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## Continued Resistance to the Inclusion of Personnel Policies in Contracts of Employment: *Griffin v. Housing Authority of Durham*

The United States Supreme Court has long recognized the inequality of bargaining power between employers and employees that often leaves employees helpless against their employers' arbitrary and reprehensible treatment.<sup>1</sup> Under the employment-at-will doctrine, however, unless an employment contract specifies a definite term of employment, an employer may discharge an employee for "good cause, or for no cause, or even for bad cause."<sup>2</sup> This doctrine was applied uniformly<sup>3</sup> until strong criticism from commentators persuaded some courts to develop exceptions.<sup>4</sup> Recently, some courts have found an implied contract right to continued employment, absent a good faith reason for termination.<sup>5</sup> Others have created a cause of action in tort protecting employees against abusive or retaliatory discharges in contravention of public policy.<sup>6</sup> The North Carolina courts, however, have been reluctant to follow the modern trend relaxing the employment-at-will doctrine. In *Griffin v. Housing Authority of Durham*<sup>7</sup> the North Carolina Court of Appeals again refused to adopt a rule that would have diminished the harshness of the at-will doctrine.

In *Griffin* the city of Durham discharged plaintiff from his position as Director of Operations as part of a reorganization plan. Plaintiff alleged that the discharge breached his employment contract because it did not comply with the procedures for discharge set forth in defendant's personnel policy.<sup>8</sup> Although the court of appeals concluded that the Authority had complied with

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1. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936). See generally, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

2. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884). See *Hutton v. Waters*, 132 Tenn. 527, 540-44, 179 S.W. 134, 137-38 (1915) (upholding employer's right to fire at will).

3. "The rule's influence on the employment relationship in this country has been so pervasive that modern legal writing frequently accepts the doctrine without inquiring into its logic or its applicability to current employment conditions." Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 335 (1974).

4. See, e.g., Blades, *supra* note 1; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *supra* note 3.

5. E.g., *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

6. E.g., *Peterman v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusal to give perjured testimony); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge for filing workers' compensation claim); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (discharge for reporting for jury service in violation of employer's orders).

7. 62 N.C. App. 556, 303 S.E.2d 200 (1983).

8. Plaintiff alleged that defendant failed to do the following as required by defendant's personnel policies: (1) dismiss plaintiff pursuant to proper action by defendant's Board of Commissioners; (2) offer plaintiff a position of similar or lower pay with defendant; (3) indicate clearly on plaintiff's papers that his dismissal in no way reflected his ability or performance, so as not to hinder his ability to obtain gainful employment elsewhere; and (4) give plaintiff notice and a hearing prior to being dismissed. Record at 2-3, *Griffin*, 62 N.C. App. 556, 303 S.E.2d 200 (1983).

its personnel policies, it held that defendant was not obligated to follow its personnel policies because they were amended after plaintiff was hired and were not incorporated expressly in plaintiff's contract.<sup>9</sup>

*Griffin* denies employees an important protection from the employment-at-will rule. The proposition that personnel policies may establish terms and conditions of the employment contract is supported by modern contract theory and has been adopted by several courts.<sup>10</sup> Further analysis of the case law and commentary concerning incorporation of personnel policies in contracts of employment should persuade North Carolina courts to reconsider this question. Recognition of personnel policies as part of the employment contract would constitute an important first step toward the goal of eliminating the employment-at-will doctrine and provide employees needed protection against the arbitrariness of the doctrine.

Supporters of the doctrine argue that employer power to discharge at will is essential to the efficient and profitable operation of a business.<sup>11</sup> To abolish the doctrine would ignore employers' legitimate interest in hiring and retaining the best personnel available.<sup>12</sup> Employers also question whether judges and juries should be allowed to question business judgments.<sup>13</sup> Evaluation of high ranking employees crucial to a business' success often involves highly personal and intuitive judgments that are not translated easily into concrete justifications.<sup>14</sup>

In addition, some commentators fear that restriction of the employment-at-will rule will bring a flood of vexatious and costly litigation<sup>15</sup> before juries sympathetic to employee's "fabricated tales" of employer unfairness.<sup>16</sup> Fear of litigation will discourage personnel termination decisions and reduce business efficiency.<sup>17</sup> This chilling effect is increased by the lack of standards defining what employer conduct violates public policy or implied promises of good faith.<sup>18</sup>

Opponents of the employment-at-will doctrine have stressed the doctrine's severe effects on employee interests, emphasizing the employee's depen-

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9. *Griffin*, 62 N.C. App. at 557, 303 S.E.2d at 201.

10. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

11. Note, *Recognizing the Employee's Interests in Continued Employment—The California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69, 79 (1980). See also *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 341, 399 A.2d 1023, 1026 (1979).

12. *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

13. See Note, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 CIN. L. REV. 616, 631-32 (1982) (The traditional refusal to review the wisdom of decisions made by corporate boards—the business judgment rule—should be applied to employment decisions.)

14. See *Blades*, *supra* note 1, at 1428; *Murg & Scharman, Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 331 (1982).

15. See Note, *supra* note 13, at 630; Note, *Limiting The Right to Terminate at Will—Have The Courts Forgotten The Employer*, 35 VAND. L. REV. 201, 228 (1982).

16. See *Blades*, *supra* note 1, at 1428.

17. *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

18. See Note, *supra* note 13, at 631; Note, *supra* note 15, at 228-29.

dence on his job as his sole source of income,<sup>19</sup> the loss of self esteem associated with termination of employment,<sup>20</sup> and the lack of mobility that limits alternative employment opportunities.<sup>21</sup> In addition, abandonment of the employment-at-will rule may improve long-run business productivity by promoting a stable and loyal workforce, which would reduce the inefficiency and training costs that arise from employee turnover.<sup>22</sup> The experience of other industrial countries that protect employees against unlawful discharge suggests that employer concerns over the impact of expanded job security may be exaggerated.<sup>23</sup> In sum, the employer's absolute right to discharge, "when weighed against the interests of the employee as an individual, [is] clearly not justified by the employer's legitimate concerns."<sup>24</sup>

The leading case affirming the employment-at-will doctrine in North Carolina is *Still v. Lance*,<sup>25</sup> in which the supreme court upheld a school board's termination of a teacher's contract without cause and reaffirmed employers' rights to terminate at will "irrespective of the quality of performance by the other party."<sup>26</sup> The court did qualify its holding, stating in dictum that:

Where . . . there is a business usage, or other circumstance, appearing on the record, . . . which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent.<sup>27</sup>

The federal district court in *Thomas v. Ward*<sup>28</sup> relied on the *Still* dictum in holding that language in an employee handbook "served as prima facie evidence which could lead a teacher to believe that he had tenure after three years service in the school system."<sup>29</sup> *Thomas* concluded that this language entitled the teacher to a hearing prior to discharge.<sup>30</sup> No state court, however, has relied on the *Still* dictum to find an unlawful discharge,<sup>31</sup> and the employ-

19. "We have become a nation of employees. We are dependent upon others for our means of livelihood and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation the substance of life is in another man's hands."

F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951).

20. See Note, *supra* note 3, at 339.

21. This decreasing mobility arises from decreasing opportunities as employees grow older and seniority and pension plans pursued by employers increasingly encourage work force stability. *Id.* at 338-339. Furthermore, advancing technology leads employees to acquire specialized skills not readily transferable to other jobs. See *Blades, supra* note 1, at 1405.

22. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1830-31 (1980).

23. *Id.* at 1835-36 (noting the experiences of West Germany and Japan).

24. *Blades, supra* note 1, at 1407.

25. 279 N.C. 254, 182 S.E.2d 403 (1971).

26. *Id.* at 259, 182 S.E.2d at 406.

27. *Id.*

28. 374 F. Supp. 206 (M.D.N.C. 1974), *rev'd in part*, 529 F.2d 916 (4th Cir. 1975).

29. *Id.* at 210 n.4.

30. *Id.* at 210.

31. Business custom or usage must establish a definite, fixed term of employment and gener-

ment-at-will doctrine remains firmly entrenched in the common law of North Carolina.<sup>32</sup>

Enforcement of personnel policies as contractual rights is the most reasonable method of limiting the harshness of the employment-at-will doctrine, particularly since employers benefit from the personnel policies they enact. Many personnel policies result from a company's desire to keep unions out of its plants.<sup>33</sup> Personnel policies also can build employee morale and consequently increase employee efficiency.<sup>34</sup> In this way, they benefit both the employer and employee, increasing employees' contentment with their jobs, causing employees to forego their rights to seek other employment, and helping to avoid labor turnover.<sup>35</sup> The impracticality and high costs of negotiating individual employment contracts containing job security provisions have led employees to rely on standard employment-at-will contracts,<sup>36</sup> but personnel policies allow the employer to avoid these transaction costs and provide a contract that satisfies the needs of employees.

Nevertheless, in *Griffin* the North Carolina Court of Appeals chose not to enforce personnel policies. Other courts generally have given three reasons for not enforcing personnel policies: the lack of mutuality of obligation; the lack of necessary additional consideration; and the employment-at-will rule's precedence over any personnel policy restrictions.<sup>37</sup> Recently, courts have been more willing to discard these traditional contract requirements in favor of modern contract theories that protect the reasonable expectations of employees and employers alike.<sup>38</sup>

The primary legal underpinning of the employment-at-will doctrine was the principle of mutuality of obligation.<sup>39</sup> Courts following this principle reasoned that if an employee could quit his job at will, the employer must have a

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ally cannot limit an employer's right to terminate for good cause only. *See Roberts v. Wake Forest Univ.*, 55 N.C. App. 430, 435-36, 286 S.E.2d 120, 123-24 (custom for golf coaches to serve long terms and personnel policy statements that employment became permanent after three months insufficient to establish a "fixed term"), *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

32. *See Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1975); *Dyer v. Bradshaw*, 54 N.C. App. 136, 139-40, 282 S.E.2d 548, 551 (1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 297, 244 S.E.2d 272, 275, *disc. rev. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978).

33. Some companies not only duplicate much of union contracts, but also impose on themselves policies that are more restrictive than those that may emerge under union contract arrangements. F. FOULKES, *PERSONNEL POLICIES IN LARGE NON UNION COMPANIES* 341 (1980).

34. R. Machol & E. Button, *HANDBOOK OF MODERN PERSONNEL ADMINISTRATION* § 74-1 (1972).

35. *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 99-100, 291 P.2d 91, 92 (1955). *See also Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978).

36. *See Note, supra* note 22, at 1830-31.

37. *See Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 628-29 (Minn.1983); Comment, *Wrongful Termination of Employees at Will: The California Trend*, 78 Nw. U.L. REV. 259, 264 (1983).

38. *See Note, Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J.L. REF., 449, 455 (1983).

39. Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 555 (1980).

corresponding right to terminate the relationship for any or no reason.<sup>40</sup> Thus, the employers should not be bound by promises not to terminate except for good cause or unless certain procedures were followed.<sup>41</sup>

*Hablas v. Armour & Co.*<sup>42</sup> demonstrates the inequitable consequences of adherence to mutuality requirements. In *Hablas* plaintiff was fired one year before retirement, losing all company pension rights after forty-five years of service to defendant. Plaintiff argued that he had been dissuaded from accepting more lucrative job offers because of repeated reminders from defendant's managers of the retirement benefits he would lose. Plaintiff further contended that these inducements constituted an implied promise that he would be retained until retirement, but the court held that because plaintiff was "at all times free to terminate his employment at will . . . the purported employment contract [was] void for want of mutuality."<sup>43</sup>

The North Carolina Court of Appeals has applied similar reasoning. In *Williams v. Biscuitville*<sup>44</sup> plaintiff alleged that defendant had breached its employment contract by failing to give a verbal and written warning prior to discharge, as provided by the company personnel manual. The court held that since the warning provisions were part of a policy unilaterally implemented by the employer, the employer could discharge plaintiff in ways other than as set forth in the policy manual.<sup>45</sup>

The notion that either both parties are bound or neither is bound has been discredited by recognition of the validity of the unilateral contract.<sup>46</sup> In a unilateral contract the offeree's bargained for performance is the detriment that makes the offeror's promise an enforceable contract, despite the absence of mutuality.<sup>47</sup> In response to a defendant's claim of lack of mutuality in an employment contract context, the Michigan Supreme Court in *Toussaint v.*

40. *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 69, 139 So. 760, 761 (1932). See also *Gollberg v. Branson Publishing Co.*, 685 F.2d 224, 228 (7th Cir. 1982) (specific performance would constitute a form of involuntary servitude).

41. "It is ironic that application of the mutuality notion to the employment relationships has been expressed as arising out of a primary concern for the freedom of employees . . ." *Blades*, *supra* note 1, at 1419 n.71.

42. 270 F.2d 71 (8th Cir. 1959).

43. *Id.* at 78. This principle was followed in *Shaw v. S.S. Kresge Co.*, 165 Ind. App. 1, 328 N.E.2d 775 (1975), in which the court held that a personnel policy providing for three warnings before discharge was unenforceable for want of mutuality of obligation. The court stated that "[t]here being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at [the employer's] discretion as well." *Id.* at 5, 328 N.E.2d at 779. See also *Edwards v. Citibank*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (1979) (right to just-cause dismissal in personnel policy held unenforceable as being "utterly lacking in mutuality"), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 237 (1980).

44. 40 N.C. App 405, 253 S.E.2d 18 (1979).

45. *Id.* at 408, 253 S.E.2d at 20.

46. *J. CALAMARI & J. PERILLO, CONTRACTS* § 4-14 (1977); See also *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108, 133 N.E. 711, 714 (1921) (if mutuality were held to be an essential element in every contract, there could be no such thing as a valid unilateral or option contract); *Scott v. J. F. Duthie & Co.*, 125 Wash. 470, 216 P. 853 (1923) (principle of mutuality has no place in the consideration of a unilateral contract).

47. The typical example of an offer of a unilateral contract is: "If you walk across the Brooklyn Bridge, I will pay you ten dollars." In this example, the offeree has not been requested to bind himself to do anything. *J. CALAMARI & J. PERILLO, supra* note 46, § 4-15.

*Blue Cross & Blue Shield*<sup>48</sup> stated:

[W]hile defendant's analysis has validity with respect to bilateral contracts or agreements, we note that the typical employment agreement is unilateral in nature . . . the employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based . . . there is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor.<sup>49</sup>

Thus, the *Toussaint* court's unilateral contract analysis allows a finding of promissory liability of the employer without the necessity of finding a return promise by the employee.<sup>50</sup>

Several courts, including the North Carolina Court of Appeals in *Biscuitville*,<sup>51</sup> have concluded that personnel policies are not enforceable provisions of an employment contract because they are unilateral, gratuitous offerings.<sup>52</sup> Yet, as noted by the *Toussaint* court, employment contracts are unilateral by nature. Bilateral agreements are impractical because of the high costs of negotiating and monitoring individual contracts with a large number of employees.<sup>53</sup> Employee acceptance of unilaterally decided terms spares employers the expense and uncertainty of bargaining by allowing employers to calculate terms before entering into contracts.<sup>54</sup> Thus, denying employees the protection of job security provisions voluntarily offered by employers through personnel policies on the basis of technical requirements of mutuality of obligation ignores the existence of unilateral contract analysis.<sup>55</sup>

Lack of consideration has been cited as a second reason for refusing to include personnel policies in employment contracts.<sup>56</sup> This rationale is based

48. 408 Mich. 599, 292 N.W.2d 880 (1980).

49. *Id.* at 630, 292 N.W.2d at 900.

50. Difficulty with this analysis arises in light of RESTATEMENT (SECOND) OF CONTRACTS § 62 (1981) which states that beginning of performance operates as a promise to render complete performance. What constitutes complete performance by an employee is unclear. Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 566 (1983).

51. See *supra* notes 44-45 and accompanying text.

52. See, e.g., *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 121, 397 N.E.2d 443, 446 (1979); *Johnson v. National Beef Packing*, 220 Kan. 52, 54-55, 551 P.2d 779, 782 (1976); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982).

53. See *supra* text accompanying note 36.

54. Note, *supra* note 39, at 456.

55. As stated by Professor Corbin, "denial of enforcement [of an employment contract] cannot be justified by a mere statement that the contract is lacking in mutuality." 1A A. CORBIN, CORBIN ON CONTRACTS § 152 (1963). Counsel facing a jurisdiction still clinging to the mutuality principle should examine closely the personnel policy in question. Some limitations on employee behavior may be construed as the necessary return promise. See *Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 3d 1056, 1059, 322 N.E.2d 574, 576 (1974) (policy requiring employee to give 30 days notice of resignation or face loss of vacation pay constituted mutuality of obligation).

56. See *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 121, 397 N.E.2d 443, 446 (1979); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982). One commentator has noted that the difficulty of relaxing rigid rules of consideration made it unlikely that the employer's right to terminate the at will relationship could be limited under contract law. Blades, *supra* note 1, at 1421. Consequently, Professor Blades turned to the law of torts for limitations on employers' rights to terminate at will.

on the assertion that limitations on employers' termination powers must be supported by some independent consideration since the employee is regarded as fully recompensed for his services by wages.<sup>57</sup> This requirement also stems from a concern for ensuring that the parties intended a continuing relationship.<sup>58</sup> This rigid consideration requirement also has been criticized. In *Pugh v. See's Candies, Inc.*<sup>59</sup> plaintiff alleged that his unexplained discharge after thirty-two years of service had violated oral assurances that he would not be discharged except for good cause. The court agreed, and found "no analytical reason why an employee's promise to render services, or his actual rendition of services over time may not support an employer's promise both to pay a particular wage . . . and to refrain from arbitrary dismissal."<sup>60</sup> The court noted that the requirement of independent consideration was contrary to the general principle that courts should not inquire into the adequacy of consideration, and concluded that the employee's services were sufficient consideration.<sup>61</sup>

Similarly, in *Pine River State Bank v. Metille*<sup>62</sup> the Minnesota Supreme Court enforced procedural discharge provisions of an employee handbook.

The requirement of additional consideration . . . does not preclude the parties, if they make clear their intent to do so, from agreeing that the employment will not be terminable by the employer except pursuant to their agreement, even though no consideration other than services to be performed is expected by the employer or promised by the employee.<sup>63</sup>

The court noted that the employer had issued an employee handbook to promote a more stable and productive workforce, and that plaintiff had continued working despite his freedom to leave.<sup>64</sup> These factors indicated that handbook provisions on disciplinary procedures had become part of the contract.<sup>65</sup>

Thus, under modern contract theory, the consideration provided by an employee's services may support employer promises of job security expressed in personnel policies. The detriment an employee suffers by continuing to work for an employer despite his freedom to leave is not just a creative characterization of the facts. There seems to be much truth in the assertion that "an employee has suffered real detriment in the irretrievable loss of productive

57. *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28, 31 (La. Ct. App. 1975).

58. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981).

59. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

60. *Id.* at 325-26, Cal. Rptr. at 925. See also *Weiner v. McGraw Hill, Inc.*, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982); RESTATEMENT (SECOND) OF CONTRACTS § 80, comment a (1981).

61. *Pugh*, 116 Cal. App. 3d at 325, 171 Cal. Rptr. at 924-25.

62. 333 N.W.2d 622 (Minn. 1983).

63. *Id.* at 629. See also *Drzewiecki v. H. & R. Block Inc.*, 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 174 (1972).

64. *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 809 (D. Col. 1983); *Wagner v. Sperry Univac*, 458 F. Supp. 505, 520 (E.D. Pa. 1978), *aff'd*, 624 F.2d 1092 (1980); *Langdon v. Saga Corp.*, 596 P.2d 524, 527 (Okla. App. 1976); *Yartzhoff v. Democrat-Herald Publishing Co.*, 576 P.2d 356, 359 (Or. 1982).

65. *Pine River*, 333 N.W.2d at 630. See also *Southwest Gas Corp. v. Ahmad*, 668 P.2d 261 (Nev. 1983) (The company's issuance of such handbooks and plaintiff's knowledge of pertinent provisions suggest that the handbook formed part of the employment contract of the parties.)

years, especially when his seniority and experience are not likely to be readily transferable to another job.”<sup>66</sup> Any evidentiary function of independent consideration has been displaced largely by a willingness to infer an agreement from an employer’s issuance of personnel policies and an employee’s knowledge of these policies.<sup>67</sup>

The need for additional consideration also may arise when the employer’s personnel policy is promulgated or amended after the employee has commenced work. *Griffin* implied that the amendment of the personnel policies after plaintiff was hired was a factor in its refusal to enforce the policies. Traditional contract rules provide that an agreement to alter the terms of a contract must be supported by new consideration.<sup>68</sup> This rule is intended to prohibit modifications obtained by coercion, duress, or extortion when one party agrees to modify the agreement in the face of threats of nonperformance.<sup>69</sup> Because contracting parties often desire to alter their agreements in response to changes in circumstances,<sup>70</sup> modern contract theory changed to reflect this consideration. The Uniform Commercial Code recognizes that a modification of good faith sales agreements needs no consideration to be binding.<sup>71</sup> This rationale—promoting enforcement of arm’s length alterations of contract and denying enforcement of coerced modifications<sup>72</sup>—suggests that alterations of an employment contract in favor of the employee should be enforced. Because the employer is invariably in the superior bargaining position, he is unlikely to be coerced by employees into unilaterally modifying his promises.

Finally, the third argument cited to support the refusal to enforce personnel policies as part of the employment contract, is the belief that the employment-at-will doctrine takes precedence over any such restrictions. In *Chin v. American Telephone & Telegraph Co.*<sup>73</sup> the court rejected plaintiff’s contract claim based on provisions of an employee manual because the manual did not contain all the terms of employment, specifically the length of employment. The court concluded that in the absence of a specific term, the employment contract was terminable at will.<sup>74</sup> Similarly, in *Muller v. Stromberg Carlson*

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66. Blades, *supra* note 1, at 1420.

67. Employees may not have to be aware of the personnel policy prior to termination. Because the employer made promises to a *class* of employees, communication to some members of the class was sufficient for all. It would be unfair, impractical, and inefficient to base an employee’s right to recover on whether he read the company’s benefit policies. *See Pettit, supra* note 50, at 583.

68. *See Brenner v. Little Red School House Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981); *Wheeler v. Wheeler*, 299 N.C. 633, 636, 263 S.E.2d 763, 765 (1980).

69. *See, e.g., Lingenfelder v. Wainwright Brewery Co.*, 103 Mo. 578, 593, 15 S.W. 844, 847-48 (1891); *J. CALAMARI & J. PERILLO, supra* note 46, § 4-8.

70. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 *COR. L.Q.* 680, 681 (1982).

71. U.C.C. § 2-204(1) (1977). *Cf. RESTATEMENT (SECOND) OF CONTRACTS* § 89 (1979) (“promise modifying a duty . . . is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made”).

72. Hillman, *supra* note 70, at 681.

73. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978).

74. *Id.* at 1072, 410 N.Y.S.2d at 739. *See also White v. Chelsea Ind.*, 425 So.2d 1090 (Ala.

*Corp.*<sup>75</sup> the Florida Court of Appeals held that employment policies did not give rise to a right to just-cause dismissal because enforcement of such policies would introduce uncertainty into the employer-employee relationship.<sup>76</sup> Like *Chin*, the *Muller* court contemplated an employment contract specifying a term expressed in months or years.

These arguments, however, misconstrue the employment-at-will doctrine. The doctrine is a rule of contract construction, and does not impose substantive limits on the formation of an employment contract.<sup>77</sup> A rule of construction should signal a court to construe a contract by looking beyond its face to the parties' true intentions.<sup>78</sup> An employer might reveal his intent to limit his power of termination by unilaterally offering job security provisions in the form of personnel policies. The courts should not limit the employer to offering only terminable-at-will contracts.

Thus, modern contract theory has supplanted the traditional reasons courts have proffered for refusing to incorporate personnel policies into employment contracts. North Carolina's continuing refusal to enforce such policies in cases like *Griffin* and *Biscuitville* no longer is justified. The North Carolina Court of Appeals already has decided a case that supports enforcement of personnel policies. In *Brooks v. Carolina Telephone & Telegraph Co.*<sup>79</sup> the court of appeals approved plaintiff's claim for severance pay because of provisions in defendant company's personnel policy. The court accepted plaintiff's claim that severance pay provisions contained in defendant's personnel policy were part of the employment contract, stating that "such an *employment contract provision*, recognizably cancellable at will by an employer, would nevertheless operate to protect employees within its coverage during their employment and during the effective operation of such a provision."<sup>80</sup> The court distinguished *Biscuitville* by stating that *Biscuitville* "dealt with each employee's right to continued employment and did not deal with the issue of benefits or compensation earned *during* employment."<sup>81</sup>

This distinction is not convincing. Plaintiffs in *Biscuitville* and *Griffin* did not allege any right to continued or permanent employment; plaintiffs in all three cases alleged breach of contract based on personnel policy provisions that were not included expressly in their employment contracts. It is unclear why the right to warnings, notice, hearings prior to dismissal, or to dismissal for just cause are not considered benefits earned during employment, whereas

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1983) (employee handbook did not vary the common-law rule that an employee is terminable at will); *Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095, 1097 (Del. 1982), (handbook did not grant employee a specific term of employment and does not therefore alter plaintiff's at will status).

75. 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

76. *Id.* at 270.

77. See *Toussaint*, 408 Mich. at 599, 292 N.W.2d at 890-91; *Pine River*, 333 N.W.2d at 628; RESTATEMENT (SECOND) OF AGENCY § 442, comment a (1958).

78. Note, *Job Security for the At Will Employee: A Contractual Right of Discharge for Cause*, 57 CHI.-[ ]KENT L. REV. 697, 719 (1981).

79. 56 N.C. App. 801, 290 S.E.2d 370 (1982).

80. *Id.* at 804, 290 S.E.2d at 372 (emphasis added).

81. *Id.* at 805, 290 S.E.2d at 372.

severance pay is considered such a benefit.<sup>82</sup> By eliminating this artificial distinction between monetary and procedural benefits, the North Carolina courts could enforce all personnel policies under the *Brooks* rationale.

It has been suggested that employers might respond to attempts to enforce personnel policies by including disclaimers in employee handbooks stating that employees serve at will and may be discharged at any time and for any reason.<sup>83</sup> Such a disclaimer has been upheld in at least one case,<sup>84</sup> but several courts have questioned its effectiveness. In *Schipani v. Ford Motor Co.*<sup>85</sup> the court held that despite the disclaimer the employee handbook's allusions to fairness in any termination may be enforced to prevent injustice.<sup>86</sup> Similarly, in *Greene v. Howard University*<sup>87</sup> defendant's employee handbook contained a qualifier that its provisions were not contractual obligations. The court, however, held that the policies and practices of the University embodied in its handbook regulations and customs contemplated a hearing prior to termination, despite the disclaimer.<sup>88</sup> These cases indicate that courts will be reluctant to allow an employer to take back with one hand what it gives with the other. If the employer chooses to create expectations of entitlement to fair and uniform personnel policy application, he may not be permitted to disclaim them.

Giving personnel policies the force of contract has been criticized for fear that employers will be encouraged to withdraw them.<sup>89</sup> Such a consequence is unlikely since employers would sacrifice the benefits of increased employee morale and productivity that flow from a sound personnel policy.<sup>90</sup> Furthermore, enforcement of personnel policies should not substantially increase costs to the employer. A policy providing employees the right to just-cause discharge does not require the employer to retain unsatisfactory employees. Retention of the freedom to discharge arbitrarily may lead to a waste of training, continuity, and expertise.<sup>91</sup> Provisions requiring warnings or a predischarge hearing are not onerous or costly invasions of an employers' freedom; they actually may improve communication between management and employees. Any costs of vexatious litigation may be reduced by including binding arbitration<sup>92</sup> provisions which an employer can draft to fit his needs.

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82. "[A]n agreement between an employee and her employer concerning the manner in which her job could be terminated constitutes an enforceable agreement." *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 581, 279 S.E.2d 46, 48 (1981) (plaintiff could be terminated at will from her supervisor position; however, such termination was not to result in her discharge, but in her demotion to her former job).

83. *Toussaint*, 408 Mich at 612, 292 N.W.2d at 891.

84. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980).

85. 102 Mich. App. 606, 302 N.W.2d 307 (1981).

86. 302 N.W.2d at 311 (Mich. App.).

87. 412 F.2d 1128 (D.C. Cir. 1969).

88. *Id.* at 1134.

89. See Note, *The Burden of Establishing Standards of Performance as a Basis for Employment Termination Rests upon the Employer*, 59 U. DET J. URB. L. 83, 95-96 (1981).

90. See *supra* notes 34-35 and accompanying text.

91. See Note, *supra* note 22, at 1834-35.

92. See *Toussaint*, 408 Mich. at 624, 292 N.W.2d at 897. See also *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521 (1976) (suggesting

In conclusion, judicial refusal to allow exceptions to the employment-at-will doctrine usually is based on dated contract principles or a simple reluctance to let go of a concept that just a few years ago seemed inviolable. Serious inroads into the employment-at-will doctrine, however, are inevitable. The recognition that personnel policies constitute enforceable contract rights can provide many of the protections employees need against abusive discharge while allowing employers to retain some control and flexibility in shaping their work force. Both employers and employees can benefit from a decision to enforce personnel policies as part of the employment contract. North Carolina's courts should take note of current contract and employment trends, re-examine their personnel policy position, and adopt this personnel policy exception to the employment-at-will doctrine.

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passage of statutory right not to be dismissed except for just cause with adjudication of the right through arbitration).