MASTER AND SERVANT—EMPLOYMENT-AT-WILL—PERSONNEL MANUAL ONE FACTOR OF TOTALITY OF CIRCUMSTANCES TO CREATE CONTRACTUAL RIGHT TO JUST CAUSE DISMISSAL—*Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1983).

An increased societal interest in providing job security for employees[1] is eroding the common law doctrine of employment-at-will.[2] Recent court decisions grappling with the problems of employee job security bear witness to the growing belief that this common law doctrine requires modification.[3] While a portion of the work force is protected by collective bargaining agreements permitting termination only for just cause, a significant number of employees do not have the benefit of such contracts.[4] Recognizing the often severe consequences of the employment-at-will doctrine, which permits employers to dismiss employees without justification, courts have acknowledged exceptions to this common law rule through the application of tort and contract principles.[5] Recently, the New York Court of Appeals joined

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[1] *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Ct. App. 1981) (implied-in-fact promise of just cause dismissal); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980) (implied-in-law covenant of good faith and fair dealing found in employment contract); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (just cause dismissal provision in policy manual enforced); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (right to discharge at-will restricted by clear mandate of public policy). This proposition has been the subject of a number of legal commentaries. Articles discussing the employment-at-will doctrine include: Blades, *Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); DeGiuseppe, *The Effect of The Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981); Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

[2] An early commentator on the employment-at-will doctrine stated that "the rule is inflexible, that a general or indefinite hiring is, *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). In sum, the doctrine gave the employer the right to dismiss the employee at any time. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) (general hiring or hiring for indefinite period is hiring at-will, terminable by either party at any time); I. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159, at 516-20 (1913); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967).

[3] *See supra* note 1.

[4] Comment, *supra* note 1, at 1816. Approximately 25% of the American workers are unionized. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83, at 375 (table 624) (in 1980 there were 95.9 million civilian, nonagricultural workers); *id.* at 409 (table 682) (22.8 million workers are members of labor organizations).

[5] Courts utilizing contract principles have found the existence of an agreement not to arbitrarily terminate from the surrounding facts and from the conduct of the parties. *See* Pugh v.

those jurisdictions which have begun to restrict the application of the employment-at-will rule with its decision in *Weiner v. McGraw-Hill, Inc.*,[6] in which the court denied a motion to dismiss an action for breach of an employment contract of indefinite duration.[7]

Walton Lewis Weiner had been employed by Prentice-Hall for four years when, in 1969, he was approached by defendant McGraw-Hill to explore possible employment opportunities with the company.[8] Weiner commenced negotiations with a McGraw-Hill representative who informed him of the company's firm policy of dismissal for "just cause."[9] On September 15, 1969, Weiner completed and signed an employment application form which contained a provision releasing McGraw-Hill from any liability in investigating the applicant's personal history and previous employment.[10] Contained within this declaration was the further stipulation that "employment [by McGraw-Hill] would be subject to the provisions of McGraw's 'handbook on personnel policies and procedures.' "[11] The application was subse-

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See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Ct. App. 1981); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). Contract actions for wrongful discharge have been upheld by finding an implied covenant of good faith and fair dealing. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). Public policy limitations on the right to discharge have been recognized under both the contract, *see* Petermann v. International Bhd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (Ct. App. 1959) (dismissal for refusal to commit perjury); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (discharge for refusing advances of supervisor), and the tort theories, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharged for refusing to participate in illegal price fixing scheme); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (discharged for filing worker's compensation claim); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharged for serving on jury duty); *see* DeGiuseppe, *supra* note 1; *infra* notes 42-74 and accompanying text; *see generally* Annot., 12 A.L.R. 4th 544 (1982).

[6] 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

[7] *Id.* at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

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

[9] *Id.*

[10] Brief for Respondent McGraw-Hill, Inc. at 7-8, Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) [hereinafter cited as Brief for Respondent].

[11] 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194. The defendant argued that its reference to the employee handbook on the application form should be narrowly construed as applying only to false statements made by the employee. The application states in pertinent part:

> I understand that the information given in my application for employment and any statements made by references supplied by me will become part of my permanent personnel record and that my employment by McGraw-Hill, Inc. will be subject to the provisions set forth in the McGraw-Hill Employee Handbook on Personnel Policies & Procedures and contingent upon the accuracy and acceptability of such information and statements.

Brief for Respondent, *supra* note 10, at 8 (emphasis omitted). This statement, however, suggests two interpretations. A narrow reading would construe the sentence to refer exclusively to the company's procedures regarding the making of false statements on the application form. A more

quently signed by the interviewer and a company supervisor.[12] Weiner accepted a position with McGraw-Hill as a senior copywriter in October, 1969,[13] declining a salary increase offered by Prentice-Hall and forfeiting the fringe benefits he had accrued during his four years of employment with them.[14] At the time of his hiring by McGraw-Hill, Weiner was given a copy of the employee handbook "McGraw-Hill and You"[15] which stated, in relevant part: "[t]he 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. However, if the welfare of the company indicates that dismissal is necessary, then that decision is arrived at and is carried out forthrightly."[16]

For the next eight years, Weiner worked for McGraw-Hill, receiving regular salary increases and promotions. During that time he declined several job offers.[17] In addition, in his position as supervisor, he always followed the guidelines outlined in the handbook as had been recommended to him on several occasions by his supervisors.[18] In February, 1977, however, Weiner was dismissed for what McGraw-Hill maintained was a "continuing failure to manage his group and communicate with his subordinates in a professional and effective way."[19] Weiner alleged that McGraw-Hill had failed to comply with the handbook provisions by terminating his employment without just and sufficient cause,[20] and brought suit in the Supreme Court of New

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expansive reading would incorporate all of the handbook provisions into the application form and operate as the terms for employment. The *Weiner* court adopted the latter view. *See infra* note 112 and accompanying text.

[12] 57 N.Y.2d at 461, 443 N.E.2d at 442, 457 N.Y.S.2d at 194. The Brief for Respondent indicates that the two signatures of the company representatives were affixed below the caption "Do Not Write Below This Line." The company supervisor's signature appeared in a separate section entitled "Record of Employment." Brief for Respondent, *supra* note 10, at 9 n.6.

[13] Brief for Respondent, *supra* note 10, at 9 n.6.

[14] 57 N.Y.2d at 461, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

[15] Brief for Appellant Walton Lewis Weiner at 3, Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). The Brief for Respondent states that: "The document on which the complaint alleges that Weiner relied is the handbook 'McGraw-Hill and You' . . . . The record is silent as to the identity of the handbook referred to in the application form ('Employee Handbook on Personnel Policies and Procedures'), but for the purpose of this appeal we have accepted appellant's assumption that they are the same thing." Brief for Respondent, *supra* note 10, at 8 n.5 (citation omitted).

[16] 57 N.Y.2d at 460-61, 443 N.E.2d at 442, 457 N.Y.S.2d at 194 (citation omitted).

[17] *Id.* at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195. At the time of his termination Weiner held the supervisory position of Director of Promotion Services. *Id.*

[18] *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. Weiner was told that McGraw-Hill could be held liable for failure to comply with the procedures promulgated in the handbook. *Id.*

[19] Brief for Respondent, *supra* note 10, at 2.

[20] 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

York County, seeking damages in tort and contract for wrongful discharge.[21]

The complaint set forth three causes of action: the first in contract for breach of an employment agreement, the second in tort for malicious failure to comply with the handbook provisions, and the third in tort for inducement in the breach of an employment agreement.[22] McGraw-Hill moved to dismiss the complaint on the theory that Weiner's application, with its reference to the handbook, did not create an employment agreement giving rise to contractual rights, and that therefore, his employment was at-will.[23] Further, McGraw-Hill claimed it was not bound by its oral promise of job security.[24]

The lower court dismissed the two tort actions, but denied the motion to dismiss the cause of action in contract by relying exclusively on the fact that the plaintiff had signed the application and bound himself to the terms of the handbook.[25] The appellate division reversed, holding that the application did not constitute an employment contract because it contained no term specifying duration.[26] In a dissenting memorandum, Justice Kupferman agreed with the decision of the Special Term, stating that when an employee signs an application form specifically referring to company rules, he should be able to

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[21] Weiner v. McGraw-Hill, Inc., No. 104 (N.Y. Sup. Ct. Sept. 26, 1980), *rev'd*, 83 A.D.2d 810, 442 N.Y.S.2d 11 (App. Div. 1981), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

[22] *Id.* The second and third tort actions joined Weiner's supervisor as a defendant. *Id.*

[23] 57 N.Y.2d at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

[24] *Id.*

[25] Weiner v.McGraw-Hill, Inc., No. 104, slip op. at 2 (N.Y. Sup. Ct. Sept. 26, 1980), *rev'd*, 83 A.D.2d 810, 442 N.Y.S.2d 11 (App. Div. 1981), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). Special Term succinctly rejected defendant's Statute of Frauds defense, finding that the application form with its reference to the employee handbook constituted a writing to satisfy the statute's requirement. *Id.* at 1. In addition, the lower court distinguished the facts of the case at bar from the facts of Edwards v. Citibank, N.A., 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.), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980) which was relied upon by the defendant. It found that Edwards never signed a statement binding him to the provisions of an employee handbook and while Edwards was alleging the existence of a contract for life employment, Weiner was merely maintaining that the manual gave rise to a contract for termination for just cause. Weiner v. McGraw-Hill, Inc., No. 104, slip op. at 2 (N.Y. Sup. Ct. Sept. 26, 1980), *rev'd*, 83 A.D.2d 810, 442 N.Y.S.2d 11 (App. Div. 1981), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). For a discussion of the *Edwards* case see *infra* text accompanying notes 96-100.

[26] Weiner v. McGraw-Hill, Inc., 83 A.D.2d 810, 811, 442 N.Y.S.2d 11, 12 (App. Div. 1981), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). The court stated that the plaintiff could terminate his employment-at-will and correspondingly the defendant possessed the same right. Further, the court believed that the company was free to unilaterally amend provisions set forth in the handbook. *Id.*

rely on them.[27] The Court of Appeals of New York reversed the decision of the appellate division, and, stressing the significance of the facts alleged by the plaintiff, found that the complaint stated a valid cause of action for breach of an employment contract.[28]

The English law doctrine of master and servant was characterized by a paternalistic relationship.[29] In the nineteenth century, however, drastic changes occurred as a result of the competitive business practices which developed during the Industrial Revolution.[30] This economic climate fostered a change in the doctrine of master and servant, and the rigid class structure which had formerly maintained the relationship was replaced by freedom of contract principles.[31] As a result, the parties were considered to be free to bargain and to limit their commitment to each other.[32]

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[27] *Id.* (Kupferman, J., dissenting).

[28] 57 N.Y.2d at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

[29] *See* P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 122-23 (1969); DeGiuseppe, *supra* note 1, at 4-5; Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 212-13 (1973). From the 14th to the 19th centuries the structure and necessities of an agrarian society shaped the terms of employment. P. SELZNICK, *supra*, at 122. As circumstances often required the servant to work directly within the master's household, a paternalistic relationship developed. *Id.* at 123. Several aspects of the master/servant relationship illustrated this paternalistic nature: the master could discipline the servant (with moderation), assumed responsibility for his misconduct, and was expected to provide for his general welfare. *Id.* at 124-28.

[30] P. SELZNICK, *supra* note 29, at 130-31.

[31] *Id.* at 131.

[32] *See id.* The emphasis, however, was not on the employee's freedom to bargain for job security; rather the employer's freedom to terminate employees was deemed fundamental. Note, *supra* note 1, at 343. The contract theory of employment contained four presumptions: 1) because it was contractual in nature, the job relationship could be governed by the law of contract; 2) rules and working conditions were incorporated as implied terms of the contract; 3) the employment contract had a special status drawn from the old law of master and servant—the employer had authority over the employee; and 4) the employment contract was terminable at will. P. SELZNICK, *supra* note 29, at 131-32. It has been suggested that the employer's advantage in the employment relationship was encompassed in the doctrine of freedom of enterprise. Note, *supra* note 1, at 343. In America, the influence of laissez-faire principles flourished, resulting in the articulation of the at-will rule by H. Wood in 1877. *See supra* note 2. Although the rule was formulated with little precedent it was adopted in several states. Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) is often cited as the authority incorporating Wood's Rule into American common law: "The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood." *Id.* at 121, 42 N.E. at 471; *see* Blumrosen, *Worker's Rights Against Employers and Unions: Justice Francis—A Judge For Our Season*, 24 RUTGERS L. REV. 480, 481 (1970); DeGiuseppe, *supra* note 1, at 6; Comment, *supra* note 29, at 216; Note, *supra* note 1, at 344; *see also* Greer v. Arlington Mills Mfg. Co., 43 Del. 581, 43 A. 609 (1899) (indefinite hiring is terminable at-will); Harrod v. Wineman, 146 Iowa 718, 125 N.W. 812 (1910) (indefinite employment terminable at-will by either party); Edwards v. Seaboard & R.R., 121 N.C. 490, 28 S.E. 137 (1897) (hiring to pay wages at specific time intervals does not convert indefinite hiring to hiring of definite duration).

In advancing the freedom of enterprise doctrine, courts utilized formal contract principles which ultimately operated to the disadvantage of the employee.[33] Manifestation of assent, mutuality of obligation, and consideration were three contract principles which the courts articulated in their findings of at-will employment.[34] Thus, the courts held that an at-will employment relationship existed unless the parties specified a definite duration of employment.[35] The courts stressed that because an employee had the freedom to leave his job, mutuality of obligation required that an employer have the corresponding right to discharge the employee for any or no cause.[36] Similarly, the courts found that additional consideration was necessary to support a promise of employment for a fixed term.[37] Prior employee service was viewed as past consideration, inadequate to uphold such an agreement. Service to the employer guaranteed the employee only the right to compensation in the form of wages and would not protect him from termination at the will of his employer.[38]

Despite the demise of laissez-faire policies[39] and the subsequent modification of the traditional contract principles of mutuality and

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Several commentators have indicated that the cases Wood cited not only were weak authority, but contradicted his proposition. DeGiuseppe, *supra* note 1, at 6 n.13; Note, *supra* note 1, at 341 n.54.

[33] Comment, *supra* note 1, at 1825.

[34] Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 336 (1982).

[35] Comment, *supra* note 1, at 1825.

[36] Blades, *supra* note 1, at 1419.

[37] Riefkin v. E. I. DuPont de Nemours & Co., 290 F. 286 (D.C. Cir. 1923); Odum v. Bush, 125 Ga. 184, 53 S.E. 1013 (1906); Rape v. Mobile & O. R.R., 136 Miss. 38, 100 So. 585 (1924); Blades, *supra* note 1, at 1420.

[38] Blades, *supra* note 1, at 1420; *see also* Murg & Scharman, *supra* note 34, at 337-38; Note, *supra* note 1, at 351-52.

[39] Historically, freedom of contract principles were considered necessary to foster economic growth. Comment, *supra* note 1, at 1826. The courts were often reluctant to interfere with freedom of contract principles as applied to employment contracts: they viewed the employer as free to set the conditions of employment, and the employee as having the correlative right to accept them. *See* Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Comment, *supra* note 1, at 1826. In both *Adair* and *Coppage* the Supreme Court invalidated legislation which prohibited the employer from discharging employees who had joined a labor union. *Coppage*, 236 U.S. at 26; *Adair*, 208 U.S. at 176; Blades, *supra* note 1, at 1416-17.

By 1937, however, the Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) departed from the laissez-faire approach to the employment relation. Recognizing the inequality in bargaining between the employer and the employee, the Court upheld legislation which protected the right of the employee to unionize and enjoined the employer from interference with that right. Blades, *supra* note 1, at 1418. Thus, freedom to form employment contracts was tempered by a broader concern for equality and fairness in dealings between employers and employees. Comment, *supra* note 1, at 1826; *see generally* Blades, *supra* note 1, at 1418-19; Murg & Scharman, *supra* note 34, at 338-40. Subsequent federal legislation prohibiting discrimi-

adequacy of consideration,[40] the employment-at-will doctrine remains the law in most jurisdictions today.[41] Courts have, however, found ways to limit the employer's right to terminate employment at-will. For example, a limitation on the employer's right to terminate at-will has been found through the imposition of an implied covenant of good faith and fair dealing. In *Cleary v. American Airlines, Inc.*,[42] the plaintiff alleged that he was discharged, after eighteen years of service, for his union-organizing efforts.[43] The California court was faced with determining whether a long-term employee hired for an indefinite duration could be discharged at-will.[44] The court found that California law limited an employer's absolute right to discharge when an employee had provided additional consideration or there was an implied or express condition restricting the right to discharge for good cause.[45] The *Cleary* court reasoned that the employee's length of service and the employer's express policy concerning employee grievances and dismissals created an implied contract for job security.[46] The implied-in-law covenant of good faith and fair dealing inherent in all contracts applied to employment contracts, thereby limiting the employer's power to arbitrarily deprive the employee of the benefits of the employment contract.[47] In establishing a grievance policy, the employer had recognized its duty to act in good faith.[48] Therefore, the

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natory discharges and retaliatory discharges for exercising statutory and constitutional rights placed restrictions on the absolute right to terminate employment. *See* National Labor Relations Act of 1935, 29 U.S.C. §§ 157, 158(a)(3) (1976) (prohibits retaliatory discharges for union organizing); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2 (1976) (prohibits discrimination based on race, sex, color, religion, or national origin in hiring or discharging); Railway Labor Act, 45 U.S.C. §§ 151, 152(a) (1976) (protects the right to join labor unions without fear of discharge).

[40] Consideration is essential to the validity of a contract; mutuality of obligatation is not required unless the values exchanged between the parties are so unbalanced that the contract becomes unenforceable. Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924); Murg & Scharman, *supra* note 34, at 337 n.49; *see generally* A. CORBIN, 1 CORBIN ON CONTRACTS §§ 109-52 (1950 & Supp. 1971).

[41] Murg & Scharman, *supra* note 34, at 321 n.2 lists representative cases from all state jurisdictions.

[42] 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Ct. App. 1980).

[43] *Id.* at 447, 168 Cal. Rptr. at 724. The plaintiff asserted that he was discharged without a complete investigation after he was accused of theft, leaving his work area, and threatening a fellow employee. He maintained that the real reason for his dismissal was his union-organizing activities. *Id.*

[44] *Id.* at 446, 168 Cal. Rptr. at 724.

[45] *Id.* at 455, 168 Cal. Rptr. at 729 (citing Drzewiecki v. H. & R. Block, Inc., 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (Ct. App. 1972)).

[46] *Id.* at 446, 168 Cal. Rptr. at 724.

[47] *Id.* at 455, 168 Cal. Rptr. at 729. The employee had accrued pension and retirement benefits, membership in the credit union, and seniority. *Id.* at 448, 168 Cal. Rptr. at 725.

[48] *Id.* at 455, 168 Cal. Rptr. at 729.

Cleary court held that the employee's longevity of service and the express company policy estopped the employer from discharging the employee without good cause.[49]

A minority of jurisdictions consider all of the circumstances in ascertaining the parties' intentions regarding the duration of employment.[50] Identifiable factors such as consideration,[51] the "common law of the job,"[52] and longevity of employment[53] can give rise to an implied-in-fact contract,[54] which then creates enforceable employee rights.[55] In 1981 a California appellate court in *Pugh v. See's Candies*,

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[49] *Id.* Other courts have also found that the implied-in-law covenant of good faith and fair dealing extends to employment contracts. In Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), the plaintiff alleged that she was fired for resisting the advances of her foreman. In upholding the jury finding that she was maliciously discharged, the court stated that termination of an at-will employee exercised in bad faith or malice offends the public good and amounts to a breach of contract. *Id.* at 133, 316 A.2d at 551. The court's language was somewhat confusing, however, in that it found the duty to terminate in good faith arising from a public policy or interest rather than one implied from contract. *Id.* at 133, 316 A.2d at 551; *see also* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (salesman's written contract terminable at-will carried an implied covenant of good faith and fair dealing).

[50] Note, *supra* note 1, at 351; *see* Denis v. Thermoid Co., 128 N.J.L. 303, 25 A.2d 886 (Ct. Err. & App. 1942) (examination of surrounding circumstances to determine duration); Eilen v. Tappin's Inc., 16 N.J. Super. 53, 83 A.2d 817 (Law Div. 1951) (same). This approach is said to be modeled after the English rule that the presumption of an at-will employment can be rebutted by proof of circumstances surrounding the transaction. H. WOOD, *supra* note 2, § 134, at 271 & n.5. Indeed, Wood himself characterized an indefinite hiring as a prima facie hiring at will and indicated that a plaintiff could establish a definite hiring with proof. *Id.* The *Weiner* court also interpreted the doctrine of employment-at-will as a rebuttable presumption. *See infra* note 117 and accompanying text.

[51] Note, *supra* note 1, at 351. A plaintiff could prove the intent to create a permanent employment by the showing of additional or separate consideration, which is characterized as a benefit enjoyed by the employer or significant reliance by the employee. *Id.* at 351-52. Benefits to the employer can include surrender of tort claims or employee contribution to the business. *Id.* at 352-53. Reliance by the employee includes the sale of the employee's business to pursue the employment, changing jobs, or moving. *Id.* at 354-55. The authors also suggest that a recruiter may, with a particular demeanor or approach, induce a potential employee to undertake other actions to his detriment. *Id.* at 355.

[52] *Id.* at 356-59. The "common law" of the job is a neutral concept which may establish the terms of the employment agreement when they have not been expressly stated. *Id.* at 356. The common law of the job can be determined by the company policy expressed in manuals or handbooks, the nature of the job itself, or the custom of the industry. *Id.* at 356-59.

[53] *Id.* at 361-64. Longevity in the employment can also be used to show the intention of the parties as to the duration of the contract and retains a special meaning today because compensation often includes participation in pension and health care plans. *Id.* at 361. Because time in service creates employee rights to pension plans and fringe benefits, longevity can be considered as establishing implied contractual rights. In addition, it provides a separate consideration when the employee declines another offer to preserve the benefits he believes have accrued. *Id.* at 362-64.

[54] *Id.* at 368. The authors of that Note proposed the use of contract principles to ameliorate the harshness of the at-will rule. *Id.*

[55] The doctrine of promissory estoppel also has been occasionally applied in employment-at-will cases. *See, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981)

Inc.,[56] applied elements of the foregoing analysis and determined that the plaintiff had presented facts from which a jury could find the existence of an implied promise that the employer would not act arbitrarily in dealing with the employee.[57] The plaintiff had been employed by the defendant for thirty-two years, working his way up from pot-washer to vice-president in charge of production and member of the board of directors.[58] The plaintiff, who had never received criticism of his work,[59] alleged the reason for his dismissal was his refusal to acquiesce to a "sweetheart" contract in which one company obtains an unfair competitive advantage over another by paying employees at a lower wage rate with the permission of the union.[60] The court stated that California law allowed discharges for good cause only upon either a showing of independent consideration[61] or the finding of an express or implied agreement to terminate only for cause.[62] The court found that the company policy of terminating executives for cause only,[63] as well as the length of Pugh's employment and the commendations and promotions he had received, established the existence of an implied promise.[64]

Employees also have been successful in bringing wrongful discharge actions by challenging dismissals as violative of public policy.[65] While some jurisdictions apply contract principles in finding public policy violations, most courts impose tort liability to protect against

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(promissory estoppel theory applied where employer left former job in reliance on job offer made by defendant). The doctrines of promissory estoppel and employment-at-will, however, differ in focus. Promissory estoppel is used to prevent injustice to a promisee who failed to give consideration to bind a contract but nevertheless has acted reasonably in reliance on the promise and has suffered a significant detriment. Fuchs, *Promissory Estoppel and Employment Agreements*, 49 N.Y.St. B.J. 386 (1977). In employment contracts, the doctrine's application contemplates detrimental reliance by the employee. Under the employment-at-will doctrine, a promise of job security is not enforced against the employer unless he has received a benefit in addition to the employee services; it gives no effect to the detrimental reliance suffered by the employee. *See supra* note 38 and accompanying text.

[56] 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (Ct. App. 1981).

[57] *Id.* at 329, 171 Cal. Rptr. at 927.

[58] *Id.* at 315-16, 171 Cal. Rptr. at 918-19.

[59] *Id.* at 317-18, 171 Cal. Rptr. at 919.

[60] *Id.* at 318-19, 171 Cal. Rptr. at 920.

[61] *Id.* at 326, 171 Cal. Rptr. at 925. Independent consideration is synonymous with additional consideration. *See* Blades, *supra* note 1, at 1419. The term denotes consideration other than services to be performed. 116 Cal. App. 3d at 325, 171 Cal. Rptr. at 924; *see also supra* note 38 and accompanying text.

[62] 116 Cal. App. 3d at 326, 171 Cal. Rptr. at 925.

[63] *Id.* at 317, 171 Cal. Rptr. at 919.

[64] *Id.* at 329, 171 Cal. Rptr. at 927.

[65] *See generally* DeGiuseppe, *supra* note 1, at 30-34; Murg & Scharman, *supra* note 34, at 343-44; Comment, *supra* note 1, at 1822.

such discharges.[66] Tort law protects the personal interests and freedom of the individual;[67] thus, when an employer discharges for a bad cause he breaches a duty "imposed by law, and . . . based primarily upon social policy."[68] Jurisdictions have upheld wrongful discharge actions when the employee has been terminated for refusing to commit a criminal act,[69] for exercising a statutorily created right,[70] or for serving on jury duty.[71] Several courts have been careful to limit the application of the public policy exception through the imposition of a "clear mandate" standard.[72] Those jurisdictions assert that the articulation of public policy should emanate from the legislature and not from the courts,[73] and therefore, to maintain the action, a plaintiff must identify a declared public interest.[74]

Recently, courts have dealt with cases in which the employee maintained that the issuance of a personnel manual or handbook

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[66] *See* Adler v. American Standard Corp., 291 Md. 31, 36, 432 A.2d 464, 467-68 (1981) (action for wrongful discharge can be brought in contract or tort); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (wrongful discharge for breach of employment contract); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980)(implied provision in employment contract that employee will not be discharged in violation of clear mandate of public policy; wrongful discharge action may be brought in contract, tort, or both); *see also* DeGiuseppe, *supra* note 1, at 30.

[67] W. PROSSER, LAW OF TORTS § 92 (4th ed. 1971).

[68] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980) (quoting W. PROSSER, *supra* note 67, § 92, at 613 (4th ed. 1971)); *see generally* Blades, *supra* note 1, at 1421-27. California was the first state to impose a public policy restriction on the right to terminate at-will. Murg & Scharman, *supra* note 34, at 344.

[69] Petermann v. International Bhd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (Ct. App. 1959). In *Petermann*, the plaintiff alleged that he was discharged for his refusal to commit perjury. *Id.* at 187, 344 P.2d at 26. The court stated that it would offend public policy to allow an employer to discharge an at-will employee for refusing to commit a criminal act. *Id.* at 189, 344 P.2d at 27; *see also* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employer has duty to uphold fundamental public policy reflected in state's penal code).

[70] *See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge wrongful where termination in retaliation for filing worker's compensation claim); *see also* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (same); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981) (same).

[71] *See* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharge wrongful if based on employee having served on jury duty).

[72] *See* Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174(1974).

[73] Adler v. American Standard Corp., 291 Md. 31, 45, 432 A.2d 464, 472 (1981) (expression of public policy more aptly relegated to legislature); *cf.* Murphy v. American Home Prods. Corp., 58 N.Y. 2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (court refused to recognize cause of action in tort for wrongful discharge, holding recognition must come from legislation).

[74] *See supra* note 73. In Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980), the court stated that the sources of public policy include legislation, administrative rules, regulations, or decisions, and judicial decisions. *Id.* at 72, 417 A.2d at 512.

established contract rights between himself and the employer.[75] In *Johnson v. National Beef Packing Co.*,[76] a 1976 Kansas case, the plaintiff alleged that the policy manual provision "[n]o employee shall be dismissed without just cause" created an employment for life.[77] Affirming the common law rule that a contract for permanent employment was an indefinite hiring absent additional consideration or an express or implied agreement specifying duration, the court found that the manual established no such agreement.[78] Instead, the court found that the manual was nothing more than a unilateral expression of company policy; its terms were not bargained for and, therefore, it did not express a meeting of the minds.[79]

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[75] *See, e.g.*, Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F.2d 500 (3d Cir. 1979); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (Ct. App. 1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W. 2d 147 (1980); Dickhaus v. Jersey Cent. Power & Light Co., A-3281-80-T2 (N.J. App. Div. Nov. 13, 1981), *certif. denied*, 89 N.J. 430, 446 A.2d 156 (1982); Edwards v. Citibank, N.A., 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.), *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. 1978), *aff'd mem.*, 70 A.D.2d 791, 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); *see also* DeGiuseppe, *supra* note 1, at 45.

Generally, the plaintiffs in these actions assert that the manuals imply an agreement for permanent or life employment. See above cited cases. Plaintiffs also have contended that employment manuals restrict the employer's right to terminate to the reasons explicitly enumerated in the handbook. *See* Wagner v. Sperry Univac, 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd mem.*, 624 F.2d 1092 (3d Cir. 1980); Beidler v. W. R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F.2d 500 (3d Cir. 1979); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Dickhaus v. Jersey Cent. Power & Light Co., A-3281-80-T2 (N.J. App. Div. Nov. 13, 1981), *certif. denied*, 89 N.J. 430, 446 A.2d 156 (1982); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), *aff'd mem.*, 70 A.D.2d 791, 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).

[76] 220 Kan. 52, 551 P.2d 779 (1976).

[77] *Id.* at 54, 551 P.2d at 781-82. The plaintiff was employed as a "beef lugger"; he incurred an injury on the job which rendered him unable to lift heavy objects. *Id.* at 53, 551 P.2d at 781. Consequently he was transferred to another job. He was terminated when he informed his supervisor that he was unable to perform the heavy lifting. *Id.*

[78] *Id.* at 54-55, 551 P.2d at 781-82.

[79] *Id.* In Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980), the Nebraska court followed *Johnson* in deciding that even if the booklet were part of the employment contract, the employment was still terminable at-will where no agreement fixing the duration of the employment could be shown. *Id.* at 314-15, 299 N.W.2d at 151. Courts have applied the same analysis where plaintiffs have alleged that termination is restricted to a cause specified in the personnel manual. *See* Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982) (company rules enumerated in manual not all encompassing); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (Ct. App. 1975) (handbook must specify duration to be enforceable as contract); Dickhaus v. Jersey Cent. Power & Light Co., A-3281-80-T2 (N.J. App. Div. Nov. 13, 1981) (company rules enumerated in manual not all encompassing), *certif. denied*, 89 N.J. 430, 446 A.2d 156 (1982); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737

A contrary result was reached in *Toussaint v. Blue Cross & Blue Shield*,[80] where the Michigan Supreme Court was faced with facts similar to those of the *Weiner* case and decided that handbook provisions restricting the right to termination could create enforceable rights.[81] The court noted that Michigan law required a showing of distinguishing features in the contract or additional consideration to rebut the presumption that an indefinite hiring was terminable at-will.[82] This rule, however, did not prevent an employer who has hired an employee for an indefinite term from agreeing to a termination for cause.[83] The plaintiff in *Toussaint* had specifically discussed job security during his interview and was assured that as long as he performed his job he would not be dismissed.[84] Toussaint was given a manual which limited dismissal to " 'just cause only.' "[85] The court decided that a company policy made known to the plaintiff was sufficient to create "distinguishing features or provisions" and to rebut the presumption that the employment was terminable at-will.[86]

(Sup. Ct. 1978) (manual not contract and therefore not exclusive grounds for discharge), *aff'd mem.*, 70 A.D.2d 791, 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). In Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982), the Delaware Supreme Court held that the employee booklet did not change the plaintiff's at-will employment status because it lacked a specific period of employment. *Id.* at 1097. Further, the list of offenses justifying dismissal were not "inclusive, but illustrative." *Id.*

Plaintiffs have been unsuccessful in alleging that the procedure for termination was not followed. For example, in Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F.2d 500 (3d Cir. 1979), the district court dismissed the plaintiff's breach of contract claim which alleged the employer failed to follow company procedure. *Id.* at 1016. The court applied Pennsylvania law in finding that there was no restriction on an employer's absolute right to discharge absent a clear violation of public policy. *Id.* at 1015.

[80] 408 Mich. 579, 292 N.W.2d 880 (1980).

[81] *Id.* at 598, 292 N.W.2d at 885. The court held:

> 1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite,"and
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> 2) such a provision may become part of the contract either by express agreement, oral or written; or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

Id.

[82] *Id.*

[83] *Id.* at 610, 292 N.W.2d at 890. The court stated that:

> When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause).

Id.

[84] *Id.* at 597, 292 N.W.2d at 884.

[85] *Id.* at 597-98, 292 N.W.2d at 884.

[86] *Id.* at 596, 614, 292 N.W.2d at 883, 892.

The *Toussaint* court maintained that its ruling was consistent with past decisions recognizing the contractual rights to employee benefits, bonuses, and pensions published in personnel manuals,[87] and held that a company manual providing for termination for cause created similar contractual rights.[88] The *Toussaint* court further found that clearly expressed policies and practices implicitly created contractual rights.[89]

Traditionally, New York has followed those jurisdictions which do not recognize a restriction on the right to terminate at-will through the publication of a personnel policy manual.[90] In *Chin v. American Telephone & Telegraph Co.*,[91] a 1978 case, the plaintiff alleged that the "Code of Conduct" issued by American Telephone & Telegraph established exclusive grounds for discharge.[92] The lower court cited *Johnson v. National Beef Packing Co.*[93] in ruling that the manual did not create a contract for a specific term.[94] The court stated that the handbook lacked the necessary elements of an employment contract because it failed to define duties, duration of employment, and compensation. Consequently, the manual could not alter the plaintiff's employee-at-will status.[95]

In *Edwards v. Citibank, N.A.*,[96] the New York appellate division found that a company manual defining the conditions of employment did not change the plaintiff's at-will employment status since the employer could alter or withdraw the manual at any time.[97] The *Edwards* court stated that the list of causes for dismissal in the manual

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[87] *Id.* at 614-19, 292 N.W.2d at 892-94; Cain v. Allen Elec. & Equip. Co., 346 Mich. 568, 78 N.W.2d 296 (1956) (personnel policy established contractual right to severance pay); *see* Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936) (benefit plan is contract supported by employee's continued and quality performance); Gaydos v. White Motor Corp., 54 Mich. App. 143, 220 N.W.2d 697 (Ct. App. 1974) (adoption of severance pay policy is unilateral contract accepted by employee's continued performance).

[88] 408 Mich. at 618-19, 292 N.W.2d at 894.

[89] *Id.* at 617, 292 N.W.2d at 893-94 (citing Perry v. Sinderman, 408 U.S. 593 (1972)).

[90] *See supra* notes 76-79 and accompanying text; *see generally* DeGiuseppe, *supra* note 1, at 46.

[91] 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), *aff'd mem.*, 70 A.D.2d 791, 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).

[92] *Id.* at 1072, 410 N.Y.S.2d at 739.

[93] 220 Kan. 52, 551 P.2d 779 (1976); *see supra* notes 78-79 and accompanying text.

[94] 96 Misc. 2d at 1073, 410 N.Y.S.2d at 739.

[95] *Id.*

[96] 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.), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

[97] Edwards v. Citibank, N.A., 74 A.D.2d 553, 554, 425 N.Y.S.2d 327, 328 (App. Div.), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

was not exclusive, and that it did not afford the employee a right to permanent employment merely because he did not violate a specified provision for termination.[98] In a dissenting opinion, Justice Kupferman maintained that policies defining the terms of employment voluntarily set forth by the employer could create a mutuality of obligation which either party could enforce.[99] An employee could detrimentally rely on such policies, thereby estopping the employer from violating them.[100]

The *Weiner* decision, however, indicates that a company policy manual can be incorporated into an agreement restricting the right to terminate. In deciding that an employment manual can create enforceable contract rights between an employer and an employee,[101] the *Weiner* court noted that the laissez-faire philosophy which had contributed to the acceptance of the at-will rule by the American legal system in the nineteenth and twentieth centuries had lost considerable influence.[102]

The court initially determined that Weiner's claim was not barred by the Statute of Frauds because the terms of the agreement between Weiner and McGraw-Hill did not preclude performance of the contract within one year.[103] The court then turned to its discussion

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[98] *Id.*, 425 N.Y.S.2d at 328-29 (citing *Chin*, 96 Misc. 2d at 1073, 410 N.Y.S.2d at 739).

[99] *See id.*, 425 N.Y.S.2d at 329 (Kupferman, J., dissenting).

[100] *See id.* In Wernham v. Moore, 77 A.D.2d 262, 432 N.Y.S.2d 711 (App. Div. 1980), the plaintiff claimed that the defendant (Episcopal Mission Society) failed to follow the termination procedures jointly developed by the defendant and employees. Unlike the manuals in *Chin* and *Edwards* the manual contained terms bargained for by both parties and therefore was distinguishable from a company manual unilaterally setting forth terms and conditions of employment. The appellate division held that in New York, separate agreements could serve to alter the at-will status of an employee. *Id.* at 265, 432 N.Y.S.2d at 713.

[101] 57 N.Y.2d at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195. Justice Fuchsberg also noted that abusive discharge, implied promise of fair treatment, and good faith were other theories upon which wrongful discharge actions have been upheld, but declined to discuss them since he found that an allegation of the existence of a contract was sufficient to state a claim. *Id.*

[102] *Id.* at 462-63, 443 N.E.2d at 443-44, 457 N.Y.S.2d at 195-96. The court cited Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) for its adoption of the at-will rule articulated by Wood. 57 N.Y.2d at 463, 443 N.E.2d at 444, 457 N.Y.S.2d at 196. The court recognized the questionable authority upon which the employment-at-will rule was based. *Id.* at 463 n.5, 443 N.E.2d at 444 n.5, 457 N.Y.S.2d at 196 n.5; *see* DeGiuseppe, *supra* note 1, at 6 n.3. The court noted the Supreme Court's acceptance of the employment-at-will rule in Adair v. United States, 208 U.S. 161 (1908) and Coppage v. Kansas, 236 U.S. 1 (1915). 57 N.Y.2d at 463, 443 N.E.2d at 444, 457 N.Y.S.2d at 196. Commentators continue to advocate modification of the at-will rule to achieve job security through legislative action. Committee on Labor and Employment Law, *At-Will Employment and The Problem of Unjust Dismissal, reprinted in* J. BARBASH, J. FEERICK & J. KAUFF, UNJUST DISMISSAL AND AT WILL EMPLOYMENT 155 (1982); Blades, *supra* note 1.

[103] 57 N.Y.2d at 463, 443 N.E.2d at 444, 457 N.Y.S.2d at 196. The court acknowledged that defendant McGraw-Hill had not affirmatively pleaded the defense of the Statute of Frauds in its

of the contract action and stated that Weiner's freedom to terminate the employment did not defeat the creation of a binding agreement if he provided other consideration.[104] In drawing this conclusion, the majority distinguished the principle of consideration from that of mutuality of obligation.[105] The court determined that mutuality involves reciprocal promises of equal value, while consideration requires only a benefit to the promisor or a detriment to the promisee.[106] Thus, while mutuality creates an enforceable contract, the court found that it was not necessary to have promises which were of equal weight as long as the promisor had derived a benefit or the promisee had incurred a detriment.[107]

The majority determined that an agreement by the employer to dismiss an employee only for just cause and after rehabilitative efforts prove unsuccessful does not necessarily result in an employment-at-will relationship.[108] In support of its holding, the court noted that in contracts of definite duration, the employer can be barred from dismissing the employee without cause after the commencement of services.[109] In such contracts it is well established that although the em-

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responding brief to the court of appeals. *Id.* The defendant, however, had raised the defense in its motion to dismiss the complaint in the lower court. Weiner v. McGraw-Hill, Inc., No. 104, slip op. at 1-2 (N.Y. Sup. Ct. Sept. 26, 1980), *rev'd*, 83 A.D.2d 810, 442 N.Y.S.2d 11 (App. Div. 1981), *rev'd*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). Special Term found that the existence of an application signed by both the plaintiff and defendant was a sufficient writing to remove the bar of the Statute of Frauds. *Id.*; *see* North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 175-76, 239 N.E.2d 189, 191, 292 N.Y.S.2d 86, 89 (1968) (Statute of Frauds not applicable if contract, although capable of performance in one year, can continue for indefinite duration); N.Y. GEN. OBLIG. LAW § 5-701 (McKinney Supp. 1983) (Statute of Frauds); *see also* Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (Ct. App. 1979) (Statute of Frauds not violated when contract capable of completion within year extends for longer period).

[104] 57 N.Y.2d at 463-64, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

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

[106] *Id.* (citing Meurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688 (3d Cir. 1924); Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968)).

[107] *Id.* (citing Holt v. Feigenbaum, 52 N.Y.2d 291, 299, 419 N.E.2d 332, 336, 437 N.Y.S.2d 654, 658 (1981)); *see* RESTATEMENT (SECOND) OF CONTRACTS § 75. The consideration given by the promisor could take the form of a reciprocal promise, action, forebearance, or detriment. Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891).

The court stated: "Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee." 57 N.Y.2d at 464, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

[108] 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197; *accord Pugh*, 116 Cal. App. 3d at 311, 171 Cal. Rptr. at 917 (implied promise of just cause dismissal); *Cleary*, 111 Cal. App. 3d at 443, 168 Cal. Rptr. at 722 (longevity of service and company policy imply just cause dismissal); *Toussaint*, 408 Mich. at 579, 292 N.W.2d at 880 (policy manual creates express or implied promise of just cause dismissal).

[109] 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. The court cited *Corbin on Contracts:*

ployee makes no reciprocal promise and still reserves the right to leave the employment at-will, the employer cannot terminate him without cause if the employee had been hired for a specific time period.[110]

The court found the facts alleged by Weiner sufficient to adduce a contract and a possible breach.[111] The court emphasized the plaintiff's allegations that McGraw-Hill had initially induced Weiner to leave Prentice-Hall and had limited his dismissal to cause on the McGraw-Hill application form.[112] Relying on this guarantee, Weiner had refused subsequent job offers.[113] In addition, Weiner's superiors had insisted that his own supervisory actions be governed by the policy manual.[114] The court found that these factors were sufficient to allege that the manual created a contract restricting McGraw-Hill's power of termination and binding the company to attempt rehabilitation.[115]

The *Weiner* court also stressed that the court in *Martin v. New York Life Insurance Co.*[116] had articulated the employment-at-will

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> [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 consideration.

Id. (quoting A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1960 & Supp. 1971)); *see also Pugh*, 116 Cal. App. 3d at 325, 171 Cal. Rptr. at 925 (employee's services consideration for both salary and just cause dismissal); St. Louis, B. & M. Ry. v. Booker, 5 S.W.2d 856 (Tex. Civ. App. 1928) (consideration to uphold promise for continued employment found in continued job performance); Comment, *supra* note 1, at 1819-20.

[110] 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197; Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311 (Iowa 1971) (mutuality not necessary to hold contract enforceable); *Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885 (same); Murg & Scharman, *supra* note 34, at 337 n.49; *see* Note, *supra* note 1, at 367 n.209.

[111] 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

[112] *Id.*

[113] *Id.*

[114] 57 N.Y.S.2d at 466, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

[115] *Id.*; *see also* Wernham v. Moore, 77 A.D.2d 262, 432 N.Y.S.2d 711 (App. Div. 1980) (ancillary bilateral agreement may amend terms of an employment contract otherwise terminable at-will); *cf.* Parker v. Borock, 5 N.Y.2d 156, 161, 156 N.E.2d 297, 299, 182 N.Y.S.2d 577, 580 (1959) (collective bargaining agreement may restrict right to terminate employee hired at-will). The majority addressed the concern raised by the dissenting justices that an unfavorable reception of the decision by industry would force employers out of the state. 57 N.Y.2d at 466 n.7, 443 N.E.2d at 446 n.7, 457 N.Y.S.2d at 198 n.7. The court noted that states such as California, Michigan, and Massachusetts, which recognize exceptions to the at-will rule, have not suffered these consequences. *Id.* The court cited personnel management authorities who support the proposition that job security does not adversely affect work productivity. *Id.*; *see* Committee on Labor and Employment Law, *supra* note 102, at 175-76; Pascale, *Personnel Practices and Employee Attitudes; A Study of Japanese and American-Managed Firms in the United States*, 31 HUM. REL. 597 (1978).

[116] 148 N.Y. 117, 42 N.E. 416 (1895).

rule as a presumption which could be rebutted by attending facts and circumstances.[117] The court emphasized that an isolated act or the singular intent of defendant McGraw-Hill was not controlling and that the conduct of the parties, preliminary negotiations, and writings had to be considered in their entirety in order to determine the intention of the parties.[118] Accordingly, the court reversed the decision of the appellate division dismissing the action and reinstated the order of the Special Term upholding the breach of contract claim.[119]

In a dissenting opinion,[120] Justice Wachtler stated that the employment-at-will rule has long been upheld in New York.[121] He found that in order to defeat the presumption of employment-at-will, an employee must show an agreement specifying the duration of employment.[122] Neither the statement in the employee manual nor the reference to it in the application, nor the two taken together evidenced an intention by McGraw-Hill to be bound to its contents.[123] Accordingly, the dissent asserted that the plaintiff's allegations did not sufficiently state a contract in contravention of an at-will employment status.[124]

Justice Wachtler stressed the significance of the substance and format of the application.[125] He found that the application lacked the necessary terms of employment and that therefore no evidence of an offer or acceptance of employment was presented.[126] In addition, the format of the application defeated the implication of a contractual agreement between Weiner and McGraw-Hill[127] because the signa-

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[117] 57 N.Y.2d at 466, 443 N.E.2d at 446, 457 N.Y.S.2d at 198; *see supra* notes 50-64 and accompanying text.

[118] 57 N.Y.2d at 466, 443 N.E.2d at 446, 457 N.Y.S.2d at 198; *see* Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399-400, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 352 (1977) (parties' objective intent gleaned from totality of surrounding circumstances); *see also* Drzewiecki v. H. & R. Block, Inc., 24 Cal. App. 3d 695, 703, 101 Cal. Rptr. 169, 174 (Ct. App. 1972) (intention of parties as to employment contract construed from attendant circumstances).

[119] 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

[120] *Id.* Justice Gabrielli concurred in the dissent. *Id.* at 469, 443 N.E.2d at 447, 457 N.Y.S.2d at 199.

[121] *Id.* at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting); *see Martin*, 148 N.Y. at 117, 42 N.E.2d at 416.

[122] 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting); *see supra* notes 77-79, 90-97 and accompanying text.

[123] 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting); *see* supra notes 77-79, 90-97 and accompanying text.

[124] 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

[125] *Id.* at 467-68, 443 N.E.2d at 446-47, 457 N.Y.S.2d at 198-99 (Wachtler, J., dissenting); Brief for Respondent, *supra* note 10, at 9 n.6.

[126] 57 N.Y.2d at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting); *Johnson*, 220 Kan. at 54, 551 P.2d at 782; *Chin*, 96 Misc. 2d at 1070, 410 N.Y.S.2d at 739.

[127] 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 198-99 (Wachtler, J., dissenting); Brief for Respondent, *supra* note 10, at 9 n.6.

tures of the company officials were subsequently affixed under captions entitled "[R]ecord of [E]mployment . . ." and "Additional Approval."[128] Their purpose, according to the dissent, served not to bind the defendant, but rather to record the hiring for company use.[129] Further, the manual was devoid of any language indicating an intent by McGraw-Hill to be bound to its provisions,[130] and thus McGraw-Hill could alter its policy and procedures at any time.[131] In effect the handbook set forth general company guidelines and as such evinced no elements of an employment contract.[132] Justice Wachtler cautioned against interpreting the manual and application form liberally.[133] He stated that public policy militated against an imposition on the employer's right to discharge.[134] Employers wishing to evade costly and time-consuming litigation would retain unsatisfactory employees, resulting in a loss of efficiency and productivity in the workplace.[135] In Justice Wachtler's opinion, the majority's construction of these instruments as an employment contract threatened the viability of an economy already burdened by high unemployment and loss of industry.[136]

The *Weiner* decision represents a limitation on the employment-at-will rule by stating that an employment for an indefinite duration can nevertheless carry with it a restriction on the right to terminate.[137] Although the parties are not equally bound to the same terms, an employee can enforce the right to a just cause dismissal by providing consideration for the promise.[138]

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[128] 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 198-99 (Wachtler, J., dissenting); Brief for Respondent, *supra* note 10, at 9 n.6.

[129] 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

[130] *Id.*

[131] *Id.*; *see supra* notes 79, 97 and accompanying text.

[132] 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting); *see supra* notes 78, 95 and accompanying text.

[133] 57 N.Y.2d at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

[134] *Id.*; *see also* Committee on Labor and Employment Law, *supra* note 102, at 175; DeGiuseppe, *supra* note 1, at 69; Comment, *supra* note 1, at 1842.

[135] 57 N.Y.2d at 468-69, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

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

[137] *Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197; see *Toussaint*, 408 Mich. at 579, 292 N.W.2d at 880 where the Michigan court could find no authority for the proposition that a hiring for an indefinite duration " 'cannot be made other than terminable at will by a provision that states that an employee will not be discharged except for cause.' " *Id.* at 611, 292 N.W.2d at 890-91 (quoting Toussaint v. Blue Cross & Blue Shield, 79 Mich. App. 429, 435, 262 N.W.2d 848, 851 (Ct. App. 1977), *rev'd and remanded*, 408 Mich. 579, 292 N.W.2d 880 (1980) (emphasis omitted)). *Contra* Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982) (an indefinite hiring cannot be restricted by a just cause dismissal by statements made in manuals); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (Ct. App. 1975) (same); *Johnson*, 220 Kan. at 52, 551 P.2d at 779 (same). For a discussion of the emerging trend to recognize contractual rights to a just cause dismissal as stated in employment manuals see Murg & Scharman, *supra* note 34, at 367-72.

[138] 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

In finding that Weiner had presented evidence of additional consideration for the promise of job security, the court departed from traditional employment contract analysis.[139] The court stressed that changing jobs, relinquishing fringe benefits, or a rejection of subsequent offers of employment could provide the consideration to create contractual rights.[140] Recognizing these factors in this light represents an expansion of the concept of additional consideration.[141] Previously, a job change or the rejection of other offers was regarded as a natural incident to the acceptance of employment,[142] and therefore failed to satisfy the consideration requirement. Only when the employee had suffered a detriment of consequence, such as the relinquishment of tenure[143] or the vesting of a pension right,[144] had prior courts found a binding obligation on the part of the employer. Traditionally, the requirement of separate consideration has proven to be an insurmountable barrier to the plaintiff alleging a contract for continued employment.[145] With its decision in *Weiner*, however, the New York Court of Appeals has provided a means to use such factors in maintaining an action against the employer.

Despite the beneficial result to the employee, the *Weiner* decision nevertheless fails to grant employees substantial rights to job security.

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[139] Blades, *supra* note 1, at 1420; Murg & Scharman, *supra* note 34, at 355-57.

[140] 57 N.Y.2d at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. The court found that Weiner was induced to leave Prentice-Hall with the promise of job security and therein relied on this promise by giving up a salary increase and accrued benefits. *Id.* Because Weiner was employed at Prentice-Hall for only four years, the value of those "accrued benefits" is questionable. In the employment application Weiner stated that his reasons for changing jobs were "[l]arger salary and reduced commuting time." Brief for Respondent, *supra* note 10, at 15 n.9. On deposition he stated that he disliked the commute to Englewood Cliffs. *Id.*

[141] Murg & Scharman, *supra* note 34, at 358-59.

[142] *See* Fisher v. Jackson, 142 Conn. 734, 118 A.2d 316 (1955) (accepting new position necessitates leaving former employment); Hanson v. Central Show Printing Co., 256 Iowa 1221, 130 N.W.2d 654 (1964) (same); Chesapeake & Potomac Tel. Co. v. Murray, 198 Md. 526, 84 A.2d 870 (1951)(same); *see also* Note, *supra* note 1, at 354-55. The writers indicate that the reason for not recognizing a job change is that accepting a new position necessitates the resignation of a former job, hence the required additional consideration would be found regularly. Note, *supra* note 1, at 354-55. It is suggested that a promise of continued employment could be the distinguishing characteristic. *Id.*

[143] *See* Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973) (giving up tenured teaching position is independent consideration to support promise of permanent employment).

[144] *See* Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (Ct. App. 1979) (plaintiff had relinquished "soon to vest" pension).

[145] Comment, *supra* note 1, at 1819; Committee on Labor and Employment Law, *supra* note 102, at 162. *But see* A. CORBIN, *supra* note 40, § 152, at 14-15 (employer's express or implied promise to retain employee for definite period of time can be supported by services previously rendered). *Id.* at § 125 (single consideration can support one or more promises).

Unlike the Michigan court in *Toussaint*,[146] the *Weiner* court failed to explicitly hold that a personnel manual by itself can be enforced as a contract. Rather, the court held that the entire employment relationship must be examined to determine whether the parties intended a just cause dismissal.[147] In *Weiner*, the court relied on a number of factors in determining that the plaintiff had a cause of action for breach of contract. The court initially focused on the fact that a reference to the defendant's manual was made on the application form.[148] It also was noted that the plaintiff was given oral assurances of job security and that in reliance upon these assurances he refused other job opportunities.[149] The plaintiff was also familiar with the manual's provisions for dismissal and was told to follow the manual in dealing with his subordinates.[150] This recognition of a "totality of the circumstances" test by the *Weiner* court gives employees little guidance in determining whether an enforceable agreement can be adduced. It is not clear if a provision for a just cause dismissal in an employment manual, absent other factors, will be sufficient to support a cause of action. A better approach would have been to adopt the reasoning of the *Toussaint* court, which found that a just cause dismissal provision of a manual in and of itself was sufficient to provide the plaintiff with a cause of action.[151] This would clarify to the employer that the presence of such provisions could expose him to liability.

Those arguing against the enforcement of assurances of job security maintain that work productivity will diminish because employers will be less likely to discharge unsatisfactory workers in order to avoid costly and disruptive litigation.[152] Employers, however, can take a number of protective measures to discourage spurious suits. First, employers can assure that a discharge is in good faith and for work-related reasons through the maintenance of employee performance records. Second, employers can maintain meticulous documents of the rehabilitative efforts taken by management to help the employee improve. Third, employers can provide for internal grievance proce-

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[146] 408 Mich. at 579, 292 N.W.2d at 880; *supra* notes 81, 86, 89 and accompanying text.

[147] 57 N.Y.2d at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

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

[149] *Id.*

[150] *Id.*

[151] *Toussaint*, 408 Mich. at 598, 292 N.W.2d at 895.

[152] 57 N.Y.2d at 468-69, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J. dissenting); *see* Committee on Labor and Employment Law, *supra* note 102, at 175; Murg & Scharman, *supra* note 34, at 331.

dures to review an employee's performance before termination and the reasons for termination after an employee has been discharged.[153] Litigation is at least as costly for a worker as for an employer; an employee who has been afforded the opportunity to challenge his release, being aware of documented evidence supporting the dismissal, will be less likely to bring suit.

Employers also receive economic benefits in providing job security. Reduced costs in job training, a higher rate of productivity achieved through continuity in employment, and enhanced worker satisfaction and morale are important considerations.[154] Further, a just cause dismissal equalizes the imbalance of power in the employment relationship by giving the worker more control over his situation: his efforts to perform satisfactorily will result in greater job protection. Employers can avoid contract liability entirely by omitting just cause dismissal provisions from their company handbooks and by declining to give oral assurances of job security.[155] The recognition that such provisions and assurances are enforceable will prevent an employer from making such statements haphazardly and thus should reduce the incidence of situations in which prospective employees are misled.

The *Weiner* decision, then, represents only a small step in the modification of the employment-at-will rule. The court recognized the need to protect workers employed at-will, but the "totality of the circumstances" test which it adopts does not adequately protect the employee. The decision is not helpful in providing guidance for employers in avoiding future liability, nor does it clarify the rights of employees. It is thus up to the New York Legislature to take the next step by affording employees the statutory right to a just cause dismissal automatically, by eliminating the doctrine of employment-at-will.[156]

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[153] Murg & Scharman, *supra* note 34, at 383-84.

[154] *See* Comment, *supra* note 1, at 1832-35.

[155] *Toussaint*, 408 Mich. at 623, 292 N.W.2d at 896-97.

[156] *See* Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976).

In Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983), the New York Court of Appeals declined to recognize the tort of abusive discharge or contract action for breach of an implied covenant of good faith. The court stated that these issues require the determination of public policy and the balancing of competing interests. Thus, resolutions of these problems are more appropriately relegated to the legislature. *Id.* at 301-02, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235-36.