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Contractual Exceptions to the Employment-at-Will Doctrine

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I. [3.1] SCOPE OF CHAPTER

The general rule of law in Illinois is that, in the absence of an express agreement regarding the duration of employment, employment is presumed to be “at will,” and either party is free to terminate the employment relationship at any time for any reason or for no reason at all. The at-will nature of the relationship allows the employee freedom to quit a job in order to move to a new city or to begin a new career, and it gives the employer the flexibility to operate its business in our free market economy.

Illinois courts have created two exceptions to the employment-at-will doctrine: a public policy exception and an employment contract exception. The public policy exception generally prohibits an employer from terminating an employee in retaliation for the employee’s activities if the discharge violates a clear mandate of public policy. For example, an employer is prohibited from terminating an employee in retaliation for filing a workers’ compensation claim or for “whistle-blowing.” The public policy exception to the employment-at-will doctrine is outside the scope of this chapter and is discussed in Chapter 4 of this handbook.

The contract exception to the employment-at-will doctrine is rooted in the freedom of contract of the employer and the employee. As long as the traditional elements of contract formation (*i.e.*, offer, acceptance, and consideration) are present, a court will find the existence of a contract of employment, and it will enforce the terms of the agreement between the parties.

In general, this chapter deals with Illinois cases in which a discharged employee sought to enforce the terms of a specific employment contract and the employer argued that there was no contract because the employment was at will. It does not discuss cases in which an employee argues that he or she was “constructively discharged” or cases discussing doctrines that apply only in the public employment setting, such as due process and constitutional guarantees.

Section 3.2 below contains a brief discussion of the presumption that all employment contracts that do not contain an express agreement regarding the duration of employment are at will.

Sections 3.3 – 3.17 below describe written exceptions to the employment-at-will doctrine. They trace the evolution of Illinois caselaw since the Illinois Supreme Court recognized in *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), that events may occur during the course of employment to change an employee’s at-will status. The emphasis in these sections is on the effect of the published writings of the employer, including handbooks and manuals. These sections also explore the effect of disclaimers, which many employers have included in employee handbooks and policy manuals since *Duldulao*. In addition, these sections include a discussion of contractual claims based on writings other than employee handbooks, including letters, employment applications, and individual performance warnings.

Sections 3.18 – 3.20 below deal with claims that a contract was formed based on an employer’s oral representations and the application of the statute of frauds to these contracts.

Section 3.21 below addresses whether an employer has the right to modify provisions in a handbook or other “contract” created under the *Duldulao* analysis.

Section 3.22 below outlines the promissory estoppel doctrine in the employment-at-will context. Finally, in §§3.23 – 3.26 below, this chapter touches on some of the other issues raised in employment-at-will litigation, including situations in which Illinois courts have declined to apply the *Duldulao* analysis, rules of construction, statutes of limitation, and damages.

II. [3.2] PRESUMPTION OF EMPLOYMENT AT WILL

The rule of law in Illinois is that the employment relationship is presumed to be terminable at will unless the employee can show that his or her status as an at-will employee has been modified. An at-will employment situation arises when the parties have not specified a definite duration for the employment relationship. *E.g.*, *Martin v. Federal Life Insurance Co.*, 109 Ill.App.3d 596, 440 N.E.2d 998, 1002, 65 Ill.Dec. 143 (1st Dist. 1982) (if employment agreement does not specify definite duration, either party may terminate relationship without liability for breach of contract); *Malone v. United Parcel Service, Inc.*, No. 86 C 1813, 1987 U.S. Dist. LEXIS 572 (N.D.Ill. Jan. 28, 1987) (contract not for specific period of time, but contingent on “satisfactory performance,” was terminable at will). In an employment-at-will situation, the employee is free to leave his or her employment at any time for any reason without penalty. At the same time, the employer is free to terminate the employee “at any time, for any or for no cause, without the employer’s incurring any liability.” *Mein v. Masonite Corp.*, 109 Ill.2d 1, 485 N.E.2d 312, 314, 92 Ill.Dec. 501 (1985). *See also Criscione v. Sears, Roebuck & Co.*, 66 Ill.App.3d 664, 384 N.E.2d 91, 95, 23 Ill.Dec. 455 (1st Dist. 1978) (dismissal of at-will employee not based on legitimate business reason does not give rise to cause of action for wrongful discharge); *Daymon v. Hardin County General Hospital*, 210 Ill.App.3d 927, 569 N.E.2d 316, 317, 155 Ill.Dec. 316 (5th Dist. 1991) (“In Illinois an employment relationship at will can be terminated for ‘a good reason, a bad reason, or no reason at all.’”), quoting *Criscione, supra*, 384 N.E.2d at 95; *Gomez v. The Finishing Co.*, 369 Ill.App.3d 711, 861 N.E.2d 189, 197, 308 Ill.Dec. 124 (1st Dist. 2006) (“In general, a noncontract employee serves at the will of his employer and can be discharged for any reason or no reason.”).

The employment-at-will doctrine is “a rule of construction, mandating only a presumption that a hiring without a fixed term is at will.” *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 318, 106 Ill.Dec. 8 (1987). This presumption can be overcome if the employee can demonstrate that he or she and the employer contracted otherwise. *Id.* As with any contract, the ultimate burden of proof rests with the party seeking to prove the contract.

In the employment termination setting, Illinois courts do not recognize a distinct cause of action for violation of the covenant of good faith and fair dealing implied in all contracts. “The ‘good faith’ principle does not have an independent life, and does not independently create a cause of action.” *Zewde v. Elgin Community College*, 601 F.Supp. 1237, 1250 (N.D.Ill. 1984). The “principle of performance in good faith comes into play in defining and modifying duties which grow out of specific contract terms and obligations. It is a derivative principle.” *Gordon v. Matthew Bender & Co.*, 562 F.Supp. 1286, 1289 (N.D.Ill. 1983). “If the implied obligation [of]

good faith created such a cause of action, it would eviscerate the at will doctrine altogether.” 562 F.Supp. at 1290. Thus, Illinois courts are in agreement that the covenant of good faith and fair dealing does not extend to at-will employees. See *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 215 (7th Cir. 1986), *overruled in part by Saxon v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533 – 534 (7th Cir. 1993); *Cresswell v. Bausch & Lomb Inc.*, 2 I.E.R.Cas. (BNA) 1925, 1929 (N.D.Ill. 1986). *But see Criscione, supra*, 384 N.E.2d at 94 (noting that element of good faith is implied in every contract but finding no factual allegations in complaint indicating any bad faith by Sears).

III. CONTRACTUAL MODIFICATION OF EMPLOYMENT-AT-WILL DOCTRINE

A. Written Modifications of Employment-at-Will Doctrine

1. [3.3] *Duldulao v. Saint Mary of Nazareth Hospital Center: Handbooks as Contractual Modification of Employment-at-Will Doctrine*

Duldulao v. Saint Mary of Nazareth Hospital Center, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), is the seminal case holding that statements in an employee handbook can modify an employee’s at-will status. In *Duldulao*, the Illinois Supreme Court set forth a three-part test for determining whether a policy statement in an employee handbook may create a binding contractual relationship between an employer and an employee. This test has been applied in nearly every post-*Duldulao* Illinois case addressing claims that the employer’s conduct altered the employer-employee relationship so that it could not be terminated at will. The criteria under the *Duldulao* test are the following:

First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. 505 N.E.2d at 318.

As many subsequent courts and commentators have noted, the facts in *Duldulao* provided very strong support for the argument that the hospital’s manual formed an employment contract. The plaintiff, Nora Duldulao, worked continuously at Saint Mary from 1970 through her discharge on December 11, 1981. Duldulao began her career as a nurse, was promoted to head nurse in 1971, and was promoted to staff development coordinator of the department of nursing in 1972. She worked in this position until September 14, 1981, when she was transferred to the position of human resources coordinator. Less than 90 days after the transfer, Nora Duldulao was terminated for “unsatisfactory performance.”

Duldulao claimed her termination violated her procedural rights under an implied contract with the hospital. She asserted that these rights were enumerated in the hospital’s employee handbook, which had last been revised in 1975.

The first page of the 1975 handbook was signed by Sister Stella Louise, the president of the Saint Mary of Nazareth Hospital Center. It contained the following note:

N.B. The Personnel Policies of Saint Mary of Nazareth Hospital Center are presented in this booklet in a summarized form. Further details regarding any policy may be obtained by consulting the master file in the Personnel Department.

It is then necessary that every employee of Saint Mary of Nazareth Hospital Center be well informed on hospital policy and other pertinent information that will assist him in directing his total efforts toward the best patient care possible. A booklet containing hospital and personnel policy is given to each employee. As a new policy change is finalized, a copy will be given to every employee to be read and placed in his booklet. If a policy needs clarification, your Supervisor or Department Head will be happy to assist you in its interpretation.

Please take the time to become familiar with these policies. They are designed to clarify your rights and duties as employees. Your observance of these policies will produce a safe and pleasant environment in which to work and assure you a respected place in Saint Mary's family of employees. [Emphasis added.] 505 N.E.2d at 316.

The Illinois Supreme Court summarized additional relevant provisions in Saint Mary of Nazareth's handbook as follows:

Among other things the 1975 handbook modified the previous policy which had required two weeks' notice for dismissal of a probationary employee. The 1975 handbook, as amended by a policy statement finalized on June 18, 1981, provided that "[a]n employee may be terminated without notice but for just cause during the initial probationary period." The probationary period was to last 90 days, unless "extended up to 180 days by the department head for just cause." Once an employee successfully completed the probationary period he or she was to become a "permanent employee." Permanent employees could be terminated only with "proper notice and investigation." The amendments to the handbook provided that "[p]ermanent employees are never dismissed without prior written admonitions and/or investigation that has been properly documented." Except in the case of extremely serious offenses the handbook required three warning notices before a permanent employee could be dismissed. [Emphasis added.] *Id.*

The primary question presented to the Supreme Court was: "Did the employee handbook . . . create contractual terms binding defendant to a particular procedure for terminating plaintiff's employment?" 505 N.E.2d at 315. The Supreme Court noted that employment at will is a common-law "rule of construction, mandating only a presumption that a hiring without a fixed term is at will" and that this presumption "can be overcome by demonstrating that the parties contracted otherwise." 505 N.E.2d at 318. Following this logic, the court held:

[A]n employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present. *Id.*

The court then set forth the three-part test quoted above and applied the test to the facts of the case. The court found that the handbook contained strong language, *e.g.*, that “permanent employees” were “*never dismissed without prior written admonitions and/or an investigation that has been properly documented*”; that (except in a few specifically enumerated circumstances) “three warning notices within a twelve-month period *are required* before an employee is dismissed,” which would lead Nora Duldulao to the reasonable understanding that she would not be terminated without three prior warnings except in the case of a serious offense; and that she continued to work in reliance on the promises contained in the handbook. [Emphasis added.] 505 N.E.2d at 318. In addition to the very specific nature of the policy statement, Saint Mary’s handbook contained absolutely no disclaimers to negate the effect of the promises contained in the handbook.

The court rejected the argument that Nora Duldulao’s transfer to a new position less than 90 days before she was terminated caused her status to revert from “permanent” back to “probationary” until she completed a separate 90-day probationary period in her new position. Although the handbook contained a policy statement regarding transfers, the court found that the policy did not specifically indicate that an employee who was serving a “designated probationary period” loses the right to progressive disciplinary procedures gained after the initial 90-day employment period. 505 N.E.2d at 319. The court granted summary judgment in favor of Nora Duldulao.

In order for an employee to prevail under the *Duldulao* theory, the employee must meet all three elements of the test. The plaintiff has the burden of proving that the policy statement contained a clear promise that he or she reasonably believed to be an offer, that he or she was aware of the contents of the policy statement, and that he or she commenced or continued to work after learning of the policy statement.

a. [3.4] Requirement That Employer’s Policy Statement Constitute Clear Promise

The question of whether the policy statement constitutes “a clear and definite promise is not for the trier of fact to determine, but is, rather, ‘a threshold question of law to be determined by the court.’” *Mansourou v. John Crane, Inc.*, 248 Ill.App.3d 963, 618 N.E.2d 689, 692, 188 Ill.Dec. 119 (1st Dist. 1993), quoting *Harrell v. Montgomery Ward & Co.*, 189 Ill.App.3d 516, 545 N.E.2d 373, 376, 136 Ill.Dec. 849 (1st Dist. 1989). It should be noted that courts utilize the clear promise prong of the *Duldulao* test to analyze not only the affirmative promises made by a handbook but also the effectiveness of any disclaimers contained in the handbook. *See Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). Disclaimers are treated separately in §§3.14 – 3.16 below.

(1) [3.5] Cases finding that employer’s policy statement was clear promise

In 1990, the Supreme Court amplified its ruling in *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), in *Mitchell v. Jewel Food*

Stores, 142 Ill.2d 152, 568 N.E.2d 827, 154 Ill.Dec. 606 (1990), *reh'g denied* (Apr. 1, 1991). The court found that Jewel's employment manual contained a clear promise that an employee who completed a 90-day probationary period enjoyed contractual protection against dismissal without just cause.

James Mitchell was a security guard who worked at a number of Jewel's southeast Chicago stores between 1976 and 1983. Mitchell was fired for falsifying his time cards.

The Supreme Court determined that Jewel's manual contained a clear promise that an employee who had been with the company for more than 90 days "shall not be suspended, discharged or otherwise disciplined without just cause." 568 N.E.2d at 831. The manual defined "just cause" to "include but not be limited to . . . dishonesty or other misconduct in connection with work." *Id.* The Supreme Court reversed summary judgment for the employer, holding that the term "misconduct" was ambiguous. The court remanded the matter to the trial court, instructing that it was to be left to a jury to decide whether the incorrect information the plaintiff placed on his time card constituted "misconduct" as described in the employee handbook or if it was merely a "mistake" on the time card as the plaintiff claimed. 568 N.E.2d at 834.

A number of other cases have found a clear promise based on language in the employee handbook or manual, typically in situations in which the policy statement at issue provides for a grievance procedure or progressive discipline. *See, e.g., Robinson v. Ada S. McKinley Community Services, Inc.*, 19 F.3d 359, 361 (7th Cir. 1994) (manual and letter indicating that employee who successfully completed probationary period would achieve permanent employment status and tenure were clear promise that employee could not be terminated without certain protections); *Dawson v. W. & H. Voortman, Ltd.*, 853 F.Supp. 1038, 1041 (N.D.Ill. 1994) (allegations of complaint sufficiently alleged cause of action for breach of employment contract); *Wojcik v. Commonwealth Mortgage Corp.*, 732 F.Supp. 940, 942 (N.D.Ill. 1990) (procedure in manual, purpose of which was to "give employees the opportunity to correct their conduct," was clear promise); *Harden v. Playboy Enterprises, Inc.*, 261 Ill.App.3d 443, 633 N.E.2d 764, 769, 198 Ill.Dec. 923 (1st Dist. 1993) ("Corrective Action Policy" in handbook that outlined termination and progressive discipline procedures was clear promise); *Vajda v. Arthur Andersen & Co.*, 253 Ill.App.3d 345, 624 N.E.2d 1343, 1349, 191 Ill.Dec. 965 (1st Dist. 1993) (written and oral promises were sufficient for jury to conclude that termination was only for good cause and that progressive discipline policy that included three warnings would be implemented before termination); *Perman v. ArcVentures, Inc.*, 196 Ill.App.3d 758, 554 N.E.2d 982, 987, 143 Ill.Dec. 910 (1st Dist. 1990) (manual containing grievance and appeal procedures was binding despite disclaimers); *Land v. Michael Reese Hospital & Medical Center*, 153 Ill.App.3d 465, 505 N.E.2d 1261, 1263, 106 Ill.Dec. 470 (1st Dist. 1987) (employment manual contained promise that employee could utilize grievance procedures if she had dispute with employer); *Hicks v. Methodist Medical Center*, 229 Ill.App.3d 610, 593 N.E.2d 119, 121, 170 Ill.Dec. 577 (3d Dist. 1992) ("precise" and "unequivocal" language in personnel handbook regarding grievances and transfers was clear and certain enough to become part of offer of employment); *Wood v. Wabash County*, 309 Ill.App.3d 725, 722 N.E.2d 1176, 243 Ill.Dec. 107 (5th Dist. 1999) (language of disciplinary procedure in personnel policy handbook sufficiently and clearly stated promise that plaintiff could reasonably believe amounted to offer and created contractual rights for plaintiff); *Wooten v. Fortune Brands, Inc.*, No. 98 C 4603, 1999 U.S. Dist. LEXIS 14267 (N.D.Ill. Aug. 25,

1999) (portions of policy manual contained clear language that was unequivocal and mandatory and that created promise clear enough that employee would reasonably believe that offer has been made).

While most of the clear promise cases involve promises of procedures for discipline or discharge, some courts have found a clear promise regarding benefits or other terms and conditions of employment. See *DeFosse v. Cherry Electrical Products Corp.*, 156 Ill.App.3d 1030, 510 N.E.2d 141, 145, 109 Ill.Dec. 520 (2d Dist. 1987) (promise to pay disability benefits set forth in group benefit plan booklet); *Anderson v. City of Wood Dale, Illinois*, No. 93 C 425, 1994 U.S. Dist. LEXIS 1513 (N.D.Ill. Feb. 8, 1994) (promise to pay overtime set forth in personnel policy manual); *Dow v. Columbus-Cabrini Medical Center*, 274 Ill.App.3d 653, 655 N.E.2d 1, 211 Ill.Dec. 341 (1st Dist. 1995) (holding that employee under *Duldulao* had enforceable contractual right to receive payment for unused sick days).

(2) [3.6] Cases finding that employer's policy statement was not clear promise

In many reported cases, Illinois courts have held that the employer's representations did not constitute a clear promise. Most of the reported decisions finding no clear promise involve statements made by the employer concerning the manner and type of discipline it will use and the procedures and grounds for discharge.

Courts have refused to recognize contractual rights based on statements in employee handbooks that the employer would not discriminate on the basis of race. In *Sample v. Aldi Inc.*, No. 93 C 3094, 1994 U.S. Dist. LEXIS 1518 (N.D.Ill. Feb. 8, 1994), the employee claimed that the employer discriminated against him because of his race and that this violated his contractual rights. The court noted that the employer was obligated to implement a policy of nondiscrimination under federal and state antidiscrimination laws and concluded that the handbook's statements regarding equal opportunity were "in effect mere restatements of a pre-existing duty under federal and state law." 1994 U.S. Dist. LEXIS 1518 at *35. It cited *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), and held that the equal opportunity language was "without consideration" and could not "form the basis of a contract claim." *Sample*, 1994 U.S. Dist. LEXIS 1518 at *36. See also *Willis v. Evans Products Co.*, No. 86 C 9111, 1987 U.S. Dist. LEXIS 4175 (N.D.Ill. May 14, 1987) (equal opportunity policy prohibiting age discrimination did not give rise to enforceable contract); *Patton v. University of Chicago Hospitals*, 706 F.Supp. 627, 629 (N.D.Ill. 1989) (employer's policy prohibiting age discrimination did not create contract between university and its employees).

Similarly, courts have generally refused to extend *Duldulao* to other intangible benefits, including promises to maintain a harassment-free workplace. In *Svigos v. Petry Television, Inc.*, No. 95 C 5899, 1996 U.S. Dist. LEXIS 9558 (N.D.Ill. July 8, 1996), the plaintiff alleged that her employer had violated its employment contract with her when the employer allegedly ignored her complaints of a coworker's sexual harassment and ultimately terminated her. The court dismissed Svigos' claim, concluding that the company's harassment policy merely summarized the existing state of the law without making any promises to investigate complaints and discipline violators. See also *Zakaras v. United Airlines, Inc.*, 121 F.Supp.2d 1196 (N.D.Ill. 2000) (sexual harassment

policy is not binding contract); *Russo v. Nike, Inc.*, No. 99 C 2726, 2000 U.S. Dist. LEXIS 6037 (N.D.Ill. Mar. 27, 2000) (finding sexual harassment policy is not enforceable contract under Illinois law); *Finnane v. Pentel of America, Ltd.*, 43 F.Supp.2d 891, 900 – 901 (N.D.Ill. 1999) (finding sexual harassment policy lacked sufficient consideration to be contract under Illinois law because alleged “contract” imposed no duties on employer beyond those required by law); *Wexler v. Morrison Knudsen Corp.*, No. 99 C 6522, 2000 U.S. Dist. LEXIS 16789 (N.D.Ill. Nov. 15, 2000) (company’s statements reflected summaries of existing laws, not promises to employees).

A list of various grounds for dismissal does not convert a handbook into an employment contract. *Groat v. Olympia Fields Ford Sales, Inc.*, No. 91 C 0606, 1994 U.S. Dist. LEXIS 1383 (N.D.Ill. Feb. 8, 1994); *Campbell v. City of Champaign*, 940 F.2d 1111, 1113 (7th Cir. 1991); *Shepley v. E.I. DuPont de Nemours & Co.*, 722 F.Supp. 506, 511 (C.D.Ill. 1989); *Callahan v. City of Rockford, Illinois*, No. 90 C 20090, 1994 U.S. Dist. LEXIS 3320 (N.D.Ill. Mar. 2, 1994); *Williams v. Toshiba America Medical Systems, Inc.*, No. 93 C 3448, 1994 U.S. Dist. LEXIS 5304 at *28 (N.D.Ill. Apr. 22, 1994), *aff’d*, 42 F.3d 1392 (7th Cir. 1994) (no clear promise in 90-day “Performance Plan” for otherwise at-will employee when employer retained right to terminate employee prior to expiration of 90 days). Courts will not find a clear promise to use progressive discipline unless the employer makes it clear that progressive discipline is mandatory. *See Morgan v. Harris Trust & Savings Bank of Chicago*, 44 F.E.P.Cas. (BNA) 704 (N.D.Ill. 1987) (no clear promise of progressive discipline when employee manual stated that progressive discipline not required in all cases and that certain misconduct would result in immediate termination); *Frank v. South Suburban Hospital Foundation*, 256 Ill.App.3d 360, 628 N.E.2d 953, 959, 195 Ill.Dec. 489 (1st Dist. 1993) (no clear promise; handbook that provided for progressive discipline but allowed discharge on first offense for certain serious conduct did not mandate use of progressive discipline); *Williams v. Chicago Housing Authority*, 217 Ill.App.3d 1055, 578 N.E.2d 71, 74, 160 Ill.Dec. 892 (1st Dist. 1991) (no clear promise to use progressive discipline when handbook described progressive disciplinary procedure but outlined second disciplinary procedure for “gross violations”); *Semerau v. Village of Schiller Park*, 210 Ill.App.3d 493, 569 N.E.2d 183, 186, 155 Ill.Dec. 183 (1st Dist.) (manual stating that discipline may include suspension, dismissal, demotion, or other actions and that disciplinary action should generally be progressive in severity did not mandate progressive discipline), *appeal denied*, 141 Ill.2d 560 (1991); *Habighurst v. Edlong Corp.*, 209 Ill.App.3d 426, 568 N.E.2d 226, 229, 154 Ill.Dec. 226 (1st Dist. 1991) (no clear promise when handbook referred to progressive disciplinary action but had no provision for specific disciplinary procedures); *Lampe v. Swan Corp.*, 212 Ill.App.3d 414, 571 N.E.2d 245, 247, 156 Ill.Dec. 658 (5th Dist. 1991) (no clear promise to provide formal counseling before termination when handbook stated that “[i]f any problem is serious enough, any employment may be terminated without previous formal counseling”); *Rudd v. Danville Metal Stamping Co.*, 193 Ill.App.3d 1009, 550 N.E.2d 674, 675 – 676, 140 Ill.Dec. 789 (4th Dist.) (no clear promise to utilize progressive discipline when handbook contained provision that employer may utilize progressive discipline but also permitted discharge for certain offenses on first occurrence), *appeal denied*, 132 Ill.2d 554 (1990); *Crenshaw v. DeVry, Inc.*, 172 Ill.App.3d 228, 526 N.E.2d 474, 476, 122 Ill.Dec. 215 (1st Dist. 1988) (no clear promise to place employee on probation before termination when employment contract stated that failure to meet minimum standards of productivity was “cause for placement on probationary status”).

Many courts have also declined to find a clear promise of “continued employment” absent “just cause” for termination when the employer’s writing lacks specific language providing for dismissal only for “just cause.” *Corcoran v. Chicago Park District*, 875 F.2d 609, 612 (7th Cir. 1989) (no clear promise to continue employment when employer stated that employees would be retained and hired solely on basis of performance); *Lashbrook v. Oerkfitz*, No. 93 C 20224, 1994 U.S.Dist. LEXIS 1288 (N.D.Ill. Feb. 2, 1994) (no clear promise of termination only for just cause when handbook stated that employees may be terminated for just cause and that tenure of every employee shall be contingent on acceptable conduct and satisfactory performance of duties as language was suggestive, not mandatory); *Callahan, supra*, 1994 U.S.Dist. LEXIS 3320 at *3 (no clear promise of just cause dismissal when personnel rules stated that city retained right to take any necessary action, including discharge, and provided for grievance procedure); *Sample, supra*, 1994 U.S.Dist. LEXIS 1518 at *37 (no clear promise to terminate for cause in handbook giving examples of conduct that could lead to discipline and reserving employer’s right to “impose appropriate disciplinary action for any form of disruptive or inappropriate behavior”); *Cresswell v. Bausch & Lomb Inc.*, 2 I.E.R.Cas. (BNA) 1925 (N.D.Ill. 1986) (no clear promise of permanent employment when employer stated that employment would be permanent and continuous if employee performed his duties as laid out and that employee could probably do well in company); *Daymon v. Hardin County General Hospital*, 210 Ill.App.3d 927, 569 N.E.2d 316, 320, 155 Ill.Dec. 316 (5th Dist. 1991) (no clear promise to terminate only for just cause when handbook contained no provision, express or implied, requiring just cause for dismissal); *Bjorn v. Associated Regional & University Pathologists, Inc.*, 208 Ill.App.3d 505, 567 N.E.2d 417, 420, 153 Ill.Dec. 459 (1st Dist. 1990) (policies and practices summary with no specific “just cause” provision did not overcome presumption of employment at will); *Jackson v. Avanti/Case-Hoyt, Inc.*, No. 02 C 7001, 2003 U.S.Dist. LEXIS 3373 (N.D.Ill. Mar. 4, 2003) (language in employee handbook that contained progressive discipline policy allowing employer, in its discretion, to skip one or more steps in policy and proceed directly to termination too loose and vague to confer legally enforceable right to progressive discipline); *Miller v. Ford Motor Co.*, 105 Fed.Appx. 84 (7th Cir. 2004) (language of employment handbook and statement of policies dictating that employees were expected to conform to certain level of conduct could not have reasonably led former employee to believe employer was modifying his employment relationship with clear promise of employment that was no longer at will); *Denis v. P&L Campbell, Inc.*, 348 Ill.App.3d 391, 809 N.E.2d 773, 284 Ill.Dec. 207 (5th Dist. 2004) (employee handbook did not clearly convey offer to employee, and thus handbook did not create contract between employee and employer); *Killacky v. Hondo, Inc.*, 98 Fed.Appx. 529 (7th Cir. 2004) (drug and alcohol policy contained in employee handbook did not create implied contractual obligation between employer and employee, who was terminated even though he allegedly complied with drug and alcohol policy); *Moskerc v. American Airlines, Inc.*, No. 02 C 710, 2004 U.S.Dist. LEXIS 8326 at **25 – 26 (N.D.Ill. May 10, 2004) (reinstatement rights section of employer’s extended medical leave policy providing that employees would be reinstated to their same or similar job upon conclusion of leave was not clear and definite promise of permanent employment or employment for any duration of time).

Courts have considered and rejected employee claims of a clear promise in many other situations involving employee discipline or termination. *Doe v. First National Bank of Chicago*, 865 F.2d 864, 872 (7th Cir. 1989) (no clear promise that specific disciplinary procedures would be used in employer memorandum describing major and minor offenses but containing no

description of specific disciplinary procedures); *Jacobs v. Mundelein College, Inc.*, 256 Ill.App.3d 476, 628 N.E.2d 201, 205 – 206, 194 Ill.Dec. 704 (1st Dist. 1993) (no clear promise of right to appeal matters of discharge or employment status despite handbook provision establishing grievance procedure; no clear promise that more than three individuals would make contract renewal decision when handbook stated it would be done with great deal of input from others); *Altman v. City of Chicago*, 224 Ill.App.3d 471, 586 N.E.2d 698, 700, 166 Ill.Dec. 740 (1st Dist. 1991) (no clear promise that employee's illness would be disregarded when discretion was specifically reserved to officer preparing performance evaluations even though manual suggested employee's work absences may be viewed globally by reviewing officer). *See also DeFosse v. Cherry Electrical Products Corp.*, 156 Ill.App.3d 1030, 510 N.E.2d 141, 144 – 145, 109 Ill.Dec. 520 (2d Dist. 1987) (no clear promise requiring notice before discipline when provision in welcome booklet allowed employee to discuss problem with supervisor or personnel officer but did not mandate that employer initiate grievance procedure or notify employee before discipline); *Toombs v. City of Champaign*, 245 Ill.App.3d 580, 615 N.E.2d 50, 52, 185 Ill.Dec. 755 (4th Dist. 1993) (no clear promise stating that employees would be fired only for specifically enumerated reasons when handbook noted types of terminations and indicated that grounds for termination included certain offenses). Even a written statement that it is company policy to base termination on "verified facts, not on anyone's whim or unsupported opinion," did not create a binding contractual obligation. *Brown v. R.R. Donnelly & Sons Co.*, 272 Ill.App.3d 94, 650 N.E.2d 8, 9, 208 Ill.Dec. 737 (4th Dist. 1995).

It should be noted that an employer's unwritten customary practice regarding discipline does not create a contract for procedures to which all employees are entitled. *Walton v. St. Anne's Hospital*, 3 I.E.R.Cas. (BNA) 1594 (N.D.Ill. 1987). In cases involving matters other than discipline or discharge, courts have also declined to find the clear promise *Duldulao* requires. Hiring at a monthly or annual salary, if no period of duration is specified in the contract, is presumed to be at will, and either party may terminate the hiring at his or her pleasure without liability. *White v. American Electric Fusion Corp.*, 328 Ill.App. 128, 65 N.E.2d 234 (1st Dist. 1946). *See also Atwood v. Curtiss Candy Co.*, 22 Ill.App.2d 369, 161 N.E.2d 355, 357 (1st Dist. 1959). An employer's promise to compensate an employee on a monthly or yearly basis does not create an employment contract for the duration of one year. *Cassel v. Ancilla Development Group, Ltd.*, 704 F.Supp. 865, 867 (N.D.Ill. 1989); *Medina v. Spotmail, Inc.*, 591 F.Supp. 190, 197 (N.D.Ill. 1984); *Payne v. AHFI/Netherlands, B.V.*, 522 F.Supp. 18, 22 (N.D.Ill. 1980); *Kepper v. School Directors of District No. 120, County of LaSalle*, 26 Ill.App.3d 372, 325 N.E.2d 91, 93 (3d Dist. 1975); *Palmateer v. International Harvester Co.*, 85 Ill.App.3d 50, 406 N.E.2d 595, 597, 40 Ill.Dec. 589 (3d Dist. 1980), *rev'd on other grounds*, 85 Ill.2d 124 (1981); *Mann v. Ben Tire Distributors, Ltd.*, 89 Ill.App.3d 695, 411 N.E.2d 1235, 1236, 44 Ill.Dec. 869 (4th Dist. 1980); *Groat, supra* (no clear promise when statement was management guideline); *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 287, 124 Ill.Dec. 461 (3d Dist. 1988) (management guideline for discipline not employment contract), *appeal denied*, 124 Ill.2d 555 (1989). *But see Miller v. Community Discount Centers, Inc.*, 83 Ill.App.2d 439, 228 N.E.2d 113, 115 (1st Dist. 1967) (job offer letter stating, "[r]egarding moving expenses, we will pay one-half now and the balance *after one year*" [emphasis added], was offer to employ for one year); *Berutti v. Dierks Foods, Inc.*, 145 Ill.App.3d 931, 496 N.E.2d 350, 354, 99 Ill.Dec. 775 (2d Dist. 1986) (guaranteed salary for 12 months of \$750 per week created 1-year employment contract).

b. [3.7] *Requirement That Employer's Statement Be Disseminated*

The second prong of the *Duldulao* test is that “the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer.” *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 318, 106 Ill.Dec. 8 (1987). While courts typically refer to this prong of the test as the “dissemination requirement,” the analysis tends to focus on whether the employee was aware of the policy statement. Reported cases do not often hinge on this requirement, and judicial analysis of the dissemination requirement often bleeds over into the clear promise area.

(1) Requirement that employee be aware of employer's statement

(a) [3.8] Cases finding that employee was sufficiently aware of employer's statement

In *Belsanti v. CFS Holdings, Inc.*, 260 Ill.App.3d 419, 632 N.E.2d 10, 12, 197 Ill.Dec. 941 (1st Dist. 1992), the First District held that a policy kept in a binder available in the personnel office for all employees to review was disseminated to the employees. It reversed summary judgment in favor of the defendant and remanded for trial.

Jack Belsanti was a regional sales manager for CFS from 1950 through 1973 when he voluntarily left the company. He was rehired by CFS in 1984 as a branch manager. As a regional sales manager, Belsanti had a copy of the company's policy regarding termination. The pertinent passage from the policy was that a “supervisor must ‘document, prepare and condition an employee that his job was in jeopardy and that if certain predetermined steps were not taken and improvement made, that separation from the company was an imminent situation.’” 632 N.E.2d at 11. Belsanti did not receive a new copy of this policy when rehired, but he testified that he presumed the policy was still in effect. Thirteen months after he was rehired, the plaintiff was told that his position was being eliminated as part of a reduction in force. The plaintiff objected because he had not been warned or conditioned for the termination, at which point he was told that his performance evaluation was “not acceptable.” *Id.* After he was terminated, the plaintiff's brother (who was a regional sales manager with CFS) showed him a copy of CFS' current “Employee Relations Policies and Practices.” The policy was “almost identical to the policy in effect when plaintiff had been a manager.” *Id.*

The court found that the statement in CFS' policy manual that read “[i]t is the Policy of CFS Continental, Inc., to discharge employees only when there is reasonable cause” was sufficiently “clear and definite enough to form a contractual promise to CFS employees.” 632 N.E.2d at 12. The result was the creation of a contract for just cause. In rejecting CFS' arguments that the policy had not been disseminated, the court ignored the fact that Belsanti did not see the actual policy until after he was terminated.

In other cases, Illinois courts have found that the dissemination requirement was fulfilled. *Anderson v. City of Wood Dale, Illinois*, No. 93 C 425, 1994 U.S. Dist. LEXIS 1513 (N.D.Ill. Feb. 8, 1994) (dissemination requirement met when employer distributed manual to employees when they became employed); *Harden v. Playboy Enterprises, Inc.*, 261 Ill.App.3d 443, 633 N.E.2d 764, 769, 198 Ill.Dec. 923 (1st Dist. 1993) (handbook was disseminated to employees who were

required to sign acknowledgement and encouraged to read handbook); *Land v. Michael Reese Hospital & Medical Center*, 153 Ill.App.3d 465, 505 N.E.2d 1261, 1263, 106 Ill.Dec. 470 (1st Dist. 1987) (employee's conduct showed her awareness of employer's offer when made); *Hicks v. Methodist Medical Center*, 229 Ill.App.3d 610, 593 N.E.2d 119, 121, 170 Ill.Dec. 577 (3d Dist. 1992) (plaintiff read handbook).

- (b) [3.9] Cases finding that employee was not sufficiently aware of employer's statement

At least one court has concluded that there is not yet a judicial definition of *Duldulao's* dissemination requirement. See *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). In *Hany v. General Electric Co.*, 221 Ill.App.3d 390, 581 N.E.2d 1213, 1218, 163 Ill.Dec. 790 (4th Dist. 1991), the appellate court found no error in the trial court's decision to provide the jury with a dictionary definition of the word "disseminate." The *Hany* court upheld a verdict in favor of General Electric, stating: "While a trial court should inform a jury of judicial or legal interpretations of an ordinary term . . . no such judicial interpretation of the word 'dissemination' exists to support plaintiffs' proposed instruction." [Citation omitted.] *Id.* The jury found that the new plant manager repeatedly advised nonmanagerial salaried personnel orally at monthly meetings that he would not approve payment of overtime for any salaried employees. These oral statements made the salaried personnel sufficiently aware that the company's 1983 written memo to its salaried managerial personnel outlining GE's liberal overtime payment policy had been rescinded. The Fourth District agreed, noting that "GE need not have distributed a written memo or new policy statement to rescind a written policy that the employees never received." *Id.*

In *Groat v. Olympia Fields Ford Sales, Inc.*, No. 91 C 0606, 1994 U.S. Dist. LEXIS 1383 (N.D.Ill. Feb. 8, 1994), the court held that the dissemination requirement was not met when the manual was not distributed generally to the employees and when the plaintiff employee received a copy of the manual so that she could comply with its requirements in her accounting duties as secretary-treasurer. See also *Callahan v. City of Rockford, Illinois*, No. 90 C 20090, 1994 U.S. Dist. LEXIS 3320 (N.D.Ill. Mar. 2, 1994) (no evidence that personnel rules were disseminated in such manner that employee was aware of contents and believed them to be offered when rules were not distributed to city employees); *Morgan v. Harris Trust & Savings Bank of Chicago*, 44 F.E.P.Cas. (BNA) 704 (N.D.Ill. 1987) (plaintiff did not establish that any promise made was distributed in such manner that he was aware of its contents and reasonably believed it to be offer); *Jacobs v. Mundelein College, Inc.*, 256 Ill.App.3d 476, 628 N.E.2d 201, 205, 194 Ill.Dec. 704 (1st Dist. 1993) (no evidence that documents plaintiff relied on were disseminated to him); *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 287, 124 Ill.Dec. 461 (3d Dist. 1988) (guidelines distributed only to supervisors and management, rather than all employees, were insufficiently disseminated to establish contract under *Duldulao*), *appeal denied*, 124 Ill.2d 555 (1989).

- (2) [3.10] Requirement that employee reasonably believed employer's statement to be offer

In addition to the dissemination element, the second prong of the *Duldulao* test reincorporates the reasonableness element found in the first prong of the test. Specifically, "the statement must

be disseminated to the employee in such a manner that the employee is aware of its contents and *reasonably believes it to be an offer.*” [Emphasis added.] *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 318, 106 Ill.Dec. 8 (1987). Courts will frequently focus on the reasonableness of the employee’s belief that a particular policy statement constituted an offer of an employment contract. When looking at the reasonableness of the employee’s belief, it is not uncommon for the court to consider the presence of any disclaimers in the policy statement at issue. Disclaimers are discussed more fully in §§3.14 – 3.16 below.

- (a) [3.11] Cases finding that employee reasonably believed that employer’s statement was offer

Courts finding that a contract has been established pursuant to *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), seldom discuss the reasonable belief element other than to indicate that it has been satisfied. See *Melicharek v. Carson Pirie Scott & Co.*, 215 Ill.App.3d 873, 576 N.E.2d 99, 101, 159 Ill.Dec. 430 (1st Dist. 1991) (“these statements [by the employer] are clear enough to have caused plaintiff to reasonably believe that an offer has been made”).

- (b) [3.12] Cases finding that employee could not reasonably believe that employer’s statement was offer

The reasonable belief element of the *Duldulao* test is used as a bar to contract formation in situations in which the underlying facts alleged by the plaintiffs are, on their face, outside the realm of what an ordinary individual would consider to be a promise. See *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). For example, in *Thierry v. Carver Community Action Agency of Knox County, Inc.*, 212 Ill.App.3d 600, 571 N.E.2d 484, 156 Ill.Dec. 700 (3d Dist. 1991), the appellate court dismissed a complaint brought by the former executive director of a not-for-profit organization. The plaintiff had no written or oral agreement concerning the duration of her employment, but her employer had adopted a personnel policy in 1983 that permitted certain categories of employees to demand a hearing before the executive director of the agency upon termination. Excluded from the protected categories were “individuals having special or unique qualifications, or individuals on whom the executive director relies, to develop or implement the broad philosophy of the agency.” 571 N.E.2d at 485. The court held that the plaintiff could not pass the *Duldulao* test since “the personnel policy does not contain a promise clear enough that the plaintiff would reasonably believe [it] to be an offer.” 571 N.E.2d at 486. The court went on to state:

The language in the personnel policy cannot be interpreted by a reasonable person to constitute an offer to the executive director of the right to a hearing before herself upon her termination. Thus, the plaintiff is unable to show that the language of the personnel policy contains a clear promise such that she could have reasonably construed [it] to be an offer. 571 N.E.2d at 487.

Similarly, in *Moore v. Illinois Bell Telephone Co.*, 155 Ill.App.3d 781, 508 N.E.2d 519, 108 Ill.Dec. 358 (2d Dist. 1987), the court held that it was unreasonable for the plaintiffs to believe that the language of Illinois Bell’s incentive plan was a contractual offer entitling plaintiffs to

receive scheduled bonuses for selling 805 percent of their annual quota during the first year after AT&T was split up by the government. The plaintiffs reached such a high figure over the quota because the single customer they were assigned to service was one of the newly created “Baby Bell” subsidiaries. The court determined that the three-line introduction found alone on a separate page at the beginning of defendant’s incentive plan, which stated in part that “[t]he Plan is a statement of management’s intent and is not a contract or assurance of compensation” led to “but one reasonable conclusion: that defendant was not promising, and did not intend to be bound by, anything in the incentive plan.” 508 N.E.2d at 521.

In *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 287, 124 Ill.Dec. 461 (3d Dist. 1988), *appeal denied*, 124 Ill.2d 555 (1989), the court found that an employee did not have a reasonable belief that a promise was made to him, noting:

IPC [Illinois Power Company] also did not disseminate the handbook in such a manner that employees would be aware of the contents and reasonably believe it to constitute an offer. The IPC document was delivered to supervisory and management employees to assist them with disciplinary procedures; the plaintiff received a copy of the Guidelines in his capacity as a supervisor. He knew that the handbook was not distributed to all employees and could not reasonably have believed it was an offer to him. The fact that the plaintiff placed the Guidelines in the General Operating Procedure Manual to which employees had access does not make the dissemination more reasonable. [Emphasis added.]

See also Wojcik v. Commonwealth Mortgage Corp., 732 F.Supp. 940, 943 (N.D.Ill. 1990) (purpose of procedures “to provide management with termination guidelines that will promote effective employee relations and comply with legislation”; thus it would be unreasonable for employee to consider any of provisions thereunder to constitute promise sufficient to be offer by company); *Morgan v. Harris Trust & Savings Bank of Chicago*, 44 F.E.P.Cas. (BNA) 704, 705 (N.D.Ill. 1987) (“In light of the manual’s restricted distribution and limited purpose, plaintiff could not reasonably have believed that it was intended to create a contractual offer.”); *Daymon v. Hardin County General Hospital*, 210 Ill.App.3d 927, 569 N.E.2d 316, 320, 155 Ill.Dec. 316 (5th Dist. 1991) (“language of the handbook does not contain a promise clear enough that an employee would reasonably believe an offer has been made not to discharge him or her except for just cause”).

c. [3.13] Requirement That Employee Accept Employer’s Offer

The third prong of the *Duldulao* test requires that “the employee [commence] or [continue] to work after learning of the policy statement.” *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 318, 106 Ill.Dec. 8 (1987). In *Campbell v. City of Champaign*, 940 F.2d 1111, 1112 (7th Cir. 1991), the court noted that an employee accepts a unilateral offer by taking up or continuing his or her employment after receiving a handbook that contains a promise on which a reasonable employee would rely. *See Hicks v. Methodist Medical Center*, 229 Ill.App.3d 610, 593 N.E.2d 119, 121, 170 Ill.Dec. 577 (3d Dist. 1992) (offer accepted as employee commenced work); *Land v. Michael Reese Hospital & Medical Center*, 153 Ill.App.3d 465, 505 N.E.2d 1261, 1263, 106 Ill.Dec. 470 (1st Dist. 1987) (offer accepted as

employee continued to work after employee manual was adopted). This prong of the test satisfies the consideration requirement of contract formation.

In *Williams v. Toshiba America Medical Systems, Inc.*, No. 93 C 3448, 1994 U.S. Dist. LEXIS 5304 (N.D.Ill. Apr. 22, 1994), *aff'd*, 42 F.3d 1392 (7th Cir. 1994), an unreported decision, the court found that the plaintiff did not establish the third prong of the *Duldulao* test. After receiving an unsigned 90-day performance plan intended to focus the employee on improving performance, the employee returned a counteroffer. The court concluded that the plaintiff rejected the offer by making a counteroffer. Thus, the fact that the employee continued to work after he received the offer did not constitute acceptance of the offer and did not fulfill the third prong of *Duldulao*.

Actual knowledge of the policy statement is not required. *Anderson v. City of Wood Dale, Illinois*, No. 93 C 425, 1994 U.S. Dist. LEXIS 1513 (N.D.Ill. Feb. 8, 1994) (commencing or continuing work sufficient for acceptance; employee need not allege that she read or had knowledge of manual); *Belsanti v. CFS Holdings, Inc.*, 260 Ill.App.3d 419, 632 N.E.2d 10, 13, 197 Ill.Dec. 941 (1st Dist. 1992) (finding acceptance even though employee did not learn of policy statement until after termination).

2. [3.14] Employer Disclaimers

The potential effect of disclaimers was recognized by the court in *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 319, 106 Ill.Dec. 8 (1987), which deemed it significant that the 1975 version of Saint Mary's Hospital handbook contained no language disclaiming contract formation. After the decision in *Duldulao*, courts began to examine situations in which contract disclaimers were included in employee handbooks. In most cases, Illinois courts have held that the existence of disclaiming language in an employee handbook precludes the formation of a contract despite the presence of other allegedly promissory language in the handbook.

The impact of a well-placed disclaimer on a former employee's claim that a handbook creates an employment contract is perhaps best illustrated by a 1991 case against Saint Mary of Nazareth Hospital, the same defendant involved in *Duldulao*. In *Chesnick v. Saint Mary of Nazareth Hospital*, 211 Ill.App.3d 593, 570 N.E.2d 545, 546, 156 Ill.Dec. 69 (1st Dist. 1991), the plaintiff, at the same time she received her employee handbook, signed a document that stated:

I have received a copy of the Saint Mary of Nazareth Hospital Center Employee Handbook. I will accept the responsibility for reading this handbook to become familiar with the rules, regulations and benefits of the Hospital. I understand that the employment relationship between myself and the hospital is not contractual in nature.

I understand that the Personnel policies of Saint Mary of Nazareth Hospital Center are presented in this handbook in summarized form. For more information about any policy I may consult with my superior, department head of the Personnel Department. These policies are subject to change without my prior notification, and I am subject to policy changes as they are made.

Name _____ Date _____

Please return this page to the Personnel department after you have signed it.
[Emphasis added.]

The trial court entered summary judgment in favor of the employer. The sole issue on appeal was whether a reasonable person could believe that the employee handbook constituted a contractual offer.

The plaintiff argued that the disclaimer should be “strictly construed against the drafter, likening the disclaimer to an exculpatory clause.” 570 N.E.2d at 548. The court disagreed, stating:

Plaintiff’s [argument] begs the question. . . . [T]he disclaiming language here attempts to prevent contract formation. Plaintiff cannot use a rule concerning the interpretation of a contract to establish the existence of a contract. [Emphasis added.] *Id.*

When disclaimers are present, the three factors that establish a contract under *Duldulao* apply equally to analysis of the disclaiming language. *Anders v. Mobil Chemical Co.*, 201 Ill.App.3d 1088, 559 N.E.2d 1119, 1122, 147 Ill.Dec. 779 (4th Dist. 1990). In *Anders*, the plaintiff was discharged from Mobil’s Jacksonville, Illinois, plant (which manufactures polyethylene products such as grocery bags and garbage bags) for repeated violations of company safety rules regarding the use of cutting tools. The court upheld summary judgment for Mobil and rejected the plaintiff’s contention that the progressive disciplinary procedure contained in the handbook constituted a contract between the plaintiff and Mobil.

In reaching this conclusion, the *Anders* court interpreted a disclaimer that appeared immediately after the table of contents at the front of Mobil’s employee handbook. The disclaimer read as follows:

This handbook is meant to show the policies and procedures currently employed by the Plastics Division of Mobil Chemical Company (“Mobil”) and are subject to change by Mobil unilaterally and at any time. Mobil does not intend that this handbook, whether provided to an employee before commencement of employment or after commencement of employment, constitute part of any offer of employment or be interpreted expressly or by implication to constitute a contract for employment or to evidence the existence of a contract of employment between Mobil and any employee. [Emphasis added.] 559 N.E.2d at 1120.

The handbook also contained a list of specific acts of misconduct that “are so universally recognized as being serious violations of accepted behavior that the commission of these acts may

subject a person to immediate discharge.” *Id.* Included in this list was “[b]reach of company or departmental safety or smoking rules.” *Id.*

The court rejected the plaintiff’s argument that the *Duldulao* test did not apply to its interpretation of the disclaimer. It stated: “While it is true that the handbook at issue in *Duldulao* contained no disclaimer, the test for contract formation set forth in that case is equally applicable here.” 559 N.E.2d at 1122. The *Anders* court also rejected an argument by the plaintiff that disclaimers in handbooks violated public policy. In its consideration and rejection of this argument, the court stated:

Plaintiff also notes that “a further consideration that the law takes cognizance of is whether the operation of a disclaimer results in an unconscionable result.” The “result” created by the disclaimer in defendant’s employee handbook is an at-will employment relationship. It is difficult to conceive how the at-will employment relationship between plaintiff and defendant, which would have been legally presumed if the defendant had issued no handbook, is somehow an “unconscionable result.” We do not view at-will employment relationships as inherently unfair.

In sum, there is no authority supporting plaintiff’s contention that clauses disclaiming the existence of an employment contract are legally disfavored. In the absence of such authority, we decline to adopt plaintiff’s reasoning. It seems illogical to conclude that an employer violates public policy by asserting the existence of an at-will employment relationship when, as in this case, such a relationship is legally presumed. An additional consideration counseling against a finding that employment contract disclaimers violate public policy is the likely result of such a holding. Without the ability to disclaim the existence of an employment contract, employers would be hesitant to publish any rules or procedures, fearing that such statements would be construed as contractual terms. Consequently, employees would have little knowledge of their employer’s expectations. It seems a better public policy not to discourage employers from publishing general rules and expectations. Published policies, as opposed to spoken policies or no articulation of policy at all, provide a greater degree of clarity and certainty to at-will employment relationships and foster a better working environment. [Emphasis added.] 559 N.E.2d at 1124 – 1125.

a. [3.15] Cases Finding Employer’s Disclaimer Effective

Many employers accepted *Duldulao*’s invitation to include disclaimers in their handbooks, and many were rewarded with favorable court decisions holding that the presence of the disclaimer prevented their handbooks from having contractual force. See *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). In *Spann v. Springfield Clinic*, 217 Ill.App.3d 419, 577 N.E.2d 488, 160 Ill.Dec. 358 (4th Dist. 1991), the discharged employee signed a handbook receipt that included a disclaimer. The handbook in question also contained a disclaimer. The appellate court affirmed the dismissal of the plaintiff’s complaint, holding that the plaintiff did not establish the first element of the *Duldulao* test because the “‘policy statement’ of the handbook does not contain ‘a promise clear enough that an

employee would reasonably believe that an offer has been made.’” 577 N.E.2d at 491, quoting *Duldulao, supra*, 505 N.E.2d at 318. The *Spann* court expressly refused to adopt a public policy exception prohibiting employers from discharging a faithful at-will employee without giving a reason for the termination.

In *Lee v. Canuteson*, 214 Ill.App.3d 137, 573 N.E.2d 318, 157 Ill.Dec. 900 (3d Dist. 1991), the appellate court affirmed summary judgment in favor of the employer. The plaintiff Tess Lee claimed that various provisions of the employee handbook created an enforceable promise to “act fairly and reasonably in disciplinary situations.” 573 N.E.2d at 321. The appellate court rejected the plaintiff’s arguments as follows:

The only statement in the employment agreement or the employee handbook that is close to this statement is in the section of the employee handbook on the procedure for grievances and appeals, and it reads: “It is the sincere intent of Bethphage to be fair and reasonable with all employees at all times.” *An employee could not reasonably believe that this statement constituted a promise clear enough and certain enough to become a part of an offer of continued employment.*

Regarding progressive discipline, the employee handbook states, “To communicate to employees what work habits and skills are expected of them to perform their job satisfactorily, a progressive discipline approach *may be used.*” . . . *This language clearly gave discretion to Bethphage management to use progressive discipline or not in any given case as it saw fit, and so could not be construed as a promise to always use progressive discipline.* [Emphasis added.] 573 N.E.2d at 322.

The *Lee* court concluded:

The presence of a disclaimer will not always prevent a particular statement in an employee handbook from becoming a term of a contract of employment. . . . In this case, however, the combination of the clarity of the disclaimers in the employment agreement and the employee handbook and the uncertainty of the relevant statements in those documents was such that an employee could not have reasonably believed that the employer intended those statements to be promises that were part of an offer of new or continued employment. [Citation omitted.] *Id.*

A number of other reported decisions have addressed the validity of disclaimers, and “Illinois courts have repeatedly recognized that a personnel manual is not reasonably interpreted as an offer of employment when the manual contains language that disclaims the creation of a contract of employment.” *Semerau v. Village of Schiller Park*, 210 Ill.App.3d 493, 569 N.E.2d 183, 185, 155 Ill.Dec. 183 (1st Dist.), *appeal denied*, 141 Ill.2d 560 (1991). *See also Birks v. First Evergreen Corp.*, No. 92 C 6589, 1994 U.S. Dist. LEXIS 1193 at **10 – 11 (N.D.Ill. Feb. 7, 1994) (introductory section of employee manual stated that “[i]n no event shall the issuance of this material be considered as creating a contractual relationship between the employee and the Bank. Such relationship shall be an ‘employment at will’ where either party may dissolve the relationship,” and also included disclaimer in termination of employment section); *Callahan v. City of Rockford, Illinois*, No. 90 C 20090, 1994 U.S. Dist. LEXIS 3320 (N.D.Ill. Mar. 2, 1994)

(personnel rules stated in introduction that they did not constitute contract and city was at-will employer); *Lashbrook v. Oerkfitz*, No. 93 C 20224, 1994 U.S. Dist. LEXIS 1288 (N.D.Ill. Feb. 2, 1994) (disclaimer in first paragraph of manual stated that handbook's contents were guide for employees and management and were not to be construed as employment contract); *Bagnell v. Komatsu Dresser Co.*, 838 F.Supp. 1279, 1291 – 1292 (N.D.Ill. 1993) (handbook stated that it should not be interpreted as binding agreement and that no rights would accrue by reason of or arising from any statement made in or omitted from handbook); *Rand v. CF Industries, Inc.*, No. 91 C 8079, 1993 U.S. Dist. LEXIS 17938 (N.D.Ill. Dec. 17, 1993) (underlined disclaimer on first page stating that manual did not constitute contractual agreement with any employee as to terms and conditions of employment); *Wojcik v. Commonwealth Mortgage Corp.*, 732 F.Supp. 940, 941 (N.D.Ill. 1990) (no contract when “language in this handbook is not intended to create a contract between the Company and any of its employees”); *Bennett v. Evanston Hospital*, 184 Ill.App.3d 1030, 540 N.E.2d 979, 980, 133 Ill.Dec. 113 (1st Dist. 1989) (no contract when handbook stated in introduction on page one that it was not intended to create contract of employment); *Moore v. Illinois Bell Telephone Co.*, 155 Ill.App.3d 781, 508 N.E.2d 519, 520, 108 Ill.Dec. 358 (2d Dist. 1987) (incentive plan, which stated on first page that it was not statement of management's intent and was not contract or assurance of compensation, did not create contract); *Robinson v. Christopher Greater Area Rural Health Planning Corp.*, 207 Ill.App.3d 1030, 566 N.E.2d 768, 772, 152 Ill.Dec. 891 (5th Dist. 1991) (no contract created when employer “assumes no contractual liability to any employee via the job description *or this publication* (emphasis added)”); *Long v. Illinois Municipal Electric Agency*, 90 F.Supp.2d 181 (C.D.Ill. 2000) (policy manual did not create any contractual rights because of disclaimer at very beginning of policy manual); *Robinson v. SABIS (R) Education Systems, Inc.*, No. 98 C 4251, 1999 U.S. Dist. LEXIS 9065 (N.D.Ill. June 3, 1999) (handbook included clear disclaimers prominently placed in key locations, including introduction and termination section, destroying any claim of enforceable contract rights); *Sciortino v. Winnebago County Housing Authority*, No. 94 C 50375, 1998 U.S. Dist. LEXIS 5266 at *18 (N.D.Ill. Apr. 13, 1998) (language informing employee that handbook did not constitute employment contract, that handbook set guidelines, and that employee was at will and could be terminated at any time was sufficient disclaimer); *Weiss v. New York Life Insurance Co.*, No. 94 C 7023, 1995 U.S. Dist. LEXIS 3179 (N.D.Ill. Mar. 13, 1995) (finding that language reserving right to modify policies and reserving right to terminate employee at any time was sufficient disclaimer); *Spight v. Safer Foundation*, No. 98 C 4438, 1999 U.S. Dist. LEXIS 4170 at *14 (N.D.Ill. Mar. 26, 1999) (finding that disclaimer language located in introduction and at other key points in manual was sufficiently conspicuous); *Finnane v. Pentel of America, Ltd.*, 43 F.Supp.2d 891, 900 – 901 (N.D.Ill. 1999) (enforceable contract could not exist in light of clear unequivocal disclaimer); *Brahos v. Brown*, 79 Fed.Appx. 196 (7th Cir. 2003) (finding no reasonable basis for believing that handbook created contract because of express disclaimer located on first page); *Killman v. Martin*, No. 04-3165, 2006 U.S. Dist LEXIS 60650 at *22 (C.D.Ill. Aug. 24, 2006) (holding that manual containing express disclaimer did not create enforceable employment contract); *James v. Heartland Health Services*, 95 F.E.P.Cas. (BNA) 566 (N.D.Ill. 2005) (explicit disclaimers reminding employees of their at-will status prevented handbook from forming contract).

Courts find it persuasive when the plaintiff has signed an acknowledgement of the disclaimer. See *Habighurst v. Edlong Corp.*, 209 Ill.App.3d 426, 568 N.E.2d 226, 229, 154 Ill.Dec. 226 (1st Dist. 1991). However, it is not necessary that the plaintiff do so. *Sample v. Aldi Inc.*, No. 93 C 3094, 1994 U.S. Dist. LEXIS 1518 (N.D.Ill. Feb. 8, 1994).

b. [3.16] Cases Finding Employer's Disclaimer Ineffective

Not all disclaimers will prevent contract formation. Illinois courts suggest that the disclaimer must be conspicuous, although it is unclear exactly where courts draw the line for determining whether a disclaimer is sufficiently prominent to be effective.

The leading case finding that a disclaimer did not prevent a handbook from becoming a contract is *Perman v. ArcVentures, Inc.*, 196 Ill.App.3d 758, 554 N.E.2d 982, 143 Ill.Dec. 910 (1st Dist. 1990). The plaintiff in *Perman* was the executive director of extended pharmacy services for ArcVentures, a for-profit subsidiary of Rush-Presbyterian-St. Luke's Medical Center that sold prescription services to public entities and private corporations. In July 1983, Perman received a copy of Rush's personnel policies. The introduction to the manual stated:

The Personnel Policies and Procedures which follow, and which may be modified from time to time by the Medical Center, are meant to provide managers and supervisors with guidance as to how the above-discussed employee relations policy of the Medical Center should be implemented. The Personnel Policies and Procedures do not constitute, modify, or otherwise alter the terms and conditions of employment of any Medical Center employee, do not limit or restrict the right of management to terminate or otherwise discipline any Medical Center Employee, and do not constitute an employment contract with any Medical Center Employee. 554 N.E.2d at 985.

Even though the personnel policies contained a disclaimer, the court reversed the trial court's grant of summary judgment, finding that Perman's employment could not be terminated at will. The court stated:

We are mindful that in *Duldulao* the handbook did not contain a disclaimer and that a contract claim may be difficult to maintain when the employee handbook expressly provides that the employment relationship is at will. . . . Nonetheless, we find that the language in Rush's manual of personnel policies and procedures created enforceable contractual rights despite its disclaimer.

Specifically, the manual provided that “[S]uch discharges *must* be approved in advance by the director of employee relations or designees, and *are subject to employee appeal through established grievance procedures.*” (Emphasis added.) The manual further asserts that, “It is the policy of the Medical Center to *assure* every employee of the right of appeal, through an established grievance procedure from an unfavorable decision affecting his employment.” (Emphasis added.) [Citation omitted.] 554 N.E.2d at 987.

Despite its holding, the court ruled against Perman, determining that “Rush accorded Perman his contractual rights as provided by the grievance procedures when Sinioris, Hill, Lerner and Lewandowski reviewed the termination decision [and] that there was just cause for Perman's termination.” 554 N.E.2d at 987 – 988.

In *Killman v. Martin*, No. 04-3165, 2006 U.S. Dist LEXIS 60650 at **22 – 23 (C.D.Ill. Aug. 24, 2006), the court noted:

The *Perman* decision conflicts with other decisions of the Illinois Appellate Court. E.g., *Davis v. Times Mirror Magazines, Inc.*, 297 Ill.App.3d 488, 498, 697 N.E.2d 380, 388, 231 Ill.Dec. 826 (Ill.App. 1st Dist. 1998). The Seventh Circuit has noted this conflict. *Workman v. United Parcel Service, Inc.*, 234 F.3d 998, 1001 (7th Cir. 2000). The Seventh Circuit further observed that the Illinois Supreme Court has not directly addressed the issue, but has given some indication that disclaimers in employment manuals at the time that an employee commences employment are “effective to bar the employee’s claim of breach of contract.” *Id.*

The Seventh Circuit further criticized the *Perman* line of cases as “paternalistic in the extreme.” *Id.* The Seventh Circuit explained:

Employment at will is the norm in the United States. An employee therefore has no reason to presume that he has tenure, and a disclaimer that a handbook creates a contract is a clear statement that if he is fired he can’t sue for breach of contract. What more is needed? *Id.*

Given the conflict in the decisions of Illinois Appellate Courts, the lack of Illinois Supreme Court authority, and the Seventh Circuit’s criticisms of *Perman*, this Court declines to follow *Perman*.

In *Seehawer v. Magnecraft Electric Co.*, 714 F.Supp. 910 (N.D.Ill. 1989), the plaintiff, Mary Seehawer, worked for Magnecraft Electric Company from 1967 until 1986. She was the personal executive secretary to James A. Steinback, Magnecraft’s president, from 1977 until she was terminated on October 21, 1986. In late 1981 or early 1982, Seehawer received an employee handbook entitled “Manual of General Policy and Rules.” This manual stated in part: “Employees shall be discharged or disciplined only for just cause.” 714 F.Supp. at 912. At approximately the same time she received the manual, Seehawer signed an “Employee Statement,” which stated:

In consideration of my employment, I agree to conform to the rules, regulations and policies of Magnecraft Electric Company, and my employment and compensation can be terminated, with or without cause and notice, at any time, at the option of the Company or myself. I understand that no manager or representative of Magnecraft Electric Company, other than the president or vice president . . . has the authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing. *Id.*

The court decided that the language of the manual and the disclaimer were in conflict. It resolved this conflict as follows:

We are faced with two simultaneous and seemingly conflicting “offers” to Seehawer. The Manual, upon which Seehawer primarily relies in opposition to summary judgment, promises termination only for just cause. The Statement, upon

which defendants rely in support of summary judgment, appears to disclaim any such promise. For two reasons, this apparent inconsistency precludes summary judgment. First, the provisions can be reconciled in Seehawer's favor. As we recently stated, "When faced with inconsistent or conflicting contractual language, we give effect to the interpretation of that language that best reconciles and harmonizes each provision with the remainder of the contract." *Goldberg v. Hilltop Apartments, Inc.*, 684 F.Supp. 199, 200 (N.D.Ill. 1988). In addition to the disclaimer, the Statement provides that the president and vice-president have sole authority to bind Magnecraft to a promise to terminate only for cause. It is not unreasonable to view the Manual as an exercise of that authority, thus requiring Magnecraft to justify its termination decisions. Second, to the extent that the provisions are irreconcilable on their face, the clarification of ambiguities in contractual provisions is a matter best left to the trier of fact. 714 F.Supp. at 914 – 915.

In *Long v. Tazewell/Pekin Consolidated Communication Center*, 215 Ill.App.3d 134, 574 N.E.2d 1191, 158 Ill.Dec. 798 (3d Dist. 1991), the plaintiff claimed that the handbook set out disciplinary procedures in an unequivocal manner. The appellate court agreed and reversed the dismissal of the plaintiff's complaint. The court found it significant that the "the disclaimer [on which defendant relies] was not distinctly set out separate and apart. The disclaimer was in effect hidden within the text describing the duties of the telecommunicator." 574 N.E.2d at 1193 – 1194. Nonetheless, the court found in favor of the employer on the ground that the discharged dispatcher was given an opportunity to be heard by the village authorities.

In *Hicks v. Methodist Medical Center*, 229 Ill.App.3d 610, 593 N.E.2d 119, 170 Ill.Dec. 577 (3d Dist. 1992), the plaintiff, Steven Hicks, worked in the dietary department at the hospital for three months in 1983 before he was terminated. In 1984, he was rehired in the housekeeping department. After three years and nine transfer requests by Hicks, he was transferred to the parking department in September 1987, where his duties included making change and computing charges.

When he was rehired in 1984, Hicks received a 39-page handbook that included a grievance procedure and provided for a transfer period of 60 days during which an employee could adjust to his new position or seek a transfer back to his former position. On page 38 of the handbook, under the heading "Revisions," there was the following disclaimer:

Revisions:

This employee handbook is subject to revision at any time. It is not the intent of this statement or the Personnel Handbook to establish contractual agreement between the MMCI and employees. 593 N.E.2d at 120.

The court declined to enforce the disclaimer. It stated:

In order to negate any promises made in contract provisions, a disclaimer must be conspicuous. . . . The disclaimer itself was located at page 38 of the handbook. It was not highlighted, printed in capital letters, or in any way prominently displayed.

Furthermore, the disclaimer was not entitled “Disclaimer”, but was located under a section headed “Revisions”. This disclaimer was not conspicuous and so did not negate the promises made in the handbook’s provisions. We hold that a contract existed. [Citation omitted.] 593 N.E.2d at 121 – 122.

Despite the court’s conclusion regarding the disclaimer, it upheld the judgment in favor of the defendant as it concluded that the plaintiff cashier’s inability to balance the cash drawer was cause for termination.

In *Wheeler v. Phoenix Company of Chicago*, 276 Ill.App.3d 156, 658 N.E.2d 532, 537, 213 Ill.Dec. 62 (2d Dist. 1995), the court held that a separate, signed acknowledgement that an employee could be discharged “at any time, with or without notice, for violation of any of the rules in the handbook” did not negate the contractual nature of the handbook. The court came to this conclusion because the acknowledgement did not disclaim the handbook’s rules and policies in regard to progressive discipline and because it did not contain an explicit statement that the handbook was not a contract. *Id.*

PRACTICE POINTER

- ✓ When drafting an effective disclaimer it should
1. be conspicuous, *e.g.*, on first page in large, bold type;
 2. contain an unequivocal statement that the handbook is not a contract;
 3. state that nothing in the handbook is intended to change the traditional relationship of employment at will, and that both the employer and employees have the right to terminate the employment relationship for any reason, at any time, with or without notice; and
 4. reserve the right to make changes to the handbook.

Additionally, it is helpful to have employees sign an acknowledgment of the disclaimer and to retain acknowledgment forms in employee files.

3. [3.17] Other Writings as Modification of Employment-at-Will Doctrine

Claims based on written representations are not limited to allegations based on statements in the employee handbook or personnel manual. An employer’s written statements in other writings, including employment letters, employment applications, and individual performance warnings, have also been used to avoid the employment-at-will doctrine. Illinois courts apply *Duldulao* principles in determining whether these writings bind the employer. *See Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987).

In a number of cases, letters from the employer have been held insufficient to create contractual rights. In two pre-*Duldulao* cases involving overseas employment, federal district courts applied Illinois law and found that there was no contract of employment for any specific term based on letters sent to the employee confirming the employment. In *Buian v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970), the Seventh Circuit addressed a claim that a letter to the plaintiff from his employer constituted a contract. The letter at issue in *Buian* stated in pertinent part:

It is scheduled that your assignment in Saudi Arabia will continue for a period of eighteen (18) months. . . .

It is intended that all staff associates assigned to the Saudi Arabia projects will remain in Saudi Arabia (except for vacation or other approved personal travel) throughout the duration of the specified assignments. This of course presumes satisfactory service by each associate, no interruption or cancellation of the project by the Saudi Arabia government, and continued desire by each associate to continue on the assignment. 428 F.2d at 532.

Buian was terminated approximately one month after arriving in Saudi Arabia. The Seventh Circuit upheld the trial court's grant of summary judgment, specifically finding that the "agreement is clear on its face that it does not guarantee any specific term of employment." 428 F.2d at 533. The court rejected the plaintiff's argument that the reference to the assignment "continu[ing] for a period of eighteen (18) months" created an employment contract for a specific term on the basis that the time frame was "merely one of expectation and not sufficient to insert any ambiguity into an otherwise customary employment relationship terminable at will." *Id.* The court came to the same conclusion in *Payne v. AHFI/Netherlands, B.V.*, 522 F.Supp. 18, 22 – 23 (N.D.Ill. 1980) (written employment contract with expectation that overseas employment would continue for two years not sufficient to overcome at-will presumption; alleged parol variation of contract defeated based on indefinite nature, lack of mutuality, fact that statements antedated writing, and statute of frauds).

An individual performance warning given to an employee who is not performing up to expectations is not sufficient to change the employee's at-will status. *Gordon v. Matthew Bender & Co.*, 562 F.Supp. 1286, 1290 – 1291 (N.D.Ill. 1983). In *Gordon*, the plaintiff was an at-will salesman for a law book publishing company. The plaintiff claimed that a letter from his employer placing him on probationary status altered his at-will status and that the warning created a contract for continuous employment conditioned on Gordon's acceptable sales performance. The plaintiff argued that "there existed a condition to his employment contract with Matthew Bender — 'acceptable sales performance' — so that . . . a legal claim exists which at the very least precludes a dismissal of this count of the complaint." 562 F.Supp. at 1291.

The court disagreed with *Gordon*, noting that satisfactory or acceptable performance language does not transform an at-will contract into a contract that cannot be terminated by either party at any time for any reason. *Id.*

A “condition” of satisfactory or acceptable performance theoretically could be implied in every employment contract. Such an end-run around the at will doctrine would eviscerate it altogether, and the Illinois courts do not seem inclined to do so. 562 F.Supp. at 1292.

A number of other courts analyzing claims under the *Duldulao* standards have rejected claims that a written statement by an employer created contractual rights. See *Corcoran v. Chicago Park District*, 875 F.2d 609, 612 (7th Cir. 1989) (letters to employees expressing hopes and intentions that new park district board would not engage in wholesale firings did not constitute firm offer of continued employment); *Doe v. First National Bank of Chicago*, 865 F.2d 864, 872 (7th Cir. 1989) (employee memorandum providing that employees might be disciplined or discharged for certain conduct was not sufficiently promissory in nature to create enforceable employment rights under Illinois law); *Boll v. Hyatt Corp.*, 243 Ill.App.3d 1005, 614 N.E.2d 71, 73, 184 Ill.Dec. 870 (1st Dist. 1993) (validity of plaintiff’s written acknowledgement on job application of his terminable at-will status cannot be subsequently superseded by his subjective belief that contract was created through informational or policy manual); *Jago v. Miller Fluid Power Corp.*, 245 Ill.App.3d 876, 615 N.E.2d 80, 82 – 83, 185 Ill.Dec. 785 (2d Dist. 1993) (references in letters from employer to participation in future management bonus, employee’s contribution to employer’s growth over the next several years, and “permanent” employment did not establish employment for any specific term).

In other cases, an employer’s writings were found to constitute a contract. See *Miller v. Community Discount Centers, Inc.*, 83 Ill.App.2d 439, 228 N.E.2d 113, 114 – 115 (1st Dist. 1967) (personnel director’s letter to prospective employee stating that employee would have rewarding and satisfying career ahead, that beginning salary was \$10,000 per year, and that one half of moving expenses would be paid after one year found to be contract of employment for at least one year); *Berutti v. Dierks Foods, Inc.*, 145 Ill.App.3d 931, 496 N.E.2d 350, 354, 99 Ill.Dec. 775 (2d Dist. 1986) (employment letter providing for “[g]uaranteed salary for 12 months” went beyond rate of compensation and connoted guaranteed salary for specified duration). These decisions are not in direct conflict with *Duldulao*, but their continuing viability is unclear.

In *Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 733 n.3 (7th Cir. 1997), the plaintiff’s employer sent a “Transition Team Letter” to him, which provided:

We agree to the following as part of this commitment. At the completion of your assignment in the merger negotiation and transition periods, you are assured of an assignment which includes career choices from available positions in all AT&T Business Units and Divisions. You will have the opportunity to have a choice in the matter of your next assignment. Your next assignment will be equivalent to or higher than your current salary grade. . . . If after this assignment [to the transition team] you are unable to find a satisfactory position within AT&T and choose to leave the business, you will receive a separation allowance.

The United States Court of Appeals for the Seventh Circuit rejected the employer’s contention that the “Transition Team Letter” was not an enforceable contract because it did not contain a durational term. The court explained its finding as follows:

Under Illinois law, an employer-employee relationship without an explicit durational term is presumed to be an at-will relationship. *See Evans v. Gurnee Inns, Inc.*, 268 Ill.App.3d 1098, 645 N.E.2d 556, 559, 206 Ill.Dec. 551 (Ill.App.Ct. 1994). However, this presumption is a rule of construction only; it can be overcome by demonstrating that the parties contracted otherwise. *Id.* (citing *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (Ill. 1987)). Here, the Transition Team Letter's terms overcome the presumption and demonstrate that a durational term was intended by the parties. The Transition Team Letter commits AT&T to placing Mr. Maier in another assignment when his work on the transition team was finished. AT&T also promised to provide Mr. Maier with the choice of his next assignment after the transition team assignment was finished. If Mr. Maier was not satisfied with the choices of his assignment, according to the Transition Team Letter, he could leave AT&T. The contract did not terminate until these conditions were met. *Cf. Johnson v. George J. Ball, Inc.*, 248 Ill.App.3d 859, 617 N.E.2d 1355, 187 Ill.Dec. 634 (Ill.App.Ct. 1993) (finding that, when contract indicated that parties contemplated that employee would work through the end of a project, contract provided sufficient durational term). The Transition Team Letter's terms demonstrate that the parties did not intend an employment-at-will relationship but rather a contract for a duration. 120 F.3d at 737 – 738.

In *Cress v. Recreation Services, Inc.*, 341 Ill.App.3d 149, 795 N.E.2d 817, 277 Ill.Dec. 149 (2d Dist. 2003), the plaintiff alleged that he was terminated in contravention of a deferred compensation agreement that contained a guarantee of employment until he reached age 65. The agreement allegedly provided that if the funds in the plaintiff's IRA were not sufficient to provide the plaintiff a monthly payment of \$7,083.33 after his retirement, the defendant would pay the difference. The agreement also stated:

It is further agreed that [plaintiff's] compensation cannot be substantially reduced prior to his retirement provided he is capable of performing as General Manager for Recreational Services, Inc. 795 N.E.2d at 832.

The defendant argued that the purpose of the agreement was to provide the plaintiff with retirement benefits, not to promise him employment. The defendant also argued that an agreement to employ the plaintiff at least until age 65 was of indefinite duration and therefore not binding. The court rejected the defendant's argument and found that a specific temporal duration of employment need not be provided to overcome the presumption of at-will employment. According to the court: "An employment agreement articulating cognizable events upon which termination may occur is not perpetual and terminable at will and will be upheld even in the absence of a specified termination date." 795 N.E.2d at 839. Since the employment agreement conditioned the salary guarantee on the plaintiff's capacity to perform his duties, it created a binding employment agreement. 795 N.E.2d at 840.

B. Oral Modifications of Employment-at-Will Doctrine

1. [3.18] Contracts Based on Oral Representations; Permanent Employment

In general, oral employment contract cases fall into two categories. Those cases deal either with (a) promises of permanent employment or (b) promises to employ for a specific duration or to provide a specific benefit.

Generally, an agreement for permanent employment is indefinite and is considered to be terminable at will. In order to be valid, an oral contract of permanent employment must be (a) clear and definite and (b) supported by sufficient consideration. *Ladesic v. Servomation Corp.*, 140 Ill.App.3d 489, 488 N.E.2d 1355, 1356, 95 Ill.Dec. 12 (1st Dist. 1986); *Kamboj v. Eli Lilly & Co.*, No. 05 C 4023, 2007 U.S. Dist. LEXIS 4259 at *20 (N.D.Ill. Jan. 18, 2007). Illinois courts have traditionally viewed claims of contracts for permanent employment with skepticism. In *Heuvelman v. Triplett Electrical Instrument Co.*, 23 Ill.App.2d 231, 161 N.E.2d 875 (1st Dist. 1959), the defendant's company president allegedly told the plaintiff, during his employment, that their arrangement was a permanent one. The court noted:

It is our further conclusion that . . . no contract for permanent employment was made, nor was any adequate consideration to support one shown. Such contracts extending for a long duration and resting entirely on parol should have for their basis definite and certain mutual promises. The words and the manner of their utterance should not be of that informal character which expresses only long continuing good will and hopes for eternal association. 161 N.E.2d at 878.

Illinois courts have not altered this approach in light of *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). In *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 124 Ill.Dec. 461 (3d Dist. 1988), *appeal denied*, 124 Ill.2d 555 (1989), the plaintiff claimed that oral representations made to him by his employer, Illinois Power Company, constituted a contract. He maintained that when he was approached about accepting a promotion to a supervisory position, Merlin Barber of Illinois Power Company promised him that he would retain the union contract protection against job termination if he accepted the new position. The court noted:

The oral agreement between plaintiff and IPC was anything but clear and definite. Plaintiff could not recall the language used by Merlin Barber in making the oral contract for IPC. He expressed his belief that he would have some sort of representation in disputes with IPC but was unable to state anything more specific than the idea he was to have the same protection he had had while in the union. Clear and definite language is required as courts should not rewrite a contract by imposing an obligation where none is intended. . . . In this case, the language of the oral contract was so uncertain the court would have to restructure it with new, more definite terms for an enforceable agreement to exist. The alleged oral contract must fail for lack of clarity and definition. [Citation omitted.] 529 N.E.2d at 284.

In another post-*Duldulao* case, *Birks v. First Evergreen Corp.*, No. 92 C 6589, 1994 U.S. Dist. LEXIS 1193 (N.D.Ill. Feb. 7, 1994), the court considered the requirement of a clear and definite

promise. In *Birks*, the plaintiff claimed that a statement by the president of the defendant bank that the bank did not intend to eliminate jobs or staff constituted an oral contract. The court noted:

In order to defeat the “at will” presumption, a party must establish that it entered into a “clear and definite agreement.” . . . The alleged promise must be clear enough that an employee would reasonably believe that an offer has been made. . . . Furthermore, assurances of job security are insufficient to create an oral contract. . . .

The court agrees with defendants that the alleged statements made by the president of Evergreen Bank did not contain the specificity that ordinarily is present in a discussion of contract terms. Also, plaintiff’s inability to recall the exact language used by the president of Evergreen Bank demonstrates that the promise was not clear and definite. . . . Thus, the court finds that there is no issue of material fact as to whether an oral contract existed between plaintiff and defendants. [Citations omitted.] 1994 U.S. Dist. LEXIS 1193 at ** 12 – 13.

See also *Kercher v. Forms Corporation of America*, 258 Ill.App.3d 743, 630 N.E.2d 978, 979, 196 Ill.Dec. 813 (1st Dist. 1994) (statements that employment was “long term proposition” and that company had gone to “a lot of expense” to hire employee did not constitute definite promise of permanent employment); *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 361 – 364 (7th Cir. 2005) (promises to retain employees performing satisfactorily and to not make politically-driven firings were too vague to establish enforceable contract for employment).

If the plaintiff can establish a clear and definite promise, he or she must also show that there was sufficient consideration for that promise.

In *McInerney v. Charter Golf, Inc.*, 176 Ill.2d 482, 680 N.E.2d 1347, 223 Ill.Dec. 911 (1997), the Illinois Supreme Court held that foregoing another lucrative opportunity in exchange for a promise of permanent employment constitutes sufficient consideration to modify an existing employment-at-will relationship. In *McInerney*, an employee told his employer of his decision to take a more lucrative offer elsewhere. The employer then offered the employee inducements, including permanent employment, to convince him to stay at his job. 680 N.E.2d at 1349. The Supreme Court stated:

In the instant case, Charter Golf argues that an employee’s promise to forgo another employment offer in exchange for an employer’s promise of lifetime employment is not sufficient consideration. But why not? The defendant has failed to articulate any principled reason why this court should depart from traditional notions of contract law in deciding this case. While we recognize that some cases have indeed held that such an exchange is “inadequate” or “insufficient” consideration to modify an employment-at-will relationship, we believe that those cases have confused the conceptual element of consideration with more practical problems of proof. As we discussed above, this court has held that a promise for a promise constitutes consideration to support the existence of a contract. To hold otherwise in the instant case would ignore the economic realities underlying the

case. Here McInerney gave up a lucrative job offer in exchange for a guarantee of lifetime employment; and in exchange for giving up its right to terminate McInerney at will, Charter Golf retained a valued employee. Clearly both parties exchanged bargained-for benefits in what appears to be a near textbook illustration of consideration. 680 N.E.2d at 1350.

The court went on to explain:

Of course, not every relinquishment of a job offer will necessarily constitute consideration to support a contract. On the related issue of mutuality of obligation, Charter Golf complains that McInerney's promise to continue working was somehow illusory, because it alleges that McInerney had the power to terminate the employment relationship at his discretion while it lacked any corresponding right. The court's decision in *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108, 133 N.E. 711 (1922), teaches that "where there is any other consideration for the contract mutuality of obligation is not essential." Charter Golf's argument on this point fails because McInerney continued working for Charter Golf and relinquished his right to accept another job opportunity. When, as here, the employee relinquishes something of value in a bargained-for exchange for the employer's guarantee of permanent employment, a contract is formed. [Emphasis in original.] 680 N.E.2d at 1350 – 1351.

2. [3.19] Promises of Specific Duration or Benefit

In a few cases, Illinois courts have found contracts of employment for a specific duration or for a specific benefit based on an employer's oral representations.

In *Johnson v. George J. Ball, Inc.*, 248 Ill.App.3d 859, 617 N.E.2d 1355, 187 Ill.Dec. 634 (2d Dist. 1993), the plaintiff sued her former employer for breach of an oral employment contract based on assurances from the company president in 1988 that he was committed to the program the plaintiff was hired to direct and that he would hire the support staff and market the programs, which would continue through 1991. The plaintiff was summarily terminated in 1989. The court cited *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), and noted: "In general, an employment contract is terminable at will by either party unless the contract itself specifies a different durational term." 617 N.E.2d at 1358. The court noted that the "critical assertion" in the plaintiff's brief was that the parties intended to enter into an employment contract through the end of 1991 and not the consideration given in return for that promise. 617 N.E.2d at 1359. It concluded:

We hold that, when liberally construed and viewed in the light most favorable to plaintiff, the complaint's allegations are sufficient to state a cause of action for breach of an oral contract to employ plaintiff through 1991. Taking as true all the well-pleaded facts, it appears that the parties contemplated that plaintiff would be hired for the duration of the project. The parties contemplated a considerable investment of time in developing and initially presenting the training programs and expected plaintiff to supervise the entire process. Although not of themselves

conclusive, the references to an annual salary and bonus further buttress this conclusion. . . . The allegations concerning the employment of a support staff and the development of a marketing budget add further credence to the conclusion that the parties intended a substantial undertaking with plaintiff at its head. [Citations omitted.] *Id.*

Other cases have found oral contracts to employ for a specific duration. *Barry Gilberg, Ltd. v. Craftex Corp.*, 665 F.Supp. 585, 594 (N.D.Ill. 1987) (summary judgment denied when plaintiff raised sufficient questions of material fact concerning existence of express oral contract when defendant stated that plaintiff would continue to be employed for six months); *Chambers v. John T. Shayne & Co.*, 32 Ill.App.2d 16, 176 N.E.2d 645, 649 (1st Dist. 1961) (jury had adequate basis to find oral contract on year-to-year basis).

Statements concerning duration of employment must be specific in order to create an enforceable contract. In *Robinson v. BDO Seidman, LLP*, 367 Ill.App.3d 366, 854 N.E.2d 767, 771, 305 Ill.Dec. 175 (1st Dist. 2006), the court found that no contract for employment existed because the duration was not established. The plaintiff was told during the interview process that he would be employed in a new department until that department was successfully established. 854 N.E.2d at 771. This statement was not sufficiently clear and definite to overcome the presumption that the plaintiff's employment was at will. *Id.*

An oral contract to pay commissions was found in *Stein v. Malden Mills, Inc.*, 9 Ill.App.3d 266, 292 N.E.2d 52, 57 (1st Dist. 1972). *But see Cresswell v. Bausch & Lomb Inc.*, 2 I.E.R.Cas. (BNA) 1925 (N.D.Ill. 1986) (no oral contract based on representation that person at plaintiff's level would normally be entitled to 9 – 12 months' severance pay).

3. [3.20] Application of Statute of Frauds

Employers often argue that the statute of frauds, 740 ILCS 80/1, bars enforcement of oral contracts of employment. That statute reads as follows:

No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. *Id.*

Under Illinois law, the statute of frauds bars enforcement of a contract only if it is impossible to perform the contract within one year. "The test for determining whether the statute bars a particular agreement is 'whether the contract by its terms is capable of full performance within a year, not whether such occurrence is likely.' . . . The one-year period is measured from the time of the making of the agreement." [Citation omitted.] *Sherwin v. Ault*, 219 Ill.App.3d 213, 579

N.E.2d 425, 426, 161 Ill.Dec. 877 (3d Dist. 1991), quoting *Martin v. Federal Life Insurance Co.*, 109 Ill.App.3d 596, 440 N.E.2d 998, 1004, 65 Ill.Dec. 143 (1st Dist. 1982).

The Illinois Supreme Court's decision in *Sinclair v. Sullivan Chevrolet Co.*, 31 Ill.2d 507, 202 N.E.2d 516, 518 (1964), remains the controlling law regarding the application of the statute of frauds to employment cases. In *Sinclair*, the plaintiff was a car salesman who entered into an oral employment contract in May 1960. The contract was for one year beginning on June 6, 1960. The court determined that Sinclair's breach of contract action was barred as a matter of statute since it "could not on the date made have been performed within a year." *Id.* See also *Payne v. AHFI/Netherlands, B.V.*, 522 F.Supp. 18, 23 (N.D.Ill. 1980) (oral promise to employ for more than two years would be unenforceable); *McInerney v. Charter Golf, Inc.*, 176 Ill.2d 482, 680 N.E.2d 1347, 223 Ill.Dec. 911 (1997) (statute of frauds requires that contract for lifetime employment be in writing).

On the other hand, if the contract is "capable of being performed within one year" from the time the contract is made it will be enforced. *Vajda v. Arthur Andersen & Co.*, 253 Ill.App.3d 345, 624 N.E.2d 1343, 1351, 191 Ill.Dec. 965 (1st Dist. 1993) (contract to give three warnings before termination could be performed in one year). "Whether the possibility of an employee's death or termination takes the employment agreement from the bar of the Statute in a specific case depends in large part on the underlying purpose and specific terms of the agreement itself." *Brudnicki v. General Electric Co.*, 535 F.Supp. 84, 87 (N.D.Ill. 1982). See also *Stein v. Malden Mills, Inc.*, 9 Ill.App.3d 266, 292 N.E.2d 52, 57 (1st Dist. 1972) (reorders for garments could have ceased within one year).

Generally, the possibility that an employee may be terminated within one year or the possibility that an employee may resign or die within a year is not enough to remove the contract from the reach of the statute of frauds. As stated by one court: "To be outside the statute, the contract must be capable of being fully performed within one year and not simply terminated by some contingency such as death or bankruptcy." *Gilliland v. Allstate Insurance Co.*, 69 Ill.App.3d 630, 388 N.E.2d 68, 70, 26 Ill.Dec. 444 (1st Dist. 1979) (alleged oral contract to retain employee for 36 years, until age 62, unenforceable); *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 286, 124 Ill.Dec. 461 (3d Dist. 1988) (oral contract for permanent employment unenforceable), *appeal denied*, 124 Ill.2d 555 (1989). *But see Martin, supra*, 440 N.E.2d at 1005 (contract for permanent employment enforceable as plaintiff could have retired or quit).

For purposes of the statute of frauds, "hybrid" contracts, those that are partly oral and partly written, are considered to be oral contracts. *Gilliland, supra*, 388 N.E.2d at 71; *Koch, supra*. Note also that the doctrine of promissory estoppel cannot be applied to preclude an employer from denying the enforceability of an oral employment contract because of the statute of frauds. *Taylor v. Canteen Corp.*, 789 F.Supp. 279, 285 (C.D.Ill. 1992), *aff'd in part, rev'd in part*, 69 F.3d 773 (7th Cir. 1995). See also *Dumas v. Infinity Broadcasting Corp.*, 416 F.3d 671, 680 (7th Cir. 2005) (applying statute of frauds to plaintiff's claim for promissory estoppel). The concept of promissory estoppel is discussed in greater detail in §3.22 below.

There are a number of situations in which the statute of frauds has been found inapplicable. If there has been "part performance by one party in reliance on the promise of the other" party, the

statute of frauds is not a bar. *Johnson v. George J. Ball, Inc.*, 248 Ill.App.3d 859, 617 N.E.2d 1355, 1360, 187 Ill.Dec. 634 (2d Dist. 1993) (allegations that employer fraudulently induced plaintiff to continue in employment by reaffirming prior oral promises to hire support staff after plaintiff threatened to quit and move to Michigan held sufficient allegation of fraud to survive motion to dismiss). Moreover, “in certain instances where fraud or material misrepresentation has occurred, the guilty party may be estopped to assert” the statute of frauds defense. *Sinclair, supra*, 202 N.E.2d at 518.

The statute of frauds does not apply when there is a sufficient writing evidencing the contract. To satisfy the statute of frauds, the writing must identify both parties. Thus, a collective bargaining agreement between the employee’s union and his employer was not a writing that satisfied the statute of frauds. *Koch, supra*. A collection of e-mails that augmented an alleged oral contract did not satisfy the statute of frauds. *Dumas, supra*, 416 F.3d at 680. *But see Vajda, supra*, 624 N.E.2d at 1350 – 1351 (writings in employment manual prevented application of statute of frauds).

C. [3.21] Employer’s Ability To Unilaterally Modify Its Policy Statement

One of the issues left unresolved by the court in *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987), was whether an employer has the right to unilaterally modify its employee handbook or other policy statements in the absence of a disclaimer expressly reserving this right. In *Doyle v. Holy Cross Hospital*, 186 Ill.2d 104, 708 N.E.2d 1140, 237 Ill.Dec. 100 (1999), the Illinois Supreme Court resolved this issue, holding that if an employee handbook creates contractual rights, an employer may not unilaterally modify the handbook to disclaim those rights without providing additional consideration to its employees.

Doyle involved four nurses hired by Holy Cross Hospital between 1960 and 1972. In 1971, those nurses were given an employee handbook that set forth factors that the hospital would consider in determining which employees would be laid off in an “economic separation.” In other words, the 1971 handbook restricted the hospital’s ability to terminate employees at will. The 1971 handbook remained in effect until 1983, when the hospital added the following disclaimer:

Hospital employee and applicant communications are subject to change from time to time and are not intended to constitute nor do they constitute an implied or express contract or guarantee of employment for any period of time.

The employment relationship between the Hospital and any employee may be terminated at any time by the Hospital or the employee with or without notice. 708 N.E.2d at 1143.

In 1991, the hospital terminated the four nurses’ employment. The nurses sued the hospital for wrongful discharge, alleging breach of the “economic separation” clause set forth in the 1971 handbook. The nurses contended that the handbook created contractual rights that they were entitled to enforce. They further claimed that they never received any consideration in exchange for any changes to the 1971 handbook, and that the hospital’s disclaimer of contractual liability added in 1983 could not change their employment terms. *Id.*

The lower court dismissed the nurses' complaint, relying on *Condon v. American Telephone & Telegraph Co.*, 210 Ill.App.3d 701, 569 N.E.2d 518, 155 Ill.Dec. 337 (2d Dist. 1991), which held that an employer may unilaterally alter the terms of an employee handbook to an employee's disadvantage even though the employer had not previously reserved the right to do so. *Id.* The nurses appealed, and the appellate court reversed. The appellate court concluded that the hospital's modification of the terms of the handbook was not enforceable against the nurses because it was not supported by consideration. *Id.*

On appeal to the Illinois Supreme Court, the hospital argued that since the nurses continued to work at the hospital after they received the modifications to the handbook, this meant that they accepted the new handbook terms. The Supreme Court rejected this argument, finding that "consideration must be found elsewhere, whether in the *form of a new benefit to the employee or a new detriment to the employer*, or as the product of a mutual agreement." [Emphasis added.] 708 N.E.2d at 1145. The court also discounted the hospital's argument that an employer should not be bound for a lengthy period to the terms of employee handbooks issued long ago. The court stated that although it was "aware of these potential drawbacks . . . this is a matter of contract and [the court] see[s] no compelling reason . . . to relieve the [hospital] of the obligations it [had] voluntarily incurred." 708 N.E.2d at 1147.

In dissent, Justice Heiple focused on the public policy implications of the *Doyle* majority's ruling. First, he pointed out that "a large employer could now have literally hundreds of separate employment contracts, depending on the date when particular employees were hired and the particular language contained in the handbook at the time of each individual hiring." 708 N.E.2d at 1151. Second, he noted the unfairness of the majority's new rule:

Parties should be bound by the bargains they strike, but the majority overlooks the fact that this court did not construe an employee handbook as a binding contract until *Duldulao* . . . a full 16 years after the handbook in this case was distributed. Indeed, at the time the handbook was distributed, not a single published decision in Illinois held that an employee handbook constituted an enforceable contract. [Citation omitted.] *Id.*

In *Ross v. May Co.*, No. 1-06-0239, 2007 Ill.App. LEXIS 1191 (1st Dist. Nov. 13, 2007), the court considered whether disclaimers inserted in revised handbooks modified a contract based on an old handbook and converted the employee to an at-will employee. The court indicated that "Our review convinces us that the disclaimers did not modify plaintiff's employment contract because he received no consideration." 2007 Ill.App. LEXIS 1191 at *3. The employer terminated the plaintiff's employment. The plaintiff claimed that he was not an at-will employee and that his employer breached an employment contract based on its 1968 employee handbook. The employer claimed that even if the 1968 handbook altered the plaintiff's at-will status, disclaimer language insert in its 1987 and 1989 revisions that contained disclaimers allowing for the unilateral modification or termination of the plaintiff's employment contract and the new benefits accepted and used by the plaintiff converted him to an at-will employee.

The appellate court disagreed. Instead, it held that "the new benefits he received from defendant did not serve as consideration supporting the unilateral modification of his employment

contract because they were offered to all eligible employees and there was never any bargain-for exchange between him and defendant in which he agreed to modify or terminate his contract rights in exchange for the benefits.” 2007 Ill.App. LEXIS 1191 at **7 – 8. The court reasoned that even though the plaintiff accepted and used new benefits provided by the employer in 1990, these “additional benefits, which were offered in 1990, were in no way related to, bargained for, or referenced to any preexisting contractual rights; the benefits were offered to all eligible employees whether or not they possessed contractual rights.” 2007 Ill.App. LEXIS at **9 – 10. Therefore, the court concluded that “Defendant acted unilaterally, not in a bargained-for exchange, when it offered the additional benefits to its employees.” 2007 Ill.App. LEXIS at *10. No consideration flowed from the defendant to the plaintiff to compensate him for giving up the protections afforded to him under the 1968 employee handbook.

IV. [3.22] PROMISSORY ESTOPPEL

Claims of promissory estoppel frequently accompany *Duldulao*-based suits for breach of contract. See *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987). Promissory estoppel is a doctrine that provides that, “in appropriate circumstances, a promise not supported by consideration will be enforceable.” *Moore v. Illinois Bell Telephone Co.*, 155 Ill.App.3d 781, 508 N.E.2d 519, 521, 108 Ill.Dec. 358 (2d Dist. 1987). Illinois recognizes the doctrine of promissory estoppel and will sustain a claim based on this theory if four elements are present. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill.2d 281, 565 N.E.2d 990, 1004, 152 Ill.Dec. 308 (1990). These four elements are

- a. an unambiguous promise to the plaintiff;
- b. the plaintiff’s actual reliance on the promise;
- c. that the plaintiff’s reliance was expected and foreseeable to the defendant; and
- d. that the plaintiff relied on the promise to his or her detriment. *Id.*

See also *Lamaster v. Chicago & Northeast Illinois District Council of Carpenters Apprentice & Trainee Program*, 766 F.Supp. 1497, 1505 (N.D.Ill. 1991) (citing *Quake* for elements of promissory estoppel in employment setting); *Taylor v. Canteen Corp.*, 789 F.Supp. 279, 285 (C.D.Ill. 1992) (plaintiff must plead and prove all four elements of *Quake* promissory estoppel test), *aff’d in part, rev’d in part*, 69 F.3d 773 (7th Cir. 1995); *Dumas v. Infinity Broadcasting Corp.*, 416 F.3d 671, 677 (7th Cir. 2005) (plaintiff who could not satisfy all four elements of *Quake* test could not proceed with promissory estoppel claim).

Numerous courts have determined that a promissory estoppel claim is a valid claim in an employment context and have refused to dispose of such claims on pretrial motions. See *Dawson v. W. & H. Voortman, Ltd.*, 853 F.Supp. 1038 (N.D.Ill. 1994) (promise of continued employment and all is well enough to avoid motion to dismiss); *Falk v. U.H.H. Home Services Corp.*, 835 F.Supp. 1078, 1081 (N.D.Ill. 1993) (allegations of express promise not required to state claim for promissory estoppel; sufficient for plaintiff to allege conduct and words from which promise could be inferred); *Lamaster, supra*, 766 F.Supp. at 1505 (employer did not make argument in

motion to dismiss that “permissive view” of promissory estoppel doctrine “would likely undermine the presumption of employment at will”; thus, issue of foreseeability of reliance on promise raised fact question preventing grant of motion to dismiss); *Vajda v. Arthur Andersen & Co.*, 253 Ill.App.3d 345, 624 N.E.2d 1343, 1348, 191 Ill.Dec. 965 (1st Dist. 1993) (promise of three warnings and firing only for good cause enough to avoid summary judgment).

Courts considering the merits of promissory estoppel claims have ruled in favor of the employer in a number of cases. In *Moore, supra*, a written incentive pay plan was found not to contain a promise that was unambiguous in its terms. Thus, the doctrine of promissory estoppel was found to be inapplicable, and the plaintiffs were not entitled to scheduled bonuses for selling 805 percent of a quota to a newly created AT&T subsidiary. In *Cresswell v. Bausch & Lomb Inc.*, 2 I.E.R.Cas. (BNA) 1925 (N.D.Ill. 1986), the court found that the plaintiff was not justified in believing there was an offer of permanent employment; thus, there was no unambiguous promise to support a promissory estoppel claim. In *Jago v. Miller Fluid Power Corp.*, 245 Ill.App.3d 876, 615 N.E.2d 80, 83, 185 Ill.Dec. 785 (2d Dist. 1993), the court found that “nothing in defendant’s two letters [to plaintiff] created an unambiguous offer of employment for a minimum term of one year.” See also *Rynar v. Ciba-Geigy Corp.*, 560 F.Supp. 619, 626 (N.D.Ill. 1983) (promise to provide severance did not unambiguously include employee, employee did not appear to have relied on promise regarding severance pay, and employee not injured as he obtained other employment next day); *Czerska v. United Airlines, Inc.*, 292 F.Supp.2d 1102 (N.D.Ill. 2003) (ambiguous promise to employee regarding permanent residence in Belgium could not constitute basis on which to base promissory estoppel claim under Illinois law).

Some federal courts interpreting Illinois law are less indulgent of promissory estoppel claims, taking the position that if promissory estoppel claims are permitted in the employment context, the presumption of employment at will may be seriously undermined. *Goldstick v. ICM Realty*, 788 F.2d 456, 465 (7th Cir. 1986); *Birks v. First Evergreen Corp.*, No. 92 C 6589, 1994 U.S. Dist. LEXIS 1193 (N.D.Ill. Feb. 7, 1994) (noting reluctance to apply promissory estoppel in employment context and finding no unambiguous promise of permanent employment); *Massouras v. Litton Industrial Products, Inc.*, No. 84 C 2618, 1985 U.S. Dist. LEXIS 22865 (N.D.Ill. Feb. 4, 1985); *Lamaster, supra*, 766 F.Supp. at 1505 (noting general disapproval of promissory estoppel theory of liability in employment contract context but addressing merits of claim).

Courts have also limited the scope of promissory estoppel by applying the statute of frauds to such claims. In *Dumas, supra*, the court noted that

it is the application of the statute of frauds coupled with the lack of any written promise or agreement that defeats his promissory estoppel claim.

This decision is consistent with Illinois case law recognizing that it is only proper to conclude that “if the statute of frauds bars enforcement of an oral contract which cannot be performed within one year, it also bars the courts from using promissory estoppel to imply the existence of a contract which cannot be performed within one year.” [*Dickens v. Quincy College Corp.*, 245 Ill.App.3d 1055, 1063, 615 N.E.2d 381, 386, 185 Ill.Dec. 822 (4th Dist. 1993)] **(emphasis added). The fact that Dumas has**

presented a number of written documents, in the form of e-mails, to augment what essentially is an alleged oral contract, does not change the reality that those documents, when viewed in their entirety, do not amount to a written contract. At best, they represented an unenforceable promise or agreement (even assuming a promise or agreement existed) due to the operation of the statute of frauds and cannot form the basis of any claim premised on a theory of contract law or promissory estoppel. [Emphasis added.] 416 F.3d at 680.

V. OTHER ISSUES

A. [3.23] Situations in Which *Duldulao* Principles May Not Apply

Illinois courts have recognized certain limited “exceptions to the exceptions” to the employment-at-will doctrine. For instance, public officials cannot enter into a contract if the Illinois Municipal Code prohibits such act. *Jordan v. Civil Service Commission*, 246 Ill.App.3d 1047, 617 N.E.2d 142, 146, 186 Ill.Dec. 903 (1st Dist. 1993). Public officials’ promises of employment have also been held unenforceable on public policy grounds. *Harris v. Johnson*, 218 Ill.App.3d 588, 578 N.E.2d 1326, 1329, 161 Ill.Dec. 680 (2d Dist. 1991).

Attorneys are subject to discharge at anytime, with or without cause, and are without a remedy against their clients, employers for post-termination breach of contract damages. “This rule is grounded in a recognition of the fact that an attorney is in the unique situation of maintaining a close relationship with the client in which he receives secrets, disclosures and other information that would not normally be divulged even to the most intimate of friends.” *Anastos v. Chicago Regional Trucking Ass’n*, 250 Ill.App.3d 300, 618 N.E.2d 1049, 1050, 188 Ill.Dec. 479 (1st Dist. 1993) (upholding dismissal of in-house counsel); *Ausman v. Arthur Andersen, LLP*, 348 Ill.App.3d 781, 810 N.E.2d 566, 284 Ill.Dec. 776 (1st Dist. 2004) (in-house counsel could not bring claim for retaliatory discharge in violation of public policy because it would have chilling effect on communications between employer client and in-house counsel). *But see Grauer v. Valve & Primer Corp.*, 47 Ill.App.3d 152, 361 N.E.2d 863, 866, 5 Ill.Dec. 540 (2d Dist. 1977) (attorney could sue for breach of contract when legal duties were merely incidental to management and engineering functions performed for employer); *Kiser v. Naperville Community Unit*, 227 F.Supp.2d 954, 966 (N.D.Ill. 2002) (attorney could pursue breach of contract claim because he performed nonlegal duties and it was not clear that his dismissal related to his legal functions).

B. [3.24] Rules of Construction

When an employment manual has been found by the court to be a contract, courts have applied standard contract interpretation rules. *See Berutti v. Dierks Foods, Inc.*, 145 Ill.App.3d 931, 496 N.E.2d 350, 352, 99 Ill.Dec. 775 (2d Dist. 1986); *Crenshaw v. DeVry, Inc.*, 172 Ill.App.3d 228, 526 N.E.2d 474, 477, 122 Ill.Dec. 215 (1st Dist. 1988). “Under Illinois law, employment contracts are subject to the same general rules of construction as are other contracts.” *Goodman v. Board of Trustees of Community College District 524*, 511 F.Supp. 602, 605 (N.D.Ill. 1981).

Thus, when the language of the contract is ambiguous, it must “be construed against, and not in favor of, [the drafter].” See *Mitchell v. Jewel Food Stores*, 142 Ill.2d 152, 568 N.E.2d 827, 832, 154 Ill.Dec. 606 (1990) (construing language of policy manual against Jewel after finding that it constituted contract barring dismissal without just cause). A plaintiff cannot, however, use the rules of contract interpretation to establish the existence of a contract. *Chesnick v. Saint Mary of Nazareth Hospital*, 211 Ill.App.3d 593, 570 N.E.2d 545, 548, 156 Ill.Dec. 69 (1st Dist. 1991). See also *Anders v. Mobil Chemical Co.*, 201 Ill.App.3d 1088, 559 N.E.2d 1119, 1124, 147 Ill.Dec. 779 (4th Dist. 1990).

The parol evidence rule prevents oral modifications of a fully integrated written contract. However, if the contract was not fully integrated, the rule does not apply. *Lewis v. Loyola University of Chicago*, 149 Ill.App.3d 88, 500 N.E.2d 47, 50, 102 Ill.Dec. 425 (1st Dist. 1986) (letters from dean to professor promising to recommend tenure were part of contract; school’s form contract given to professors did not embody complete agreement); *Parenti v. Wytmar & Co.*, 49 Ill.App.3d 860, 364 N.E.2d 909, 914, 7 Ill.Dec. 618 (1st Dist. 1977) (written instrument not intended to incorporate entire agreement between parties); *Johnson v. Figgie International, Inc.*, 132 Ill.App.3d 922, 477 N.E.2d 795, 799, 87 Ill.Dec. 669 (2d Dist. 1985) (salesman’s compensation plan alone did not constitute written contract as it was either partly oral or written modification of preexisting oral agreement); *Payne v. AHFI/Netherlands, B.V.*, 522 F.Supp. 18, 23 (N.D.Ill. 1980).

C. [3.25] Limitations

The statute of limitations on an oral contract is five years pursuant to 735 ILCS 5/13-205. The statute of limitations on a written contract is ten years pursuant to 735 ILCS 5/13-206. Oral modifications of a written contract are treated as an oral contract and are subject to the five-year statute. See *Clark v. Western Union Telegraph Co.*, 141 Ill.App.3d 174, 490 N.E.2d 36, 37 – 38, 95 Ill.Dec. 563 (1st Dist. 1986); *Bloomberg v. Marks*, 34 Ill.App.3d 758, 341 N.E.2d 119, 121 (3d Dist. 1975).

D. [3.26] Damages

The principles governing awards of damages in cases involving the breach of employment contracts are the same principles governing contract damages in general. The Illinois Supreme Court has summarized these rules as follows:

The measure of damages is the salary provided in the contract . . . reduced by such sums as the wrongfully discharged teacher has earned or by reasonable diligence could have earned in other employment subsequent to the discharge. . . . The employer has the burden of showing that the employee could or did have other earnings subsequent to the wrongful discharge and that those earnings stemmed from employment incompatible with the employment from which he was wrongfully discharged. [Citations omitted.] *Bessler v. Board of Education of Chartered School District No. 150 of Peoria County, Illinois*, 69 Ill.2d 191, 370 N.E.2d 1050, 1053 – 1054, 13 Ill.Dec. 23 (1977).

Thus, while the employee has a duty to mitigate damages, the employee is not required to accept “lesser” employment than he or she held at the time of discharge. *Arneson v. Board of Trustees, McKendree College*, 210 Ill.App.3d 844, 569 N.E.2d 252, 258, 155 Ill.Dec. 252 (5th Dist. 1991) (offer of position as chief of campus security to criminal justice professor). A wrongfully discharged employee has no duty to move elsewhere to seek employment; however, if the employee does so and is successful, wages can be offset against his or her recovery. *Wells v. Board of Education of Community Consolidated School District No. 64, Cook County, Illinois*, 121 Ill.App.2d 112, 257 N.E.2d 252, 255 – 256 (1st Dist. 1970).

The employer has the burden of proving that the employee failed to mitigate damages. *Grauer v. Valve & Primer Corp.*, 47 Ill.App.3d 152, 361 N.E.2d 863, 867, 5 Ill.Dec. 540 (2d Dist. 1977) (employee must mitigate his damages after discharge, but employer has obligation to produce whatever proof existed in diminution of damages). *But see Stein v. Malden Mills, Inc.*, 9 Ill.App.3d 266, 292 N.E.2d 52, 57 (1st Dist. 1972) (no duty to mitigate when plaintiff had fully performed his part of contract for commissions). At least one Illinois court has applied the collateral source rule and refused to allow subtraction of unemployment compensation benefits from the award. *Harden v. Playboy Enterprises, Inc.*, 261 Ill.App.3d 443, 633 N.E.2d 764, 769 – 770, 198 Ill.Dec. 923 (1st Dist. 1993).

Recoverable damages are limited in cases involving the breach of a provision requiring notice of termination. In *Arneson, supra*, Robert Arneson’s teaching contract required at least 12 months’ notice of termination. Arneson was given only one and one-half months’ notice. The Fifth District held:

Where . . . an employment contract has been breached by the employer by failure to give proper notice canceling the contract at the time of the discharge, the employee is entitled to the compensation and benefits he would have received during the additional time necessary for the notice to have been of proper length. 569 N.E.2d at 258.

See also Kemnetz v. Elliot Farmers Grain Co., 136 Ill.App.3d 226, 482 N.E.2d 1076, 1079, 90 Ill.Dec. 793 (4th Dist. 1985) (rejecting theory that improper notice under termination provision served to renew contract until end of calendar year and setting correct measure of damages at additional 20 days’ wages and fringe benefits when employer terminated with 10 days’ notice in violation of provision in written employment contract providing for 30 days’ written notice of termination).

As in other contract cases, plaintiffs who have successfully avoided the employment-at-will doctrine may not recover damages that are speculative. Damages for breach of contract are limited to those that “may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.” *Bartinikas v. Clarklift of Chicago North, Inc.*, 508 F.Supp. 959, 962 (N.D.Ill. 1981) (no damages allowed for loss of investment opportunity), quoting *Hadley v. Baxendale*, 9 Exch.Ct. 341 (1854). The damage award cannot place the plaintiff in a better position than he or she would have been in absent termination. *Harden, supra* (damage award against manifest weight of evidence because it placed plaintiff in better position than if employed by considering possible raise); *Lewis v. Loyola*

University of Chicago, 149 Ill.App.3d 88, 500 N.E.2d 47, 51, 102 Ill.Dec. 425 (1st Dist. 1986) (proper measure of damages for breach of employment contract is contract price, less what employee earned or could have earned; damages awarded for breach of employment contract are limited to such damages as plaintiff may have accrued up to date of trial, and damages beyond that date are disallowed due to their speculative and uncertain nature; award to college professor of \$100,000 per year until age 65, disabled, or dead, less gross earnings, was too speculative and uncertain).

Finally, reinstatement, not wages to be earned in the future, has been held to be the proper remedy for wrongful discharge. *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (proper remedy for breach of promise in handbook to employ for specific duration is reinstatement with back pay, not damages amounting to wages plaintiff would have earned over duration of employment).