IN THE SUPREME COURT OF GUAM

FRANKLIN QUIJANO,
Plaintiff-Appellant,

v.

ATKINS-KROLL, INC.,
Defendant-Appellee.

OPINION

Cite as: 2008 Guam 14

Supreme Court Case No.: CVA07-023
Superior Court Case No.: CV1440-05

Appeal from the Superior Court of Guam
Argued and Submitted, May 13, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Plaintiff-Appellant Franklin Quijano appeals from a summary judgment dismissing a suit for wrongful discharge against Defendant-Appellee Atkins-Kroll, Inc. He argues that he and Atkins-Kroll, Inc. had an implied-in-fact employment contract allowing termination only for cause, and the existence of such a contract involved the determination of disputed material facts not subject to summary judgment. Because there is insufficient evidence in the record to allow a reasonable jury to find an implied-in-fact contract to terminate only for cause, we affirm the lower court's grant of summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Plaintiff-Appellant Franklin Quijano was an employee of Defendant-Appellant Atkins-Kroll, Inc. ("Atkins-Kroll") for more than twenty-four years. After an incident involving a fellow employee,[1] Quijano was terminated for misconduct on November 2, 2004. In response, Quijano filed a complaint against Atkins-Kroll alleging breach of contract, breach of covenant of good faith and fair dealing, and negligent discharge. On November 30, 2007 the Superior Court granted summary judgment to Atkins-Kroll on all claims. The court reasoned that: 1) all of Quijano's claims depended on the existence of an implied employment contract;[2] and 2) "no

[1] Apparently, Quijano contacted the wife of a fellow employee to report an affair that the employee was allegedly having with a customer. The employee subsequently missed work allegedly due to the pain and suffering the incident caused. The issue of whether good cause existed for termination was never reached by the court below because it effectively determined that Quijano was an at-will employee.

[2] Quijano does not object to the lower court's finding that all his claims depend upon the existence of an implied employment contract. In fact, the relevant case law supports the notion that a "covenant of good faith and fair dealing . . . cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1110 (Cal. 2000). Similarly, negligent

genuine issue of material fact exists concerning the absence of an implied contract . . . ." Appellant's Excerpts of Record ("ER") at 169 (Decision & Order, Nov. 30, 2007).

[3] Quijano points to several factors that he believes demonstrate the existence of an implied contract. During his twenty-four years of employment with Atkins-Kroll, he was the recipient of numerous awards and certificates of recognition. He was sent on trips to Japan, the Philippines, and Bali. He also received retirement benefits during his time with Atkins-Kroll. At one point during the late 1990's, he claimed to have turned down another employment opportunity.[3] In addition, Quijano testified that he believed he could only be terminated for cause, and he based this belief on the fact that other employees were fired for cause. Finally, Quijano points to the versions of the Employee Handbook in the record and notes that each one contains a disciplinary policy listing reasons that an employee might be terminated.

[4] Atkins-Kroll points to the fact that Quijano's employment application contains an at-will provision that states the employment "is for no definite period" and may be "terminated at any time without any previous notice." ER at 21 (Application, Dec. 12, 1979). At-will disclaimers also appear in three versions of the Employee Handbook submitted to the court below. Finally, Atkins-Kroll notes that the 2000 Handbook contains a disclaimer stating "[t]his Handbook is not a contract or an employee agreement." ER at 45 (2000 Handbook) (underline in original).

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discharge would not be an actionable claim absent an employment agreement. *See Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 220 (Iowa 1996) (joining the majority of jurisdictions in "reject[ing] negligent discharge as an exception to the employment at-will doctrine"). Thus all of Quijano's claims depend on a threshold finding that an implied-in-fact employment contract existed at the time of his termination.

[3] This particular fact supports Quijano's reliance theory, that is, that he relied upon job security to his detriment. *See* Appellant's Br. at 6. However, detrimental reliance is an element of a promissory estoppel claim—his primary claim is for breach of an actual implied contract. *See* Restatement (Second) of Contracts § 90 cmt. a (1981). Thus Quijano's reliance argument may be disregarded because: 1) there is scant evidence in the record that Quijano suffered injury from refusing the alleged job offer; 2) Quijano did not include a claim of promissory estoppel in his complaint; and 3) reliance is only evidence of Quijano's subjective impressions, which are irrelevant in determining whether an implied contract was formed. *See Horn v. Cushman & Wakefield Western, Inc.*, 85 Cal. Rptr. 2d 459, 472 (Ct. App. 1999).

II. JURISDICTION AND STANDARD OF REVIEW

[5] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw 2008); 7 GCA §§ 3107, 3108(a), 25101, 25102(a) (2005). However, a final judgment had not been entered in the present case when the Notice of Appeal was filed on December 6, 2007. Under Rule 58(a)(1) of the Guam Rules of Civil Procedure, "[e]very judgment and amended judgment must be set forth in a separate document" with exceptions that do not include summary judgments. Guam R. Civ. P. ("GRCP") 58(a)(1) (2007). If no separate judgment is entered, Rule 58(b)(2)(B) allows a judgment to be effectively entered, for the purpose of the separate document rule, 150 days after entry of the underlying Decision and Order on the docket. GRCP 58(b)(2)(B). The Decision and Order granting summary judgment to Atkins-Kroll was entered November 30, 2007. Therefore, a final judgment was entered for the purposes of the separate document rule on April 28, 2008. *See* GRCP 58(b)(2)(B). Although the Notice of Appeal was prematurely filed, Rule 4(a)(2) of the Guam Rules of Appellate Procedure allow a prematurely entered Notice of Appeal to refer to the subsequently entered judgment. Thus, the appeal was timely and proper once judgment was effectively entered on April 28, 2008.

[6] A grant of summary judgment is reviewed *de novo*. *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 14. Summary judgment is only proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." GRCP 56(c). "'In rendering a decision on a motion for summary judgment, the court must draw inferences and view the evidence in a light

most favorable to the non-moving party.'" *Pangelinan v. Camacho*, 2008 Guam 4 ¶ 6 (quoting *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7).

III. DISCUSSION

A. The Law of Implied-in-Fact Employment Contracts

[7] Under Guam law, "[a]n employment, having no specified term, may be terminated at the will of either party, on notice to the other." 18 GCA § 55404 (2005).[4] In theory, the statute creates a "strong presumption" of at will employment, although that presumption has been subject to several limitations. *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1100 (Cal. 2000). The original policy considerations for this presumption were described as follows:

> "[T]he courts have not deemed it to be their function, in the absence of contractual, statutory or public policy considerations, to compel a person to accept or retain another in his employ, nor to compel any person against his will to remain in the employ of another. Indeed, they have consistently held that in such a confidential relationship, the privilege [to terminate] is absolute, and the presence of ill will or improper motive will not destroy it."

Consol. Theatres, Inc. v. Theatrical Stage Employees Union, 447 P.2d 325, 336 n.12 (Cal. 1968) (quoting 9 *Williston on Contracts* 134, § 1017 (3d ed. 1957)). Thus, "[i]n an at-will employment relationship, either the employer or the employee may terminate the relationship at any time, for any reason or for no reason at all." *Boone v. Frontier Refining, Inc.*, 987 P.2d 681, 685 (Wyo. 1999).

[8] Times have changed. Throughout the 1970s and 80s, courts began to carve out numerous exceptions to the employment-at-will doctrine, even in the absence of express employment

[4] This statute is identical to section 2922 of the California Labor Code. *Compare* Cal. Labor Code § 2922 (2008). Although California law is usually very persuasive in interpreting identical Guam statutes, California courts did not create the implied-in-fact exception to at-will employment until the 1980's, long after Guam adopted California's statutes. *See Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Ct. App. 1981).

agreements. *See* Katharine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 Indus. L.J. 84, 88-90 (2007) (describing the history of wrongful discharge case law). One of these exceptions, and the one Quijano relies upon, is the implied-in-fact employment contract to terminate an employee only for good cause. "A limitation [on the right to terminate an employee] will be implied when, from all the circumstances surrounding the relationship, a reasonable person could conclude that both parties intended that either party's right to terminate the relationship was limited by the implied in fact agreement." *Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 388 (Idaho 2005). Simply put, the implied-in-fact employment contract is an extension of the law of implied contracts to the arena of employment law. *Cf.* 18 GCA § 86103 (2005) ("An implied contract is one, the existence and terms of which are manifested by conduct.").

[9] Quijano never testified to, or produced any written evidence of, an *express* employment contract with Atkins-Kroll. The Appellant's Brief states that "[t]hroughout the years, [Atkins-Kroll] told Quijano again and again that he was a valued employee *who would continue in employment until retirement*." Appellant's Br. at 6 (emphasis added). However, the Excerpts of Record show only that Quijano believed that Atkins-Kroll was pleased with his performance, that Atkins-Kroll sent him overseas as a reward for his service, and that Atkins-Kroll provided him with a retirement plan. ER at 119-33 (Various Supporting Documents). None of these beliefs or actions amount to an express oral contract. In addition, neither party argues that Quijano's employment application or the Employee Handbook constitute an express written employment contract. The relevant case law suggests this interpretation is correct. *See Harden v. Maybelline Sales Corp.*, 282 Cal. Rptr. 96, 99 (Ct. App. 1991) (employment application not a

contract); *DePhillips v. Zolt Const. Co.*, 959 P.2d 1104, 1107-08 (Wash. 1998) (employee handbook not a written contract because it does not identify employee or job description).

[10] An employee's subjective belief in the existence of an employment contract is not, without more, evidence of the existence of the contract. *Horn v. Cushman & Wakefield Western, Inc.*, 85 Cal. Rptr. 2d 459, 472 (Ct. App. 1999). As the court of *Strass v. Kaiser Found. Health Plan* explained:

> Even if this training and advice created a subjective belief in plaintiff that these procedures were contractual rights for all employees, including herself, such a belief is insufficient to support a finding that Kaiser agreed that plaintiff's "at-will" employment was converted to a "just cause" employment contract. [citation omitted]. The fact that plaintiff's belief was based on Kaiser's conduct is not probative of Kaiser's intent. Kaiser's intent must be gleaned from its conduct and statements alone, without regard to plaintiff's subjective understanding of such conduct.

744 A.2d 1000, 1024-25 (D.C. 2000). Thus, Quijano's belief that he could only be terminated for cause does not, by itself, counter the presumption that his employment was at will.

[11] In evaluating whether there is an implied contract, one "must examine the conduct of the parties in order to determine whether there was an agreement . . . ." *Guam Top Builders, Inc. v. Tanota Partners,* 2006 Guam 3 ¶ 14. This requires an examination of the "totality of the circumstances." *Foley v. Interactive Data Corp.*, 765 P.2d 373, 388 (Cal. 1988). "[T]he facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered . . . to determine the agreement's explicit and implicit terms concerning discharge." *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 154 (Ohio 1985). Although a majority of states have adopted the implied-in-fact contract

exception to the at will employment presumption, they do not all agree as to which factors are most determinative. Paul H. Tobias, *Litigating Wrongful Discharge Claims* § 4.1 (2007).

[12] California considers a particularly expansive set of factors in determining whether an implied employment contract exists. These factors include: 1) the employer's personnel policies or practices; 2) the employee's longevity of service; 3) actions or communications reflecting assurances of continued employment from the employer; and 4) the practices of the industry in which the employee is engaged. *Foley*, 765 P.2d at 387 (citing *Pugh*, 171 Cal. Rptr. at 925-26). Although this court is under no obligation to adopt California's case law in this area, we agree with the holding of *Foley* to the extent that the "totality of the circumstances" must be examined in determining whether an implied-in-fact contract exists. *Id.* at 388. As for the four general factors outlined therein, we find some to be relevant, while others are only minimally so.

1. Personnel Policies and the Employee Handbook

[13] Of all the factors to be considered in determining whether an implied contract exists, examination of the policies set forth in the employee handbook is perhaps one of the most important. This is because "it would be almost inevitable for an employee to regard [the employee handbook] as a binding commitment, legally enforceable, concerning the terms and conditions of his employment." *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1265 (N.J. 1985), *judgment modified on other grounds*, 499 A.2d 515. Thus an employer, "[h]aving announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, . . . may not treat its promise as illusory." *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 895 (Mich. 1980).

[14] The handbook, although not necessarily a contract itself, is an important method by which an employer can "manifest[] by conduct" the existence of an implied contract. 18 GCA §

86103. Early employee handbooks that described for-cause termination procedures were often held to be a manifestation by the employer that the employees were no longer considered "at will." For example, in *Toussaint,* the employer's personnel manual stated that it was company "policy" to terminate employees "for just cause only." 292 N.W.2d at 884. The Michigan Supreme Court found the company's policy to be an enforceable promise not to terminate its employees except for just cause. *Id.* at 885. Similarly, in *D'Angelo v. Gardner*, the Supreme Court of Nevada found that the question of an implied contract was properly given to a jury where the employee handbook described a for-cause termination policy and the at-will disclaimer had been removed. 819 P.2d 206, 212 (Nev. 1991). Finally, in *Kinoshita v. Canadian Pacific Airlines, Ltd.*, the Hawai'i Supreme Court determined that an employee handbook describing discipline procedures was enforceable. 724 P.2d 110, 118-19 (Haw. 1986).[5]

a. The Effect of Disclaimers

[15] Understandably, employers soon began to include disclaimers in their employee handbooks to remind employees that their employment is terminable at will. The effect of such disclaimers varies from jurisdiction to jurisdiction. Many courts are more than willing to give an at-will disclaimer its intended effect.[6] Some interpret the disclaimer in light of other evidence—

[5] The employer in *Kinoshita* also distributed a letter to its employees claiming that "our written employment arrangements with you . . . constitute[ ] an enforceable contract." 724 P.2d 110, 117 (Haw. 1986).

[6] *Tyco Electronics Corp. v. Davis*, 895 A.2d 638, 640 (Pa. Super. Ct. 2006) ("Pennsylvania law disfavors extrapolating an implied contract from an employment policy that clearly contained strong disclaimer language . . . ."); *Clement-Rowe v. Mich. Health Care Corp.*, 538 N.W.2d 20, 22-23 (Mich. Ct. App. 1995) (employee who signed at-will disclaimer cannot later claim a legitimate expectation of just-cause employment); *Bailey v. Perkins Rests., Inc.*, 398 N.W.2d 120, 123 (N.D. 1986) (clear and conspicuous disclaimer preserves presumption of employment at-will); *Andrews v. Sw. Wyo. Rehab. Ctr.*, 974 P.2d 948, 951 (Wyo. 1999) (valid, conspicuous, and unambiguous disclaimer notifying employees of their at-will employment status can preclude a progressive discipline policy from forming an implied contract); *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1389 (Nev. 1998)

especially where conflicting provisions in the employee handbook cast doubt on the employee's at-will status.[7] The California Supreme Court explained the reason that disclaimers are not dispositive as follows:

> We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. *But even if a handbook disclaimer is not controlling* [citation omitted] in every case, *neither can such a provision be ignored* in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed.

Guz, 8 P.3d at 1103-04 (emphasis added). We agree that a court should still look to the "totality of the circumstances" in determining whether an implied-in-fact employment contract exists, even in the presence of an at-will disclaimer. *Foley*, 765 P.2d at 388.

[16] Similarly, a contractual disclaimer—one stating that the employee handbook does not constitute a contract—will not always prevent a finding that the handbook is evidence of an implied contract. *See Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 788 (Alaska 1989). "A contractual disclaimer does not automatically negate a document's contractual status and must be read by reference to the parties' 'norms of conduct and expectations founded upon them.'" *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476-77 (10th Cir. 1988) (quoting *Hillis v.*

("Reno Air's Employee Handbook and its Drug and Alcohol Policy do not create an inherent ambiguity with regard to Reno Air's express disclaimer that an employee's at-will status retains its vitality.").

[7] *Walker v. Blue Cross of Cal.*, 6 Cal. Rptr. 2d 184, 189 (Ct. App. 1992), *abrogated on other grounds by Guz*, 8 P.3d at 1111("[L]anguage in the handbook that there is an at-will employment relationship does not establish the nature of the relationship as a matter of law."); *Loffa v. Intel Corp.*, 738 P.2d 1146, 1148, 1153 (Ariz. Ct. App. 1987) (summary judgment properly denied even though employee handbook contained at will disclaimer); *Brown v. United Methodist Homes for the Aged*, 815 P.2d 72, 83 (Kan. 1991) (denial of summary judgment was proper given that employee manual contained a for-cause termination policy and at-will disclaimer was added after employment began); *Alexander v. Phillips Oil Co.*, 707 P.2d 1385, 1388-89 (Wyo. 1987) (summary judgment not appropriate where employee handbook contained both an at-will disclaimer and an inconsistent policy of terminating only for cause).

Meister, 483 P.2d 1314, 1317 (N.M. Ct. App. 1971)). Therefore, if Quijano produces sufficient evidence that Atkins-Kroll intended to terminate his employment only for cause, the contractual disclaimer in the 2000 Handbook would be only evidence of a contrary intent and not necessarily controlling.

b. The Effect of Handbook Disciplinary Policies

[17] The character and nature of the discipline procedures described in the employee manual help in determining whether an implied for-cause termination contract exists. For example, an employee manual that explicitly assures employees they can only be terminated for cause would be strong evidence of an implied contract. *See Brown v. United Methodist Homes For The Aged*, 815 P.2d 72, 77, 83 (Kan. 1991) (upholding a verdict for employee despite at-will disclaimer where company explicitly stated its policy not to terminate except for just cause); *but see Lytle v. Malady*, 579 N.W.2d 906, 911 (Mich. 1998) (brief handbook statement that "no employee will be terminated without proper cause or reason" insufficient to overcome presumption of at-will status). For an employee-plaintiff, the next best thing to an explicit statement of for-cause employment would be a progressive discipline policy. *See Wood v. Loyola Marymount Univ.*, 267 Cal. Rptr. 230, 233-35 (Ct. App. 1990) (triable issue of fact where university had elaborate progressive discipline system); *Robinson v. Hewlett-Packard Corp.*, 228 Cal. Rptr. 591, 599 (Ct. App. 1986) ("[A]n implied-in-fact promise . . . is reflected not only in HP's 'Personnel Policies and Guidelines,' but also in the performance evaluations, warnings, and instruction actually given to [plaintiff].").

[18] Finally, and least convincing of all, are termination clauses in handbooks that specifically reiterate that employment is terminable at will. In *Shoppe v. Gucci America, Inc.*, an employee handbook read as follows:

> *While your employment with Gucci may be terminated without cause by Gucci or by you*, the following represent some of the conduct which could result in serious disciplinary action up to and including termination: . . . .

14 P.3d 1049, 1066 (Haw. 2000) (emphasis in original). In addition to the disclaimer, the language of the handbook contained no provision providing for written notice before termination. *Id.* The Hawai'i Supreme Court therefore determined that because the handbook did not modify the employee's at will status, the lower court properly granted summary judgment to the employer. *Id.* at 1067.

[19] Even in the absence of a disclaimer, the mere presence of a disciplinary policy will not necessarily create an implied contract for the reasons explained in *Brooks v. Hilton Casinos Inc.*:

> Standardized disciplinary procedures are generally positive additions to a business. They provide employers a method of cautioning employees, and afford employees an opportunity to improve job performance in order to retain employment. They also create a general consistency and security in the work place. If we were to hold that the establishment of standard disciplinary procedures for employees is, in and of itself, sufficient to convert an at-will employee to an employee who can be fired only for cause, employers would be reluctant to continue to establish them.

959 F.2d 757, 760 (9th Cir. 1992) (interpreting Nevada law). Disciplinary policies are to be encouraged, and we would discourage such policies by holding that employers who simply articulate their employee expectations can so easily destroy the at-will presumption. Even so, a disciplinary policy that manifests an intent to create a for-cause employment agreement may be evidence of an enforceable contract. We therefore examine closely the written policies of Atkins-Kroll for evidence of such intent.

c. The Atkins-Kroll Employee Handbooks

[20] The Employee Handbook at issue in the present case is represented in three versions: one from 2000, one from 1994, and a third with an undetermined date of publication. All three

versions have section headings entitled "AK is an 'At-Will' Employer." ER at 51, 74, 95 (Handbooks). The 2000 version reads in part "[y]our employment with AK is terminable at will. It may be terminated at any time, with or without cause, and with or without notice, at the discretion of Management." ER at 51 (2000 Handbook). The undated version contains similar language, stating that "your employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at your option or at the option of Atkins-Kroll." ER at 95 (Undated Handbook). However, the language of the 1994 Handbook differs significantly from the other versions:

> We try to be very careful to hire only those people we feel reasonably sure are qualified . . . [h]owever, we may make some mistakes. If it turns out that we have hired someone who will not or cannot do the work satisfactorily or is not compatible, it will be necessary to terminate our employment relationship in order to keep our business in a strong competitive position.
>
> If your employment is terminated *consistent with AK's right to discharge at will*, whether or not any severance pay is given is up to the discretion of the Board of Directors. Dishonesty, absenteeism, [etc.] . . . are examples of behavior that could lead to discipline up to and including discharge.

ER at 74 (1994 Handbook) (emphasis added). The 1994 version, which one can speculate was drafted by a non-lawyer, does not explicitly define at-will employment at all. Instead, it describes various reasons for which an employee might be terminated. "No reason at all" is conspicuously absent from the list.

[21] Despite the editorial changes to the Handbook throughout the years, only the 2000 version is relevant to Quijano's employment status at the time of his termination. The majority rule is that "an employer may terminate or modify a contract with no fixed duration period after a reasonable time period, if it provides employees with reasonable notice, and the modification does not interfere with vested employee benefits." *Asmus v. Pac. Bell*, 999 P.2d 71, 76 (Cal.

2000), *but see Demasse v. ITT Corp.*, 984 P.2d 1138, 1145 (Ariz. 1999) (continued employment inadequate consideration for modification of employment policies). The theory behind the *Asmus* rule is that revision to employment policies are "unilateral implied-in-fact contracts" which employees can subsequently accept "by continuing their employment." *Asmus*, 999 P.2d at 76. Assuming that the 2000 Handbook is the latest version, Quijano must be considered bound by its provisions, since he continued to work for Atkins-Kroll for four years after the Handbook was published.

[22] There is also a question of whether the Handbook policies were communicated to Quijano at all, since he claims to have read the Handbook for the first time after his termination. Under unilateral contract theory, Quijano's ignorance of the Handbooks' existence may have prevented him from "accepting" Atkins-Kroll's stated policies by continuing his employment in reliance on them. *But see Ormsby v. Dana Kepner Co. of Wyo., Inc.*, 997 P.2d 465, 470 (Wyo. 2000) (order, cooperation, and loyalty are consideration for a unilateral employment contract). Therefore, some courts adhere to the position that an employee must be aware of a handbook to benefit from its promises. *See Morosetti v. La. Land and Exploration Co.*, 564 A.2d 151, 153 (Pa. 1989) (manual available only to supervisors could not be an offer accepted by employees unaware of its policies). Other courts have refused to apply unilateral contract theory in such a hyper-technical way. *See, e.g., Woolley*, 491 A.2d at 1266-68 (concluding that reliance is presumed under a unilateral contract analysis); *Toussaint*, 292 N.W.2d at 892 ("No pre-employment negotiations need take place and the parties' minds need not meet on the subject; [footnote omitted] nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally.").

[23] We find the more liberal interpretation of *Woolley* and *Toussaint* to be persuasive. Although Quijano does not recall reading the Handbooks during his twenty-four years of employment, he claims to have observed other employees being terminated for cause during his tenure with Atkins-Kroll. He therefore had some awareness of the policies that Atkins-Kroll had put in place through its Handbooks and can fairly be said to have accepted those policies by continuing his employment. In other words, an employer can communicate its policies to an employee by structuring the workplace in conformity with those policies, even if the employee had no first-hand knowledge of their written expression. *Cf. Toussaint*, 292 N.W.2d at 892.

[24] The written expression of Atkins-Kroll's employment policies can be found within disciplinary policy sections of its Handbooks. All three versions of the Handbook contain a section entitled "Disciplinary Action." ER at 58, 79, 96 (Handbooks). Each version provides "some examples of conduct that can result in immediate termination . . . ." ER at 58, 79, 96 (Handbooks). The 1994 and 2000 versions also include the additional statement that "[t]his list is not meant to be all inclusive . . . . Other improper conduct could also lead to immediate termination." ER at 58, 79 (Handbooks). Although the 2000 Handbook allows for imposition of less serious discipline such as verbal warnings, written reprimands, and suspensions, none of the Handbooks can be said to implement a progressive disciplinary procedure. For example, there is no requirement that an employee be notified before termination, given a hearing, or afforded warning for first-time conduct violations.

[25] We find that the Handbooks themselves do not adequately demonstrate the existence of an implied-in-fact contract to terminate only for cause. The at-will disclaimers and lack of procedural protections against termination would have reminded a reasonable employee that his or her employment was at-will. The present case is therefore factually analogous to *Shoppe*,

where the employee handbook included an at-will disclaimer, a non-exclusive list of reasons for termination, and few procedural protections for terminated employees. 14 P.3d at 1066. Here too, Atkins-Kroll's disciplinary procedures do not, by themselves, manifest an intent to change Quijano's status as an at-will employee.

2. The Employee's Longevity of Service

[26] California appears to be virtually alone in considering longevity of service as supporting the existence of an implied-in-fact employment contract. *But see Bowen v. Income Producing Mgmt. of Okla., Inc.*, 202 F.3d 1282, 1284 (10th Cir.2000) (interpreting Oklahoma law and mentioning longevity of service); *Allegri v. Providence-St. Margaret Health Ctr.*, 684 P.2d 1031, 1036 (Kan. Ct. App. 1984) (mentioning longevity of service in dicta). Other courts do not consider longevity of service to be a factor supporting the existence of an implied contract. *See, e.g., Roberts v. Atl. Richfield Co.*, 568 P.2d 764, 769 (Wash. 1977) (no authority to support theory that longevity of service constitutes additional consideration sufficient to establish a contract terminable only for cause); *Brooks*, 959 F.2d at 760 n.2 (interpreting Nevada law). Moreover, even California courts have accepted the notion that "an employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will." *Guz*, 8 P.3d at 1104 (emphasis in original); *see also Miller v. Pepsi-Cola Bottling Co.*, 259 Cal. Rptr. 56, 59 (Ct. App. 1989) (holding that long service and promotion alone do not change the status of an at-will employee).

[27] As the California Supreme Court explained, longevity of service is relevant because "[o]ver the period of an employee's tenure, the employer can certainly communicate, by its written and unwritten policies and practices, or by informal assurances, that seniority and

longevity *do* create rights against termination at will." *Guz*, 8 P.3d at 1105 (emphasis in original). Thus, an employee's long tenure creates more opportunity that other evidence, such as oral assurances, might establish an implied-in-fact contract. However, we also note that a lengthy employment *without* indicia of an implied-in-fact contract might be evidence that the employer had no intention of destroying the at-will presumption. An employer might even use a period of long tenure to actually affirm that employment is at will. Although a very short tenure might be relevant in determining that there was insufficient time for an implied contract to form, see *Gould v. Maryland Sound Industries*, 37 Cal. Rptr. 2d 718, 726 (Ct. App. 1995), a long tenure, by itself, has only minimal relevance to the question of whether an implied-in-fact contract existed. We therefore look to the evidence of Atkins-Kroll's intentions, rather that Quijano's length of service, in determining Quijano's employment status at the time of his termination.

3. Assurances of Continued Employment

[28] Assurances of continued employment, particularly oral assurances, can imply an intention to terminate employment only for cause. The employee of *Foley* presented not only evidence of "promotions, salary increases and bonuses" but also evidence of "repeated oral assurances of job security,"[8] which are absent from the present case. 765 P.2d at 388. However, in *Walker v. Blue Cross of California*, the court made no specific mention of oral assurances:

> Viewing the totality of the circumstances surrounding Walker's employment, including her nineteen and one-half years of service, her receipt of consistent promotions and salary increases, her receipt of merit increases and satisfactory evaluations, the personnel policies in existence during her employment, the

[8] At least one California case implied in dicta that the absence of oral assurances was evidence of the absence of an implied contract. *See Davis v. Consol. Freightways*, 34 Cal. Rptr. 2d 438, 445 (Ct. App. 1994) ("Conspicuously absent from plaintiff's pleadings or evidence is any hint that he was ever told at any time that he had permanent employment, or that he would be retained as long as he was doing a good job.").

> existence of the implied-in-fact agreement has been established as a triable issue of fact.

6 Cal. Rptr. 2d 184, 189 (Ct. App. 1992), *abrogated on other grounds by Guz*, 8 P.3d at 1111; *see also Haycock v. Hughes Aircraft Co.*, 28 Cal. Rptr. 2d 248, 257-58 (Ct. App. 1994) (implied-in-fact contract was a triable issue even though employer had never promised permanent employment during employee's twenty-five years.) Thus, Quijano may be able to demonstrate an implied-in-fact contract despite the absence of explicit oral assurances if he can muster enough evidence to imply such assurances were given indirectly.

[29] Quijano has produced only indirect evidence of Atkins-Kroll's assurances in the form of retirement benefits, employee appreciation awards, and perks such as trips to Japan, the Philippines, and Bali. Because the existence of an implied contract is demonstrated "'by the acts and conduct of the parties,'" even such indirect evidence may be helpful in establishing that Quijano had a "reasonable expectation that he would not be discharged except for good cause." *Foley*, 765 P.2d at 388 (quoting *Pugh*, 171 Cal. Rptr. at 927). Even so, the California Supreme Court has "decline[d] to interpret *Foley* as holding that long, successful service, standing alone, can demonstrate an implied-in-fact contract right not to be terminated at will." *Guz*, 8 P.3d at 1105.

[30] We agree with the reasoning of *Guz*. If this court were to create for-cause employment rights based only on evidence of raises, promotions, and benefits, the result would be to eviscerate the at-will employment presumption of 18 GCA § 55404. Promotions and raises are not necessarily evidence of contractual intent, but rather "natural occurrences of an employee who remains with an employer for a substantial length of time." *Miller*, 259 Cal. Rptr. at 59. A rule that converts long, successful at-will employment into a presumption of for-cause

employment would effectively "discourage the retention and promotion of employees." *Guz*, 8 P.3d at 1104-05. We therefore echo the concerns of one Ninth Circuit judge, who remarked in response to early California cases that "the statutory presumption of at-will employment has been reduced to a hollow legal fiction, an inconvenience to be endured on the way to a hefty recovery." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 783 (9th Cir. 1990). There are good policy reasons to avoid having the implied-in-fact employment doctrine swallow the at-will presumption rule of 18 GCA § 55404, and we decline to hold that Quijano's successful service alone is sufficient to establish an implied-in-fact employment contract.

[31] The same can be said of Quijano's observation that employees of Atkins-Kroll were terminated only for cause. Modern business managers recognize the importance of boosting employee morale by emphasizing teamwork and collaboration. One would therefore expect that employers who routinely terminate employees for no good reason would be a rarity. This, in turn, suggests that Quijano's observation would be typical of most employees in the modern workforce and not necessarily indicative of Atkins-Kroll's intent to create a for-cause employment relationship. In order to establish an implied-in-fact employment contract, Atkins-Kroll would have to manifest its intention by oral expressions or some conduct above and beyond mere sensible business practices. To hold otherwise would discourage the equitable treatment of employees and force employers to occasionally terminate employees without reason in order to preserve the at-will presumption.

4. Industry Practice

[32] Industry practice appears to be the least important factor in determining whether there exists and implied-in-fact employment contract. No California case has ever found industry practice to be relevant, possibly because industries that practice termination only for cause are

rare or non-existent. Understandably, the cases that do attempt to analyze this factor find an absence of any relevant industry practice. *See Davis v. Consol. Freightways*, 34 Cal. Rptr. 2d 438, 445-46 (Ct. App. 1994). Here too, Quijano fails to demonstrate, or even argue, that automobile retailers practice termination only for good cause.

B. Summary Judgment was Appropriate

[33] Generally, the existence of an implied contract of employment is a question of fact not suitable for summary judgment. *See Troy v. Rutgers*, 774 A.2d 476, 483 (N.J. 2001); *Kastner v. Blue Cross and Blue Shield of Kan., Inc.*, 894 P.2d 909, 916 (Kan. Ct. App. 1995); *Haycock*, 28 Cal. Rptr. 2d at 258. However, "if only one reasonable conclusion can be drawn from the undisputed facts, the issue may be decided as a matter of law on summary judgment." *Kovatch v. Cal. Cas. Mgmt. Co.*, 77 Cal. Rptr. 2d 217, 229 (Ct. App. 1998), *disapproved of on other grounds*, *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 512 n.19 (Cal. 2001). For example, "'summary judgment may be granted if the plaintiff presents only evidence of his own unilateral expectations of continued employment.'" *Kastner*, 894 P.2d at 916 (quoting *Conyers v. Safelite Glass Corp.*, 825 F. Supp. 974, 977 (D. Kan. 1993)).

[34] Atkins-Kroll has provided undisputed evidence of at-will disclaimers in both Quijano's employment application and the Handbooks. This evidence, along with 18 GCA § 55404, establishes a presumption of at-will employment. Because Atkins-Kroll has carried its burden of production, Quijano is now "subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." *Aguilar*, 24 P.3d at 510.

[35] In light of the at-will disclaimer, the existence of a non-progressive disciplinary procedure in the 2000 Handbook is not enough to overcome the at-will presumption by itself. *See Brooks*, 959 F.2d at 760. Quijano's "unilateral expectations of continuing employment" and

his subjective impression that employees of Atkins-Kroll were terminated only for cause are also insufficient to overcome the presumption. *Kastner*, 894 P.2d at 916; *see also Horn*, 85 Cal. Rptr. 2d at 472. Similarly, Quijano's long and apparently successful employment does not, by itself, create an implied-in-fact contract. *See Guz*, 8 P.3d at 1104. Finally, we do not find longevity of service and industry practice to be particularly relevant to the case before us. Although one must look to "the totality of the circumstances," *Foley*, 765 P.2d at 388, the court of *Guz* denied "that every vague combination of *Foley* factors, shaken together in a bag, necessarily allows a finding that the employee had a right to be discharged only for good cause, as determined in court." 8 P.3d at 1101. Because Quijano cannot make a prima facie case showing a triable issue of fact on any of the individual *Foley* factors, a reasonable trier of fact could not have concluded that an implied-in-fact employment contract was intended. Summary judgment was proper.

IV. CONCLUSION

[36] California has struggled to interpret the *Foley* factors on a case-by-case basis, as virtually every fact pattern entices plaintiffs' lawyers to bring a wrongful termination suit. More recent cases like *Guz* have tried to reign in the number of wrongful discharge cases by giving employers guidance as to how to avoid destroying the at-will presumption, and by reminding employees (and their lawyers) that some cases are not worth pursuing. Certain *Foley* factors, such a written policies and oral communications, are very relevant to the existence of an implied contract. Other factors, such as promotions, raises, benefits, and longevity of service, are typical of virtually every employment relationship and therefore less relevant in determining whether an implied-in-fact employment contract exists.

[37] The evidence presented in the instant case—longevity of service, raises, benefits, awards, and the observation that Atkins-Kroll would typically terminate an employee only for cause—

fall into the latter category. We therefore hold that Quijano has not presented a triable issue of fact, and summary judgment was properly granted. As a result, the judgment of the Superior Court must be **AFFIRMED**.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES, JR.
Chief Justice