

January 1983

Weiner v. McGraw-Hill, Inc.: Is Employment in New York Still at Will?

Ann Bickford

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

Recommended Citation

Ann Bickford, *Weiner v. McGraw-Hill, Inc.: Is Employment in New York Still at Will?*, 3 Pace L. Rev. 245 (1983)

DOI: <https://doi.org/10.58948/2331-3528.1638>

Available at: <https://digitalcommons.pace.edu/plr/vol3/iss2/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Notes and Comments

Weiner v. McGraw-Hill, Inc.: Is Employment in New York Still at Will?

I. Introduction

Under the employment-at-will rule¹ as it developed in the United States,² an employee hired for an unspecified term is free to quit his employment at any time for any reason.³ His employer, similarly, can fire him at any time for good cause, bad cause or no cause at all.⁴ The employment-at-will rule was well suited to the industrializing nation in which it developed,⁵ and

1. The employment-at-will rule originally developed in England. Under the English version of the rule, a hiring for an unspecified time was considered to be a hiring for a year, unless there was a custom relating to the subject and a contract was made with reference to it. See *Watson v. Gugino*, 204 N.Y. 535, 540, 98 N.E. 18, 20 (1912). See also C. LABATT, MASTER AND SERVANT § 156, at 504-05 (2d ed. 1913); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 (1974) [hereinafter cited as *Job Security*]. For a general discussion of the English employment-at-will rule see LABATT, *supra*, §§ 156, 157.

2. American law on employment-at-will departed from English law during the latter part of the 19th century. LABATT, *supra* note 1, § 159. For a general discussion of the American employment-at-will rule see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982); *Job Security*, *supra* note 1.

3. *Watson v. Gugino*, 204 N.Y. 535, 541, 98 N.E. 18, 20 (1912).

4. See Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480, 481 (1970); Murg & Scharman, *supra* note 2, at 329; *Job Security*, *supra* note 1, at 335.

Clearly an employer subject to federal and state employment discrimination laws, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980) providing protection against discharges based on race, color, religion, sex, or national origin, cannot discharge an employee in violation of such statutes. The effect of such statutory limitations on the employment-at-will rule is beyond the scope of this Note.

5. The adoption of the employment-at-will rule was prompted by the economic realities of the United States during its period of industrialization. Murg & Scharman, *supra* note 2, at 335. Laissez-faire and free enterprise were the dominant economic philosophies of the time. *Job Security*, *supra* note 1, at 343. The ability of the employer to determine

was harmonious with the philosophical underpinnings of contract law at the time.⁶ The changing complexion of society, however, has led to discontent with the rule and agitation for its modification,⁷ which in turn has led to the creation of a number

the size of his work force was considered essential. Murg & Scharman, *supra* note 2, at 336, 340.

6. Murg & Scharman, *supra* note 2, at 335. The employment-at-will rule conformed to the principles of contract law that existed during the period of its development, i.e., mutuality of obligation, mutuality of remedies, and mutuality of consideration. *Id.* See also Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419-21 (1967). The principle of mutuality of obligation provides that both parties to a contract must be bound or neither is. 1A A. CORBIN, CORBIN ON CONTRACTS § 152, at 2 (1963). "[E]ach party is under a legal duty to the other; each has made a promise and each is an obligor." *Id.* at 4. An employer could not be bound to continue the employment of an employee when the employee was free to quit at any time. Murg & Scharman, *supra* note 2, at 336; Blades, *supra* at 1419. "Therefore, the courts concluded that if the employee . . . was not obligated to continue to provide his services, the employer similarly should not be obligated to continue to provide employment." Murg & Scharman, *supra* note 2, at 336-37. See also Blades, *supra*, at 1419.

Under the theory of mutuality of remedy, a court will not grant specific performance to one party to a contract unless the other party also could have obtained specific performance. See 5A A. CORBIN, CORBIN ON CONTRACTS § 1180, at 330 (1964) "The remedy of specific performance is an extraordinary remedy developed in Courts of Equity to provide relief when the legal remedies of damages and restitution are inadequate. A decree for specific performance takes the form of a decree ordering a party affirmatively to carry out his contractual duties or enjoining him from violating the contract." J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 2d § 16-1 (1977). Contracts for personal services are almost never specifically enforced, CORBIN, *supra*, § 1204, at 398, because of courts' dislike of enforcing such decrees and of forcing people to work together in close personal association. *Id.* at 401. Furthermore, forcing an employee to work for an employer is generally considered a form of involuntary servitude in violation of the thirteenth amendment. Murg & Scharman, *supra* note 2, at 336; CORBIN, *supra*, § 1204, at 401; CALAMARI & PERRILLO, *supra*, § 16-5, at 585. Therefore, to force an employer to retain an employee would be to grant specific performance to an employee when the same remedy was not available to the employer.

The principle of consideration also supported the employment-at-will doctrine. Murg & Scharman, *supra* note 2, at 335-36. See also Blades, *supra*, at 1419-20. "The essence of consideration, then, is legal detriment that has been bargained for and exchanged for the promise." CALAMARI & PERILLO, *supra*, § 4-1, at 134-35 (footnote omitted). The employee provided his labor as consideration for his pay. Murg & Scharman, *supra* note 2, at 337; *Job Security*, *supra* note 1, at 351-52. The willingness of an employee to come to work and to perform the services required of him was not considered adequate consideration to bind his employer to continue his employment. See *id.* Unless the employee provided some additional consideration beyond mere performance of his duties, the courts found that there was no consideration provided for continued employment. *Id.*

7. See Blades, *supra* note 6, at 1435; Feerick, *Employment at Will*, N.Y.L.J., Nov. 2, 1979, at 1, col. 1; Feerick, *Employment-At-Will Rule and Unjust Dismissal*, N.Y.L.J.,

of exceptions to the at-will rule.⁸

New York courts have recognized that under certain circumstances the actions of the parties can convert what would have been an employment-at-will into one with greater contractual rights for the employee, such as in the case of a collective bargaining agreement providing that employees would not be discharged without cause.⁹ Nonetheless, New York has lagged behind other states in modifying the at-will rule,¹⁰ and as a result, employees who believe they have been unfairly fired have had little success in the New York courts.¹¹

A case recently decided by the New York Court of Appeals may signal a move away from New York's rigid adherence to the employment-at-will rule. In *Weiner v. McGraw-Hill, Inc.*,¹² a former employee, believing he had been fired without just cause in derogation of stated company policy sued his former employer.¹³ The issue as stated by the court was whether the plaintiff, employed for an unspecified term, had pleaded a good cause of action for breach of contract against his employer where he

Aug. 6, 1982, at 1, col. 1.

8. For example, the existence of a definite term of employment would limit the employer's right to discharge during the term to just cause. Murg & Scharman, *supra* note 2, at 356. Furthermore, the rule is occasionally not applied where the discharge violates public policy. *Id.* Finally, when an employee gives consideration in addition to merely performing his job, his employment will not be at will. *Id.*

9. *Parker v. Borock*, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959). In *Parker*, a case involving a discharged union employee, the court recognized that although the plaintiff's contract of employment "standing alone . . . was terminable at will, and would not give rise to a cause of action," *id.* at 159, 156 N.E.2d at 298, 182 N.Y.S.2d at 579, "[t]he collective bargain . . . provides that 'No regular employee shall be discharged or disciplined without good and sufficient cause.'" *Id.* at 160, 156 N.E.2d at 299, 182 N.Y.S.2d at 580.

10. For example, California has recognized the tort of abusive discharge. *See infra* notes 24-27 and accompanying text. California and Michigan have recognized that documents such as employee handbooks and policy manuals can create contractual rights. *See infra* note 91 and accompanying text.

11. *See, e.g., Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

12. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

13. *Id.* at 460-61, 443 N.E.2d at 442-43, 457 N.Y.S.2d at 194-95.

was allegedly "discharged without the 'just and sufficient cause' or the rehabilitative efforts specified in the employer's personnel handbook and allegedly promised at the time he accepted the employment."¹⁴ Although similar suits had been dismissed in the past for failure to state a claim,¹⁵ the court held that the record contained "sufficient evidence of a contract and a breach to sustain a cause of action."¹⁶

Part II of this Note discusses the background of the employment-at-will rule as it developed in New York. Part III presents the facts and lower court decisions in *Weiner v. McGraw-Hill, Inc.* Part IV presents the court of appeals decision and Part V analyzes it. This Note concludes that the court of appeals, while not abandoning the employment-at-will rule, did modify it by allowing Weiner a chance to prove the existence of a contract and its breach. Although the court's decision was correct given the facts of the case, this Note criticizes its inadequate treatment of the statute of frauds issue and its failure to justify its departure from precedent. Finally, in Part VI, this Note speculates on the impact of *Weiner v. McGraw-Hill, Inc.* on New York law.

II. Legal Background

The employment-at-will rule was articulated in New York in 1895 in *Martin v. New York Life Insurance Co.*¹⁷ *Martin* established the principle that a hiring for an unspecified term is a hiring at will with either side at liberty to terminate at any time.¹⁸ Since *Martin*, the New York courts have been reluctant to recognize causes of action sounding in either tort or contract

14. *Id.* at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

15. *See supra* note 11.

16. *Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

17. 148 N.Y. 117, 42 N.E. 416 (1895). In *Martin*, the plaintiff had been hired for a yearly salary to be paid monthly. After being fired during the year he claimed that he was entitled to a full year's pay. *Id.* at 119, 42 N.E. at 417. The court did not accept plaintiff's contention that he had a contract of employment for a year, *id.* at 120, 42 N.E. at 417, stating that a "contract to pay one \$2500 a year for services is not a contract for a year, but a contract to pay at the rate of \$2500 a year for services actually rendered, and is determinable at will by either party." *Id.* at 121, 42 N.E. at 417 (quoting H. Wood, MASTER AND SERVANT § 136 (2d ed.)).

18. *Id.* at 121, 42 N.E. at 417.

by discharged employees.¹⁹ Tort claims have failed because New York, unlike some states, has not yet recognized the tort of abusive discharge,²⁰ and because the elements of a prima facie tort usually cannot be established in an employment situation.²¹ The statute of frauds has been a barrier to contract causes of action,²² as has the courts' unwillingness to recognize contractual rights as being created by documents such as employee handbooks and policy manuals.²³

A. Tort Theories of Liability

1. The tort of abusive discharge

The tort of abusive discharge "provides a cause of action for employees who are discharged for engaging in certain activities which are protected as a matter of public policy,"²⁴ such as engaging in union activities,²⁵ or refusing to commit perjury²⁶ or to

19. See, e.g., *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

20. See *supra* cases cited in note 19.

21. *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

22. *Weisse v. Engelhard Minerals and Chem. Corp.*, 571 F.2d 117 (2d Cir. 1978); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

23. *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

24. *Murg & Scharman, supra* note 2, at 344. Public policy has been described as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. . . ." *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. Div. 2 1959).

25. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. Div. 1 1980).

26. *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d

participate in an illegal scheme.²⁷ To bring a cause of action successfully in abusive discharge, a plaintiff must persuade the court that there is a public policy of the state and that by firing him the defendant has violated it.²⁸ Under the theory of abusive discharge, "the interest of the employer in the exercise of his unfettered right to terminate an employee under a contract at will is balanced against the interest of the community in upholding its laws and public policy."²⁹

The New York courts have been reluctant to recognize the tort of abusive discharge, although they have hinted that they may be willing to do so in the appropriate case.³⁰ In *Chin v. American Telephone & Telegraph Co.*,³¹ (AT&T), plaintiff alleged that he had been discharged in violation of public policy by his employer, AT&T, after he was arrested for driving a van into three police officers during a political demonstration.³² He brought a complaint against AT&T under three theories: breach of contract, prima facie tort, and abusive discharge.³³ In support of his claim of abusive discharge, Chin alleged that his discharge was politically motivated.³⁴ Since Chin had proceeded under a cause of action not yet recognized in New York,³⁵ the supreme court at special term dismissed his complaint yet indicated that it was not averse to recognizing new causes of action when warranted.³⁶ The court noted that a substantial showing would have to be made that there was a public policy of the state which had

25 (2d Dist. Div. 2 1959).

27. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).

28. *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1075, 410 N.Y.S.2d 737, 741 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

29. *Id.* at 1075, 410 N.Y.S.2d at 740.

30. *Id.* at 1075, 410 N.Y.S.2d at 741. *See also* *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980).

31. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

32. *Id.* at 1073, 410 N.Y.S.2d at 739.

33. *Id.* at 1072, 410 N.Y.S.2d at 738.

34. *Id.*

35. *Id.* at 1075, 410 N.Y.S.2d at 740.

36. *Id.* at 1075, 410 N.Y.S.2d at 741.

been violated by the defendant when he fired the plaintiff.³⁷ Chin had not sustained his burden of showing that a public policy existed in New York which "would restrict the right of a private employer to discharge an employee at will due to the employee's political beliefs, activities and associations."³⁸ The court, however, did not say what would constitute the "substantial showing" necessary to sustain a cause of action in abusive discharge. It also dismissed Chin's other two causes of action pursuant to section 3211(a)(7) of the New York Civil Practice Law and Rules (CPLR) for failing to state a cause of action.³⁹

The following year, another employee discharged by his employer brought an action in breach of contract, abusive discharge and prima facie tort. In *Marinzulich v. National Bank of North America*,⁴⁰ the plaintiff alleged that he was discharged for having uncovered evidence of embezzlement.⁴¹ He claimed that by discharging him for his honesty, the bank had violated the public policy of the state of encouraging the discovery of crimes.⁴² Again, the trial court pointed out that a cause of action in abusive discharge had not yet been recognized in New York and that the allegations set forth in Marinzulich's motion did not warrant the court's making new law.⁴³ The court once more declined to indicate what allegations would be sufficient to sustain such a cause of action.

Similarly, in *Edwards v. Citibank, N.A.*,⁴⁴ the trial court dismissed plaintiff's cause of action in abusive discharge as not

37. *Id.*

38. *Id.*

39. *Id.* at 1076, 410 N.Y.S.2d at 741.

Rule 3211. Motion to dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

...

7. the pleading fails to state a cause of action. . . .

N.Y. CIV. PRAC. LAW § 3211(a)(7) (McKinney 1970).

40. N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980).

41. *Id.*

42. *Id.*

43. *Id.*

44. 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

actionable under New York law.⁴⁵ Edwards claimed he was discharged for having uncovered evidence of illegal foreign currency manipulations.⁴⁶ He alleged one contract and two tort causes of action against his employer, Citibank.⁴⁷ The appellate division unanimously affirmed the dismissal of the abusive discharge cause of action without further discussion.⁴⁸

Although the New York courts have not recognized the tort of abusive discharge based on a violation of public policy, several decisions have indicated a willingness to do so given the proper case.⁴⁹ This was the interpretation of a federal district court sitting in New York in *Savodnik v. Korvettes, Inc.*⁵⁰ The court pointed to a national trend toward recognizing this tort and cited *Chin* as an indication that New York was also arguably prepared to do so.⁵¹ The court in *Savodnik* observed that the *Chin* court had not only indicated its acceptance of the general doctrine, but had articulated the component elements of such a claim.⁵² It noted that the *Chin* court had "virtually invited recognition of such law by stating, in otherwise unnecessary dicta, that 'this court is not averse to recognizing new causes of action . . . where clearly warranted.'"⁵³ The court determined that the *Chin* court granted the motion to dismiss the abusive discharge claim, not because it was unwilling to recognize such a tort, but because the plaintiff had not sustained his burden of persuasion.⁵⁴ The court believed that even without the trend toward recognizing this tort, New York courts would allow *Savodnik's* case to proceed given the facts⁵⁵ which suggested that the defe-

45. *Id.* at 61, 418 N.Y.S.2d at 271.

46. *Id.* at 59, 418 N.Y.S.2d at 270.

47. *Id.*

48. *Edwards v. Citibank, N.A.*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

49. *See Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d at 1075, 410 N.Y.S.2d at 741; *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2.

50. 488 F. Supp. 822, 825 (E.D.N.Y. 1980).

51. *Id.*

52. *Id.* at 826.

53. *Id.* (citing *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d at 1075, 410 N.Y.S.2d at 741).

54. *Id.*

55. *Id.* at 827. *Savodnik* had worked for defendant for over 13 years. He received frequent promotions and salary increases. Part of the compensation he was to receive was a pension, the rights of which were to vest after 15 years. Defendant then sought to

dant's conduct had been unconscionable.⁵⁶ Defendant's motion to dismiss the abusive discharge cause of action was therefore denied.⁵⁷

2. *Prima facie tort*

Employees who believe they have been wrongfully discharged sometimes allege a *prima facie* tort as well as the specific tort of abusive discharge.⁵⁸ A "prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful."⁵⁹ The motive must be exclusively malicious;⁶⁰ for example, the tortfeasor cannot have acted out of business motives.⁶¹ Discharged employees frequently have difficulty proving this element of maliciousness in a wrongful discharge situation since allegations that an employer was motivated by personal gain⁶² or business considerations⁶³ are inconsistent with an exclusively malicious intent. If, for instance, the employer thought he could

avoid its responsibility to contribute to the Plan by discharging Savodnik. *Id.* at 825-26.

56. *Id.* at 826.

57. *Id.* at 827. The following year in *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981), a federal district court refused to dismiss the case of a discharged medical employee. *Id.* at 558. Hovey, 62 years old, was fired after six and a half years on the job. *Id.* at 555. The court cited *Chin* as an indication of New York's willingness to recognize a tort of abusive discharge. *Id.* at 557. The case was similar to *Savodnik* in that Hovey alleged that his employer was trying to deprive him of his pension benefits. *Id.* at 558. According to the federal court, the integrity of pension benefits was a public policy in New York. *Id.*

58. See, e.g., *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979); *Marinzulich v. National Bank of N. Am.*, N.Y.L.J. May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County, May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980).

59. *Carnival Co. v. Metro-Goldwyn-Mayer Inc.*, 23 A.D.2d 75, 78, 258 N.Y.S.2d 110, 113 (1st Dep't 1965) (citing *Ruza v. Ruza*, 286 A.D. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955)).

60. *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

61. *Id.* at 1074, 410 N.Y.S.2d at 740.

62. *Wegman v. Dairylea Coop., Inc.*, 50 A.D.2d 108, 114, 376 N.Y.S.2d 728, 735 (4th Dep't 1975).

63. See, e.g., *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1074, 410 N.Y.S.2d 737, 740 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

run his business more profitably without the employee, arguably, his motives for firing the employee would not be purely malicious.

In *Chin v. American Telephone & Telegraph Co.*,⁶⁴ the plaintiff brought a second cause of action in prima facie tort, alleging that his discharge was maliciously motivated.⁶⁵ The trial court found, however, that the allegations in his complaint were conclusory and not sufficient to establish such a cause of action.⁶⁶ Even if the allegations constituted sufficient evidence of malice, plaintiff had not shown that AT&T was not also motivated by legitimate purposes or by business considerations.⁶⁷ The court pointed out that to establish a prima facie tort, malice must be the only motive.⁶⁸ Defendant submitted affidavits establishing that it dismissed Chin, after he drove a van into three police officers during a political demonstration, due to its concern for its business, its reputation and for the safety of its customers and employees.⁶⁹ The court dismissed Chin's cause of action,⁷⁰ noting that this type of motive is inconsistent with the strictly malicious motive necessary to establish a prima facie tort.⁷¹

B. Breach of Contract

1. The statute of frauds

The employee hired for an indefinite period typically has no written contract. Claims of the existence of an oral contract for permanent employment may be barred by New York's statute of

64. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

65. *Id.* at 1072, 410 N.Y.S.2d at 738.

66. *Id.* at 1074, 410 N.Y.S.2d at 740.

67. *Id.*

68. *Id.* at 1073, 410 N.Y.S.2d at 739.

69. *Id.*

70. *Id.* at 1076, 410 N.Y.S.2d at 741.

71. *Id.* at 1074, 410 N.Y.S.2d at 740. *See also* *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980), where the court dismissed the plaintiff's complaint alleging a prima facie tort by merely observing that the allegation was fatally defective in as much as such an action would not lie where employment was terminable at will.

frauds.⁷² Under the statute, an agreement which by its terms is not to be performed within one year from its making is unenforceable unless in writing and signed by the party to be charged.⁷³ The purpose of the provision is to avoid the leaving to memory the terms of a contract which is longer than a year.⁷⁴

New York courts have interpreted this provision narrowly to give effect to oral agreements where there is any possibility of performance within one year even though the likelihood of such performance is remote.⁷⁵ Generally, only those contracts which are by their terms incapable of performance within a year are barred.⁷⁶ For instance, when part of a two-part bonus to induce an employee to join a company is to be paid in the second year of employment, one court has held the unwritten contract to be incapable of performance within a year and thus barred by the statute of frauds.⁷⁷ On the other hand, employment agreements in which either side is free to terminate at any time are usually considered hirings at will capable of performance within a year and thus not within the statute of frauds.⁷⁸

72. N.Y. GEN. OBLIG. LAW § 5-701(a)(1)(McKinney Supp. 1982).

73. New York's statute of frauds relating to contracts not to be performed within a year reads as follows:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney Supp. 1982).

74. 2 A. CORBIN, CORBIN ON CONTRACTS § 444, at 534 (1950). "Where actions on contracts are long delayed, injustice is likely to be done because of bad memory and because witnesses have died or moved away, so that mistakes will be made and perjury is more likely to be successful. And in the case of a contract whose performance is to cover a long period of time, actions are likely to be long delayed." *Id.*

75. *See, e.g.,* *Weisse v. Engelhard Minerals and Chem. Corp.*, 571 F.2d 117, 119 (2d Cir. 1978); *North Shore Bottling Co. v. Schmidt & Sons*, 22 N.Y.2d 171, 175-76, 239 N.E.2d 189, 191, 292 N.Y.S.2d 86, 89-90 (1968); 56 N.Y. JUR. *Statute of Frauds* § 15 (1967).

76. 56 N.Y. JUR. *Statute of Frauds* § 15 (1967).

77. *Weisse v. Engelhard Minerals and Chem. Corp.*, 571 F.2d 117, 119 (2d Cir. 1978).

78. 56 N.Y. JUR. *Statute of Frauds* § 38 (1967). *But see* *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 876, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980), where plaintiff claimed that his employment of indefinite duration was terminable by him at any time, but terminable by Citibank for just cause only. *Id.* at 60, 418 N.Y.S.2d at 270. The court rejected this theory, holding that the employment

The 1892 case of *Blake v. Voight*⁷⁹ established the rule in New York that if a contract has as one of its terms a bilateral option to terminate within a year it is considered capable of performance within a year and thus not within the operation of the statute of frauds.⁸⁰ When such an option to terminate is unilateral, its effect is less clear. Although one court could see no difference between unilateral and bilateral options to terminate as far as the statute of frauds was concerned,⁸¹ other courts have viewed the distinction as controlling. In *Harris v. Home Indemnity Co.*,⁸² for instance, the court said that the rule in *Blake*

should not be extended to make enforceable an oral agreement for permanent employment, where the right to cancel or terminate is limited unilaterally to plaintiff. For in such cases defendant's liability endures indefinitely, subject only to the uncontrolled voluntary act of the party who seeks to hold defendant. Under such circumstances it is illusory, from the point of view of defendant, to consider the contract terminable or performable within one year.⁸³

Thus, when an oral employment agreement is for an unspecified period the applicability of the statute of frauds depends on whether the court interprets the agreement as being capable of performance within a year.⁸⁴ In *Belfert v. Peoples Planning*

agreement was terminable at any time, for any reason by either party. *Id.* Under such an interpretation the contract certainly could have been completed within a year. Nevertheless, the court, in dealing with the statute of frauds issue, merely stated that "an oral contract of the form urged by plaintiff [was] violative of the Statute of Frauds, since performance was not to have been completed within one year." *Id.*

79. 134 N.Y. 69, 31 N.E. 256 (1892).

80. *Id.* at 72-73, 31 N.E. at 256-57. When permission to terminate is a term of the contract, termination is not destruction but performance. *Id.* at 72, 31 N.E. at 256. Termination does not defeat the contract, but simply advances the period of fulfillment. *Id.* at 73, 31 N.E. at 257.

81. *Raymond Spector Co. v. Serutan Co.*, 60 N.Y.S.2d 212, 213 (Sup. Ct. N.Y. County), *aff'd*, 270 A.D. 993, 63 N.Y.S.2d 213 (1st Dep't 1946).

82. 6 A.D.2d 861, 175 N.Y.S.2d 603 (1st Dep't 1958).

83. *Id.* at 861, 175 N.Y.S.2d at 604. *See also* *Supplee v. Hallanan*, 14 Misc. 2d 658, 179 N.Y.S.2d 725 (Sup. Ct. N.Y. County 1958), where plaintiff had an oral agreement for lifetime employment with a unilateral option to cancel within a year. *Id.* at 658, 179 N.Y.S.2d at 726. Her claim was dismissed because, following the holding of *Harris*, a unilateral option for the plaintiff did not remove the bar of the statute of frauds. *Id.* at 659, 179 N.Y.S.2d at 727.

84. A narrow reading of the statute seems to frustrate its purpose. *See supra* note 73 and text accompanying note 74. If an agreement does not contain an explicit term

Corp. of America,⁸⁵ where plaintiff had the option to renew his contract at the end of a year and defendant had the right to terminate for cause at the end of a year,⁸⁶ the rule in *Harris* on unilateral options was followed.⁸⁷ Since defendant could not discharge plaintiff after a year with impunity unless the discharge was for cause, the court reasoned that there was no bilateral option.⁸⁸ Termination for cause was considered destruction of the contract, not performance or termination.⁸⁹

2. Contract rights created by company documents

In cases where they have no written employment contracts, discharged employees have tried to convince the courts that documents such as employee handbooks and policy manuals promising job security can create contractual rights in what would otherwise be employments at will.⁹⁰ Many employees, in addition to receiving oral representations that their employments will not be terminated except for just cause, receive written rep-

which makes it incapable of performance within a year, courts generally consider it capable of such performance and thus not within the statute. If the parties contemplate that the employment agreement will last indefinitely, however, it is likely that an action for breach will be brought years after the agreement is made when memories are no longer fresh. This is the very mischief the statute was designed to prevent.

For a discussion of the inconsistent approach which New York courts have taken in deciding whether a contract was capable of performance within a year, see Note, 1956-57 *Legislature: Problems Left Uncorrected*, 26 *FORD. L. REV.* 372, 385-88 (1957).

85. 22 Misc. 2d 753, 199 N.Y.S.2d 839 (Sup. Ct. N.Y. County 1959), *aff'd*, 11 A.D.2d 760, 202 N.Y.S.2d 101 (1st Dep't 1960), *aff'd*, 11 N.Y.2d 755, 181 N.E.2d 630, 226 N.Y.S.2d 693 (1962).

86. *Id.* at 754, 199 N.Y.S.2d at 841.

87. *Id.* at 755-56, 199 N.Y.S.2d at 842.

88. *Id.* at 756, 199 N.Y.S.2d at 843.

89. *Id.* at 755-56, 199 N.Y.S.2d at 842. The court rejected the contention that there was a distinction relevant to the applicability of the statute of frauds between an option to renew and an option to terminate. "If either of such options is in plaintiff alone, the result is the same and if the agreement is oral and no existing writing evidences the agreement, it is unenforceable." *Id.* at 757, 199 N.Y.S.2d at 843. "[I]f the option is bilateral or in the defendant, the agreement is performable within a year regardless of whether the option is to renew or to terminate." *Id.*

90. See, e.g., *Chin v. American Tel. & Tel. Co.*, 96 Misc.2d 1070, 1072, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979); *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

resentations to the same effect. Several states have recognized such documents as creating contractual rights.⁹¹ New York, however, has not followed their lead, labeling such handbooks nothing more than "broad internal policy guidelines"⁹² that do not create contractual rights. For example, in *Chin v. American Telephone & Telegraph Co.*,⁹³ plaintiff had been given the

91. In a California case, *Cleary v. American Airlines, Inc.*, 111 Cal. App. 443, 168 Cal. Rptr. 722 (2d Dist. Div. 1 1980), plaintiff alleged that he was dismissed by the airline for his union organizing activities. *Id.* at 447, 168 Cal. Rptr. at 724. He claimed that company charges that he had committed theft, left his work area without authorization and threatened a fellow employee were false charges hiding its true motives. *Id.* Two issues were present in *Cleary*: the effects of plaintiff's longevity with the company and the effects of the expressed policy of the company, set forth in its Regulation 135-4, on procedures relating to employee grievances and discharge. *Id.* *Cleary* had been employed for 18 years. The court reasoned that termination without cause after such a long period of time offended the implied-in-law covenant of good faith and fair dealing contained in all contracts. The company's written policy adopting specific procedures for adjudicating employee disputes compelled the conclusion that the employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct. *Id.* The court held that "the longevity of the employee's service, together with the expressed policy of the employer, [operated] as a form of estoppel, precluding any discharge of such an employee without good cause." *Id.* at 456, 168 Cal. Rptr. at 729.

In 1980, the Michigan Supreme Court took a major step in recognizing the rights of employees hired for indefinite terms to be protected against wrongful discharge. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), involved a middle management employee who had been dismissed from his job after five years. *Id.* at 595, 292 N.W.2d at 883. Toussaint had inquired about security when interviewing for the job. *Id.* at 612, 292 N.W.2d at 891. The court reinstated the trial court's verdict for Toussaint, *id.* at 625, 292 N.W.2d at 897, who claimed that oral representations had been made to him indicating that he would not be discharged as long as he performed his job properly. *Id.* at 597, 292 N.W.2d at 884. In addition, he had been given a Blue Cross personnel policy manual that further assured him that any employee who had completed his probationary period would be released for just cause only. *Id.* at 597-98, 292 N.W.2d at 884.

Blue Cross defended the firing by arguing that when an employment was for an indefinite period, a distinct and separate consideration was necessary to limit the employer's right to fire to just cause only. *Id.* at 599, 292 N.W.2d at 885. It contended further that such an agreement by an employer, there being no mutuality of obligation, would fail for lack of consideration. *Id.* The court rejected these arguments, *id.* at 600, 292 N.W.2d at 885, and held that an employer's express agreement to terminate only for cause or statements of company policy and procedure to that effect could give rise to rights enforceable in contract. *Id.* at 610, 292 N.W.2d at 890.

92. *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

93. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 603, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

AT&T "Code of Conduct" which he claimed established the only grounds on which his employment could be terminated.⁹⁴ Yet the plaintiff could cite no case to support his claim that the company manual constituted a contract of employment for a definite term.⁹⁵ Although the code of conduct governed some conditions of employment, the court concluded that it was defective as an enforceable employment agreement because it did not contain all the necessary terms of employment, such as the duties of the particular position, the length of employment and terms of compensation.⁹⁶

Relying on *Chin* as authority, the trial court, in *Edwards v. Citibank, N.A.*,⁹⁷ dismissed a similar claim by Edwards that various staff handbooks and manuals given him by Citibank comprised a written employment contract.⁹⁸ Edwards conceded that he had no formal contract or fixed term of employment, but contended that these policy guidelines limited Citibank's power to discharge him to just cause even though he was free to terminate at will.⁹⁹ The court rejected his contention as utterly lacking in mutuality.¹⁰⁰ The manuals did not constitute a written employment contract because they did "not exclusively and completely define the terms and conditions of employment, its duration or the rate of compensation, i.e., all the essential elements of a contract of employment."¹⁰¹

III. Factual Background

A. *The Facts of Weiner*

When Walton Weiner left his job with another publisher in

94. *Id.* at 1072, 410 N.Y.S.2d at 739.

95. *Id.*

96. *Id.* at 1073, 410 N.Y.S.2d at 739. Besides lacking the essential terms of employment, such documents by their nature are typically not signed by the defendant, a condition necessary to holding a party to a contract. N.Y. GEN. OBLIG. LAW § 5-701(a) (McKinney Supp. 1982).

97. 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

98. *Id.* at 60, 418 N.Y.S.2d at 270.

99. *Id.*

100. *Id.*

101. *Id.*

1969 to join McGraw-Hill,¹⁰² his primary objectives were security and advancement.¹⁰³ Weiner received assurances during his pre-employment interview that as long as his performance was satisfactory his job would be secure.¹⁰⁴ The McGraw-Hill employee handbook, given to him when he was hired, stated that he could be dismissed for just cause only.¹⁰⁵ In addition, Weiner signed an application form which stated that he had agreed to be bound by the terms of the handbook.¹⁰⁶ Several representatives of McGraw-Hill also signed the form,¹⁰⁷ but the effect of their signatures was later to become a source of disagreement between the parties to the action.¹⁰⁸

For eight years Weiner did advance with McGraw-Hill.¹⁰⁹ In 1977, however, he was fired for what McGraw-Hill called "lack of application."¹¹⁰ Believing that he had been fired because of a dispute with his supervisor¹¹¹ and that the representations made by McGraw-Hill in its handbook were binding, Weiner sued McGraw-Hill.¹¹²

Weiner's suit alleged three causes of action: breach of con-

102. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 460-61, 443 N.E.2d 441, 442, 457 N.Y.S.2d 193, 194 (1982).

103. Weiner's Affidavit in Opposition to Motion to Dismiss Complaint, Record at 60, *Weiner*.

104. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

105. *Id.*

106. *Id.*

107. *Id.* at 461, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

108. The form Weiner signed stated that his "employment by McGraw-Hill, Inc. would be subject to the provisions set forth in the McGraw-Hill Employee Handbook on Personnel Policies & Procedures . . ." Plaintiff's Exhibit A, Employment Application, Record at 66A, *Weiner*. Weiner was required to sign directly below the statement: "I HAVE READ THE ABOVE PARAGRAPH, UNDERSTAND ITS IMPORTANCE AND EFFECT UPON MY EMPLOYMENT, AND ACCEPT THE SAME AS CONDITIONS OF MY EMPLOYMENT BY MCGRAW-HILL, INC." *Id.* About two-thirds of the way down the page is a solid line below which the employee is told not to write. In this section are lines for the signatures of the interviewer and the person approving the hiring. There is another space designated "Additional Approval." *Id.* It is unclear from the form whether the McGraw-Hill signatures relate to the company manual or in any way bind McGraw-Hill.

109. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

110. *Id.*

111. Weiner's Verified Complaint, Record at 17-18, *Weiner*.

112. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

tract, intentional interference with contract rights and wrongful inducement of breach of contract.¹¹³ Weiner joined his supervisor as a defendant in the second and third causes of action.¹¹⁴ McGraw-Hill moved to dismiss all three causes of action under CPLR 3211(a)(5) and (7).¹¹⁵ Supreme court, at special term, interpreted the second cause of action as an allegation of a prima facie tort.¹¹⁶ Since an essential element, a purely malicious motive, had not been pleaded adequately and because there was economic justification for the firing, the cause of action was dismissed.¹¹⁷ The third cause of action, also interpreted as one in tort, was dismissed for insufficiency¹¹⁸ because it was against Weiner's supervisor, an officer of McGraw-Hill, and such a claim was not available against the officers of a party to a contract.¹¹⁹ The supreme court refused, however, to dismiss Weiner's first cause of action for breach of contract.¹²⁰ It noted that not only had Weiner been given a company handbook saying that he would be discharged for just cause only, but he had been required to sign a statement on a job application form, as did agents of the company, stating that he would be bound by the provisions set forth in the handbook.¹²¹ The court reasoned that the existence of a written and signed statement removed the bar of the statute of frauds¹²² and that *Edwards v. Citibank, N.A.*,¹²³

113. McGraw-Hill's Statement Pursuant to CPLR 5531, Record at 1, *Weiner*.

114. Weiner's Verified Complaint, Record at 16, 19, *Weiner*.

115. Memorandum Opinion, Record at 6, *Weiner*. CPLR 3211(a)(5) and (7) read as follows:

Rule 3211. Motion to Dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

....

5. the cause of action may not be maintained because of . . . statute of frauds;

or . . .

....

7. the pleading fails to state a cause of action

N.Y. CIV. PRAC. LAW § 3211 (McKinney 1970).

116. Memorandum Opinion, Record at 7, *Weiner*.

117. *Id.*

118. *Id.* at 8.

119. *Id.*

120. *Id.* at 7.

121. *Id.* at 6. See *supra* note 108 and accompanying text.

122. *Id.* at 6.

123. 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74

where the plaintiff had been given a similar handbook but had signed no such statement, was not controlling.¹²⁴

B. The Appellate Division

1. The arguments

McGraw-Hill appealed the court's denial of its motion to dismiss the first complaint.¹²⁵ It argued that the court had misconstrued the law,¹²⁶ its order being in conflict with *Edwards*¹²⁷ and *Marinzulich*¹²⁸ which had declared that personnel manuals were not employment contracts.¹²⁹ It also argued that the handbook was not an employment contract since it did not set forth the necessary terms and conditions of employment.¹³⁰ McGraw-Hill also contended that the section of the application form that Weiner signed binding him to the terms of the handbook had not been signed by a company representative.¹³¹ According to McGraw-Hill the only company signatures on the form were in other sections, unrelated to Weiner's signature and to the handbook.¹³² McGraw-Hill argued in the alternative that the lack of a specified term of years made the contract unenforceable even if signed.¹³³

Weiner's main points on appeal were that the handbook and

A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

124. Memorandum Opinion, Record at 7, *Weiner*.

125. *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11 (1st Dep't 1981) (mem.), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

126. McGraw-Hill's Brief at 3, *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11.

127. *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

128. *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County, May 8, 1979), *aff'd*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980).

129. McGraw-Hill's Brief at 7, *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11.

130. *Id.* at 7, 8.

131. *Id.* at 8, 9.

132. *Id.* at 9. *See supra* note 108.

133. McGraw-Hill's Brief at 9, *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11.

application form should be read together to form a contract,¹³⁴ that the signatures by him and McGraw-Hill on the application form bound each to the terms of the handbook,¹³⁵ and finally that because McGraw-Hill's intent to be bound or not bound was irrelevant, it should be estopped from raising the defense of the statute of frauds.¹³⁶ Weiner believed his case was distinguishable from those cited by McGraw-Hill in which neither employer nor employee signed statements agreeing to bind themselves to the terms of a policy manual.¹³⁷ Unlike the employers in the cited cases, Weiner argued, McGraw-Hill by its own conduct had placed a greater significance on its handbook and therefore could not logically argue that it was a mere policy guideline.¹³⁸

2. *Opinion*

In a brief opinion the appellate division reversed special term's denial of McGraw-Hill's motion to dismiss the first cause of action.¹³⁹ The court reasoned that although both employer and employee had signed the employment application form it never rose to the level of a written employment contract¹⁴⁰ because it failed to state the critical terms of Weiner's employment.¹⁴¹ Furthermore, the court noted that McGraw-Hill could unilaterally amend or withdraw the provisions of the handbook at any time.¹⁴² Weiner could not assert that while he was free to terminate at any time, McGraw-Hill could terminate only for just cause,¹⁴³ since his employment was at will and "he could be

134. Weiner's Brief at 7, *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11.

135. *Id.* at 4.

136. *Id.* at 7.

137. *Id.* at 9.

138. *Id.* at 10.

139. *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d at 811, 442 N.Y.S.2d at 12. Weiner did not appeal the dismissal of his second and third causes of action. *Id.* at 810, 442 N.Y.S.2d at 11.

140. *Id.* at 810-11, 442 N.Y.S.2d at 11-12. The appellate division did not discuss the issue of whether the McGraw-Hill signatures pertained to the same subject as Weiner's, i.e., agreement to be bound by to the terms of the handbook.

141. *Id.* at 811, 442 N.Y.S.2d at 12.

142. *Id.*

143. *Id.*

terminated at any time and for any or no reason. . . ."¹⁴⁴

IV. The Court of Appeals' Decision

A. *The Majority Opinion*

The court of appeals reversed, holding that the record contained "sufficient evidence of a contract and a breach to sustain a cause of action."¹⁴⁵ Before discussing Weiner's contract cause of action, however, the court observed that the parties had supplemented the contract issue with arguments directed to "such legal formulations as 'abusive discharge', 'implied promise of fair treatment' and 'good faith', which some courts have applied . . . to overcome what they conceived to be the harsh effect of inflexibly strict enforcement of at-will employment agreements. . . ."¹⁴⁶ The court found it unnecessary to address these alternative theories, however, because it was allowing Weiner to proceed under his contract cause of action.¹⁴⁷

Addressing the availability of a contract cause of action, the court summarily disposed of the statute of frauds issue.¹⁴⁸ It stated that "the agreement between Weiner and McGraw-Hill, whether terminable at will or only for just cause [was] not one which, 'by its terms', could not [have been] performed within one year and, therefore, [was not] . . . barred."¹⁴⁹

Dealing with the substance of the complaint, the court observed that the fact that Weiner was free to quit at any time was inconclusive of an employment at will.¹⁵⁰ The court determined that McGraw-Hill's contention, that it was also free to fire Weiner at anytime, was based on the theory of mutuality of obliga-

144. *Id.* The dissent believed that an employee was entitled to rely on the policy manual to his detriment and that the employer should be equitably estopped from acting contrary to its terms. *Id.* (Kupferman, J., dissenting) (mem.).

145. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 465, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982). Judge Fuchsberg wrote the majority opinion in which Chief Judge Cooke and Judges Jasen, Jones and Meyer concurred. Judge Wachtler wrote the dissenting opinion in which Judge Gabrielli concurred.

146. *Id.* at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

147. *Id.* The court noted that it was dealing only with the breach of contract cause of action since Weiner did not appeal the dismissal of his two tort causes of action. *Id.* at 461 n.2, 443 N.E.2d at 443 n.2, 457 N.Y.S.2d at 195 n.2.

148. *Id.* at 463, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

149. *Id.*

150. *Id.*

tion.¹⁵¹ Mutuality in the sense of requiring such reciprocity, the court declared, is not always essential to the formation of a binding contract, although the presence of consideration is a fundamental requisite.¹⁵² The court cited several New York cases standing for the principle that consideration need not benefit the promisor as long as the promisee suffer some detriment.¹⁵³ The court also quoted from Corbin on consideration in an employment context:

[I]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him "at will" after the employee has begun or rendered some of the requested service or has given any other consideration. . . . This is true even though the employee has made no return promise and has retained the power and legal privilege of terminating the employment "at will." The employer's promise is supported by the service that has been begun or rendered or by the other executed consideration¹⁵⁴

Applying these principles of consideration to the facts of *Weiner*, the court held that the record contained "sufficient evidence of a contract and a breach to sustain a cause of action."¹⁵⁵ It mentioned several factors which together formulated a question for trial. Specifically, McGraw-Hill had used the promise of job security, which was incorporated into its handbook, to induce Weiner to leave his former job. Furthermore, after joining McGraw-Hill, Weiner, relying on these assurances, turned down other offers of employment. Finally, when Weiner considered firing certain subordinates, his supervisors told him that em-

151. *Id.* at 463-64, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

152. *Id.* at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

153. *Id.* at 464-65, 443 N.E.2d at 445, 457 N.Y.S.2d at 197 (citing *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299, 419 N.E.2d 332, 336, 437 N.Y.S.2d 654, 658 (1981) (modern concept of consideration includes both benefit to the promisor and detriment to the promisee); *Hamer v. Sidway*, 124 N.Y. 538, 545, 27 N.E. 256, 257 (1891) ("It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him")).

154. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197 (quoting 1A A. CORBIN, CORBIN ON CONTRACTS § 152, at 14 (1963)).

155. *Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

ployees could be fired for just cause only.¹⁵⁶

As the court articulated it, the question for trial was whether McGraw-Hill was "bound to a promise not to discharge plaintiff without just and sufficient cause and an opportunity for rehabilitation."¹⁵⁷ The court concluded by cautioning the trial court that the at-will rule as adopted in *Martin v. New York Life Insurance Co.*¹⁵⁸ was merely a rebuttable presumption.¹⁵⁹ "[T]he trier of facts [would] have to consider the 'course of conduct' of the parties, 'including their writings' and their antecedent negotiations."¹⁶⁰ It would not be McGraw-Hill's "subjective intent, nor 'any single act, phrase or other expression', but 'the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain', which [would] control."¹⁶¹

B. *The Dissent*

The dissent in *Weiner* argued that *Martin v. New York Life Insurance Co.*¹⁶² and almost a century of New York common law stood for the proposition that "absent some form of contractual agreement between an employee and employer establishing a durational period, the employment is presumed terminable at the will of either party"¹⁶³ The dissent reasoned that the presumption had not been rebutted in *Weiner* since it believed that as a matter of law no language contained in either the handbook or the employment application, read separately or together, evidenced an intent by the defendant to be bound by the contents of the handbook.¹⁶⁴ The dissent construed the company

156. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. *Weiner* also claimed that he was told that "if he did not proceed in accordance with the strict procedures set forth in the handbook, McGraw-Hill would be liable for legal action." *Id.* at 466, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

157. *Id.*

158. 148 N.Y. 117, 42 N.E. 416 (1895).

159. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 466, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

160. *Id.*

161. *Id.* at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

162. 148 N.Y. 117, 42 N.E. 416 (1895).

163. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

164. *Id.*

handbook as a document that merely espoused internal policy guidelines¹⁶⁵ which could be unilaterally amended or withdrawn.¹⁶⁶ Furthermore, according to the dissent, the application form did not spell out the critical terms of plaintiff's employment, the type of work, salary or duration.¹⁶⁷ The dissent disputed the plaintiff's contention that McGraw-Hill had also signed the application form in such a way as to bind itself to the terms of the handbook, noting:

It is evident from the layout of the form . . . that the signatures of the company officials were not part of the application and represent no contractual exchange between plaintiff and defendant. Those signatures and the statement that plaintiff [had been] employed [were], rather, nothing more than a memorialization of the hiring event for internal record keeping purposes.¹⁶⁸

The dissent concluded by stating that public policy weighed against elevating such documents to the level of contracts.¹⁶⁹ Making it more difficult for a business to dismiss an unsatisfactory employee, it argued, would create an unfavorable business climate and encourage business and industry to move out of the state.¹⁷⁰

V. Analysis

Aggrieved ex-employees in New York who believe they have been unjustly fired have had little success in bringing causes of action sounding in tort.¹⁷¹ Although New York courts have ex-

165. *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

166. *Id.*

167. *Id.* at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting). The dissent went on to observe, however, that a section of the application form captioned "Record of Employment" was filled in to indicate that Weiner was employed as a senior copywriter at a salary of \$15,000 per year. *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

168. *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

169. *Id.* at 468-69, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting). The dissent seemed to be responding to the majority's mention of policy considerations leading to agitation for modification of the at-will rule to provide greater job security.

170. *Id.* at 469, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

171. *See, e.g.,* *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979); *Marinzulich v. National Bank of N. Am.*, N.Y.L.J., May 10, 1979, at 10, col. 2 (Sup. Ct. N.Y. County, May 8, 1979), *aff'd*, 73

pressed a willingness to recognize the tort of abusive discharge given the proper circumstances,¹⁷² they have not yet done so or indicated exactly what those circumstances are. Plaintiffs alleging a prima facie tort have rarely been able to establish the exclusive motive of malice that is a necessary element of that tort.¹⁷³

Discharged employees have been equally unsuccessful in arguing breach of contract.¹⁷⁴ Although the effect of the one-year provision of the statute of frauds on employment contracts in New York is unclear, it has sometimes been a bar to the pleading of an oral contract of permanent employment.¹⁷⁵ As a further impediment, New York courts have been unreceptive to recognizing company documents as creating contractual rights.¹⁷⁶

The court of appeals, in allowing Weiner to go to trial on his breach of contract cause of action, reached the correct decision but failed to justify adequately its reasons for breaking with a century of precedent or to distinguish the case sufficiently from conflicting cases. The court's offhand dismissal of the statute of frauds issue is also troubling. Nevertheless, its conclusion that Weiner may have provided adequate consideration in the form of detrimental reliance to make binding McGraw-Hill's promise

A.D. 2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980).

172. See, e.g., cases cited *supra* note 171.

173. See, e.g., *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1074, 410 N.Y.S.2d 737, 740 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979). See *supra* notes 58-71 and accompanying text.

174. See, e.g., *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 824 (E.D.N.Y. 1980); *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1072-73, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979).

175. See, e.g., *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 60, 418 N.Y.S.2d 269, 270 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Savodnik v. Korvettes, Inc.*, 488 F.2d 822, 824 (1980). See *supra* notes 72-89 and accompanying text.

176. See, e.g., *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979). See *supra* notes 90-101 and accompanying text.

to discharge for just cause only is correct. The court's apparent reliance on the principle of equitable estoppel—implying that McGraw-Hill, having by its own words and actions led Weiner to believe that his employment was not at will, should be estopped from asserting that it was—is also correct.

The court's interpretation of the statute of frauds, allowing an unwritten contract which has any chance of being performed within a year to fall outside the statute's scope, was extremely narrow. Its interpretation of Weiner's rights, however, was vague, the court stating merely that the agreement "whether terminable at will or only for just cause [was] not one which, 'by its terms,' could not [have been] performed within one year. . . ."¹⁷⁷ The court's interpretation conflicts with prior cases. For instance, if either side was free to terminate at any time for any reason, according to *Blake v. Voight*,¹⁷⁸ the agreement definitely was capable of performance within a year. Weiner's case, however, rested on his contention that McGraw-Hill was *not* free to terminate for any reason but for just cause only. If Weiner alone could terminate within a year, then, under *Harris v. Home Indemnity Co.*,¹⁷⁹ the defendant's liability endured indefinitely, it being "illusory, from the point of view of defendant, to consider the contract terminable or performable within one year."¹⁸⁰ If McGraw-Hill could terminate for just cause only, then under the reasoning of *Belfert v. Peoples Planning Corp. of America*,¹⁸¹ this would be destruction of the contract, not performance or termination.¹⁸² Moreover, from all indications it is apparent that neither Weiner nor McGraw-Hill intended the agreement to be completed within a year and Weiner did in fact remain employed for eight years.

While the court of appeals relied on its interpretation of the agreement as being capable of performance within a year to

177. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 463, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 196 (quoting N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney 1978)).

178. 134 N.Y. 69, 31 N.E. 256 (1892).

179. 6 A.D.2d 861, 175 N.Y.S.2d 603 (1st Dep't 1958).

180. *Id.* at 861, 175 N.Y.S.2d at 604.

181. 22 Misc. 2d 753, 199 N.Y.S.2d 839 (Sup. Ct. N.Y. County 1959), *aff'd*, 11 A.D.2d 760, 202 N.Y.S.2d 101 (1st Dep't 1960), *aff'd*, 11 N.Y.2d 755, 181 N.E.2d 630, 226 N.Y.S.2d 693 (1962).

182. *Id.* at 755-56, 199 N.Y.S.2d at 842.

avoid the bar of the statute of frauds, special term had taken a different approach. Apparently conceding that the agreement could not be completed within a year and must therefore be in writing, special term focused on the application form which had been signed by Weiner and representatives of McGraw-Hill. It thus distinguished the case from *Edwards v. Citibank, N.A.*,¹⁸³ where the employee had received a similar handbook,¹⁸⁴ concluding that Edwards apparently had not signed a statement binding himself to its contents.¹⁸⁵ To make an agreement binding, however, the writings must be signed by the party to be bound.¹⁸⁶ Although the court of appeals mentioned special term's finding that Weiner had signed such a statement,¹⁸⁷ it did not deal with the issue of whether McGraw-Hill had signed it in such a manner as to make it binding upon itself. As the dissent correctly pointed out, it was "evident from the layout of the [application] form, then, that the signatures of the company officials were not part of the application and represent no contractual exchange between plaintiff and defendant."¹⁸⁸ In its sole reference to the McGraw-Hill signatures, the majority referred to them as only written approval to the engagement of Weiner's services.¹⁸⁹ It was remiss in not dealing with the disputed issue of whether those signatures bound McGraw-Hill to the terms of the handbook. It seems clear that while Weiner was agreeing to be bound by the terms of the company handbook, the McGraw-Hill signatures merely indicated approval of such things as his hiring, his starting salary and position.

The application form and company handbook, although they could properly be read together,¹⁹⁰ then, were not sufficient

183. 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

184. *Id.* at 60, 418 N.Y.S.2d at 270.

185. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 461, 443 N.E.2d 441, 443, 457 N.Y.S.2d 193, 195.

186. N.Y. GEN. OBLIG. LAW § 5-701 (a) (McKinney 1978).

187. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

188. *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

189. *Id.* at 461, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

190. *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 55, 110 N.E.2d 551, 554 (1953).

to create a binding contract between Weiner and McGraw-Hill. The court was correct, however, in allowing Weiner's breach of contract cause of action to go forward. The theories of detrimental reliance as a form of consideration and of equitable estoppel were sufficient to protect Weiner from termination except for just cause. Although the handbook and application form did not rise to the level of a contract, they created a reasonable reliance by plaintiff that he could not be discharged without cause. According to plaintiff's version of the facts, he had given up accrued fringe benefits and a proffered salary increase by his former employer when he joined McGraw-Hill and since then he had routinely rejected other offers of employment. Furthermore, under the facts as alleged, McGraw-Hill went so far by its own actions and statements to dispell the notion that the employment was at will that it should be estopped from asserting that it was. Again according to plaintiff, Weiner had told McGraw-Hill that job security was essential to him.¹⁹¹ Not only had company representatives assured him that he would have it,¹⁹² but the company handbook made the same promise.¹⁹³ Weiner signed an application form agreeing to be bound by the terms of the handbook.¹⁹⁴ Regardless of whether the application form was signed by defendant in such a manner as to make it binding on it, the fact that McGraw-Hill required Weiner to sign it must have impressed upon him the importance of the terms of the handbook with which he was promising to comply.

Finally, when Weiner considered firing certain subordinates he was warned to proceed in strict compliance with the company handbook.¹⁹⁵ Although Weiner may not have had a formal contract with McGraw-Hill as a result of the handbook, he was certainly justified in believing its representations that he could be fired for just cause only. An employer should not be permitted to go to such lengths to induce an employee to join it with the promise of job security only to assert that it is not bound by any

191. Weiner's Brief at 8, *Weiner v. McGraw-Hill, Inc.*, 83 A.D.2d 810, 442 N.Y.S.2d 11.

192. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

193. *Id.*

194. *Id.*

195. *Id.* at 466, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

of its oral or written representations.

The court wisely did not rule on the tort issues raised. Weiner did not appeal special term's order dismissing his second and third causes of action. Had he appealed, however, it is unlikely that he would have been able to show the absence of business motives necessary to allege a prima facie tort. Furthermore, the New York courts have long avoided specifically defining what allegations are necessary for the tort of abusive discharge. There were no allegations that Weiner was fired for engaging in the type of activities which have been recognized as being protected as a matter of public policy.

VI. Conclusion

The employment-at-will doctrine, which allows an employer to fire an employee at will, has generally been rigidly adhered to by New York courts. Disgruntled, discharged employees have thus been unsuccessful in advancing tort and contract theories of liability which would support claims against their employers arising from their terminations. In *Weiner v. McGraw-Hill, Inc.*, the plaintiff again presented the New York courts an opportunity to join other states in permitting a basis for liability in contract. The New York Court of Appeals modified the at-will rule by allowing Weiner to argue that his employer, by its words and actions, had limited its freedom to fire him in what would otherwise have been an employment-at-will situation.

The decision appears to mark a significant development in the law affecting employment practices in New York. A trial on the merits is now indicated in situations where previously an aggrieved employee would have had his case dismissed. Just how significant a change this represents may depend in part, however, on how Weiner fares at trial.¹⁹⁶ Based on the facts as presented, his case appears to be a strong one on the merits. If he cannot meet the burden of establishing a contractual right to be fired for just cause only, it is difficult to imagine what would be necessary to do so.

196. To prevail at trial, however, Weiner presumably will have to show not only that McGraw-Hill's representations created contractual rights but that he relied on such representations and that he was not in fact fired for just cause, i.e., "lack of application," as McGraw-Hill claimed.

The *Weiner* holding appears to be a narrow one in that it does not abandon the employment-at-will rule. Management's right to fire an incompetent employee remains. More importantly, management's right to fire an employee without just cause also appears to survive the *Weiner* decision. Only when an employer, by his own statements and actions, goes as far as McGraw-Hill apparently did in assuring an employee that his employment is not at will, will it be estopped from later asserting that it was.

Nevertheless, in spite of its possible practical limitation and narrow holding, *Weiner* marks a significant development in the law affecting employment practices in New York. Employers, fearing similar suits, will undoubtedly scrutinize not only their recruitment practices but other employment practices to safeguard against creating unintended contractual rights.¹⁹⁷

Although the *Weiner* holding itself is narrow, there are indications that further erosion of the employment-at-will doctrine is inevitable.¹⁹⁸ The court in *Weiner* pointed to increasing criticism of the doctrine for its harsh effects and to the trend toward recognizing causes of action sounding in both tort and contract. Mindful that such a further modification of the employment-at-will rule looms, employers undoubtedly will temper their actions to prevent discharged employees from prevailing in such suits if and when the tort is recognized. Thus management now has several additional legal principles to consider before making what previously would have been simply a business decision.

Ann Bickford

197. One almost certain result of *Weiner* will be that employers will revise their employee handbooks to avoid such promises of continued employment in the absence of just cause for dismissal.

198. Although lower courts in New York have indicated their willingness to recognize the tort of abusive discharge, the court of appeals does not appear to be ready to do so. Recently, in *Murphy v. American Home Prods. Corp.*, No. 83-35, slip op. (N.Y. Ct. App. Mar. 29, 1983), a case involving the discharge of a company assistant treasurer who had called management's attention to deviations from its internal accounting procedures, the court concluded that recognition of the tort of abusive discharge should be left to the legislature. *Id.* at 7, 8.