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the utmost scrutiny in ensuring that a defendant's decision to proceed pro se is an informed one, the *Mirenda* holding is fair to both the pro se defendant and the criminal justice system.¹¹¹

Donna M. Hitscherich

An employee who is hired for no specific duration but who has received assurances that he would not be terminated without just cause may maintain a breach of contract action for wrongful termination

Pursuant to the employment-at-will doctrine,¹¹² unless the duration of employment is specified, the employment relationship

standby counsel is "to be seen, but not heard." *Id.* at 273. The *Wiggins* Court further amplified this position by stating that "[standby counsel] is not to compete with the defendant or supersede his defense, [but] [r]ather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." *Id.* (footnotes omitted).

¹¹¹ A pro se defendant essentially is held to the same standards of courtroom procedure as is a criminal defendant who is represented by counsel. *See, e.g.,* *United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973). Pragmatically, however, trial judges sometimes attempt to aid the pro se defendant. *See, e.g.,* *Grubbs v. State*, 255 Ind. 411, 416, 265 N.E.2d 40, 43-44 (1970). Furthermore, a judge who presides over a criminal trial being conducted by a pro se defendant "must be especially acute and vigilant in governing the conduct of counsel and witnesses. . . ." *Id.*, 265 N.E.2d at 44. The defendant, moreover, may not use his constitutional right to appear pro se in order to disrupt the court proceedings. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Thus, in the interests of an orderly trial procedure, a trial judge may be prompted to appoint standby counsel for a pro se defendant. *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971).

¹¹² The employment-at-will doctrine was derived from the common-law principles of master and servant which existed until the middle of the 19th century. *See generally* *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967); Committee on Labor and Employment Law, *At-Will Employment and the Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170, 170-71 (1981) [hereinafter cited as Committee on Labor Law]; DeGiuseppe, *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 3-4 (1981-1982); Feerick, *Employment At Will*, N.Y.L.J., Oct. 5, 1979, at 1, col. 1; Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-20, 122-23 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980) [hereinafter cited as HARVARD Note]. English common law regarded the employment relationship as founded upon contract principles. When an employee was hired for an indefinite period, the term of employment was presumed to be 1 year. *See* Committee on Labor Law, *supra*, at 171; DeGiuseppe, *supra*, at 4; Feinman, *supra*, at 120. The English rule was accepted generally in the United States until the end of the 19th century. *See* Committee on Labor Law, *supra*, at 171; DeGiuseppe, *supra*, at 5-6; Feinman, *supra*, at 122; *see also* *Adams v. Fitzpatrick*, 125 N.Y. 127, 129, 26 N.E. 143, 145 (1891). At that time, the laissez-faire political and economic theory that developed from American industrial growth significantly

may be terminated by either party at any time, for any or no reason.¹¹³ Nevertheless, hired-at-will employees have sought recovery for wrongful termination on the grounds of abusive discharge,¹¹⁴

affected the employment relationship. See Feinman, *supra*, at 124-25; HARVARD Note, *supra*, at 1825-26. The new industrial era favored self-reliance, social freedom and economic individualism. HARVARD Note, *supra*, at 1826. Consequently, there existed fewer commitments between the employer and the employee, and the notions of mutual responsibility and job security were largely abandoned. *Id.* at 1825. The American concept of employment at will thus provided that a general hiring for an indefinite period was terminable at any time, rather than a hiring for a term of 1 year. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1981); see Committee on Labor Law, *supra*, at 171.

The rule gained wide acceptance in the United States, and the Supreme Court determined that the employer's right to discharge was a constitutionally protected property right and that he could purchase labor under the conditions he desires. See *Coppage v. Kansas*, 236 U.S. 1, 10-11 (1915); *Adair v. United States*, 208 U.S. 161, 174-75 (1908); *Blades, supra*, at 1416-17. The New York Court of Appeals adopted the rule in *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895).

¹¹³ *E.g.*, *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439, 441 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964); *James v. Board of Educ.*, 37 N.Y.2d 891, 892, 340 N.E.2d 735, 735, 378 N.Y.S.2d 371, 371 (1975); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E.2d 416, 417 (1895). Consistent with a *laissez-faire* theory, the at-will doctrine as formulated by the American courts provided that the parties were free to contract in order to reach a bargain that would satisfy both the employer and the employee. See Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 554-55 (1980) [hereinafter cited as ST. JOHN'S Note]. Thus, the rule was premised on the principle of mutuality of obligation; it was argued that because the employee was free to leave at will and for any or no reason, the employer was also free to terminate the employment relationship in such a manner. See *Blades, supra* note 112, at 1419; Committee on Labor Law, *supra* note 112, at 172, 174; ST. JOHN'S Note, *supra*, at 555. The employment-at-will doctrine, based on contract principles, presumed equal bargaining positions between the employer and the employee. See Feinman, *supra* note 112, at 124-25; ST. JOHN'S Note, *supra*, at 555-56. As industry and technology developed, however, it became apparent that there was a disparity in bargaining positions, clearly favoring the employer. This was due in part to the fact that advancing technology required the worker to specialize, thus decreasing his mobility. See *Blades, supra* note 112, at 1405; ST. JOHN'S Note, *supra*, at 557. See generally Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1443 (1975) ("[o]nly the most unusual [hired-at-will] employee possesses the sufficient bargaining power to insist upon a restriction of the dismissal power") [hereinafter cited as HASTINGS Note].

¹¹⁴ See, *e.g.*, *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 249, 297 N.E.2d 425, 426 (1973); *Petermann v. International Bd. of Teamsters*, 174 Cal. App. 2d 184, 187, 344 P.2d 25, 26, 28 (1959). The New York courts have not yet recognized a cause of action for abusive discharge. See *Murphy v. American Home Prods. Corp.*, 88 App. Div. 2d 870, 870, 451 N.Y.S.2d 770, 771 (1st Dep't 1982); *Edwards v. Citibank, N.A.*, 74 App. Div. 2d 553, 553-54, 425 N.Y.S.2d 327, 328 (1st Dep't 1980); *Marinzulich v. National Bank of N. Am.*, 73 App. Div. 2d 886, 886, 423 N.Y.S.2d 1014, 1014 (1st Dep't 1979); *Stewart v. Albert Einstein College of Medicine, N.Y.L.J.*, Nov. 26, 1982, at 15, col. 5 (Sup. Ct. Bronx County 1982); *Chin v. AT&T*, 96 Misc. 2d 1070, 1075, 410 N.Y.S.2d 737, 741 (Sup. Ct. N. Y. County 1978), *aff'd*, 70 App. Div. 2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979). The *Chin* court acknowledged the possibility of recognizing a cause of action under the appropriate circumstances, however, in stating that "[t]he doctrine of abusive discharge places upon the plaintiff the burden of

intentional infliction of emotional harm,¹¹⁵ prima facie tort,¹¹⁶ and

persuading this court that (1) there is a public policy of this State that (2) was violated by the defendant." 96 Misc. 2d at 1075, 410 N.Y.S.2d at 741. Moreover, in *Murphy*, while it was held that the plaintiff failed to show a violation that has been recognized as supporting a cause of action in other jurisdictions, the possibility of New York recognizing an abusive discharge action was not foreclosed. *Murphy v. American Home Prods. Corp.*, 88 App. Div. 2d 870, 870, 451 N.Y.S.2d 770, 771 (1st Dep't 1982).

In contrast to the New York state courts, federal courts applying New York law have upheld actions on the abusive discharge theory in cases where the employee's termination contravened public policy. *See, e.g.*, *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287, 1289 (S.D.N.Y. 1981) (involving a violation of New York's public policy concerning age discrimination); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980) (employer held liable for abusive discharge in terminating an employee in order to avoid the vesting of his pension plan). Justifying such a holding, the *Savodnik* court stated "[w]hile no case in New York has yet recognized the tort of abusive discharge, precedent does suggest New York courts will do so when presented with the proper case." 488 F. Supp. at 826. In addition, it has been stated that in New York, one would be "wrong in asserting that an employee may never sue for improper termination of a contract at will [under] a tort claim for abusive discharge." *Placos*, 517 F. Supp. at 1289.

Finally, other jurisdictions have upheld abusive discharge claims where the firing contravened public policy. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 177, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 185, 384 N.E.2d 353, 358 (1979) (discharging an employee for filing worker's compensation claim contravened public policy); *Nees v. Hocks*, 272 Or. 210, 218, 536 P.2d 512, 515-16 (1975) (employer held for abusive discharge in firing employee for serving on a jury); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 276 (W. Va. 1978) (cause of action stated where employee was terminated for attempting to urge employer to comply with consumer protection laws).

¹¹⁵ *See, e.g.*, *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346-47 (E.D. Mich. 1980). The defendant will be liable under the theory of intentional infliction of emotional harm only where his conduct is extreme and outrageous, causing severe emotional distress. RESTATEMENT (SECOND) OF TORTS § 46(1), at 71 (1965). Liability under this theory will accrue "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* comment d, at 73. Hence, this theory has been utilized by employees to recover damages in cases where the employer acted "outrageously" in discharging the employee. *See Richey v. American Auto Ass'n*, 9 Mass. Adv. Sh. 733, 406 N.E.2d 675, 676 (Mass. 1980) (employer can be held liable for damages resulting from outrageous conduct in discharging employee); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315, 319 (1976) (waitress stated cause of action for intentional infliction of emotional harm when she was fired as part of restaurant manager's plan to discharge waitresses in alphabetical order until he was given information regarding recent thefts).

¹¹⁶ *See, e.g.*, *Shaitelman v. Phoenix Mut. Life Ins. Co.*, 517 F. Supp. 21, 24 (S.D.N.Y. 1980); *Keating v. BBDO Int'l, Inc.*, 438 F. Supp. 676, 683 (S.D.N.Y. 1977). In New York, five elements must be established for an action to lie in prima facie tort: "(1) the intentional infliction of harm; (2) without excuse or justification; (3) by an act . . . which would otherwise be lawful; (4) resulting in actual temporal damage; and (5) not classified as any other recognized tort." 517 F. Supp. at 24; *see also McCullough v. Certain Teed Prods. Corp.*, 70 App. Div. 2d 771, 771, 417 N.Y.S.2d 353, 354 (4th Dep't 1979); *Chin v. AT&T*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 App. Div. 2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979). Although New York has not allowed recovery on this theory, *see Kushner v. Ciba-Geigy Corp.*, 76 App. Div. 2d 950, 950, 428 N.Y.S.2d 745, 746

breach of contract.¹¹⁷ In New York, actions based upon these theories of liability generally have been unsuccessful.¹¹⁸ Recently, however, in *Weiner v. McGraw-Hill, Inc.*,¹¹⁹ the Court of Appeals held that an employee who is hired for no specific duration can maintain a breach of contract action for wrongful termination based upon representations regarding job security made by members of the employer's staff and contained in the employer's personnel handbook.¹²⁰

(3d Dep't 1980); *Cartwright v. Golub Corp.*, 51 App. Div. 2d 407, 409, 381 N.Y.S.2d 901, 902 (3d Dep't 1976), the *Chin* court left such a possibility open by simply stating that the plaintiff had "failed to demonstrate the required elements," 96 Misc. 2d at 1074, 410 N.Y.S.2d at 740. Recovery has been quite limited in this area, however, primarily because "[t]he pleading must demonstrate an exclusive malicious motivation for the acts of [the employer]," *id.* at 1073, 410 N.Y.S.2d at 739, and in order to prevail, the employee must specifically plead his actual damages, *McCullough v. Certaineed Prods. Corp.*, 70 App. Div. 2d 771, 771, 417 N.Y.S.2d 353, 354 (4th Dep't 1979).

¹¹⁷ See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 102, 364 N.E.2d 1251, 1256 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 611, 292 N.W.2d 880, 890-91 (1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549, 551 (1974). Most courts which have allowed recovery in contract for the termination of an employment-at-will relationship have implied an obligation of good faith and fair dealing in the employment contract, as is present in other contracts. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 727-28 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 103, 364 N.E.2d 1251, 1256-57 (1977). In addition, some courts have found implied-in-fact promises or detrimental reliance in order to uphold the employer's action, see *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 611, 292 N.W.2d 880, 891 (1980); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 261-62, 283 N.W.2d 713, 717 (1979); see also Note, *supra* note 112, at 1820, while others have considered whether personnel handbooks which assure continued employment absent "just cause" for discharge are enforceable promises, see, e.g., *Toussaint*, 408 Mich. at 612, 292 N.W.2d at 892; see *infra* note 120.

¹¹⁸ See *Murphy v. American Home Prods. Corp.*, 88 App. Div. 2d 870, 871, 451 N.Y.S.2d 770, 771 (1st Dep't 1982); *Edwards v. Citibank, N.A.*, 74 App. Div. 2d 553, 553-54, 425 N.Y.S.2d 327, 328 (1st Dep't 1980); *Stewart v. Albert Einstein College of Medicine, N.Y.L.J.*, Nov. 26, 1982, at 15, col. 5 (Sup. Ct. Bronx County 1982); *Chin v. AT&T*, 96 Misc. 2d 1070, 1076, 410 N.Y.S.2d 737, 741 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 App. Div. 2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979).

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

¹²⁰ *Id.* at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195. Most courts that have considered the enforceability of assurances in personnel handbooks that discharge will only be for just cause have not found an enforceable promise. See, e.g., *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 54-55, 551 P.2d 779, 782 (1976); *Edwards v. Citibank, N.A.*, 74 App. Div. 2d 553, 554, 425 N.Y.S.2d 327, 328 (1st Dep't 1980); *Chin v. AT&T*, 96 Misc. 2d 1070, 1072-73, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 App. Div. 2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979); HARVARD Note, *supra* note 112, at 1820-21. In general, personnel handbooks are viewed as unilateral expressions of company policy, lacking in mutuality of obligation and, therefore, not considered part of the employment contract. See *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55, 551 P.2d 779, 782 (1976); see also *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 5-6, 328 N.E.2d 775, 778-79 (1975); *Edwards v. Citibank*,

In *Weiner*, the plaintiff engaged in a series of discussions with a representative of McGraw-Hill, Inc., in which the plaintiff was assured that the company adhered to a policy, outlined in the company's personnel handbook, of terminating employees only for "just cause" and after a chance for rehabilitation.¹²¹ In addition, the employment application form signed and submitted by the plaintiff indicated that the employment would be in conformity with the personnel handbook.¹²² The plaintiff was hired and remained in the defendant's employ for 8 years, until February 1977, at which time the plaintiff's employment was terminated for "lack of application."¹²³ Thereafter the plaintiff brought suit on the theories of abusive discharge, implied promise of good faith and fair dealing, and breach of contract.¹²⁴ Distinguishing this case from those in which an employee had not been bound to a handbook's contents,¹²⁵ Special Term upheld the breach of contract action.¹²⁶ A divided Appellate Division, First Department reversed, holding that the plaintiff could be released "at any time and for any or no

N.A., 74 App. Div. 2d 553, 554, 425 N.Y.S.2d 327, 328 (1st Dep't 1980). Courts from jurisdictions other than New York holding that the personnel handbook is a binding part of the employment contract generally have been decided under the facts and circumstances of each case. See *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 335, 563 P.2d 54, 59 (1977); *Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 3d 1056, 1058-59, 322 N.E.2d 574, 576 (App. Ct. 1974).

In *Toussaint*, the Supreme Court of Michigan adopted a liberal approach, stating that when an employer establishes personnel policies and procedures, and makes them known to the employees, "the employment relationship is presumably enhanced." 408 Mich. at 613, 292 N.W.2d at 892. A personnel policy is legally enforceable by an employee-at-will in the event that it becomes part of the employment contract; this can result by express written or oral agreement, or from the employees "legitimate expectations" grounded in the employer's policy statements. *Id.* at 600, 292 N.W.2d at 885.

¹²¹ 57 N.Y.2d at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

¹²² *Id.* The printed employment form stated that *Weiner's* employment would be subject to the provisions of McGraw-Hill's "handbook on personnel policies and procedures." *Id.* The handbook provided that "[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." *Id.*

¹²³ *Id.* at 461, 443 N.E.2d at 442-43, 457 N.Y.S.2d at 194-95. The plaintiff had left his previous employer, Prentice-Hall, and thereby forfeited accrued fringe benefits and a salary increase that had been proffered to induce him to stay. *Id.*, 443 N.E.2d at 442, 457 N.Y.S.2d at 194. The defendant's representatives told the plaintiff that employment with McGraw-Hill would "bring him the advantage of job security." *Id.* at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

¹²⁴ *Id.* at 461, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

¹²⁵ *Id.*

¹²⁶ *Id.*

reason" since he had been hired at will.¹²⁷

The Court of Appeals reversed and held that the record evidenced the existence of a contract and its breach sufficient to sustain a cause of action.¹²⁸ Writing for the majority,¹²⁹ Judge Fuchsberg initially noted the history of the employment-at-will doctrine and the growing trend favoring reform of this strict principle.¹³⁰ Further, reasoning that mutuality is not always an essential element of a contract when consideration is present, the Court observed that although an employee has the right to leave the company when he wishes, an employer nevertheless may have bargained away his right to terminate.¹³¹ As long as the consideration is a benefit to the promisee or a detriment to the promisor,¹³² reasoned the Court, the plaintiff's services are valid consideration for the defendant's promise.¹³³ Accordingly, Judge Fuchsberg determined that "an agreement on the part of the employer not to dismiss except for 'good and sufficient cause only'" does not "ineluctabl[y]" result in employment at will.¹³⁴ Finally, reminding the trial court that hiring for an indefinite term gives rise to merely a rebuttable presumption of at-will terminability,¹³⁵ the Court concluded that the totality of circumstances combined to present a question of fact as to whether the defendant was bound to his promise not to discharge without sufficient cause.¹³⁶

¹²⁷ 83 App. Div. 2d 810, 811, 442 N.Y.S.2d 11, 12 (1st Dep't 1981). Justice Kupferman dissented, stating that he could not agree that "an employee handbook on personnel policies and procedures is a corporate illusion . . ." *Id.* (Kupferman, J., dissenting).

¹²⁸ 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. The Court stated that because the plaintiff established a sustainable cause of action in breach of contract, it was not necessary to address the arguments for abusive discharge and implied promise of good faith and fair dealing. *Id.* at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195. The Court also noted that the Statute of Frauds argument was not an obstacle since the contract, by its terms, could be performed in less than 1 year. *Id.* at 463, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

¹²⁹ Chief Judge Cooke, Judges Jasen, Jones and Meyer joined in the majority opinion written by Judge Fuchsberg. Judge Gabrielli joined in the dissenting opinion of Judge Wachtler.

¹³⁰ 57 N.Y.2d at 462-63, 443 N.E.2d at 443-44, 457 N.Y.S.2d at 195-96; *see supra* note 112.

¹³¹ 57 N.Y.2d at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

¹³² *See Hamer v. Sidway*, 124 N.Y. 538, 546, 27 N.E. 256, 257 (1891) (self-denial of liquor and tobacco was adequate consideration for the promise to pay a sum of money).

¹³³ 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197 (quoting 1A A. CORBIN, CORBIN ON CONTRACTS § 152 (1963)).

¹³⁴ 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

¹³⁵ *Id.* at 466, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

¹³⁶ *Id.* at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198. The Court considered the

In a dissenting opinion, Judge Wachtler argued that there is no question of fact for the jury since neither the application form nor the personnel handbook evidenced any intent on the part of the defendant to be bound by such a promise.¹³⁷ Judge Wachtler stated that in the absence of an agreement providing for the duration of employment, traditional employment-at-will principles should apply.¹³⁸ In addition, the dissent opined that public policy militated against broadly construing the personnel handbook and the application form to find a contract,¹³⁹ because the limitation on the employer's right to discharge could cause inefficiency in the workplace as well as encourage companies to relocate in states adhering to the more traditional rule.¹⁴⁰

In concluding that the *Weiner* circumstances established a sustainable cause of action in breach of contract,¹⁴¹ it is submitted that the Court significantly retreated from the rigidity of the employment-at-will doctrine.¹⁴² This departure comports with the more enlightened view of a number of foreign¹⁴³ and American ju-

following factors: (1) the plaintiff was induced to leave his previous position based upon the defendant's assurances; (2) these assurances were expressed in the application form and the personnel handbook; (3) during his employment, the plaintiff routinely rejected other offers of employment; and, (4) in his position as a director, he was expected to comply with the handbook procedure in terminating other employees. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

¹³⁷ *Id.* at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

¹³⁸ *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting). Judge Wachtler examined the application form and personnel handbook and argued that the form was merely "for internal record-keeping purposes" and the handbook was a statement of "broad internal policy guidelines generally followed." *Id.* at 468, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting); *see also* *Weiner v. McGraw-Hill, Inc.*, 83 App. Div. 2d 810, 811, 442 N.Y.S.2d 11, 11-12 (1st Dep't 1981) (the application form never rose to the level of an employment agreement because it did not spell out the critical terms of the employment such as duration).

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

¹⁴⁰ *Id.* at 468-69, 443 N.E.2d at 447, 457 N.Y.S.2d at 199 (Wachtler, J., dissenting).

¹⁴¹ *Id.* at 462, 443 N.E.2d at 443, 457 N.Y.S.2d at 195.

¹⁴² Recently, there has been a growing recognition in the United States of the need for reform in the employment-at-will doctrine. *See* *Blades, supra* note 112, at 1405, 1418 n.69; *DeGiuseppe, supra* note 112, at 2; *HARVARD Note, supra* note 112, at 1816-17; *HASTINGS Note, supra* note 113, at 1436; *Sr. JOHN'S Note, supra* note 113, at 566-67. John Feerick, presently the Dean of Fordham University School of Law, stated that "employers would be well advised to examine their policies and procedures for terminating employees so as to guard against arbitrary, malicious and unfair terminations." Feerick, *Erosion of Rule on Employment At Will*, N.Y.L.J., Nov. 7, 1980, at 1, col. 1.

¹⁴³ While American courts are just beginning to deviate from the strictures of the employment-at-will doctrine, *see supra* notes 112, 114-17 and accompanying text, the ideas of "stability of employment" and "job security" are commonplace in many other industrialized countries, *Committee on Labor Law, supra* note 112, at 175. By statute, Great Britain,

risdictions.¹⁴⁴ Indeed, contrary to Judge Wachtler's fear concerning workplace efficiency, it is persuasively contended that enhancing job security results in increased productivity and a more cooperative work environment.¹⁴⁵

It is further submitted that the *Weiner* facts lent themselves more to the remedies of promissory estoppel or implied promise of good faith and fair dealing than to a contractual intent theory.¹⁴⁶ The result is that the success of future employee-plaintiffs who rely on the employer's personnel handbook to support breach of contract actions remains unclear. Because the Court failed to articulate clearly a standard for when a breach of contract action lies for an employee induced to accept employment by representations of job security,¹⁴⁷ the *Weiner* holding must be viewed purely as *sui generis*.¹⁴⁸ Ostensibly, the result places employers in a precarious position in that a determination of contractual intent on the part of the employer can be more equivocal. Notwithstanding this increased employer vulnerability, however, employers can protect themselves from unexpected liability merely by including disclaimers in written employment representations,¹⁴⁹ or by requiring employees to agree expressly to employment at will.¹⁵⁰ In sum, it is

France, Japan and West Germany, among others, provide protection for employees who pass a probationary period, provide for money damages in the event of unjust dismissal, and in some instances, provide the remedy of reinstatement in addition to money damages. *Id.*

¹⁴⁴ See *supra* notes 114-17 and accompanying text.

¹⁴⁵ HARVARD Note, *supra* note 112, at 1836; see also Feerick, *Developments in Employee Rights*, N.Y.L.J., June 5, 1981, at 1, col. 1.

¹⁴⁶ See *supra* notes 123 and 136 and accompanying text. Other courts when presented with similar factual situations have not proceeded on a strict contractual intent theory, but rather, have imposed an obligation of good faith and fair dealing, or, alternatively, have focused on implied-in-fact promises or detrimental reliance. See *supra* note 117. Present in *Weiner* were explicit assurances on the part of the defendant and consequent detrimental reliance. 57 N.Y.2d at 460-61, 443 N.E.2d at 442, 457 N.Y.S.2d at 194; see *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 729 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 103, 364 N.E.2d 1251, 1256 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 611, 292 N.W.2d 880, 890-91 (1980).

¹⁴⁷ See 57 N.Y.2d at 465-67, 443 N.E.2d at 445-46, 457 N.Y.S.2d at 197-98 (such cases must be decided on conduct and intent of parties, and attendant facts and circumstances).

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

¹⁴⁹ See, e.g., *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 612-14, 302 N.W.2d 307, 312 (1981); *Kari v. General Motors Corp.*, 79 Mich. App. 93, 95, 261 N.W.2d 222, 224 (1977). It should be borne in mind by employers that oral and written assurances of job security may negate the effect of disclaimers. *Id.* at 95, 261 N.W.2d at 224; see also 102 Mich. App. at 612-14, 302 N.W.2d at 312.

¹⁵⁰ See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 612, 292 N.W.2d 880, 891 (1980). In *Toussaint*, the court stated that an employer could assure that employees were hired at will by establishing a "company policy of requiring prospective employees"

submitted that the *Weiner* decision aligns New York with the more progressive view of the employment relationship with no concomitant undue hardship on the employer.

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Evidence obtained through a police informant in a noncustodial setting must be suppressed if the police knew that the defendant was represented by counsel on a pending, unrelated criminal charge

The New York Court of Appeals traditionally has afforded a broad construction to a criminal defendant's right to counsel.¹⁵¹ The right to counsel attaches when the accused requests the aid of an attorney, when formal proceedings against the defendant commence, or when an attorney enters the proceeding,¹⁵² and state-

to agree to this as a condition of their employment. *Id.* at 612, 292 N.W.2d at 891. The employer can protect himself by entering into a written contract explicitly stating that the employment is at will, *id.* at 612 n.24, 292 N.W.2d at 891 n.24; see *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980) (relying on the exception elicited in *Toussaint* to find no right of "just cause" dismissal for employers); DeGiuseppe, *supra* note 112, at 48, for "[i]f the employment agreement expressly permits a discharge for any reason whatsoever, courts would, under contract theory, be helpless to protect the employee from abusive discharge," HASTINGS Note, *supra* note 113, at 1455.

¹⁵¹ Note, *The Expanding Right to Counsel in New York*, 10 FORDHAM URB. L.J. 351, 351 (1982). The Court of Appeals has described as "a cherished principle" the right of the defendant under the state constitution to place an attorney between himself and the "awesome power of the sovereign." *People v. Settles*, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 613, 412 N.Y.S.2d 874, 877 (1978); see N.Y. CONST. art. I, § 6. It is not surprising, therefore, that the right to counsel in New York has developed independently of the sixth amendment guarantee contained in the federal Constitution. 46 N.Y.2d at 161, 385 N.E.2d at 615, 412 N.Y.S.2d at 877. As a result, a defendant, in many respects, has a broader right to counsel under New York law than he does under federal law. See Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BURLINGAME L. REV. 157, 178 & n.149 (1979).

Exemplifying New York's broad interpretation of the right to counsel is the rule that once the right to counsel attaches, the defendant cannot effectively waive his privilege against self-incrimination or his right to counsel, unless the waiver is made in the presence of an attorney. *People v. Hobson*, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422 (1976). This principle has been said to "[breathe] life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary." *Id.*; accord *People v. Skinner*, 52 N.Y.2d 24, 29, 417 N.E.2d 501, 503, 436 N.Y.S.2d 207, 209 (1980); *People v. Cunningham*, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980).

¹⁵² In the early 1960's, the Court of Appeals expansively defined the right to counsel and the privilege against self-incrimination as those rights are embodied in the state constitution. The Court held that upon the indictment of an accused, formal proceedings com-