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## **New York: The Right to Discharge At-Will Employees Post Weiner**

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## NEW YORK: THE RIGHT TO DISCHARGE AT-WILL EMPLOYEES POST *WEINER*

*"The unilateral involuntary termination of employment is inherently unfair. It is the harshest act that an employer can take toward an employee."*<sup>1</sup>

### INTRODUCTION

For nearly a century, New York State common law upheld the unrestrained right of an employer to terminate the services of an employee who was not party to an express employment contract.<sup>2</sup> The decision in *Weiner v. McGraw-Hill, Inc.*<sup>3</sup> signaled a substantial change in the judiciary's analysis of at-will employment discharges.<sup>4</sup> The court of appeals held that the totality of the circumstances must be evaluated in order to determine whether an implied contract, between employer and employee, had been created and breached.<sup>5</sup> *Weiner* was hailed as a landmark decision that would enable employees in New York to secure the increased job security that had long evaded them.<sup>6</sup>

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1. *Cox v. Resilient Flooring Div. of Congoleum Corp.*, 638 F. Supp. 726, 737 (C.D. Cal. 1986).

2. *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895) is often cited as the initial New York case that recognized the right of either employer or employee to terminate their relationship at will. *See also* *Copp v. Colorado Coal and Iron Co.*, 20 Misc. 702, 46 N.Y.S. 542 (1897) (citing *Martin* as controlling); *Granger v. American Brewing Co.*, 25 Misc. 701, 55 N.Y.S. 695 (1899) (employer prevention of employee performance of at-will contract is not a breach); *Watson v. Gugino*, 204 N.Y. 535, 98 N.E. 18 (1912) (agreement to pay employee on a weekly basis is terminable at will); *Edwards v. Citibank*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (App. Div. 1980) (absent written contract fixing term of employment, employment is terminable at will).

3. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

4. It could be argued that the United States District Court led the way with *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980) (recognized tort claim for actions in contravention of public policy where employee alleged he was terminated solely to deprive him of pension benefits). *But see* *Murphy v. American Home Products Corp.*, 58 N.Y.2d 297, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (refusal to judicially create tort action for wrongful discharge where employee claimed he was discharged, inter alia, for disclosing alleged accounting improprieties by corporate personnel to top management).

5. 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

6. *See, e.g.,* Kauff and McClain, *Unjust Dismissal Update 1985, How to Evaluate, Litigate, Settle, and Avoid Claims*, PRACTICING L. INST. 58-61 (1985); H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* (1984) (*Weiner* cited in 13 separate sections of the text). *See also* Note, *Weiner v. McGraw-Hill, Inc.: Is Employment in New York Still at Will?* 3 PACE L. REV. 245 (1983).

Since *Weiner*, the legislative and judicial branches of the New York State government have been actively pursuing a redefinition of the rights of employers and employees in the non-contractual setting.<sup>7</sup> This Comment will identify and discuss the impact of those actions.

Examination of the principles which formed the basis of the at-will relationship is basic to fully appreciating the reasoning for the emerging changes.<sup>8</sup> Therefore, this Comment begins with a survey of the historical trail that at-will employment followed prior to *Weiner*. The facts and findings in *Weiner* are then detailed. This case is the genesis of the judiciary's creation of a modern standard<sup>9</sup> for analyzing at-will relationships.

A two-part analysis of post-*Weiner* activity ensues. Legislative action on the State and New York City levels is presented first. The impact of the judicial decisions handed down since *Weiner* follows. Additionally, the judicial response to courses of action other than breach of an implied contract is discussed. This Comment concludes with a projection of the foreseeable near-term actions to be taken by the legislative and judicial branches of the New York State government. It also examines those actions, favored by the author, that are not projected to be implemented in the near future.

## I. HISTORICAL TRAIL OF AT-WILL EMPLOYMENT

The foundation of at-will employment law in New York was based on the acceptance of Wood's rule,<sup>10</sup> which stated that a hiring for an indefinite period of time is terminable at the will of either the employer or the employee.<sup>11</sup> New York adopted this rule in *Martin v.*

7. See *infra* notes 49-95 and accompanying text.

8. As Justice Cardozo noted, "The rules and principles of case law have never been treated as final truths . . . for if the rules derived from a principle do not work well, the principle itself must ultimately be reexamined." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 23 (1921).

9. In fact, the court argued that this was merely a return to the *Martin* standard of a rebuttable presumption of at-will employment. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

10. Professor Wood's 1877 treatise was the first major American work to influence the subject of employment relationships. It rejected the English rule of presuming that a hiring was for a one year period. H. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* (1877).

11. The rule, in pertinent part states, "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if a servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." H. WOOD, *MASTER AND SERVANT* § 136 (2d ed. 1886).

*New York Life Ins. Co.*,<sup>12</sup> without discussing the highly questionable foundation upon which it was based.<sup>13</sup> Acceptance of this doctrine has been generally attributed to the strong public policy of encouraging economic development.<sup>14</sup>

Changing socioeconomic philosophy<sup>15</sup> on the national level led to significant restrictions in employment practices, which Congress enacted through numerous labor<sup>16</sup> and anti-discrimination<sup>17</sup> laws. The

12. 148 N.Y. 117, 42 N.E. 416 (1895) (employee was not entitled to the unpaid balance of his annual salary when discharged prior to the end of a fiscal year).

13. The dissent in *Murphy v. American Home Products Corp.*, 58 N.Y.2d, 293, 303, 448 N.E.2d 86, 93-94, 461 N.Y.S.2d 232, 247 (1983) (Meyer, J., dissenting in part) cited four reasons for questioning adoption of Wood's rule; (1) Wood had conceded in his treatise that, in England, a general hiring, i.e. at-will, is a hiring by the year; (2) *Adams v. Fitzpatrick*, 125 NY 124, 26 N.E. 143 (1891), was a better reasoned decision and it adopted the English rule; (3) the fact, documented at Annot., 11 A.L.R. 469, 476 that Wood's rule was not supported by any of the cases cited by him; and (4) the illogical conclusion that "permanent employment means nothing more than that the employment is to continue indefinitely and until one or the other of the parties wishes for some good reason to sever the relation." (citing *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 444, 164 N.E. 342, 344 (1928)).

14. "The preponderance of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is now scarcely open to criticism." 1 C. LABATT, *MASTER AND SERVANT* § 160 (1913). The Industrial Revolution changed the basic personalized relationship of master and servant to an impersonal, economic one. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980). See also Hermann & Sor, *Property Rights in One's Job: The Case for Limiting Employment At-Will*, 24 ARIZ. L. REV. 763 (1982); Krauskopf, *Employment Discharge: A Survey and Critique of the Modern At-Will Rule*, 51 UMKC L. REV. 189 (1983); Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982); Note, *Implied Contract Right to Job Security*, 26 STAN. L. REV. 335 (1974).

15. This change was propelled forward by the Depression in the 1930's. P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 138 (1980).

16. Major Federal Statutes include; Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1982) (prohibits wage, equal pay, and age discrimination and retaliation for instituting proceedings); National Labor Relations Act, 29 U.S.C. § 158(a)(3), (4) (1982) (prohibits termination for union or concerted activity or for instituting charges or giving testimony in proceedings); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1975) (prohibits termination to avoid vesting of pension rights); Railway Labor Act, 45 U.S.C. § 152 Fourth (1982) (prohibits interfering, influencing, or coercing employees from union activity or membership); Civil Service Reform Act of 1978, 5 U.S.C. § 7513(a) (1982) (prohibits discharge of federal civil servant for other than cause); and Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1982) (prohibits retaliatory termination for exercising rights under the Act).

17. The most far reaching statutes include: Equal Pay Act, 29 U.S.C. § 206(d) (1982) (prohibits discrimination in wages based on a person's gender); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) (prohibits discharge based on race, color, religion, sex, or national origin); the Age Discrimination in Employment Act, 29 U.S.C. § 623 (1982 & Supp. III 1985) (unlawful to discharge because of individual's age); Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) (prohibits discrimination against handicapped employees); and the Vietnam Era Veterans Readjustment Assistance Act of 1972, 38 U.S.C. §§ 2021, 2024 (1982) (entitling veterans to certain rights of reemployment).

effect of this legislation has been to greatly diminish the percentage of the workforce that truly could be considered at-will employees.<sup>18</sup> New York State has also enacted legislation that further reduces the scope of the at-will employee designation.<sup>19</sup> These federal and state laws reflect legislative recognition that there was a public policy necessity for limiting an employer's previously unbridled right to discharge an employee for any reason at all.<sup>20</sup> This resulted in public employees, private unionized employees, and specially identified discriminated classes<sup>21</sup> gaining statutory protection from termination of their employment, except for just cause. This has led to an artificial creation of both "protected" and "unprotected" groups of employees.<sup>22</sup> The court of appeals noted this trend of recognizing greater employee protection from arbitrary discharge<sup>23</sup> and started on the path toward bringing New York common law into step with its decision in *Weiner*.<sup>24</sup>

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18. See, e.g., U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 424 (1985) (in 1980, 25% of the labor force was covered by the Labor Management Relations Act).

19. Major New York State statutes include: Human Rights Law, N.Y. EXEC. LAW, § 296 (McKinney 1982 & Supp. 1987) (prohibits termination based on race, color, religion, national origin, sex, or handicap or for filing or testifying on behalf of a complaint); New York Labor Relations Act, N.Y. LAB. LAW § 704(2), (5), (8), (10) (McKinney 1977) (prohibits termination for union activity or for instituting or testifying on behalf of a complaint); Minimum Wage Act, N.Y. LAB. LAW § 662(1) (McKinney 1977 & Supp. 1987) (prohibits termination for filing or testifying on behalf of a complaint concerning wages and hours); Worker's Compensation Law, N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1987) (prohibits termination for filing or testifying on behalf of a worker's compensation claim); and Judiciary Law, N.Y. JUD. LAW § 532 (McKinney 1975) (prohibits termination for answering a summons to serve as a juror).

20. The House Report on the Civil Rights Act of 1964 demonstrates this concern. "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. REP. NO. 914, 88th Cong., 1st Sess. 1, 18 (1963).

21. These classes, which have been deemed to have received disparate treatment in the workforce include, inter alia, females, minorities, handicapped persons, and Vietnam Era veterans.

22. This dichotomy is pronounced in New York State as 56.9% of the public sector is unionized and 31.2% of the private workforce is unionized. L. TROY, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE, FINANCE, DIRECTORY (1985) (table 7.6).

23. It was recognized that there is "an ever growing trend toward statutory and judicial rejection of the traditional employment at-will common law rule." *Weiner*, 57 N.Y.2d 458, 463, 443 N.E.2d 441, 443, 457 N.Y.S.2d 193, 195 (quoting Feerick, *Employment At-Will Rule and Unjust Dismissal*, NYLJ, Aug. 6, 1982, at 1, col. 1).

24. *Weiner*, 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

## II. WEINER v. MCGRAW-HILL, INC.

*Weiner* presented an opportunity for the court of appeals to reevaluate whether, in the absence of an express employment contract for a specific period of time, an individual could successfully litigate a cause of action for breach of an implied contract.

Mr. Weiner was actively recruited by McGraw-Hill with guarantees that the company had a "firm policy . . . not to terminate employees without just cause"<sup>25</sup> and thereby guarantee him job security. He completed, with signature, an application that committed him to be bound by the terms of McGraw-Hill's Employee Handbook on Personnel Policies and Procedures.<sup>26</sup> Upon joining the company, he was issued the handbook which contained the statement that "the company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed."<sup>27</sup>

Mr. Weiner worked for the company for eight years, during which time he was promoted and given salary increases in recognition of his successful performance.<sup>28</sup> During the course of his employment, he disciplined and recommended discharge for employees whom he supervised. In each instance he was advised by upper management that he was required to follow the progressive discipline system, as detailed in the handbook.<sup>29</sup> Relying on these reinforcements of McGraw-Hill's "just cause" discharge policy and his own career progression, he routinely rejected offers of employment from other companies.<sup>30</sup> After being employed by McGraw-Hill for eight years, Weiner was abruptly discharged without prior warning for "lack of application."<sup>31</sup>

The court restricted its decision to the implied contract issue, rejecting consideration of other claims based in theories of abusive dis-

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25. *Id.*

26. Weiner was required to sign 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." Plaintiff's Exhibit A, Employment Application, Record at 66A. (available in Touro Law School Library).

27. *Weiner*, 57 N.Y.2d at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 194.

28. *Id.* at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

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

30. *Id.* at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

31. *Id.*

charge, implied promise of fair treatment, and good faith.<sup>32</sup> The court also disposed of the company's defense based on the Statute of Frauds. It held that the agreement was not one which, "whether terminable at will or only by just cause . . . could not be performed within one year . . . ."<sup>33</sup>

The court then discussed the sufficiency of the consideration and the satisfaction of its concept of mutuality.<sup>34</sup> Having found the basic elements necessary to form an existent contract, it then found that the circumstances of Weiner's employment taken as a whole sustained a finding of an implied contract of employment.<sup>35</sup> The court of appeals, in order to mitigate the effect of seeming to have taken a radical departure from common law, emphasized that it had continued to follow the principles enunciated in *Martin*<sup>36</sup> and expanded upon in *Brown Bros. Elec. Contr. v. Beame Const.*<sup>37</sup>

The dissenting opinion in *Weiner* specifically found that McGraw-Hill had not, either explicitly or through implication, intended to be bound.<sup>38</sup> Its analysis weighed each element of the evidence and concluded that, taken either independently or as a whole, there was no implied contract.<sup>39</sup> The dissent found that McGraw-Hill merely intended the documents to be broad policy guidelines which were subject to company revision or elimination.<sup>40</sup> It further addressed itself

32. *Id.* "[B]ecause we hold that plaintiff's complaint spelled out a cause of action in contract, this case does present the occasion to address these theories." *Id.* at 461 n.2, 443 N.E.2d at 443, n.2, 457 N.Y.S.2d at 194 n.2.

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

34. *Id.* "[A] search for 'mutuality' . . . is not always essential to a binding contract, rather . . . determine the presence of consideration, which is a fundamental requisite." *Id.* at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

35. *Id.* "We find in the record . . . sufficient evidence of a contract and a breach to sustain a cause of action." *Id.* at 465, 443 N.E.2d at 445, 47 N.Y.S.2d at 197.

36. 148 N.Y. 117, 43 N.E. 416 (1895) (existence of an at-will relationship is merely a rebuttable presumption). In *Martin*, the court found a total lack of evidence to support such a rebuttal. *Id.* at 120, 42 N.E. at 417.

37. 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1970) (it is "the totality of all of these, given the attendant circumstances, the situation of the parties and the objectives they were striving to attain," *id.* at 400, 361 N.E.2d at 1001, 393 N.Y.S.2d 352).

38. *Weiner*, 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

39. *Id.* It was error to find that the "statement in the personnel manual . . . that employees would be dismissed 'for just and sufficient cause only,' together with a reference to the manual in a printed application . . . constitutes an agreement by defendant to employ him 'for the remainder of his working life.'" *Id.*

40. *Id.* The manual "is nothing more than a conglomerate of broad internal policy guidelines generally followed, none of which even slightly portend to enumerate the essential elements of a contract of employment . . . ." 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199.

to public policy considerations to which it felt the majority should have given greater weight.<sup>41</sup>

The first public policy concern noted was that recognizing exceptions to the at-will doctrine would have a chilling effect on the freedom employers perceived they had to discharge employees for unsatisfactory performance.<sup>42</sup> Employers would thus retain incompetent employees out of fear of costly litigation that would result if the employers were to discharge them. This concern has proved unfounded in other countries that have adopted statutory limitations to at-will discharge.<sup>43</sup>

The experience has been quite dissimilar in the states that have created common law exceptions to the at-will relationship.<sup>44</sup> The majority predicted increased productivity through clearer performance and disciplinary standards. This increased productivity, however, has been more than offset by the growth in litigation that has resulted.<sup>45</sup>

The dissent was also concerned with the negative effect such limitations would have on the maintenance and possible growth in the number of jobs within the state.<sup>46</sup> It reasoned that given the added constraints on discharge, companies would move out of the state to more employer-oriented locales, causing increased unemployment.<sup>47</sup> This consequence has been largely disproved in the four years follow-

41. *Id.*

42. See Note, *Committee on Labor and Employment Law, At-will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170 (1981).

43. See E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA, 131-57 (1979) (encouragement of a more cohesive workforce through employee protection); G. HALLETT, THE SOCIAL ECONOMY OF WEST GERMANY, 90 (1973) (statutory employee protection promotes greater worker efficiency); See also B. Aaron, Remarks at the Oxford/BNA Symposium on Comparative Industrial Relations (Aug. 3-17, 1983), reprinted in DAILY LAB. REP. (BNA) No. 170, at D-1 to D-4 (Aug. 31, 1983) (The Employment Appeal Tribunal is an effective mechanism for curbing employer abuses in England); Note, *Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform*, 16 ALTA. L. REV. 470, 495 (1978) (describing reasons for enactment of Canada's unjust dismissal statute, Canada Labour Code, 5 CAN. REV. STAT. ch. L-1 (1978)).

44. Federal Judge J. Spencer Letts has stated, "it is clear that these four cases are only a trickle taken from the major flood of such cases which are inundating courts all over California and in many other states." *Cox v. Resilient Flooring Div. of Congoleum Corp.*, 638 F. Supp. 726, 735 (C.D. Cal. 1986).

45. *Id.* Describing the current state of affairs, the court notes, "the apparent response has been the development of a 'disemployment industry' comprised of lawyers and personnel administrators whose sole job function is to assure that each and every termination of employment can be defended against later legal attack. The development of such an industry in response to actions by courts serves no one's legitimate interests." *Id.* at 736.

46. *Weiner*, 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

47. *Id.*

ing the decision.<sup>48</sup> However, as discussed below, *Weiner* did result in increased activity in the legislature and in the courts.

### III. GOVERNMENTAL ACTION

#### A. Legislative Response

The limited reach of *Weiner*<sup>49</sup> in restraining employers from discharging at-will employees was narrowed further by the holding in *Murphy v. American Home Products, Corp.*<sup>50</sup> This decision held that New York common law does not recognize the tort of wrongful discharge.<sup>51</sup> Responsibility for creation of such a legal right and the remedies available was cited as most appropriate for the legislature to address.<sup>52</sup>

The legislature responded in 1984 to this challenge with the enactment of a "whistleblower" law.<sup>53</sup> This law protects from discharge employees who disclose or threaten to disclose to a governmental official any activity, policy, or practice of a private employer that is in violation of any law, rule, or regulation and poses a substantial and specific danger to public health or safety.<sup>54</sup> This protection was extended to public employees through modification of the Civil Service Law.<sup>55</sup> Two significant restrictions were included. First, the employee must notify the employer of the perceived violation and allow a reasonable time for its correction.<sup>56</sup> Second, seeking redress under

48. In New York State, the unemployment rate between January 1, 1983 and July 31, 1986 fell from 8.6% to 6.2% and total employment increased from 7,122,000 to 8,054,000. OCCUPATIONAL NEEDS IN THE 1980's, NEW YORK STATE 1987-89 (1986).

49. See *supra* note 32 and accompanying text.

50. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

51. *Id.* at 297, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. Modern acceptance of the wrongful discharge concept is based on three common law theories: implied contract, *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); breach of implied covenant of good faith and fair dealing, *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251, (1977); and acts contrary to public policy, *Petermann v. Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

52. *Murphy*, 58 N.Y.2d at 297, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. See also *Cox*, 638 F. Supp. at 736 ("Rules designed for general application in this regard must come from the legislature . . .").

53. N.Y. LAB. LAW § 740 (McKinney 1984).

54. *Id.*

55. N.Y. CIV. SERV. LAW § 75-b (McKinney 1984).

56. *Id.*

this law would preclude the availability of remedies through any other forum.<sup>57</sup>

Additional legislation<sup>58</sup> was passed in 1985 that increased the penalties available against employers who discharge employees in retaliation for filing complaints alleging Labor Law violations.<sup>59</sup> This increase was deemed necessary because the previous penalties were too small to be an economic deterrent, nor did they provide for imprisonment in appropriate situations. The bill also allowed civil action by the employee.<sup>60</sup> Also introduced was an amendment to the 1984 "whistleblower" law.<sup>61</sup> Employees would be protected from reporting suspected violations of the public trust which do not present a danger to the public health or safety.<sup>62</sup> Bringing the suspected violation to the attention of the news media would also be protected.<sup>63</sup> Finally, the provision requiring selection of this cause of action as the exclusive avenue of redress would be eliminated.<sup>64</sup>

The legislature has proposed additional protections in the public interest. Licensed professionals would have been protected from discharge in retaliation for refusing to engage in conduct which would constitute professional misconduct by allowing them to commence a civil action to obtain damages and reinstatement with back pay.<sup>65</sup> Governor Cuomo's veto message<sup>66</sup> expressed concern that "enactment of this legislation could result in disruption in the workplace, which, particularly in the health care environment, could result in

57. *Id.* Attorney General Robert Abrams, Law Dep't Memorandum #132 (1985) (the Supreme Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), found public policy to be against an election of remedies where employee rights are involved).

58. Assembly Bill 2856-A, B (1985) The existing Labor Law § 215 provided for fine of at least \$50 and not more than \$500. This bill increased the fine to at least \$200 and not more than \$2000. A higher fine might have decreased the amount the aggrieved employee would receive, thus improperly channeling a part of an award to the state.

59. The most common complaints include improper payment of wages, Minimum Wage Act, N.Y. LAB. LAW § 662(1) (McKinney 1977 & Supp. 1987), and improper treatment based on employee's union activity, New York Labor Relations Act, N.Y. LAB. LAW § 704(2), (8), (10) (McKinney 1977).

60. Discharged employee will have a cause of action for reinstatement, back pay, damages, and reasonable attorney's fees. Lee Smith, Supporting Memorandum, Assembly Bill 2856-A (1985).

61. Assembly Bill 6945-A (1985).

62. *Id.* at 2.

63. *Id.*

64. *Id.* This would eliminate the concern that a selection of remedies is contrary to public policy in this situation.

65. Assembly Bill 6610-A, B (1983) (vetoed by Governor Cuomo).

66. Exec. Memorandum #48 (1983).

loss of life, if an employee refused to perform an assignment because of his or her perception of applicable ethical standards."<sup>67</sup>

New York City has added to the protection of city employees by prohibiting retaliatory discharge for "making a report of information concerning conduct which he or she knows or reasonably believes to involve corruption, criminal activity or conflict of interest by another city officer or employee."<sup>68</sup> Additionally, discrimination in employment, by either public or private sector employers, on the basis of sexual orientation, has been prohibited.<sup>69</sup>

To date, the legislation that has been enacted has had vocal and political lobbies to pressure for its passage. The effect has been to encourage employees to act in the public interest by exposing questionable activities by their employers.

## B. *The Judicial Response*

The actions by the legislature served as a sign to the judiciary that movement in the common law toward a more compatible standard was favored. In this light, the courts have been fulfilling their mandate, albeit at a metered pace.<sup>70</sup>

### 1. Implied Contracts

The cases that have followed *Weiner* have given dimension to its holding. The issue of how and when the Statute of Frauds will act as a bar to employment discharge claims has been analyzed in subsequent cases. In *D & N Boening v. Kirsch Beverages, Inc.*<sup>71</sup> and *Cun-*

67. *Id.*

68. New York City Local Law 10 (1984).

69. New York City Local Law 2 (1986) and implementing Executive Order 94 (June 19, 1986) (empowering the city to cancel contracts with companies that discriminate in hiring).

70. The several actions by the legislative bodies is in contrast to the executive branch's position on altering at-will relationships. Governor Cuomo has supported the legislature's creation of protection for employees who come forward to report suspected violations of public policy by their employers. Cuomo, Annual Message to the Legislature 10-11 (1984). However, he has been hesitant to further limit the at-will relationship and has ordered full investigations into the ramifications of any additional legislation that has been proposed. The Annual Messages to the Legislature have documented the executive branch's priority of producing the most conducive business environment possible. Cuomo, Annual Message to the Legislature (1985). Adding constraints on terminating employees at will is in direct conflict with this objective. Thus, there has been no executive branch support for additional limitations to the at-will employment standards.

71. 63 N.Y.2d 447, 472 N.E.2d 992, 483 N.Y.S.2d 164 (1984) (agreement was for relationship to continue for as long as plaintiffs' performance was satisfactory, they gave their best effort, and they acted in good faith).

*nison v. Richardson Greenshields Securities, Inc.*,<sup>72</sup> the courts held that the terms of the alleged agreements were not capable of being performed within one year. In *D & N Boening*, the agreement was to continue in effect unless there was a breach of contract and in *Cunnison* the claim was for breach of a five-year oral agreement.

These cases have been distinguished from *Weiner* in that McGraw-Hill retained the right to discharge an employee for just cause.<sup>73</sup> Having retained this right, the implied contract was capable of being performed within one year. This distinction provided adverse parties with the legal arguments on which to base their claim.<sup>74</sup>

However, in *Ohanian v. Avis Rent a Car System, Inc.*,<sup>75</sup> a federal district court upheld a verdict that found that the company was bound by its representations of lifetime employment, even though the court noted that the company had retained the right to discharge the employee, at any time, as part of a reduction in its work force during an economic downturn and that the agreement was capable of being performed within one year. This holding sharply curtailed the use of the Statute of Frauds as a valid defense in future diversity cases. On the state level, the resolution of these fine distinctions, where the court must determine whether the contract is performable within one year, must await further judicial interpretation.

The New York State courts have also had the opportunity to differentiate between the significance of oral representations and different types of written representations. Claims based solely on oral statements have been uniformly dismissed.<sup>76</sup> The courts will not

72. 107 A.D.2d 50, 485 N.Y.S.2d 272 (App. Div. 1985) (employee was terminated shortly after being relocated by employer to a different branch).

73. In *D & N Boening*, the court noted that, in *Weiner*, McGraw-Hill had reserved the right to terminate an employee for the welfare of the company. 63 N.Y.2d at 456, 472 N.E.2d at 994, 483 N.Y.S.2d at 166. In *Cunnison*, the court stated, "[p]laintiff's reliance on *Weiner* . . . is misplaced. There, no statute of frauds issue was presented." 107 A.D.2d at 55, 485 N.Y.S.2d at 277.

74. Thus, opposing counsel argue either the contract was terminable within one year based on just cause or that the relationship was a long-term agreement terminable only for breach.

75. *Ohanian v. Avis Rent-a-Car System*, 779 F.2d 101 (2d Cir. 1985) (the Statute of Frauds is "an anachronism today"). *Id.* at 102. This decision demonstrates the federal court's willingness, while following state precedent, to extend the state court's reasoning a step beyond actual state holdings.

76. *Toshiba America, Inc. v. Simmons*, 104 A.D.2d 649, 480 N.Y.S.2d 28 (App. Div. 1984) (oral promise to treat employees fairly does not establish an implied contract); *Hager v. Union Carbide Corp.*, 106 A.D.2d 348, 483 N.Y.S.2d 261 (App. Div. 1984) (no implied contract where employee relocated in reliance upon promise of employment); *Greaney v. Prudential-Bache Securities, Inc.*, N.Y.L.J., Feb. 4, 1985, at 14, col. 2 (N.Y. Sup. Ct. Feb. 3, 1985) (promises to employee not documented in either handbook or application); *O'Connor v. Eastman Kodak Co.*, 65 N.Y.2d 724, 481 N.E.2d 549, 492 N.Y.S.2d 9 (1985) (no handbook relied

transform an at-will relationship into a contractual one absent tangible evidence of the employer's intent to be bound.<sup>77</sup> This hesitation has been less prevalent, however, when written documentation of assurances can be shown to have been relied upon by the employee.<sup>78</sup> One result has been the increase in corporate attention to revision of written policies and procedures.

Cases such as *Colvin v. Eastern Air Lines*<sup>79</sup> and *Citera v. Chemical New York Corp.*,<sup>80</sup> have found a triable issue present when a company manual, handbook, or explicit letter is specific in limiting the right of the employer to discharge an at-will employee. The courts consistently find that an employee could reasonably rely on these documents and therefore hold the company to its written word. Exceptions to this limitation exist when the documents do not contain a detailed progressive disciplinary program, but rather a general policy of the company.<sup>81</sup> This has produced harsh results in cases where it was shown that the employee relied on representations made by the company which could reasonably be interpreted as an assurance of continued employment.<sup>82</sup> This line of cases, dealing with written documents, has demonstrated the court's inchoate willingness to place restrictions on the at-will relationship based on implied contractual terms.<sup>83</sup>

In two recent cases, the Second Circuit has expansively interpreted the reach of the court of appeals' findings in *Weiner*. In *Gorrell v. Icelandair/Flugleidir*,<sup>84</sup> pilots were discharged under a newly adopted company rule that required termination at age 60. Prior to the adoption of this rule, the company operations manual had provided for termination at age 63, provided employees continued to pass the regularly required physical examinations. The court found

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upon for promise of continued employment); and *Silver v. NL Industries*, No. 82-6875 (S.D.N.Y. Apr. 19, 1984) (promise of promotion does not alter at-will relationship); *Patrowich v. Chemical Bank*, 98 A.D.2d 318, 470 N.Y.S.2d 599 (App. Div.), *aff'd*, 63 N.Y.2d 541, 473 N.E.2d 11, 483 N.Y.S.2d 659 (1984) (handbook contained no provisions limiting reasons for discharge).

77. *Id.*

78. See *infra* notes 79-81 and accompanying text.

79. 92 A.D.2d 908, 460 N.Y.S.2d 483 (App. Div. 1983).

80. 105 A.D.2d 636, 481 N.Y.S.2d 694 (App. Div. 1984). See also *Tiranno v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (App. Div. 1984) (personnel manual contained disciplinary procedures which created a triable issue).

81. *O'Connor v. Eastman Kodak Co.*, 65 N.Y.2d 724, 481 N.E.2d 549, 492 N.Y.S.2d 9 (1985) (as opposed to *Weiner*, employee relied upon the "popular perception of Kodak as a 'womb to tomb' employer . . .," *id.* at 725, 481 N.E.2d at 550, 492 N.Y.S.2d at 10).

82. *Hager v. Union Carbide Corp.*, 106 A.D.2d 348, 483 N.Y.S.2d 261 (App. Div. 1984).

83. See *supra* note 80 and accompanying text.

84. 761 F.2d 847 (2d Cir. 1985).

that the manual had created a binding contract. However, this case did not contain the other factors presented by *Weiner*. The decision concluded that *Weiner* "stands for the proposition that the merits of a claim . . . are not to be determined by application of a formula or checklist; instead, the totality of facts giving rise to the claim must be considered."<sup>85</sup>

Similarly, in *Wakefield v. Northern Telecom, Inc.*,<sup>86</sup> a salesman was terminated without being paid commissions that had been earned under a written sales incentive plan. The plan required an employee to be with the company at the time the commissions were payable.<sup>87</sup> The court found that the salesman had a right to show that he had been discharged in an attempt to avoid payment.<sup>88</sup> The obligation from the implied covenant of good faith under the sales incentive plan was distinguished from an implied covenant of good faith not to terminate an at-will employee. This decision followed *Murphy's* refusal to recognize this cause of action for discharge claims while leaving open the possibility that a limited cause of action for breach of an implied obligation of good faith may be available where benefit plans or other employment agreements attain contractual significance.<sup>89</sup>

## 2. Tort Claims

It was initially understood that the decision in *Chin v. American Telephone and Telegraph Co.*<sup>90</sup> indicated that the courts would recognize a cause of action for the tort of wrongful or abusive discharge.<sup>91</sup> In *Savodnik v. Korvettes, Inc.*, the federal district court cited *Chin* to support its finding of a tort of abusive discharge in subsequent pension cases.<sup>92</sup> *Murphy v. American Home Products Corp.*,<sup>93</sup> however, rebuffed judicial development of this tort. The plaintiff claimed that he was discharged because he had informed senior management that other employees were engaged in a variety

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85. *Id.*

86. 769 F.2d 109 (2d Cir. 1985).

87. *Id.* at 110.

88. *Id.*

89. *Id.*

90. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), *aff'd*, 70 A.D.2d 91, 416 N.Y.S.2d 160 (App. Div.), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979).

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

92. 488 F. Supp. 822 (E.D.N.Y. 1980) (deprivation of pension benefits only reason for discharge); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981) (employee terminated solely to reduce pension benefits).

93. See *supra* notes 50-52 and accompanying text.

of illegal accounting manipulations. The court, while taking note of the trend in other jurisdictions of recognizing this cause of action in tort, rejected the claim in its entirety.<sup>94</sup> The record has been consistent since the *Murphy* decision.<sup>95</sup> There has not been a single successful claim for wrongful or abusive discharge in either the federal or state courts.

### 3. Additional Actions

Twenty-six states<sup>96</sup> and the District of Columbia<sup>97</sup> have recognized an implied contract exception to the at-will employment doc-

94. *Murphy*, 58 N.Y.2d at 297, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. (creation of this cause of action must come from the legislature).

95. *Marino v. New York Life Ins. Co.*, 94 A.D.2d 792, 462 N.Y.S.2d 1017 (App. Div. 1983) (motion to amend complaint to include cause of action for abusive discharge was denied); *O'Donnell v. Westchester Community Service Council*, 96 A.D.2d 885, 466 N.Y.S.2d 41 (App. Div. 1983) (New York does not recognize tort of abusive or wrongful discharge); *Supan v. Michelfeld*, 97 A.D.2d 755, 468 N.Y.S.2d 384 (App. Div. 1983) (tort of abusive discharge requires pleading of special damages); *Silver v. Mohasco Corp.*, 94 A.D.2d 820, 462 N.Y.S.2d 917 (App. Div. 1983), *aff'd*, 62 N.Y.2d 741, 465 N.E.2d 361, 476 N.Y.S.2d 822 (1984) (plaintiff failed to allege facts to support cause of action); *Pedone v. Avco Fin. Services of New York*, 102 A.D.2d 885, 476 N.Y.S.2d 933 (App. Div. 1984) (*Murphy* cited as controlling).

96. *Scott v. Lane*, 409 So.2d 791 (Ala. 1982) (contract created by promise of employment and change of position); *Leikvold v. Valley View Community Hospital*, 141 Ariz. 544, 688 P.2d 170 (1984) (handbook limits at-will relationship); *Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982) (employer's statements alters at-will relationship); *Brooks v. Trans World Airlines*, 574 F. Supp. 805 (D. Colo. 1983) (handbook created an implied contract); *Jackson v. Minidoka Irrigation*, 98 Idaho 330, 563 P.2d 54 (1977) (handbook is enforceable limitation on at-will relationship); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982) (recognized cause of action for breach of employer's representations); *Pepsi-Cola General Bottlers v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982) (employee reasonably relied on employer's assurances when changing jobs); *Rouse v. Peoples Natural Gas Co.*, 605 F. Supp. 230 (D. Kan. 1985) (employer's statements restricted freedom to discharge at-will); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. Ct. App. 1983) (tort of wrongful discharge permitted as cause of action); *Terrio v. Millinocket Community Hospital*, 379 A.2d 135 (Me. 1977) (employer's statement altered at-will relationship); *Pinne River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (employer held to terms in handbook); *Sartin v. Columbus Util. Comm'n*, 421 F. Supp. 393 (N.D. Miss. 1976) (written retirement plan may give rise to creation of a contract); *Arie v. Intertherm*, 648 S.W.2d 142 (Mo. Ct. App. 1983) (handbook terms are binding on the employer); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983) (at-will relationship modified by handbook); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (Nev. 1983) (terms in handbook binding on employer); *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985) (terms of personnel manual enforceable against employer); *Hernandez v. Home Educ. Livelihood Program*, 98 N.M. 125, 645 P.2d 1381, *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (employer bound by oral promises); *Bennet v. Eastern Rebuilders*, 52 N.C. 579, 279 S.E.2d 46 (1981) (employee terminated after reliance on employer's assurances of continued employment has a cause of action); *Hammond v. North Dakota State Personnel Board*, 345 N.W.2d 359 (N.D. 1984) (employer liable for breach of assurances to employee of continued employment);

trine. Written documents, as well as oral commitments, have been found to create the basic agreement. New York courts should consider giving greater weight to oral statements which an employee has reasonably relied upon. The judiciary has a responsibility to respond to the modern socio-economic principles of increased job security.

Six other states<sup>98</sup> have recognized a cause of action for breach of an implied covenant of good faith and fair dealing. Nine additional states<sup>99</sup> have found a cause of action for wrongful or abusive discharge in regard to terminations that violated public policy. New York courts are obliged to review their consistent refusal to recognize these causes of action, not only as a result of the above noted decisions, but also in response to the legislature's indication that exposure of public policy violations should be encouraged. It should also recognize that the concern of Judge Wachtler (now Chief

Weaver v. Shopsmith, Inc., 556 F. Supp. 348 (S.D. Ohio 1982) (violation of employer's assurances actionable); Vinyard v. King, 728 F.2d 428 (10th Cir. 1984) (handbook terms restrict employer's right to discharge at-will employees); Osterkamp v. Alkota Mfg., 332 N.W.2d 275 (S.D. 1983) (breach of employer's assurances actionable); Gee v. Federal Express Corp., 710 F.2d 1181 (6th Cir. 1983) (employer's rights limited by handbook statements); Sea-Land Service v. O'Neal, 224 Va. 343, 297 S.E.2d 647 (1982) (employer breached its assurances of employment); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (terms of handbook enforceable against employer).

97. Hodge v. Evans Fin. Corp., 707 F.2d 1566 (D.C. Cir. 1983) (employer may not violate its own statements modifying at-will relationship).

98. Conway Inc. v. Ross, 627 P.2d 1029 (Alaska 1981) (court enforced implied covenant of good faith and fair dealing); Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982) (recognized covenant of good faith and fair dealing); Mag-nan v. Anaconda Indus., 37 Conn. Supp. 438, 429 A.2d 492 (1980) (covenant of good faith and fair dealing applied to employment relationship); Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977) (implied covenant of good faith and fair dealing enforceable); Chamberlain v. Bissell, 547 F. Supp. 1067 (W.D. Mich. 1982) (employer liable for negligently failing to provide written support of employee's unsatisfactory performance); Gates v. Life of Montana Ins. Co., 668 P.2d 213 (Mont. 1983) (court recognized cause of action for breach of covenant of good faith and fair dealing).

99. Smith v. Piezo Technology & Professional Adm'r, 427 So. 2d 182 (Fla. 1983) (retaliatory discharge for filing worker's compensation claim is actionable); Parnar v. Americana Hotels, 65 Hawaii 370, 652 P.2d 625 (1982) (discharge for failure to violate antitrust laws is actionable); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (prohibited termination in violation of public policy); Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980) (covenant of good faith and fair dealing applied to public policy violation); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (use of discharge to curb free speech is a public policy violation); Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. Ct. App. 1984), *aff'd*, 687 S.W.2d 733 (1985) (retaliatory discharge for refusal to violate federal law is actionable); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979) (retaliatory discharge for refusal to violate public policy may be actionable); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (employee cannot be discharged in attempt to avoid public policy); Brockmeyer v. Dun & Bradstreet, 109 Wis. 2d 44, 325 N.W.2d 70 (1982), *aff'd*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (discharge in violation of public policy is actionable).

Judge) that industry would move out of state<sup>100</sup> has been largely disproven by the universal acceptance by neighboring states of strong limitations on the freedom to discharge at-will employees.

Several proposals have been offered which would address the apparent need for a statutory scheme to unify the judicial patchwork that has developed. South Dakota's statute which presumes that employment is for a one month period in the absence of a written agreement is an important first step but it does not fully address this issue.<sup>101</sup>

The most noted proposal has been offered by Professor Summers<sup>102</sup> who has encouraged enactment, on the state level, of legislation that would prohibit termination of employees under an unjust dismissal standard.<sup>103</sup> This standard would be drawn from the experience of labor arbitrations.<sup>104</sup> While detailed in many of the issues that would need to be considered, this proposal goes too far in subjecting every discharge to a complex and costly procedure.<sup>105</sup>

Another proposal would prohibit terminations except for just cause.<sup>106</sup> This proposal, while not as detailed as that of Professor Summers, contains the same drawbacks of reach and expense.<sup>107</sup> One of the most promising proposals utilizes statutory protection coupled with arbitration.<sup>108</sup> This proposal recommends that states legislatively protect employees who report violations of law by their employer, but that terminations for other reasons be subject only to arbitration.<sup>109</sup> This alternative method of resolving discharge contests has also been forwarded in a subsequent article.<sup>110</sup> Adoption of

100. *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 467, 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (Wachtler, J., dissenting).

101. S.D. CODIFIED LAWS ANN. § 60-1-3 (1978).

102. C. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

103. *Id.*

104. *Id.* The current state-created panels of arbitrators for labor-management disputes that exist in several states could be drawn upon. *Id.* at 522.

105. *Id.* The proposal would require judicial review, a judicially based hearing procedure, and the right to employ an attorney. *Id.* at 528-29.

106. Note, *Reforming At-Will Employment Law: A Model Statute*, 16 J. L. REFORM 389, 417 (1983).

107. *Id.* This proposal utilizes the court system for complaint filing, arbitrator/mediator appointment, and appeal. *Id.* at 417-20.

108. Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982).

109. *Id.* at 83-86. This article also provides an in-depth analysis of the judicial role. *Id.* at 86-87.

110. Hunt, *Wrongful Discharge: A Statute For The Year 2000?*, 36 THE JOURNAL OF THE COLLEGE & UNIVERSITY PERSONNEL ASSOCIATION No. 2 (1985).

mediation-arbitration statutes could incorporate cost/time constraints to make the process more acceptable to employers and more accessible to employees.<sup>111</sup>

## CONCLUSION

It is important to recognize the employer's legitimate need for the authority to discharge at-will employees for just cause. However, employer abuse of this right must be strongly curtailed.

The executive branch has made its intention of accommodating the interests of increased business activity a cornerstone of its economic development program.<sup>112</sup> Continued firm resistance to restricting employer freedom to discharge at-will employees should be expected.

The legislature has taken action since *Weiner* and can be expected to continue to seek improved protection for both private and public workers. The "whistleblower" law was an important first step in extending this protection. The reach of this law is not as limited as it might appear. As the public becomes more familiar with its provisions, increased litigation can be anticipated. Whistleblower coverage will be expanded to include areas of public concern other than safety and health.<sup>113</sup> Legislators will press for increased criminal penalties against individuals in policymaking positions who violate state laws against retaliatory discharges.<sup>114</sup>

The great majority of courts throughout the country have been carving out exceptions to the at-will employment doctrine. The New York judiciary<sup>115</sup> has restricted itself to recognizing the implied contract theory. It can be expected to solidify the right of at-will employees to successfully bring causes of action for breach of an implied employment contract. The totality of the circumstances standard<sup>116</sup> will control decisions. The courts have issued a warning to employers that they will be held responsible for the documents they produce. Having given employers fair notice, the courts are likely to liberalize their interpretation of implying contracts through

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111. *Id.* at 44-49.

112. *See supra* note 70 and accompanying text.

113. *See supra* note 62 and accompanying text.

114. *See supra* note 58 and accompanying text.

115. Two additional factors to be considered are that as of January 1, 1987, the Court of Appeals is comprised of six Associate Judges who were not sitting when the *Weiner* case was decided and that the current Chief Judge (S. Wachtler), authored the dissent in *Weiner*.

116. *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847 (2d Cir. 1985).

document statements. This will result in increased liability for employers who breach terms of reasonably relied upon documents.

The court of appeals should be urged to reconsider recognizing the covenant of good faith and fair dealing. It should also extend the public policy reasoning behind the whistleblower statute to other situations that substantially effect the public interest. If the court of appeals declines to proceed on this path, the legislature should turn to the arbitration/mediation statutes discussed above as the most equitable method for increasing protection of at-will employees.

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