

2.12 PERSONNEL MANUAL CREATING A CONTRACT¹
(Approved 1/97)

Plaintiff has asserted a claim against defendant for breach of an employment contract. Plaintiff's claim is not based upon an individual contract he/she had with defendant, but rather, upon defendant's *[personnel manual/handbook — use employer's terminology]*.

In order to resolve plaintiff's claim you must make two determinations:

First, you must determine whether the personnel manual in fact created a contract between the parties; and

Second, if you find that a contract did exist, you must then determine whether defendant breached that contract.

I will now explain to you in more detail the two determinations you must make.

¹This charge is to be given if a claim is asserted under *Woolley v. Hoffman-LaRoche*, 99 N.J. 284, modified, 101 N.J. 10 (1985), wherein the Court recognized a cause of action for breach of contract premised on an employer's personnel manual. The Committee has retained the original placement of this charge within the "Exceptions to the Employment At-Will Doctrine" section, although the Supreme Court has held that the *Woolley* doctrine is not an exception to the at-will doctrine, but rather, a recognition of basic contract principles.

A. Whether a Contract Existed²

You must first determine whether defendant's personnel manual in fact created a contract between the parties, that is, whether the manual contains enforceable and binding obligations. Plaintiff claims that defendant's manual contains a binding promise that he/she could only be terminated [*insert appropriate allegations, e.g., after receiving progressive discipline and/or only if "good cause" existed*].

You must determine whether a contract existed from the perspective of a reasonable employee. That is, you must decide whether a reasonable employee would believe that the manual was intended by the defendant to create these enforceable and binding obligations.

You must consider [*two/three*] general factors in this regard:

First, you must consider the manual's specific provisions.

Second, you must consider the context in which the manual was prepared and distributed.

²The charge assumes plaintiff alleges a breach of the manual's progressive discipline policy and/or just cause termination policy, rather than other policies that may be contained in the manual. If plaintiff's allegations are otherwise, the appropriate changes should be made.

Third, you must determine whether the manual contained an effective disclaimer of liability, that is, a clear statement by which the employer unequivocally reserved the right to terminate employees without cause.³

1. Manual’s Specific Provisions

a. Manual’s Application to Plaintiff

[This paragraph should be read to the jury only if a question of fact exists as to whether the plaintiff is in the class of employees to whom the manual applies.]

³The *Woolley* Court held that an employer can negate the otherwise binding effect of an employment manual by inclusion of a disclaimer. *Woolley*, 99 N.J. at 309. To be effective, the disclaimer must satisfy two elements: it must be prominent/conspicuous and it must appropriately advise employees that their employment is terminable at will. *Id.*

In *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401 (1994), the Court held that “We are...satisfied that when the facts surrounding the content and placement of a disclaimer are themselves clear and uncontroverted ... the effectiveness of a disclaimer can be resolved by the court as a question of law. *Id.* at 416. Conspicuousness will always be a matter of law. *Id.* In other cases, the effect of a disclaimer’s content will also be a question of law. In some cases, however, just as a jury determines whether an employment manual gives rise to an implied contract, so too may a jury need to decide whether the content of a disclaimer is effective.” *Id.* (Emphasis supplied).

Nicosia thus directs that in all cases the court should determine as a matter of law whether a disclaimer satisfies the conspicuous/prominence requirement. (*Nicosia* provides guidance to courts on this issue. 136 N.J. at 415-416.) Further, if reasonable minds cannot differ as to the effectiveness or ineffectiveness of the content of the disclaimer, the court should also resolve that issue as a matter of law. However, if reasonable minds can differ as to the effectiveness or ineffectiveness of the content of the disclaimer, the issue should be put to the jury using the instructions provided in charge 2.12(A)(3). *Cf. Michaels v. Brookchester, Inc.*, 26 N.J. 379, 387 (1958) (construction of unambiguous contract is question of law for court; where meaning is uncertain or ambiguous, meaning should be left to jury). *See also* note 8, *infra*.

You must first determine whether the manual applies to the plaintiff. If you find that the plaintiff is within the class of employees covered by the manual, the manual may have created a contract between the plaintiff and the defendant. On the other hand, if you find that the plaintiff is not within the class of employees covered by the manual, the manual could not create a contract between the plaintiff and the defendant, and the plaintiff's claim fails.

b. Provisions Suggesting Intention to Create Binding Obligations

[Note: The bracketed language should only be used if there is an instruction on 1. above; otherwise begin the instruction with the language following the brackets.]

[If you find that the manual applies to the plaintiff, then] (Y)ou must decide whether a reasonable employee reading the manual would believe that the manual created a binding promise. In making this decision, you should look at the manual as a whole. By that I mean you should consider the entire document.

Here are some provisions that, if present, tend to indicate the manual created a binding promise or, if not present, that tend to indicate the manual was not intended to be binding.⁴

⁴Not all of these factors may be applicable to a particular case. If a factor is not applicable, it should not be charged.

- a. Any statements promising or implying job security to those employees who satisfactorily perform their duties.⁵
- b. A definite and comprehensive progressive discipline policy under which employees are entitled to specified warnings prior to termination. A definite and comprehensive termination policy that, for example, identifies different types of terminations, or identifies specific acts or offenses that will justify termination.
- c. Whether the manual applies to all classes of employees.
- d. You may also consider any other specific provisions in the manual that would lead a reasonable employee to believe that the defendant intended or did not intend the manual to create an enforceable and binding promise.

As I instructed you, you should consider the manual in its entirety in making your determination, and no single factor standing alone is determinative.

⁵For example, in *Woolley*, the manual provided that “It is the policy of *Hoffman-La Roche* to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively.” In *Preston v. Claridge Hotel & Casino*, 231 N.J. Super. 81 (App. Div. 1989), the manual made various representations of “maximum job security.”

2. Manual's Preparation and Distribution

The next matter you must consider is the manual's preparation and distribution.

You must now decide whether the manual's preparation and distribution would create a reasonable expectation in defendant's employees that the manual was intended to govern the rights and duties of defendant's employees. In considering the manual's preparation and distribution, you should consider the following factors. However, no single factor standing alone is determinative and you should consider all of the evidence relating to the manual's preparation and distribution in making your decision.

- [Consider whether defendant employs a substantial number of employees.]⁶
- Consider whether the manual was widely distributed.⁷ For example, if the defendant distributed the manual to all or a substantial number of its employees, that is an indication it was intended to be binding. On the other hand, if the employer limited distribution of the manual to only a

⁶The Committee is undecided on whether this factor should be presented to the jury. The *Woolley* Court found that a workforce of 3000 employees was "substantial." The *Nicosia* Court found that a workforce of 1500 non-unionized (to whom the manual applied) and 1500 unionized employees was "substantial." However, it is not clear from the Court's decisions whether reference to the number of employees was intended to establish the number of employees as a separate factor to be considered by the jury or whether the references are solely factual. This issue has not yet been directly litigated and the Committee could not resolve the matter in the absence of more definitive judicial authority.

⁷In *Woolley*, the court found the widely-distributed requirement satisfied when 300 out of 3000 employees received the manual. In *Nicosia*, the Court found this requirement satisfied when 300 out of 1500 non-unionized employees (to whom the manual applied) received the manual. In an appropriate case, the court may choose to charge the substance of this footnote to the jury.

small group of employees, such as upper management, that would suggest the manual was not intended to be binding.

- Consider whether the manual was made available to employees for their inspection or whether access to the manual was restricted. If the manual was made available to employees for their inspection, that is an indication that the manual was intended to be binding; if access to the manual was restricted, that is an indication that the manual was not intended to be binding.
- Whether the defendant required employees to acknowledge receipt of the manual, for example, by signing an acknowledgment form. If so, that is an indication that the manual was intended to be binding; if not, that is an indication that the manual was not intended to be binding.⁸
- Whether there are any other circumstances concerning the preparation and distribution of the manual that would lead a reasonable employee to believe that the defendant intended or did not intend the manual to create enforceable and binding obligations.

Again, as I previously instructed you, remember that none of these factors standing alone is determinative. You should consider all the evidence relating to the manual's preparation and distribution in reaching your decision.

[The following paragraph should be read only when it is claimed that the plaintiff did not receive the manual.]

⁸This should not be confused with the effect of an acknowledgment form which contains a valid disclaimer. While the fact that the employer requires employees to sign a general acknowledgment form is an indication that the employer intended the manual to be binding, if the acknowledgment form contains a valid disclaimer, it will negate any contractual effect of the manual.

However, it is not necessary if the plaintiff actually received or read the manual or relied upon it or even knew of its existence. If the manual was widely distributed to the defendant's work force, it may form the basis of the plaintiff's claim.⁹

3. Manual's Disclaimer¹⁰

[The next three paragraphs are to be read if a jury question exists regarding the effectiveness of the content of a disclaimer. See notes 3 and 8, *supra*.]

The third and final factor you must consider in determining whether the manual created a contract is whether the manual contains an effective disclaimer. An effective disclaimer is a clear statement by which the defendant reserved the unambiguous right to terminate employees without cause. An employment manual that contains an effective disclaimer cannot create a binding promise even if all the other factors on which I have previously instructed you are present. If you find that the manual did contain an effective disclaimer, then the manual did not create a contract between the parties. To be effective, a disclaimer's language must convey to a reasonable employee that the manual does not constitute a legally binding obligation. The language in the disclaimer must make clear that the employee is terminable at will and that the employer retains the absolute power to fire anyone at any time with or without

⁹*Nicosia v. Wakefern Food Corp.* 136 N.J. at 411.

¹⁰The prominence of a disclaimer is a matter of law for the trial judge. *Nicosia v. Wakefern Food Corp.* 136 N.J. at 415-416.

cause. Although no specific language is required, the disclaimer must convey this message in straightforward terms and without confusing legal language.

The defendant contends that the following statement in the manual constitutes an effective disclaimer: _____.

4. Summary

In sum, to determine whether the manual created a contract between the parties, you must consider *[both/all three]* of the foregoing factors, that is, the manual's specific provisions and the context and distribution of the manual *[and whether the manual contained an effective disclaimer.]*

If you determine that the manual did not create a contract between the parties, then there can be no breach of contract and plaintiff is not entitled to damages. If, on the other hand, you determine that the manual did create a contract between the parties, you must then make the second determination, that is, whether defendant breached the contract.

B. Whether Defendant Breached the Contract¹¹

Plaintiff claims that the defendant breached the manual by terminating his/her employment without *[first applying the manual's progressive discipline procedures and/or without "good cause" — insert appropriate allegations]*.

[Option 1: This paragraph for use when plaintiff's claim is only for breach of progressive discipline provisions, and manual contains no exceptions to progressive discipline requirement, e.g., no provision for immediate termination for certain infractions.]

You must determine whether defendant followed the progressive discipline procedures contained in the manual before terminating plaintiff's employment. If you determine that defendant did follow the progressive discipline procedures, you must find that defendant did not breach the contract. If you determine that defendant did not follow the progressive discipline procedures, the defendant breached the contract.

[Option 2: This paragraph for use when plaintiff's claim is only for breach of progressive discipline provisions, and manual does contain exceptions to progressive discipline requirement, e.g., when manual authorizes immediate termination for certain infractions.]

¹¹This charge assumes plaintiff alleges that defendant breached the manual by failing to follow the progressive discipline procedures and/or by terminating him/her without good cause. If plaintiff's allegations are otherwise, the appropriate changes should be made.

You must first determine whether defendant followed the progressive discipline procedures contained in the manual before terminating plaintiff's employment. If you determine that defendant did follow the progressive discipline procedures, you must find that the defendant did not breach the contract. If you determine that defendant did not follow the progressive discipline procedures, you must then determine whether one of the exceptions to the progressive discipline procedure stated in the manual is applicable. Specifically, defendant contends that progressive discipline was not required before termination because plaintiff engaged in *[insert specific exception from manual]*. If you find that plaintiff did engage *[insert specific exception from manual]*, then defendant did not breach the contract. If you find that plaintiff did not engage in *[insert exception]*, then the defendant breached the contract.

[Option 3: This paragraph for use when plaintiff's claim is only for breach of "good cause" termination provisions, and manual defines "good cause" by citing specific examples of conduct that constitutes "good cause."]

You must determine whether "good cause" existed for plaintiff's termination under the terms of the manual. Specifically, defendant contends that plaintiff engaged in *[insert infraction, poor performance, etc.]*. If you find that the plaintiff did engage in *[insert infraction, poor performance, etc.]*, then defendant did not breach the

contract.¹² If you find that the plaintiff did not engage in [*insert infraction, poor performance, etc.*], then the defendant breached the contract.

[Option 4: This paragraph for use when plaintiff’s claim is for breach of progressive discipline provisions and for breach of good cause termination provisions, and manual defines “good cause” by citing specific examples of conduct that constitute “good cause.”]

You must first determine whether defendant followed the progressive discipline procedures contained in the manual before terminating plaintiff’s employment. If you determine that defendant did not follow the progressive discipline procedures, then the defendant breached the contract.¹³ If you determine that defendant did follow the progressive discipline procedures, you must then determine whether good cause existed for plaintiff’s termination under the terms of the manual. Specifically, defendant contends that plaintiff engaged in [*insert infraction, poor performance, etc.*]. If you find that the plaintiff did engage in [*insert infraction, poor performance,*

¹²With respect to Options 3 and 4, it has not yet been determined whether there is a “good faith” defense to a *Woolley* claim, *i.e.*, whether the employee must actually have engaged in the proscribed conduct or whether the employer’s “reasonable belief” that the employee engaged in such conduct is sufficient.

¹³*Woolley* 101 *N.J.* at 11.

etc.], then defendant did not breach the contract.¹⁴ If you find that the plaintiff did not engage in [*insert infraction, poor performance, etc.*], then the defendant breached the contract.

[Option 5: This paragraph for use when plaintiff’s claim is only for breach of good cause termination provision, and manual does not define “good cause” through specific examples or otherwise.]

You must determine whether good cause existed for plaintiff’s termination. Specifically, defendant contends that plaintiff engaged in [*insert infraction, poor performance, etc.*]

The manual does not define what is meant by “good cause.” This is a determination you must make based on the following instructions. To constitute “good cause” for termination, an act or omission need not necessarily involve either commission of a crime or involve an improper purpose. However, the act or omission must substantially disadvantage the employer, in view of the duties and obligations of the employee. A discharge for mere whim or caprice is not a discharge for good cause. Nor is a discharge because of the employer’s general subjective dislike or disapproval of an employee. Rather, a discharge for good cause must bear some relationship to and focus on the ability and fitness of the employee to discharge the

¹⁴ See note to Option 3.

duties of his or her position. In sum, “good cause” is a cause or ground that a reasonable employer, acting in good faith, would regard as a good and sufficient reason for terminating an employee’s services.¹⁵

[Option 6: This paragraph for use when plaintiff’s claim is for breach of progressive discipline provisions and for breach of good cause termination provisions, and manual does not define “good cause” through specific examples or otherwise.]

You must first determine whether defendant followed the progressive discipline procedures contained in the manual before terminating plaintiff’s employment. If you determine that defendant did not follow the progressive discipline procedures, then the defendant breached the contract. If you determine that the defendant did follow the progressive discipline procedures, you must then determine whether good cause existed for plaintiff’s termination. Specifically, defendant contends that plaintiff engaged in [*insert infraction, poor performance, etc.*]. The manual does not define what is meant by “good cause.” This is a determination you must make based on the following instructions. To constitute “good cause” for termination, an act or omission need not necessarily involve either commission of a crime or involve an improper purpose. However, the act or omission must substantially disadvantage the employer,

¹⁵*Fried v. Aftac, Inc.*, 246 N.J. Super. 245, 254-256 (App. Div. 1991).

in view of the duties and obligations of the employee. A discharge for mere whim or caprice is not a discharge for good cause. Nor is a discharge because of the employer's general subjective dislike or disapproval of an employee. Rather, a discharge for good cause must bear some relationship to and focus on the ability and fitness of the employee to discharge the duties of his or her position. In sum, "good cause" is a cause or ground that a reasonable employer, acting in good faith, would regard as a good and sufficient reason for terminating an employee's services.¹⁶

¹⁶*Fried, 246 N.J. Super. 254-256.*