" the court criticized the potentially indefinite duration of the MESP condition.¹¹⁴

Next, the court explained that this critique is corroborated by Pacific Bell's own testimony that if such a change *were* to occur "it would result from forces beyond Pacific Bell's control, and would include 'major changes in the economy or the public policy arena.'"¹¹⁵

extinguishes a contract as if it never existed." *Id.* at 6 n.2. Pacific Bell did acknowledge that a contract once existed, they were simply arguing that they had the authority to terminate that contract at-will. *Id.* at 11.

111. *Id.* at 5-6 (footnote omitted) (emphasis added). This is the focal question of this note. See *infra* Part VI.

112. Compare *Thompson*, 674 F. Supp. 1194, and *supra* notes 69-74 and accompanying text, with *Sadler*, 431 N.W.2d 296, and *supra* notes 28-34 and accompanying text.

113. *Asmus*, 23 Cal. 4th at 16-17.

114. *Id.* at 17.

115. *Id.* (quoting a Pacific Bell spokesperson). However, as Chief Justice George's dissent appropriately notes, "the condition allowing termination of the MESP is ascertainable and specifies a definite duration for the MESP. . . . [N]ot even Pacific Bell contends that such a change cannot be measured in a reasonable manner." *Id.* at 19 (George, C.J., dissenting). Furthermore, courts have generally refused to allow the defense of "indefiniteness" to invalidate employment security provisions. See *supra* text accompanying notes 22-25.

Finally, the court concluded with a convoluted rule that side-stepped the original certified question.¹¹⁶ Accordingly, California's current rule regarding modification of unilateral job security provisions with specified conditions reads as follows: "An employer may terminate a written employment security policy that contains a specified condition, if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits."¹¹⁷ Unfortunately, most specified conditions as attached to employment security policies would probably be considered sufficiently definite in duration, i.e., not "indefinite."¹¹⁸ California does not have a rule addressing termination or modification of employment security provisions with sufficiently definite specified conditions.¹¹⁹

V. ACADEMIC SOLUTIONS

Jason A. Walters and Brian Kohn, have each published works that address the quandary surrounding attempted unilateral modifications of job security provisions in employment handbooks.¹²⁰ This Note argues that their proposed solutions, though slightly off the mark, will comprise the cornerstones of a just and feasible solution to this issue.

A. Handbooks Viewed As Option Contracts

In 2002 Jason A. Walters published an article suggesting that job security provisions should be treated as creating option contracts.¹²¹ Walters argues that justices who believe an employee's continued employment constitutes acceptance of an employer's

116. See *Asmus*, 23 Cal. 4th at 19 (George, C.J., dissenting) ("The majority, however, inexplicably answers a different question . . .").

117. *Id.* at 18.

118. Courts have generally refused to allow the defense of "indefiniteness" to invalidate employment security provisions. See *supra* text accompanying notes 22–25.

119. See *Asmus*, 23 Cal. 4th at 18. The court fails to distinguish provisions with specified conditions.

120. Walters, *supra* note 25; Brian T. Kohn, *Contracts of Convenience: Preventing Employers From Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799 (2003).

121. Walters, *supra* note 25, at 412.

attempted termination of a job security provision "fail to recognize that *the agreement being modified is the option contract*, not the unilateral contract. The unilateral contract has yet to be accepted (and the option contract is still in effect) because the employee has not completed performance."¹²² Under classic option contract law, the offeree has the right to continue performing under the original offer (i.e., the original job security provision), which the offeror is prohibited from revoking.¹²³ Accordingly, Walters's theory supposes that employers/offerors must provide additional bargained for consideration¹²⁴ to their employees/offerees if they hope to be relieved of their contractual obligations under their job security provisions/option contracts.¹²⁵

Walters's theory, though provocative in its simplicity, would likely run into criticism from the drafters of the Restatement Second of Contracts § 45: Option Contract Created By Part Performance Or Tender.¹²⁶ Comment b to this Restatement Section succinctly expresses the rationale and limitation of this rule: "The rule of this Section is designed to protect the offeree in *justifiable reliance* on the offeror's promise, and the rule yields to a manifestation of

122. *Id.* (emphasis added).

123. See RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981) ("The rule of this Section is designed to protect the offeree in justifiable reliance on the offeror's promise . . .").

124. This is actually an oversimplification of Walters's theory. Walters actually argues that, "[a]bsent some additional indication of . . . assent" courts should not hold that employees/offerees are "bound by the terms of [a] revised handbook simply because they continued working." Walters, *supra* note 25, at 416. Walters believes Chief Justice George's dissent in *Asmus* "erred when it stated that handbook modification required additional consideration." *Id.* However, to the best of my knowledge, Walters's notion of an "additional indication of assent" is indistinguishable from the common legal conception of mutual consideration, which need not be ostensibly equal in "value." See MCGOVERN ET AL., *supra* note 50, at 104 (stating that mutuality of obligation "does not require that the promisee *actually* have conferred a benefit or suffered a detriment") (emphasis added).

125. Walters, *supra* note 25, at 416.

126. See RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981). That section is based on 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 60-60B (3d ed. 1957); 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 49-52 (1963 & Supp. 1980); L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373, 410-17 (1937); K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, II, 48 YALE L.J. 779, 802-18 (1939).

intention *which makes reliance unjustified*.¹²⁷ Walters explains that the return performance that an employer seeks is the employees' "employment for as long as the [employees] desire[] to continue working" in any capacity.¹²⁸ Accordingly, Walters probably assumes that the employee's belief—that a job security option in a handbook will be valid for as long as the particular employee *chooses* to work for the offering employer—is reasonable and thus, justifiable. Yet, considering the at-will history of employment arrangement, the employer's status as "master"¹²⁹ of the employment agreement, and the broad stroke with which employment handbooks are generally issued, it seems possible that a strong argument could be made for the position that such reliance is *not* reasonably justifiable.¹³⁰

B. Implied Promises Not to Modify

In 2003 Brian Kohn published an article in which he recommended that all handbook provisions be read to imply a promise not to modify any resultant contractual obligations.¹³¹ "Under this proposed model, an employer could not unilaterally revise the terms of an employee handbook without rendering the initial employment contract illusory."¹³² Consequently, an employer who desires to modify a handbook provision must garner the employee's "consent to the alteration and [the employee must] receive additional consideration."¹³³

Kohn supports his argument for an implied promise not to modify with the famous case, *Drennan v. Star Paving Co.*,¹³⁴ and with the Oregon Supreme Court's decision in *Taylor v. Multnomah County Deputy Sheriff's Retirement Board*.¹³⁵ The *Drennan* court ruled that a subcontractor's construction bid implies a promise not to

127. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981) (emphasis added).

128. Walters, *supra* note 25, at 416.

129. MCGOVERN ET AL., *supra* note 50, at 63 note 4 ("The offeror is the master of the offer . . .").

130. *See supra* Parts II–III.

131. Kohn, *supra* note 120, at 842.

132. *Id.*

133. *Id.*

134. *Id.* at 844–45 (citing *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Taylor v. Multnomah County Deputy Sheriff's Ret. Bd.*, 510 P.2d 339 (Or. 1973)).

135. 510 P.2d 339.

revoke or modify when a general contractor relies upon the subcontractor's bid in making a prime bid to a project owner.¹³⁶ Unfortunately for Kohn's position, "courts have not widely utilized [*Drennan*] outside of the [construction] bid context."¹³⁷

In contrast, the *Taylor* decision was born out of an employment dispute.¹³⁸ In *Taylor*, the court held that a provision for retirement security implied a promise not to unilaterally modify the retirement plan.¹³⁹ *Taylor* actually supports Jason Walters's argument better than Kohn's because the *Taylor* court relied heavily on the Restatement Second of Contracts § 45 in characterizing the employer's retirement plan as an option contract.¹⁴⁰ As such, this argument runs into the same problems with regards to whether total reliance on an indefinite job security provision in a handbook is genuinely justifiable.¹⁴¹

VI. A NEW RULE

A. *Ben Phired, Options, and Implied Promises*

Recall our unhappy friend Ben Phired.¹⁴² Section (C) of the employment security policy in XYZ's first employment handbook (the 1985 version) promised:

(C) This policy is to be maintained until production of one or more widget models is abandoned by XYZ Widgets, Inc.

This clause specifies when XYZ's employment security provisions will lose their permanence. Phrased in a different way, XYZ, via the terms of its 1985 handbook, both *promised* that its job security policy would remain in place as long as the company continued to manufacture X, Y, and Z model widgets, and *warned* that if production of any widget model were abandoned the employment security policies would likely be abandoned as well. In light of such an assuring promise, it would seem that employees would be

136. *Drennan*, 51 Cal. 2d at 413-15.

137. Kohn, *supra* note 120, at 844.

138. *Id.* at 844-45.

139. *Taylor*, 510 P.2d at 342-43.

140. *See id.*

141. *See supra* text accompanying notes 123-26.

142. *See supra* Part I.

“reasonably justified”¹⁴³ in relying on such a promise, believing that their job security would remain intact as long as their company continued to produce X, Y, and Z model widgets.

“The offeror is the master of the offer and may dictate the mode of acceptance.”¹⁴⁴ Employers like XYZ choose performance as their preferred method of acceptance when they unilaterally issue employment handbooks to their employees.¹⁴⁵ By this method, when an employee continues to work after being issued a handbook, the employee has accepted the employer’s offer.¹⁴⁶ Building on the keen insight of Jason A. Walters and Brian Kohn, this Note avers that when an employer (1) issues an employment handbook (2) with an employment security provision (3) that also contains a condition assuring the reliability of that provision, courts should find that an option contract has been created by the employee’s continued employment and should imply a promise on the part of the employer not to modify the provision in the absence of the specified condition.¹⁴⁷

B. A Technically Sound Solution

This transformation of Walters’s and Kohn’s concepts avoids the criticisms and downfalls they each originally encountered, while protecting the interests of employees like Ben Phired. Recall that Walters thought that *all* attempted modifications of handbook provisions should create option contracts for as long as the employee desired to work for the employer.¹⁴⁸ As discussed, such a belief on the part of the employee could be deemed “unjustifiable reliance,” thus invalidating the option.¹⁴⁹ Yet, when an employer expressly provides a condition dictating a policy’s lifespan (like XYZ’s policy in section c of its 1985 handbook), an employee’s reliance on that option for the duration *expressly specified* is, arguably, far more reasonable.

143. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981).

144. MCGOVERN ET AL., *supra* note 50, at 63 note 4.

145. W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy?*, 10 TEX. WESLEYAN L. REV. 9, 21 (2003).

146. *See id.*

147. *See* discussion *infra* Part VI.B–C.

148. Walters, *supra* note 25, at 416.

149. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. c (1981).

In addition to stumbling upon “reasonableness” barricades similar to those encountered by Walters, recall that Kohn’s argument for an “implied promise not to revoke” also ran up against the weight of precedent expressly limiting such implied promises to bidding scenarios.¹⁵⁰ However, if the implied promise is limited to those scenarios where the employer has expressly provided that:

“*A*”¹⁵¹ *will remain in effect until “B”*¹⁵² *happens,*

the position is stronger. Under this limited circumstance, the implied promise is simply a negative restatement of the express assurance and would not necessitate expanding the law surrounding bidding to the employment setting.

Take the above example and consider only its express assurance clause:

... will remain in effect until “B” happens.

Now consider the negative restatement of the express assurance clause:

... will not be modified or revoked until “B” happens.

This is identical to the implied promise sought by Kohn if the implication is limited to situations where the employer has made an express assurance! In essence the employer is saying,

I promise not to modify or revoke “A” until “B” happens.

Accordingly, employers, hoping to prematurely alter or abolish unilaterally formed employment security policies bearing assurances that have yet to expire, would have to provide additional consideration (possibly by negotiating an adequate severance package) and acquire express assent to effectuate a modification.¹⁵³

C. Advancing the Interests of All Parties

Limiting the rule proposed by Walters and Kohn in this way would benefit the employer as well as the employee (and even the

150. See *supra* Part V.B (discussing where a general contractor relies on the offer/bid of a subcontractor in making the prime bid to the project owner).

151. “A” indicates any employment security policy.

152. “B” indicates any sufficiently definite condition or specified time period.

153. Interestingly, the claims of fifty-two of the plaintiffs to the original *Asmus* suit were dismissed because Pacific Bell had negotiated a severance deal with them and obtained their signed consent to MESP’s termination. *Asmus v. Pac. Bell*, 23 Cal. 4th 1, 8 (2001).

courts). Employers would be confident in their future freedom to modify¹⁵⁴ after issuing employment policies not containing assurances of permanence.¹⁵⁵ Conversely, employers would understand the gravity of additional express assurances, if they did eventually choose to include them in their handbooks.

Obviously, employees would reap an equitable benefit from such a rule. They would be forewarned not to rely wholeheartedly on the permanence of bald job security provisions in their employers' handbooks. On the other hand, employees like Ben Phired could not be duped by stark language, promising policy permanence for a specified period, because employers would be held to such assurances.

Finally, the courts would also welcome the precision of this rule. The system would no longer have to grapple with multiple diametrically opposed principles in determining whether to apply an old or a new handbook.¹⁵⁶ Under the proposed rule, if handbooks included an unmet condition assuring policy adherence, employees would be justified in relying on the old policies. Conversely, if the policy did not contain such an assurance, employers would be justified in modifying their policies once their employees accepted the offered modifications by way of their continued performance/employment.¹⁵⁷

D. California's Step Backward

As indicated, California missed a golden opportunity to distinguish between provisions with assurances and those without assurances in *Asmus v. Pacific Bell*. With this certified question, the Ninth Circuit invited the California Supreme Court to recognize and defend the *Asmus* plaintiffs' reasonable reliance: "Once an employer's unilaterally adopted policy—which *requires* employees to be retained so long as a specified condition *does not occur*—has become a part of the employment contract, may the employer

154. This is after providing reasonable notice to the employee, of course.

155. See Slawson, *supra* note 145, at 11. ("The public policy [is] the need for management flexibility to meet changing business conditions.")

156. Compare Robinson v. Ada S. McKinley Cmty. Servs., Inc., 19 F.3d 359 (7th Cir. 1994), with Sadler v. Basin Elec. Power Coop., 431 N.W.2d 296 (N.D. 1988); see *supra* Part IV.

157. See Slawson, *supra* note 145.

thereafter unilaterally [*terminate*] the policy, even though the specified condition *has not occurred?*”¹⁵⁸ The court could have responded:

No, the employer may not terminate the policy without first providing additional consideration to the employees and obtaining their consent. *A unilateral job security policy with a specified condition creates an option contract that implies a promise not to terminate the policy until the occurrence of the condition.* The employee has the option to enjoy the policy’s security until the condition occurs. The employee exercises this option through the form of acceptance chosen by the employer: performance, i.e., by continuing to work for the employer.¹⁵⁹

Had it done so, it could have established a precise general rule and then proceeded to define and distinguish the exceptions.¹⁶⁰

Regrettably, as the dissent in *Asmus* points out, the majority chose to answer a question it was not asked and which the facts of the case do not adequately support:

Once an employer’s unilaterally adopted employment security policy—which indicates that certain employees will be retained unless a vague and formless condition happens to occur—has become a part of the employment contract, may the employer thereafter unilaterally modify the policy, even though the flimsy condition seems not to have occurred?¹⁶¹

The court’s answer to its self-imposed question, though possibly justifiable,¹⁶² did a disservice to California jurisprudence. The Ninth Circuit’s certified question crystallized the court’s construction of the

158. *Asmus*, 23 Cal. 4th at 5–6 (citations omitted) (emphasis added) (alterations by the *Asmus* court).

159. This “answer” is a creation of the Note, incorporating the change for the law as proposed in Part VI.A.

160. Such a situation would possibly arise when a condition was found insufficiently definite or to conflict with a disclaimer.

161. This “certified question” is a creation of the author and was developed from the *Asmus* court’s arguably improper answer to its certified question. *Asmus*, 23 Cal. 4th at 19 (George, C.J., dissenting) (“The majority, however, inexplicably answers a different question . . .”).

162. See *supra* note 155 (noting potential exceptions to the proposed rule, including indefinite conditions).

Asmus facts; it had already been determined that the MESP job security policy contained a sufficiently definite specified condition that did not occur.¹⁶³ The question inquired was whether the employer could unilaterally modify such a policy. By reinterpreting the facts, concluding that the MESP condition was indefinite, and purporting to answer the question by announcing that such indefinite policies may be unilaterally terminated, the *Asmus* court scuttled the precedent value of its decision. Lower courts are left with the onerous task of determining when and how to apply the holding. Whether all conditional job security provisions can be unilaterally modified, or only those with indefinite conditions, is a legal question answerable only by the most persuasive advocate on a given day. Accordingly, the *Asmus* decision has provided employers with an escape hatch from the promises to which the law should strive most earnestly to bind them.

VII. CONCLUSION

Employers, especially large corporate employers, need latitude and flexibility in defining and changing the employment status of their workforce.¹⁶⁴ Compelling employers to bargain and negotiate on an individual basis with each employee whenever they changed their handbooks would impose an undue burden on business.¹⁶⁵ However, when an employer voluntarily promises employment security *and* makes an additional written assurance that the promised security will remain in effect until a specific event occurs, the employer has taken extraordinary steps to create the appearance of ironclad, irrevocable job security. Such an extraordinary guarantee, a promise bearing all the hallmarks of contractual legitimacy, should be reliable and enforceable.

If these handbook policies were read to create enforceable option contracts, wouldn't justice be served? Clearly the resultant

163. *Asmus*, 23 Cal. 4th 1.

164. See *supra* note 150 and accompanying text.

165. See *id.*

burden on those employers consciously choosing to issue such provocative policies would not exist, were it not self-imposed.

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