Chapter 1

The Employment Contract

1-1 THE EMPLOYMENT RELATIONSHIP

The question of whether one person is the employer of another matters in many contexts. Employers are subject to antidiscrimination laws in dealings with their employees.[1] Employees enjoy the protection of the New York Labor Law, which governs matters such as minimum wage, manner of payment, and frequency of payment.[2] An employer must pay unemployment insurance premiums for each employee, and terminated employees may be eligible to collect unemployment insurance benefits.[3] An employer is liable in tort to third parties for injuries caused by an employee's wrongful acts that occur within the course and scope of employment.[4] Conversely, regardless of fault, an employer is generally liable only under the workers' compensation laws, rather than in tort, for an employee's injuries suffered within the course and scope of employment.[5]

1-1:1 Definitions

The New York Labor Law defines an "employee" as a "mechanic, workingman or laborer working for another for hire" and an "employer" as "the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent,

1. *See* Chapter 4.
2. *See* Chapter 3.
3. *See* Chapter 9.
4. *See* Chapter 6.
5. *See* Chapter 6.

superintendent, foreman or other subordinate."[6] "Working for another for hire" has three aspects: (1) the employee agrees to perform a service in return for compensation (usually monetary) from the employer; (2) the employer may exercise authority in directing and supervising the manner and method of the work; and (3) the employer usually decides whether the task undertaken by the employee has been completed satisfactorily.[7]

1-1:2 Distinction Between an Employee and an Independent Contractor

The employer's right to direct and supervise the manner and method of work done by an employee, and the employer's authority to determine when a job performed by an employee is completed, distinguish an employee from an independent contractor, such as a lawyer, doctor, plumber, or architect. The Court of Appeals has explained, "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results."[8]

An "employee" is a person "who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished."[9] By contrast, an "independent contractor" is a person "who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used."[10] The degree of control and direction exercised by the employer determines whether the person doing the work is an employee or an independent contractor.[11]

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6. N.Y. Lab. Law § 2(5), (6). *Cf. Matter of Ovadia v. Office of the Indus. Bd. of Appeals*, 19 N.Y.3d 138, 946 N.Y.S.2d 86 (2012) (holding that a general contractor is ordinarily not an employer of a subcontractor's employees for purpose of unpaid wage claim under Labor Law § 190; noting that the general contractor does not hire or supervise the workers employed by its subcontractors, maintain the employment records for each worker, or track the individual workers' schedules or rates of pay).

7. *Stringer v. Musacchia*, 11 N.Y.3d 212, 215-16, 869 N.Y.S.2d 362, 364-65 (2008).

8. *Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 694-95 (2003) (internal quotation marks and citations omitted).

9. *Liberman v. Gallman*, 41 N.Y.2d 774, 778, 396 N.Y.S.2d 159, 161 (1977) (internal quotation marks and citations omitted).

10. *Liberman v. Gallman*, 41 N.Y.2d 774, 778, 396 N.Y.S.2d 159, 161 (1977) (internal quotation marks and citations omitted).

11. *Liberman v. Gallman*, 41 N.Y.2d 774, 778, 396 N.Y.S.2d 159, 161 (1977). *See also In re Empire State Towing & Recovery Ass'n, Inc.*, 15 N.Y.3d 433, 437, 912 N.Y.S.2d 551, 554 (2010)

Under the Labor Law, to determine whether an individual is an employee or independent contractor, New York courts look to whether the individual "(1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule."[12]

Similarly, the Court of Appeals has held that in common law, the principal factors determining who is an employer are: "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct," although "the really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter."[13] This test also governs who is an employer under the Human Rights Law (N.Y. Executive Law § 296).[14]

1-2 EMPLOYMENT FOR A DEFINITE TERM

An employee may be hired for a term of definite duration (e.g., for a term of one year) or for an indefinite term. Where the contract of employment is for a definite term, the employer or the employee

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("An employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results . . . . However, control over the means is the more important factor to be considered.") (internal quotation marks and citations omitted).

12. *Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 694-95 (2003) (internal quotation marks and citations omitted). *See also Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239, 818 N.Y.S.2d 844 (2006) (holding that attorney who provided services to the State of New York was an independent contractor, not a state employee, for purposes of indemnification in a suit brought against him, where the lawyer worked without day-to-day supervision, chose his own hours of work, was paid out of sale proceeds rather than a salary, had no taxes withheld, and furnished his own materials); *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429, 633 N.Y.S.2d 754 (1995) (holding that, for purposes of the New York Executive Law, plaintiff was an independent contractor, not an employee, where plaintiff (1) was paid for performance rather than salary, (2) did not have taxes withheld, (3) could sell competitors' products, and (4) had a high degree of independence not associated with employer/employee relationship); *In re Ted Is Back Corp.*, 64 N.Y.2d 725, 485 N.Y.S.2d 742 (1984) (holding that no employer-employee relationship existed between company and salespeople for purposes of unemployment insurance, where the salespeople (1) worked at their own convenience, (2) were free to hold outside employment and were not limited to any particular territory, (3) were not reimbursed for expenses and received no salary or drawing account, but were paid strictly on a commission basis, and (4) did not have taxes withheld from their compensation).

13. *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174, 186, 54 N.Y.S.3d 360, 366 (2017) (internal quotation marks and internal punctuation omitted; citing *State Div. of Human Rights on Complaint of Emrich v. GTE Corp.*, 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dep't 1985)).

14. *See Griffin v. Sirva, Inc.*, 29 N.Y.3d 174, 186, 54 N.Y.S.3d 360, 366 (2017).

may terminate the employment only for "cause."[15] If, by its terms, the contract is for a term greater than one year, then it must be memorialized in a writing signed by the party to be charged to satisfy the Statute of Frauds.[16]

1-2:1 Linking Term of Employment to an Event

A contract of employment for a "definite term" ordinarily has a fixed length of time, e.g., a two-year employment contract. However, in *Rooney v. Tyson*, the Court of Appeals held that the parties also may create a contract of employment for a definite term by providing some other objectively ascertainable measure for when the contract will end, e.g., that a boxer would employ the plaintiff as his trainer "for as long as [the boxer] fought professionally."[17] Such a contract is for a definite term because, "although the exact end-date of [the employer's] professional boxing career was not precisely calculable, the boundaries of beginning and end of the employment period are sufficiently ascertainable" to establish a contract of definite duration.[18]

1-2:2 Permanent or Lifetime Employment

New York law disfavors alleged employment contracts that are "permanent" or "for life." The Court of Appeals has stated that any agreement for lifetime employment "is so unusual that we would expect to find it contained in some writing."[19] An oral lifetime contract may be sustained in the rare circumstances where

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15. *See Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 685, 301 N.Y.S.2d 610, 612 (1969).

16. N.Y. Gen. Oblig. Law § 5-701(a)(1). The Statute of Frauds is discussed in § 1-5.

17. *Rooney v. Tyson*, 91 N.Y.2d 685, 688, 674 N.Y.S.2d 616, 617 (1998).

18. *Rooney v. Tyson*, 91 N.Y.2d 685, 602, 674 N.Y.S.2d 616, 620 (1998). *See also Lichtman v. Estrin*, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dep't 2001) (holding that verbal agreement to continue employing plaintiff during the period of another attorney's suspension constitutes an enforceable contract for a definite term); *Huebener v. Kenyon & Eckhardt, Inc.*, 142 A.D.2d 185, 534 N.Y.S.2d 952 (1st Dep't 1988) (holding that alleged promise to employ plaintiff "until retirement" satisfied the Statute of Frauds because plaintiff conceivably could retire within one year).

19. *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 441 (1928). *Accord Honzawa Holding Co. v. Hiro Enter. USA, Inc.*, 291 A.D.2d 318, 737 N.Y.S.2d 847, 848 (1st Dep't 2002); *Matter of Liquidation of N.Y. Agency & Other Assets of Bank of Credit & Commerce Int'l, S.A.*, 227 A.D.2d 145, 145, 642 N.Y.S.2d 238, 239 (1st Dep't 1996); *Rosenblatt v. Levy*, 209 A.D.2d 680, 680, 619 N.Y.S.2d 945, 946 (2d Dep't 1994).

it is "authorized by the corporation and based on an adequate consideration."[20]

Where, instead, the alleged contract merely provides for "permanent" employment, New York courts will not read the word "permanent," standing alone, to mean "for life." Rather, "an agreement to give a person permanent employment means nothing more than that the employment is to continue indefinitely and until one or the other of the parties wishes for some good reason to sever the relation."[21]

1-3 JUST CAUSE AND WRONGFUL DISCHARGE

Where the employee enjoys a contract for a definite term of employment, the employer cannot terminate the employee before the term ends unless the employer has "just cause" for termination.[22] In such cases, the employer bears the burden of demonstrating the existence of cause to discharge the employee.[23] Just cause means "some substantial shortcoming detrimental to the employer's interests that the law and sound public opinion recognize as grounds for dismissal."[24] The parties may agree as to what constitutes cause for termination in the employment contract. New York common law, however, recognizes several different grounds for just cause for termination.

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20. *Heaman v. E. N. Rowell Co.*, 261 N.Y. 229, 231 (1933). *See also Kotick v. Desai*, 123 A.D.2d 744, 745, 507 N.Y.S.2d 217, 218 (2d Dep't 1986); *Brown v. Babcock*, 265 A.D. 596, 40 N.Y.S.2d 428 (4th Dep't 1943).

21. *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 444 (1928). *See also Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 138 (2d Cir. 2007) (holding that alleged oral promises to employee that her "old job would 'always' be available" did not create employment for definite term).

22. *See Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 685, 301 N.Y.S.2d 610, 612 (1969). *See also Crane v. Perfect Film & Chem. Corp.*, 38 A.D.2d 288, 291, 329 N.Y.S.2d 32, 34 (1st Dep't 1972) ("An employment contract for a stated term may not be terminated by the employer without a cause sufficient in law which would justify an employer in discharging an employee.") (internal quotation marks and citation omitted); *Benerofe v. Avnet, Inc.*, 236 A.D.2d 496, 654 N.Y.S.2d 619, 619 (2d Dep't 1997) (finding that employees demonstrated a factual issue concerning whether they were employed "pursuant to separate contracts of employment for definite terms, and therefore could only be terminated for good cause"); *Alpern v. Hurwitz*, 644 F.2d 943, 945 (2d Cir. 1981) (noting just cause requirement).

23. *See Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 685, 301 N.Y.S.2d 610, 612 (1969); *Jackson v. Jackson*, 306 A.D.2d 182, 182, 763 N.Y.S.2d 545, 545 (1st Dep't 2003).

24. *Scholem v. Acadia Realty Ltd. P'ship*, 45 Misc. 3d 562, 567, 992 N.Y.S.2d 857, 861 (Sup. Ct., Suffolk Cty. 2014), *aff'd*, 144 A.D.3d 1012, 42 N.Y.S.3d 214 (2d Dep't 2016).

1-3:1 Grounds Providing Just Cause for Termination

1-3:1.1 Theft and Dishonesty

Embezzlement or theft of company property may provide just cause for termination,[25] as does other dishonesty concerning employment matters.[26] An employee's acceptance of bribes from persons who conduct business with the employer is grounds for discharge.[27] Submission of padded expenses or fraudulent vouchers is also dishonest conduct that justifies termination.[28] However, an employee who uses company funds based upon a justified but mistaken belief, and stands ready to return the funds, is not guilty of dishonesty so as to provide cause for discharge.[29]

1-3:1.2 Insubordination

Insubordination is just cause for termination.[30] An employee must obey the employer's reasonable instructions. The First Department has stated:

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[25] *See Graves v. Kaltenbach & Stephens, Inc*., 205 A.D. 110, 199 N.Y.S. 248 (1st Dep't), *aff'd*, 237 N.Y. 546 (1923). *Cf. Kaiser v. Raoul's Rest. Corp.*, 112 A.D.3d 426, 976 N.Y.S.2d 59 (1st Dep't 2013) (holding that where employee maintained two sets of books, employer had bona fide basis to terminate employee on suspicion of embezzlement so as to defeat discrimination claim, even if embezzlement charge later proved false).

[26] *See Hoffman v. Wyckoff Heights Med. Ctr.*, 129 A.D.3d 526, 526-27, 11 N.Y.S.3d 154, 155 (1st Dep't 2015) ("defendant raised issues of fact as to 'cause' for his termination by submitting evidence to suggest that plaintiff was dishonest in failing to inform it about an occurrence rendering him incapable of continuing to serve as general counsel").

[27] *See Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 469-70, 410 N.Y.S.2d 274, 276 (1978).

[28] *See Hutchinson v. Washburn*, 80 A.D. 367, 80 N.Y.S. 691 (2d Dep't 1903) (holding that just cause for termination existed if, in fact, the employee obtained reimbursement for "full" hotel rate when he in fact received a discount).

[29] *See Boyle v. Petrie Stores Corp.*, 136 Misc. 2d 380, 388, 518 N.Y.S.2d 854, 858 (Sup. Ct., N.Y. Cty. 1985).

[30] *See Trieger v. Montefiore Med. Ctr.*, 15 A.D.3d 175, 175-76, 789 N.Y.S.2d 42, 43 (1st Dep't) ("[t]he motion court correctly found that the memorandum plaintiff circulated to all other department chairs at defendant hospital, strongly criticizing defendant's management . . . was insubordinate, and that it gave defendant just cause to terminate plaintiff's employment contract"), *leave to appeal denied*, 4 N.Y.3d 710, 797 N.Y.S.2d 816 (2005). *See also Schenk v. Red Sage, Inc.*, No. 91 Civ. 7868 (BN), 1994 WL 18630, at *15 (S.D.N.Y. Jan. 21, 1994) (finding just cause for termination where employee responded to [the employer's] command by shouting obscenities, refusing to perform an assigned task, and walking away"). *Cf. In re Hector*, 128 A.D.3d 1258, 1259, 8 N.Y.S.3d 737, 738 (3d Dep't 2015) ("[e]ngaging in insubordinate behavior . . . or using profane or disrespectful language toward a supervisor can constitute disqualifying misconduct" under workers' compensation law) (citations omitted); *In re Claim of Gamble*, 187 A.D.2d 751, 752, 590 N.Y.S.2d 144, 145 (3d Dep't 1992) (holding that for purposes of workers' compensation statute, employee "was terminated from her employment for insubordination and refusal to do a job assignment";

> It is settled law that an employer generally is entitled to direct how an employee shall perform his duties, and in so doing the employer is entitled to consult his own convenience as well as the interest of his business. So long as such directions are not unreasonable, the employee is bound to obey them, and it is no answer to a charge of disobedience for an employee to say that some other method of doing the business was better than that which the employer chose.[31]

Just cause for termination exists when an employee's "continuous refusal to comply with lawful and reasonable directions of an employer reaches such proportions as to be deleterious to the employer's interests, is inconsistent with continuance of the basic employer-employee relationship, and effectively stalls the conduct of important and duly authorized business affairs."[32] The employer, however, bears the burden to show that the instructions were reasonable.[33]

Acts performed by the employee "in defense of his contract rights, or in assertion of an agreed status or function in the enterprise," are not insubordinate.[34] For example, the Court of Appeals has held that where an individual was expressly hired to be an executive with supervisory responsibility, his refusal to accept a demotion with commensurate loss in status did not constitute insubordination, and thus his termination based upon such refusal constituted wrongful discharge.[35]

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her "behavior did not amount to simply poor judgment on her part but indicated that claimant specifically failed to comply with established procedures" so as to constitute misconduct giving cause for termination).

31. *Rudman v. Cowles Commc'ns, Inc.*, 35 A.D.2d 213, 216, 315 N.Y.S.2d 409, 411-12 (1st Dep't 1970), *rev'd on other grounds*, 30 N.Y.2d 1, 330 N.Y.S.2d 33 (1972). *Accord Race v. Goldstar Jewellery, LLC*, 84 A.D.3d 1342, 1343, 924 N.Y.S.2d 166, 167 (2d Dep't 2011).

32. *Race v. Goldstar Jewellery, LLC*, 84 A.D.3d 1342, 1343, 924 N.Y.S.2d 166, 167 (2d Dep't 2011) (internal quotation marks omitted; citing and quoting *Rudman v. Cowles Commc'ns, Inc.*, 35 A.D.2d 213, 216, 315 N.Y.S.2d 409, 411-12 (1st Dep't 1970), *rev'd on other grounds*, 30 N.Y.2d 1, 330 N.Y.S.2d 33 (1972)).

33. *Race v. Goldstar Jewellery, LLC*, 84 A.D.3d 1342, 1343, 924 N.Y.S.2d 166, 167 (2d Dep't 2011).

34. *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 10, 330 N.Y.S.2d 33, 40 (1972).

35. *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 330 N.Y.S.2d 33 (1972).

1-3:1.3 Disloyalty or Breach of Fiduciary Duty

Employee disloyalty may provide just cause for termination.[36] One form of disloyalty in the private sector (where First Amendment issues do not arise)[37] is "open criticism of [the] employer."[38] Another form of disloyalty is breach of the employee's fiduciary duty of "utmost good faith and loyalty in the performance of his duties."[39] Just cause exists if the employee "make[s] use of the employer's time, facilities or proprietary secrets in preparation for engaging in a competing business or endeavor";[40] diverts the employer's business opportunities to a competing business for personal profit, or otherwise competes with the employer's business during the time of his or her employment;[41] reveals the employer's confidential, need-to-know basis only information to the competitor;[42] accepts other employment that renders the employee incapable of performing his or her duties under the employment contract;[43] engages in self-dealing conduct that benefits the employee at the employer's expense;[44] or "intentionally engage[s] in misconduct that was materially adverse to the interests" of the employer.[45]

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36. *See Scott v. Beth Israel Med. Ctr., Inc.*, 47 A.D.3d 541, 850 N.Y.S.2d 81 (1st Dep't 2008).

37. For a discussion of First Amendment restrictions on termination of public employees, *see* Chapter 7, § 7-1.

38. *Golden v. Worldvision Enters., Inc.*, 133 A.D.2d 50, 52, 519 N.Y.S.2d 1, 3 (1st Dep't 1987), *leave to appeal denied*, 71 N.Y.2d 804, 528 N.Y.S.2d 829 (1988). *See also Wender v. GA Glob. Mkts., LLC*, 147 A.D.3d 663, 663, 46 N.Y.S.3d 887, 887-88 (1st Dep't 2017) ("[p]laintiff's disparagement of defendant . . . constituted cause for termination"); *Trieger v. Montefiore Med. Ctr.*, 15 A.D.3d 175, 175-76, 789 N.Y.S.2d 42, 43 (1st Dep't) ("[t]he motion court correctly found that the memorandum plaintiff circulated to all other department chairs at defendant hospital, strongly criticizing defendant's management . . . gave defendant just cause to terminate plaintiff's employment contract"), *leave to appeal denied*, 4 N.Y.3d 710, 797 N.Y.S.2d 816 (2005).

39. *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.*, 100 A.D.2d 81, 88, 474 N.Y.S.2d 281, 285 (1st Dep't), *appeal dismissed*, 63 N.Y.2d 675 (1984).

40. *Scott v. Beth Israel Med. Ctr., Inc.*, 47 A.D.3d 541, 541, 850 N.Y.S.2d 81, 82 (1st Dep't 2008).

41. *See Hercules Packing Corp. v. Steinbruckner*, 28 A.D.2d 635, 280 N.Y.S.2d 423 (4th Dep't 1967).

42. *See Wender v. GA Glob. Mkts., LLC*, 147 A.D.3d 663, 663, 46 N.Y.S.3d 887, 887-88 (1st Dep't 2017) ("[p]laintiff's . . . disclosures of certain information to clients and competitors violated the parties' employment agreement and constituted cause for termination"); *Scott v. Beth Israel Med. Ctr., Inc.*, 47 A.D.3d 541, 541, 850 N.Y.S.2d 81, 82 (1st Dep't 2008).

43. *See Harmon v. Adirondack Cmty. Coll.*, 12 A.D.3d 746, 784 N.Y.S.2d 663 (3d Dep't 2004).

44. *See Plattsburgh Hous. Auth. v. Cantwell*, 54 Misc. 3d 1216(A) (Table), 2017 WL 593160 (Sup. Ct., Clinton Cty. Feb. 10, 2017).

45. *Suffolk Anesthesiology Assocs., P.C v. Verdone*, 134 A.D.3d 1016, 1017, 22 N.Y.S.3d 511, 513 (2d Dep't 2015), *leave to appeal denied*, 27 N.Y.3d 903, 32 N.Y.S.3d 55 (2016).

1-3:1.4 Incompetence and Inefficiency

An employer "is free to discharge an employee at any time for inefficiency and incompetence."[46] An employee's demonstrable inability to perform his or her job duties may provide just cause for termination.[47]

1-3:1.5 Employer Dissatisfaction

If employment is conditioned upon satisfactory performance, "it is the employer's prerogative to determine whether the employee is, in fact, living up to the terms of his or her employment."[48] The employer "need not have an objective basis for his dissatisfaction with an employee to justify termination" on this ground, as the only relevant inquiry "is whether the employer's dissatisfaction was genuine."[49] The employer, in defending against a wrongful discharge action, "need only produce evidence showing some basis for dissatisfaction with the employee's work," and it is the employee's burden to prove "that the dissatisfaction was not genuine."[50]

To prevail, the employer only needs to show that it "honestly" believed the employee's services were unsatisfactory, not that the belief is objectively reasonable.[51] The employee may prevail if, for example, the employee shows that the contract was terminated "to suit defendant's convenience and advantage" and not because of defendant's dissatisfaction with the employee.[52] Since this question

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46. *Freehold Mgmt. Corp. v. Kelley*, 79 N.Y.S.2d 447, 449 (Sup. Ct., Westchester Cty. 1948).

47. *See Bradford v. Weber*, 138 A.D.2d 860, 862, 525 N.Y.S.2d 968, 971 (3d Dep't 1988) (finding just cause where the evidence at trial showed that "plaintiff was unable to gain the respect of the employees and that this had resulted in low morale among the workers; generally displayed poor business judgment and, on at least one occasion, had negotiated a deal which resulted in a net loss to Rushmore & Weber; had incorrectly stated Rushmore & Weber's policy concerning warranties on used trucks at a sales meeting; and had been charged with driving while intoxicated in a company vehicle he had not been authorized to use and had concealed this incident until it came out in the newspapers and he was confronted by Weber").

48. *Golden v. Worldvision Enters., Inc.*, 133 A.D.2d 50, 51, 519 N.Y.S.2d 1, 2 (1st Dep't 1987), *leave to appeal denied*, 71 N.Y.2d 804, 528 N.Y.S.2d 829 (1988).

49. *Golden v. Worldvision Enters., Inc.*, 133 A.D.2d 50, 51, 519 N.Y.S.2d 1, 2 (1st Dep't 1987), *leave to appeal denied*, 71 N.Y.2d 804, 528 N.Y.S.2d 829 (1988).

50. *Golden v. Worldvision Enters., Inc.*, 133 A.D.2d 50, 51, 519 N.Y.S.2d 1, 2 (1st Dep't 1987), *leave to appeal denied*, 71 N.Y.2d 804, 528 N.Y.S.2d 829 (1988).

51. *See Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 448, 200 N.Y.S.2d 256, 258 (1st Dep't 1960).

52. *Hortis v. Madison Golf Club, Inc.*, 92 A.D.2d 713, 713, 461 N.Y.S.2d 116, 116 (4th Dep't 1983).

turns on the employer's state of mind, it may be a question of fact for the jury to decide.[53]

1-3:1.6 Illness or Disability

In every contract of employment "there is an implied condition that the employee will be physically capable of performing his duties at the time appointed."[54] The degree of health and vigor required by the contract depends on the nature of the work involved.[55] Thus, illness may provide grounds for termination. The employee's illness, however, "does not ipso facto end his engagement unless so specified in the agreement. It only gives the employer the option to terminate it under appropriate circumstances."[56]

The factors to consider include "[t]he duration and nature of the illness, the character of the employment and the necessity of the [employer]."[57] If the illness is temporary or the employee "is in condition to return to work within a reasonable time," the illness will not give rise to a right to terminate.[58]

Where the contract is one for the performance of services requiring skill and judgment, the employer's right to terminate depends upon whether the claimed illness renders the employee incapable of performing the required services with the requisite level of skill and judgment.[59] Both federal law and New York law, however, provide significant protections to employees with disabilities, including an obligation to make reasonable accommodations to enable the employee to perform.[60]

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53. *See John Mezzalingua Assocs., Inc. v. Walker*, 6 A.D.3d 1158, 1159, 775 N.Y.S.2d 724, 724 (4th Dep't 2004); *Lo Cascio v. James V. Aquavella, M.D., P.C.*, 206 A.D.2d 96, 101, 619 N.Y.S.2d 430, 433 (4th Dep't 1994); *Natale v. Beth Israel Med. Ctr.*, No. 14 CIV. 2844 (LLS), 2017 WL 6398717, at *2 (S.D.N.Y. Nov. 29, 2017).

54. *Strader v. Collins*, 280 A.D. 582, 586, 116 N.Y.S.2d 318, 322 (1st Dep't 1952).

55. *Strader v. Collins*, 280 A.D. 582, 586, 116 N.Y.S.2d 318, 322 (1st Dep't 1952).

56. *Papaioannou v. Sirocco Supper Club, Inc.*, 75 Misc. 2d 1001, 1002, 349 N.Y.S.2d 590, 591 (Sup. Ct., App. Term 1st Dep't 1973).

57. *Strader v. Collins*, 280 A.D. 582, 586, 116 N.Y.S.2d 318, 322 (1st Dep't 1952).

58. *Fahey v. Kennedy*, 230 A.D. 156, 159, 243 N.Y.S. 396, 400 (3d Dep't 1930).

59. *See Cooper v. Dhafir*, 211 A.D.2d 860, 621 N.Y.S.2d 200 (3d Dep't 1995) (finding issue of fact as to whether medical practice properly terminated physician who showed signs of forgetfulness).

60. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (discussed in Chapter 4, § 4-1:4.2); N.Y. Exec. Law § 296 (discussed in Chapter 4, § 4-1:1). *See also* New York, N.Y., Administrative Code § 8-107.

1-3:1.7 Absenteeism and Tardiness

Absenteeism may provide just cause for termination, particularly where it is habitual and unexcused.[61] If an employee's condition results in an unacceptably high number of absences that prevent the employee from performing his or her job in a reasonable manner, the decision to terminate does not constitute unlawful discrimination based upon disability.[62]

1-3:1.8 Sexual Harassment and Sexual Misconduct

Sexual harassment or sexual relations prohibited by a company's employment policies may constitute just cause for termination.[63]

1-3:2 Waiver

A waiver is "the intentional relinquishment of a known right."[64] Waiver of the right to terminate an employee "may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage."[65] If the employee has fraudulently concealed facts that could give cause for discharge, such fraud may vitiate any express waiver by the employer.[66] If the employer continues to employ the employee after learning the facts and circumstances that provide cause for termination, an inference may arise that the employer has waived the right to terminate the employee on such grounds.[67] The fact

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61. *See Jackson v. Jackson*, 306 A.D.2d 182, 763 N.Y.S.2d 545 (1st Dep't 2003); *Capone v. Chesebrough Pond's, Inc.*, 112 A.D.2d 779, 492 N.Y.S.2d 277 (4th Dep't 1985), *leave to appeal dismissed*, 67 N.Y.2d 606, 501 N.Y.S.2d 1025 (1986).

62. *See Giaquinto v. N.Y. Tel. Co.*, 135 A.D.2d 928, 522 N.Y.S.2d 329 (3d Dep't 1987), *leave to appeal denied*, 73 N.Y.2d 701, 535 N.Y.S.2d 595 (1988).

63. *See Scholem v. Acadia Realty Ltd. P'ship*, 45 Misc. 3d 562, 566, 992 N.Y.S.2d 857, 860 (Sup. Ct., Suffolk Cty. 2014) (holding that employer had just cause for termination employee who had consensual sexual relations with subordinate in violation of company policy), *aff'd*, 144 A.D.3d 1012, 42 N.Y.S.3d 214 (2d Dep't 2016). *Cf. Phillips v. Manhattan & Bronx Surface Transit Operating Auth.*, 132 A.D.3d 149, 157, 15 N.Y.S.3d 331, 338 (1st Dep't 2015) (vacating an arbitration award that reinstated employee who had subjected a co-worker to "inappropriate and unwelcome comments of a sexual nature" in violation of the employer's sexual harassment policy; holding that "reinstating a sexual harassment offender runs counter to the strong public policy against sexual harassment in the workplace").

64. *Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274, 275 (1978).

65. *Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274, 275 (1978).

66. *Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274, 275 (1978).

67. *See Leibu v. Tri-Start Elecs., Inc.*, 26 A.D.3d 471, 471, 810 N.Y.S.2d 503, 504 (2d Dep't 2006) (affirming denial of employee's motion for summary judgment; "[w]hile the admissible evidence was sufficient to permit an inference that the defendants waived their right to terminate the plaintiff's written employment . . . the fact that the defendants

that the employer was willing to overlook cause for termination on one occasion, however, does not mean that the employee is insulated from termination for such cause on a later occasion.[68]

1-3:3 After-Acquired Evidence

Under New York common law, an employer "may defend a wrongful discharge claim on the basis of facts unknown at the time of the termination."[69] If the after-acquired evidence concerns employee dishonesty that occurred during the course of employment, the employer may assert such a defense based upon "[f]lagrant acts of dishonesty . . . which seriously affect the master's interest."[70]

The First Department has held that if the after-acquired evidence concerns fraud in the employment application (colloquially known as "resume fraud") that rises to the level of a criminal act, then the employer may assert a defense based upon material misrepresentations, made to induce employment, upon which the employer justifiably relied.[71] However, in a subsequent

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continued to employ the plaintiff after cause for discharge arose, did not, as a matter of law, constitute a waiver of the right to discharge him") (citations omitted); *Fahey v. Kennedy*, 230 A.D. 156, 159, 243 N.Y.S. 396, 400 (3d Dep't 1930) (holding that "the failure of the defendants to notify the plaintiff during the time he was ill that his contract was ended" may "operate as a waiver of their rights" to terminate the employee).

68. *See Kilian v. Ferrous Magnetic Corp.*, 245 A.D. 298, 299, 280 N.Y.S. 909, 910 (1st Dep't 1935) ("The master may overlook breaches of duty in the servant, hoping for reformation; but, if he is disappointed and the servant continues his course of unfaithfulness, he may act, in view of his whole course of conduct, in determining whether the contract of employment should be terminated.").

69. *Bompane v. Enzolabs, Inc.*, 160 Misc. 2d 315, 321, 608 N.Y.S.2d 989, 993 (Sup. Ct., N.Y. Cty. 1994).

70. *Bompane v. Enzolabs, Inc.*, 160 Misc. 2d 315, 321, 608 N.Y.S.2d 989, 993 (Sup. Ct., N.Y. Cty. 1994) (internal quotation marks and citations omitted). *See also Boyle v. Petrie Stores Corp.*, 136 Misc. 2d 380, 388, 518 N.Y.S.2d 854, 859 (Sup. Ct., N.Y. Cty. 1985) ("even if dishonesty had not been asserted as a ground for termination at the time of the firing, if facts then existed which would justify termination for cause and were later discovered, plaintiff could be denied the specified termination benefits provided for in the contract").

71. *Robitzek v. Reliance Intercontinental Corp.*, 7 A.D.2d 407, 183 N.Y.S.2d 870 (1st Dep't 1959) (granting summary judgment to employer on wrongful discharge claim, where employee made materially false representations concerning his educational qualifications in employment application, in violation of Education Law 242, upon which the employer relied), *aff'd*, 7 N.Y.2d 1041, 200 N.Y.S.2d 424 (1960). *But see Bompane v. Enzolabs, Inc.*, 160 Misc. 2d 315, 321, 608 N.Y.S.2d 989, 993 (Sup. Ct., N.Y. Cty. 1994) (denying defense based upon finding that the misrepresentation in the application was not material, was not made to induce employment, and was not relied upon); *National Med. Health Card Sys., Inc. v. Fallarino*, 21 Misc. 3d 304, 313, 863 N.Y.S.2d 556, 563 (Sup. Ct., Nassau Cty. 2008) (holding that "resume fraud," discovered after termination, did not provide grounds for rescission of employment agreement where plaintiff failed to conduct adequate screening

decision, which makes no reference to its earlier decision, the First Department held that where the employer only learned in discovery, after terminating the employee, that the employee had misrepresented his credentials, the alleged fraud could only serve to offset plaintiff's damages, and not provide grounds for rescission.[72]

1-3:4 Constructive Discharge

An employee may be deemed to be "constructively discharged" where, although the employee has resigned rather than been terminated by the employer, the decision to resign is not a "free and voluntary choice."[73] Following federal law, the Court of Appeals has held that constructive discharge occurs "when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."[74] The employer's actions in creating the intolerable workplace condition must be "deliberate and intentional," and the atmosphere in the workplace "must be so intolerable as to compel a reasonable person to leave."[75] "Deliberate" action requires "more than 'a lack of concern'; something beyond mere negligence or ineffectiveness."[76]

Where the employee has been hired to a particular position, a material change in the employee's duties or significant reduction rank constitutes a material breach of the employment agreement

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to discover employee's falsification of credential at time of hiring, and thus could not establish justified reliance); *Kleinman v. Blue Ridge Foods, LLC*, 32 Misc. 3d 1219(A), 934 N.Y.S.2d 34 (Table), 2011 WL 2899428 (Sup. Ct., Kings Cty. July 7, 2011) (same).

72. *Morford v. A. Sulka & Co.*, 79 A.D.2d 502, 503, 433 N.Y.S.2d 573, 574 (1st Dep't 1980).

73. *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 621, 825 N.Y.S.2d 697, 700 (2006).

74. *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 621, 825 N.Y.S.2d 697, 700 (2006).

75. *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 621, 825 N.Y.S.2d 697, 700 (2006).

76. *Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 405, 835 N.Y.S.2d 80, 82 (1st Dep't 2007) (internal quotation marks and citation omitted). *See also Crookendale v. N.Y. City Health & Hosps. Corp.*, 175 A.D.3d 1132, 1132, 107 N.Y.S.3d 282, 283 (1st Dep't 2019) (holding that claim for constructive discharge requires "evidence that defendant 'deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign'") (internal quotation marks and citation omitted); *Matter of Stellar Dental Mgmt. LLC v. N.Y. State Div. of Human Rights*, 162 A.D.3d 1655, 1657, 80 N.Y.S.3d 757, 760 (4th Dep't 2018) (finding substantial evidence that employer "constructively discharging [employee], because the record establishes that the conditions of her employment had become so intolerable that a reasonable person in her position would have felt compelled to resign").

that may be tantamount (if the employee resigns in consequence) to constructive discharge.[77] However, if the employee remains in employment thereafter for an unreasonable length of time, the employee may be deemed to have waived a constructive discharge claim.[78]

Separate from but closely allied to constructive discharge is the concept of resignation under coercion or duress. A resignation procured by coercion or duress "is not a voluntary act and may be nullified."[79]

1-3:5 Common-Law Damages for Wrongful Discharge

1-3:5.1 Compensatory Damages

If an employee is unjustly terminated in breach of an employment contract, the prima facie measure of damages is the present value amount of compensation the employee would have earned during the remainder of the employment term pursuant to the terms

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77. *See Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 12, 330 N.Y.S.2d 33, 42 (1972) (noting that employee hired to be an executive and administrator could not be reduced to status of writer who supervised no one and was subject to supervision by just about every other editor and junior executive). *Accord Fewer v. GFI Grp. Inc.*, 124 A.D.3d 457, 458, 2 N.Y.S.3d 428, 430 (1st Dep't 2015) (holding that where employee who previously was responsible for entire North American business and reported directly to CEO and president was replaced, reassigned to more limited responsibilities, and reported to his replacement, constructive discharge had occurred unless the claim had been waived by unduly long continued employment in the lesser position); *Hondares v. TSS-Seedman's Stores, Inc.*, 151 A.D.2d 411, 413, 543 N.Y.S.2d 442, 444 (1989); *Zeumer v. Fire Burglary Instruments, Inc.*, 210 A.D.2d 318, 319, 619 N.Y.S.2d 782, 783 (2d Dep't 1994) (finding constructive discharge where operations overseen by vice president were transferred to another division, and he was reduced to consultant position); *Lynch v. Pharm. Discovery Corp.*, 208 A.D.2d 906, 906-07, 617 N.Y.S.2d 883, 884 (1994) ("the plaintiff's uncontradicted allegation that the defendant's actions resulted in a material alteration of the executive duties and powers inherent in her position as the chief financial officer of the defendant corporation is sufficient to state a cognizable cause of action for breach of contract").

78. *See Fewer v. GFI Grp. Inc.*, 124 A.D.3d 457, 458, 2 N.Y.S.3d 428, 430 (1st Dep't 2015) (finding triable issue of fact concerning whether "plaintiff's 15-month delay in asserting the breach, during which time he continued to perform his duties, was reasonable or, by so delaying, he elected his remedy and may not now assert the breach").

79. *Gould v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 N.Y.2d 446, 451, 599 N.Y.S.2d 787, 790 (1993). *Accord Matter of Mangee (Mamorella)*, 239 A.D.2d 892, 892, 659 N.Y.S.2d 653, 653 (4th Dep't 1997). *See also Bielby v. Middaugh*, 120 A.D.3d 896, 899, 991 N.Y.S.2d 813, 817 (4th Dep't 2014) (distinguishing between constructive discharge and involuntary resignation under coercion or duress), *reargument denied*, 132 A.D.3d 1328, 17 N.Y.S.3d 337 (4th Dep't 2015).

of the contract.[80] However, because the employee has a duty to mitigate damages, this amount must be "reduced by the income which the discharged employee has earned, will earn, or could with reasonable diligence earn during the unexpired term."[81] The employer has the burden to demonstrate that the employee failed to exercise reasonably diligent efforts to mitigate damages.[82]

1-3:5.2 Liquidated Damages

The parties may agree to a dollar figure representing the amount of damages the employee would sustain if the employment contract were breached.[83] The provision is unenforceable if it in fact a penalty, i.e., an amount disproportionate to the actual loss that is adopted solely for its in terrorem effect to assure performance regardless of plaintiff's actual economic loss.[84] The sophistication of the parties and whether they were represented by counsel are factors to consider in determining whether the clause is a penalty.[85]

1-4 EMPLOYMENT AT WILL

When an employee is hired for an indefinite or unspecified term, New York law presumes that he or she is an at-will

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80. *See Cornell v. T. V. Dev. Corp.*, 17 N.Y.2d 69, 74, 268 N.Y.S.2d 29, 33 (1966). *Accord Donald Rubin, Inc. v. Schwartz*, 191 A.D.2d 171, 171, 594 N.Y.S.2d 193, 194 (1st Dep't 1993); *Tendler v. Bais Knesses of New Hempstead, Inc.*, 112 A.D.3d 911, 911, 977 N.Y.S.2d 747, 748 (2d Dep't 2013); *Rebh v. Lake George Ventures Inc.*, 241 A.D.2d 801, 803, 660 N.Y.S.2d 901, 902 (3d Dep't 1997).

81. *See Cornell v. T. V. Dev. Corp.*, 17 N.Y.2d 69, 74, 268 N.Y.S.2d 29, 33 (1966). *Accord Donald Rubin, Inc. v. Schwartz*, 191 A.D.2d 171, 171-72, 594 N.Y.S.2d 193, 194 (1st Dep't 1993); *Tendler v. Bais Knesses of New Hempstead, Inc.*, 112 A.D.3d 911, 911, 977 N.Y.S.2d 747, 748 (2d Dep't 2013); *Rebh v. Lake George Ventures Inc.*, 241 A.D.2d 801, 803, 660 N.Y.S.2d 901, 902 (3d Dep't 1997). *Weiner v. Lawrence Union Free Sch. Dist. Bd. of Educ.*, 2014 WL 12783388, at *1 (Sup. Ct., Nassau Cty. Oct. 7, 2014).

82. *See Cornell v. T. V. Dev. Corp.*, 17 N.Y.2d 69, 74, 268 N.Y.S.2d 29, 33 (1966). *Accord Rebh v. Lake George Ventures Inc.*, 241 A.D.2d 801, 803, 660 N.Y.S.2d 901, 902-03 (3d Dep't 1997).

83. *See Boyle v. Petrie Stores Corp*., 136 Misc. 2d 380, 388, 518 N.Y.S.2d 854, 858 (Sup. Ct., N.Y. Cty. 1985). *Cf. Pyron v. Banque Francaise Du Commerce Exterieur*, 256 A.D.2d 204, 205, 682 N.Y.S.2d 371, 373 (1st Dep't 1998) (holding that discovery of income tax returns and employment agreement with subsequent employer were irrelevant because liquidated damages provision of employment contract precluded mitigation defense).

84. *See Boyle v. Petrie Stores Corp.*, 136 Misc. 2d 380, 391, 518 N.Y.S.2d 854, 861 (Sup. Ct., N.Y. Cty. 1985).

85. *See Boyle v. Petrie Stores Corp.*, 136 Misc. 2d 380, 391, 518 N.Y.S.2d 854, 861 (Sup. Ct., N.Y. Cty. 1985).

employee.[86] Thus, unless the parties have agreed by contract to fix the duration of the employment contract, or have agreed to limit the grounds for termination in some way, the employment relationship is one of employment at will. Employment at will means that either the employer or the employee is free to terminate the employment relationship at any time "for any reason, or for no reason."[87] A mere verbal assurance that an employee will not be terminated except for "just cause" does not transform a contract for an indefinite term into one for a definite term so as to limit the employer's ability to terminate the employment relationship at will.[88]

Where a contract expressly provides that the employment relationship is "at will," the mere fact that the contract provides for an annual salary for a certain durational period, or guarantees that the employee's salary will not be reduced during this period, does not transform the contract into one for a term of years or otherwise guarantee continued employment for that period.[89] Conversely, the fact that the employment is at will does not affect the employee's right to enforce other aspects of the agreement, such as the agreed salary or compensation.[90]

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86. *Horn v. N.Y. Times*, 100 N.Y.2d 85, 90-91, 760 N.Y.S.2d 378, 380 (2003) ("The traditional American common-law rule undergirding employment relationships, which we adopted in *Martin v New York Life Ins. Co.* (148 N.Y. 117, 42 N.E. 416, 2 N.Y. Ann. Cas. 387 [1895]), is the presumption that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice."); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333, 514 N.Y.S.2d 209, 211 (1987) ("[i]t is still settled law in New York that, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party"); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235 (1983) (noting New York's "long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will"); *A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 375, 65 N.Y.S.2d 475, 482 (1957) ("there is no suggestion that the contracts of employment were for a definite term; hence they must be deemed terminable at will").

87. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272, *reargument denied*, 10 N.Y.3d 852, 859 N.Y.S.2d 614 (2008). *See also McHenry v. Lawrence*, 66 A.D.3d 650, 651, 886 N.Y.S.2d 492, 494 (2d Dep't 2009) ("[a]n employee who does not work under an agreement for a definite term of employment is an at-will employee who may be discharged at any time with or without cause").

88. *See Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 560 n.3, 32 N.Y.S.3d 105, 113 n.3 (1st Dep't), *appeal dismissed*, 28 N.Y.3d 946, 38 N.Y.S.3d 514 (2016).

89. *See Andersen v. Maines Food & Paper Serv., Inc.*, 156 A.D.3d 990, 991, 66 N.Y.S.3d 710, 711 (3d Dep't 2017).

90. *Ayers v. City of Mount Vernon*, 176 A.D.3d 766, 110 N.Y.S.3d 43, 46 (2d Dep't 2019). *See* § 1-5:4.

1-4:1 Limits to Employment at Will

New York law does not generally recognize any common-law limitation upon an employer's right to terminate an at-will employee freely, other than a narrow retaliatory discharge exception for attorneys reporting ethical violations. In the absence of any such common-law limitation, New York law recognizes two other limitations. *First*, the grounds for termination must not be grounds prohibited by a statute, such as an antidiscrimination statute,[91] or a whistleblowing statute.[92] *Second*, such grounds must not violate a constitutional protection, e.g., the First Amendment rights of public employees.[93] Unless one of these prohibitions is violated, the employer "generally may terminate the at-will employment for any reason, or for no reason."[94]

1-4:2 Lack of Common Law Exceptions

With the limited exception of attorneys reporting ethical violations,[95] the Court of Appeals has "repeatedly refused to recognize [common law] exceptions to" the doctrine of employment at will.[96] Thus, the Court of Appeals has refused to recognize either a tort of "abusive discharge" of an at-will employee or a common-law cause of action for retaliatory discharge (i.e., for dismissal in retaliation for conduct that is protectable as a matter of public policy where the behavior is not protected either by statute or by the Constitution).[97] An employee cannot circumvent this bar by pleading a different cause of action, such as "prima facie tort," to complain about an otherwise lawful exercise of the at-will employer's prerogative to terminate the employee for any reason or even no reason.[98]

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91. Antidiscrimination statutes are discussed in Chapter 4.

92. Whistleblowing statutes are discussed in Chapter 5.

93. First Amendment and other constitutional protections are discussed in Chapter 7, § 7-1.

94. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272 (internal quotation marks and citation omitted), *reargument denied*, 10 N.Y.3d 852, 859 N.Y.S.2d 614 (2008).

95. *See* § 1-4:3.

96. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272, *reargument denied*, 10 N.Y.3d 852, 859 N.Y.S.2d 614 (2008).

97. *See Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 302, 461 N.Y.S.2d 232, 336 (1983).

98. *See Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 1084, 892 N.Y.S.2d 154, 156 (2d Dep't 2009); *Hall v. McDonald's Corp.*, 159 A.D.3d 1591, 1592, 72 N.Y.S.3d 320, 320 (4th Dep't 2018).

For example, at-will employees enjoy no judicial protection against being discharged as retaliation for allegedly reporting either accounting or stock trading irregularities in the absence of a statute that offers such protection.[99] The Court of Appeals similarly has refused to protect an at-will employee from being terminated for allegedly refusing to engage in illegal conduct, if such refusal is not otherwise protected either by statute or by the Constitution.[100]

1-4:3 Retaliatory Discharge of Attorneys

Despite its refusal to adopt a general, common-law public policy exception to employment at will or a common-law tort of retaliatory discharge, the Court of Appeals recognized a narrow protection for attorneys, holding that, as a matter of implied contractual obligations, a law firm or legal employer may not discharge an attorney for compliance with, or based upon conduct that is mandated by, the rules of professional responsibility.[101] The Court of Appeals reasoned that when a law firm hires an attorney to practice law, "there is implied an understanding . . . that both the lawyer and the law firm in conducting the practice will do so in accordance with the ethical standards of the profession."[102] The Court of Appeals, however, has rejected attempts to expand the protection given to attorneys against discharge for refusal to engage in professionally unethical conduct to other professions.[103]

Several lower New York courts have upheld complaints by attorneys for wrongful termination based upon refusal to violate a disciplinary rule.[104] However, because the cause of action is

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[99] *Sullivan v. Harnisch*, 19 N.Y.3d 259, 946 N.Y.S.2d 540 (2012); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

[100] *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 514 N.Y.S.2d 209 (1987).

[101] *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992) (holding that plaintiff who alleges that he was fired for insisting that the firm report the ethical misconduct of a fellow employee to the disciplinary authorities stated a claim for wrongful termination).

[102] *Wieder v. Skala*, 80 N.Y.2d 628, 636, 593 N.Y.S.2d 752, 755 (1992).

[103] *See Sullivan v. Harnisch*, 19 N.Y.3d 259, 946 N.Y.S.2d 540 (2012) (refusing to recognize common-law cause of action by hedge fund compliance officer for wrongful dismissal based upon speaking out about improper trading practices); *Horn v. N.Y. Times*, 100 N.Y.2d 85, 760 N.Y.S.2d 378 (2003) (refusing to recognize common-law cause of action by doctor who is employed by nonmedical employer for wrongful dismissal after refusing to divulge confidential patient information to her employer).

[104] *See, e.g., Lichtman v. Estrin*, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dep't 2001) (holding that attorney stated a cause of action where he alleged that he was fired for

for breach of contract, and not a tort-based claim for abusive discharge,[105] courts have held that the plaintiff may assert the claim only against the law firm that entered the employment agreement with plaintiff, and not against individual attorneys of the firm.[106] A federal court has held that an attorney may assert a claim for retaliatory discharge based on allegations the attorney was terminated for reporting "ethical concerns" to senior management, even though he did not report an actual ethical violation to a disciplinary committee.[107]

1-4:4 Change in Terms of Employment

When the employment relationship is at will, the employer is free, unilaterally, to change the terms of compensation prospectively at any time, subject to the employee's right to terminate employment if the employee finds the terms unacceptable.[108] However, the

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refusing to associate with the firm's principal attorney after his anticipated suspension or disbarment); *Connolly v. Napoli, Kaiser & Bern, LLP*, 34 Misc. 3d 1215(A), 946 N.Y.S.2d 66, 2012 N.Y. Misc. LEXIS 231 (Sup. Ct., N.Y. Cty. 2012) (holding that sufficient evidence existed to defeat summary judgment on attorney's claim that he was fired for refusal to sign a false affirmation); *Kelly v. Hunton & Williams*, No. 97-CV-5631 (JG), 1999 U.S. Dist. LEXIS 9139 (E.D.N.Y. June 17, 1999) (permitting plaintiff to proceed with claim that he was fired because he reported another attorney's billing misconduct).

105. *See Wieder v. Skala*, 80 N.Y.2d 628, 638-39, 593 N.Y.S.2d 752, 757 (1992).

106. *See Lichtman v. Estrin*, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dep't 2001); *Connolly v. Napoli Kaiser & Bern, LLP*, No. 105224/05, 2010 N.Y. Misc. LEXIS 2772 (Sup. Ct., N.Y. Cty. June 16, 2010); *Vera v. Donado Law Firm*, No. 17cv03123 (LGS) (DF), 2019 WL 3306117, at *10 (June 19, 2019), *report and recommendation adopted*, No. 17 Civ. 3123 (LGS), 2019 WL 3302607 (S.D.N.Y. July 23, 2019).

107. *See Joffe v. King & Spalding LLP*, No. 17-CV-3392 (VEC), 2018 WL 2768645, at *9 (S.D.N.Y. June 8, 2018). Borrowing from the analytical framework applicable to federal retaliatory discharge claims, *Joffe* held:

> [A] plaintiff establishes a *prima facie* case under *Wieder* by demonstrating that he reported, attempted to report, or threatened to report suspected unethical behavior and that he suffered an adverse employment action under circumstances giving rise to an inference of retaliation. It is then the defendant-employer's burden to come forward with evidence that shows either that the plaintiff's attempted, threatened or actual report was not in good faith or that, regardless of the employee's good faith, any adverse action taken against the employee was not connected to the attempted, threatened, or actual report. If a defendant-employer can identify a *bona fide*, non-retaliatory reason for the adverse action, it is the plaintiff's burden to demonstrate that the purported non-retaliatory reasons are pretextual.

Joffe v. King & Spalding LLP, No. 17-CV-3392 (VEC), 2018 WL 2768645, at *8 (S.D.N.Y. June 8, 2018).

108. *See, e.g., Berger v. Roosevelt Inv. Grp. Inc.*, 28 A.D.3d 345, 813 N.Y.S.2d 419 (1st Dep't), *leave to appeal denied*, 7 N.Y.3d 712, 824 N.Y.S.2d 604 (2006); *Kronick v. L.P. Thebault Co., Inc.*, 70 A.D.3d 648, 892 N.Y.S.2d 895 (2d Dep't 2010); *Gebhardt v. Time Warner Entm't-Advance/Newhouse*, 284 A.D.2d 978, 726 N.Y.S.2d 534 (4th Dep't 2001).

employer cannot change those terms retrospectively. For example, if the employer enters a written contract that provides for at-will employment but also guarantees the employee certain bonuses and stock consideration if certain conditions are met, the employer must honor those guarantees for the applicable employment period, even if the employer offers new employment terms going forward.[109]

Similarly, where a written employment agreement for an indefinite term contains a no-oral modification clause, the existence of the clause does not alter the at-will nature of the employment nature, but it does prevent the employer from unilaterally changing other terms such as compensation or responsibilities.[110] As long as the employee has not been terminated, such other terms remain enforceable absent a subsequent writing signed by the party to be charged or conduct unequivocally referable to a purported oral modification.[111]

1-5 STATUTE OF FRAUDS

1-5:1 Unenforceability of Oral Multi-Year Contracts

Under the Statute of Frauds, any agreement that, by its terms, cannot be performed within one year must be memorialized in a writing that is signed by the party to be charged.[112] Thus, an oral employment contract for any term of more than one year is unenforceable, because any such agreement must be in writing and signed by the party to be charged.[113] This rule also bars an alleged

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109. *See JCS Controls, Inc. v. Stacey*, 57 A.D.3d 1372, 870 N.Y.S.2d 679 (4th Dep't 2008).

110. *See Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 553, 32 N.Y.S.3d 105, 108-09 (1st Dep't), *appeal dismissed*, 28 N.Y.3d 946, 38 N.Y.S.3d 514 (2016).

111. *See Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 553, 32 N.Y.S.3d 105, 109 (1st Dep't), *appeal dismissed*, 28 N.Y.3d 946, 38 N.Y.S.3d 514 (2016).

112. N.Y. Gen. Oblig. Law § 5-701(a)(1). The statute states: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime[.]"

113. *See Bykofsky v. Hess*, 65 N.Y.2d 730, 492 N.Y.S.2d 29, *aff'g on the decision below*, 107 A.D.2d 779, 484 N.Y.S.2d 839 (2d Dep't 1985) (holding that alleged oral promise to appoint faculty member to two successive one-year terms is unenforceable). *See also Cunnison v. Richardson Greenshields Sec., Inc.*, 107 A.D.2d 50, 485 N.Y.S.2d 272 (1st Dep't 1985) (holding that alleged oral five-year employment contract is unenforceable); *Doynow v. Nynex Publ'g Co.*, 202 A.D.2d 388, 608 N.Y.S.2d 683 (2d Dep't 1994) (holding that alleged oral five-year employment contract is unenforceable). *Cf. Kelley v. Bryan Ins. Agency, Inc.*,

"one-year" oral employment contract where the claimed promise occurred before the supposed start date.[114] The Statute of Frauds does not bar oral employment contracts that are for a term of one year or less.[115]

An employer's mere admission that an employment contract existed, without a further admission as to the term of employment, is insufficient to take an alleged multi-year contract outside the Statute of Frauds.[116] Similarly, written documents that establish other terms incidental to employment, such as salary and benefits, do not establish a contract for a definite term, and do not take the contract out of the Statute of Frauds.[117]

The written memorandum, however, need not be contained in a single document. It may be pieced together from multiple writings, some signed and some unsigned. The court will treat such documents as a whole if the writing allegedly constituting the contract is signed by the party to be charged and if the other, unsigned documents refer to the same transaction as the signed writing.[118] The proponent of the alleged contract may use oral testimony to show the connection among the various documents and the acquiescence of the party to be charged to the terms of the unsigned documents.[119] An appellate court has held that a

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176 A.D.3d 1042, 1044, 113 N.Y.S.3d 94, 97 (2d Dep't 2019) ("an agreement to continue to pay renewal commissions following the termination of an at-will employment relationship falls within the statute of frauds and must be in writing").

114. *See Tallini v. Bus. Air, Inc.*, 148 A.D.2d 828, 538 N.Y.S.2d 664 (3d Dep't 1989) (holding that where the alleged oral contract was made in advance of the date plaintiff's employment was to commence and was to be performed for one full year, the contract is unenforceable under the Statute of Frauds).

115. *See Walts v. Badlam*, 214 A.D.2d 875, 625 N.Y.S.2d 104 (3d Dep't 1995) (holding that Statute of Frauds is inapplicable where plaintiff alleges a seven-month contract).

116. *See Camhi v. Tedesco Realty, LLC*, 105 A.D.3d 795, 962 N.Y.S.2d 660 (2d Dep't 2013); *Tallini v. Bus. Air, Inc.*, 148 A.D.2d 828, 538 N.Y.S.2d 664 (3d Dep't 1989).

117. *See Minovici v. Belkin BV*, 109 A.D.3d 520, 522, 971 N.Y.S.2d 103, 107 (2d Dep't 2013); *Chase v. United Hosp.*, 60 A.D.2d 558, 559, 400 N.Y.S.2d 343, 344 (1st Dep't 1977).

118. *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 55-56 (1953). *Cf. Scheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970) (holding that letter from employer's attorney, requesting employee to sign enclosed agreements and then return to employer for counter-signature, did not satisfy *Crabtree*, where employer never counter-signed the agreement, because correspondence indicated that the agreement would take effect only after both parties signed, not before).

119. *See Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 56 (1953); *Nausch v. AON Corp.*, 2 A.D.3d 101, 769 N.Y.S.2d 481 (1st Dep't 2003) (holding that trial court erred in excluding parol evidence and that existence of five-year employment agreement was established through series of writings and deposition testimony).

university-promulgated employment policy that bears indicia of enforceability, and which sets forth the duration of appointment or reappointment, may create a contractual basis for employment for a multi-year term.[120]

1-5:2 Promissory Estoppel

Some employees have tried to evade the Statute of Frauds by invoking promissory estoppel. However, promissory estoppel requires the employee to have suffered an injury in detrimental reliance on the employer's alleged promise that makes it unconscionable to deny enforcement.[121] Merely changing jobs or residence in reliance on an alleged promise of a multi-year employment contract does not satisfy this standard so as to enable an employee to avoid the Statute of Frauds.[122]

1-5:3 Fraudulent Inducement

Some employees have tried to evade the Statute of Frauds by invoking fraudulent inducement. However, to state a claim for fraudulent inducement, the employee must allege a fraud that is separate from the contract that the employer supposedly failed to perform. New York courts will dismiss the fraud claim if it merely restates, under a different theory of liability, that the employer allegedly breached an oral multi-year employment contract.[123] Further, the Court of Appeals has held that an at-will employee cannot reasonably rely upon an employer's alleged promise to protect that employee against termination because at-will

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120. *Shirazi v. N.Y. Univ.*, 143 A.D.3d 602, 602-03, 40 N.Y.S.3d 65, 66 (1st Dep't 2016).

121. *See Laurel Hill Advisory Grp., LLC v. Am. Stock Transfer & Trust Co., LLC*, 112 A.D.3d 486, 486, 977 N.Y.S.2d 213, 215 (1st Dep't 2013); *Cunnison v. Richardson Greenshields Sec., Inc.*, 107 A.D.2d 50, 53, 485 N.Y.S.2d 272, 275-76 (1st Dep't 1985).

122. *See Laurel Hill Advisory Grp., LLC v. Am. Stock Transfer & Trust Co., LLC*, 112 A.D.3d 486, 486, 977 N.Y.S.2d 213, 215 (1st Dep't 2013); *Cunnison v. Richardson Greenshields Sec., Inc.*, 107 A.D.2d 50, 53, 485 N.Y.S.2d 272, 275-76 (1st Dep't 1985).

123. *See, e.g., Tannehill v. Paul Stuart, Inc.*, 226 A.D.2d 117, 640 N.Y.S.2d 505 (1st Dep't 1996); *Minovici v. Belkin BV*, 109 A.D.3d 520, 523, 971 N.Y.S.2d 103, 108 (2d Dep't 2013); *Marks v. Nassau Cty. Ass'n for Help of Retarded Children, Inc.*, 135 A.D.2d 512, 521 N.Y.S.2d 742 (2d Dep't 1987); *Grant v. DCA Food Indus., Inc.*, 124 A.D.2d 909, 508 N.Y.S.2d 327 (3d Dep't 1986), *leave to appeal denied*, 69 N.Y.2d 612, 517 N.Y.S.2d 1028 (1987). *See also Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272-73 ("Absent injury independent of termination, plaintiffs cannot recover damages for what is at bottom an alleged breach of contract in the guise of a tort."), *reargument denied*, 10 N.Y.3d 852, 859 N.Y.S.2d 614 (2008).

employees have no right to expect continued employment.[124] Thus, to state a claim, the employee must allege a misrepresentation concerning some aspect of the proffered employment other than its duration or protection against termination,[125] and must demonstrate some injury "separate and distinct from termination of their at-will employment."[126]

1-5:4 Contract for an Indefinite Term

The Statute of Frauds does not bar an employment contract for an indefinite term, although such a contract is necessarily one for at-will employment.[127] By definition, such a contract can be performed in less than one year; nothing in the contract obligates the parties to continue the relationship beyond one year, although in actual practice the relationship may extend longer.[128] Therefore, the Statute of Frauds does not bar proof of other terms that are incidental to such an employment contract, such as salary or bonus.[129]

For example, an appellate court has held that the Statute of Frauds does not bar an alleged oral agreement pursuant to which

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124. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272 (N.Y.), *reargument denied*, 10 N.Y.3d 852, 859 N.Y.S.2d 614 (2008). *See also Laduzinski v. Alvarez & Marsal Taxand LLC*, 132 A.D.3d 164, 168, 16 N.Y.S.3d 229, 232 (1st Dep't 2015) ("[a]n at-will employee, who has been terminated, cannot state a fraudulent inducement claim on the basis of having relied upon the employer's promise not to terminate the contract . . . or upon any representations of future intentions as to the duration or security of his employment") (citations omitted); *Coyle v. Coll. of Westchester, Inc.*, 166 A.D.3d 722, 725, 87 N.Y.S.3d 242, 244 (2d Dep't 2018) ("as a general rule, at-will employees may not claim that they were induced to accept their position based on the belief that they would enjoy continued employment").

125. *See Laduzinski v. Alvarez & Marsal Taxand LLC*, 132 A.D.3d 164, 16 N.Y.S.3d 229 (1st Dep't 2015) (holding that employee sufficiently alleged injury and damages stemming from loss of employment with his prior employer); *Hopkins v. Hopkins Envtl. Grp., Inc.*, No. 16-CV-841-FPG, 2017 WL 3217126, at *5 (W.D.N.Y. July 28, 2017) (holding that plaintiff sufficiently stated claim based upon alleged false representation by employer that plaintiff would be assigned different and more lucrative work than the work actually assigned).

126. *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 59, 853 N.Y.S.2d 270, 272 (2008). *See also Laduzinski v. Alvarez & Marsal Taxand LLC*, 132 A.D.3d 164, 16 N.Y.S.3d 229 (1st Dep't 2015) (holding that employee stated cause of action for fraudulent inducement based upon allegedly false representation that defendants were hiring him exclusively to manage their existing business, when in fact they sought solely to obtain his contacts).

127. *See* § 1-4.

128. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 463, 457 N.Y.S.2d 193, 196 (1982).

129. *See, e.g., Ayers v. City of Mount Vernon*, 176 A.D.3d 766, 110 N.Y.S.3d 43, 46 (2d Dep't 2019); *Air Masters, Inc. v. Bob Mims Heating & Air Conditioning Serv.*, 300 A.D.2d 513, 752 N.Y.S.2d 388 (2d Dep't 2002); *Hubbell v. T.J. Madden Constr. Co., Inc.*, 32 A.D.3d 1306, 823 N.Y.S.2d 318 (4th Dep't 2006).

a law firm agreed to pay an attorney, who was an at-will employee, "50% of the legal fees it earned on cases that he procured or originated and performed work on"; the court reasoned that "the fact that plaintiff was an at-will employee, i.e., he could be terminated at any time . . . made the oral agreement capable of completion within the one-year period."[130] Similarly, an appellate court has held that an alleged oral agreement between an at-will employee and an employer "for a share of the company's profits during the duration of plaintiff's employment did not violate the statute of frauds."[131]

1-5:5 Contracts Performable Within One Year

The Court of Appeals has held that an employee may proceed on a claim for a bonus based upon allegations that the parties had entered an oral one-year employment agreement, terminable at will, with a fixed salary and a bonus based on a percentage of profits, where the bonus would be prorated up to the employee's last date of employment.[132] The fact that the employee could perform his or her contractual duties and earn the allegedly promised compensation within one year was sufficient to take the claim out of the Statute of Frauds, even if the bonus itself could not be calculated until after the one-year period.[133] Similarly, an oral agreement by an at-will employee to forgo a previously guaranteed bonus, in exchange for an additional year of work, was not barred by the Statute of Frauds because the alleged employment contract could be performed within one year.[134]

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130. *Goldfarb v. Romano*, 160 A.D.3d 448, 449, 75 N.Y.S.3d 184, 185 (1st Dep't 2018).

131. *Garcia v. Habacus Constr., Inc.*, 157 A.D.3d 597, 597, 66 N.Y.S.3d 880, 880 (1st Dep't 2018).

132. *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998). *See also Basu v. Alphabet Mgmt. LLC*, No. 651340/10, 2014 WL 3373441 (Sup. Ct., N.Y. Cty. July 9, 2014) ("while the alleged contract provides that Basu would receive a share of the profits from certain investments that could be made after more than one year, it is also possible for the profits to be made within one year, and therefore the oral contract is not barred by the Statute of Frauds"), *aff'd in relevant part*, 127 A.D.3d 450, 8 N.Y.S.3d 273 (1st Dep't 2015).

133. *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998).

134. *Ryan v. Kellogg Partners Institutional Servs.*, 19 N.Y.3d 1, 945 N.Y.S.2d 593 (2012). In *Ryan*, the plaintiff alleged that he began employment in July 2003 based upon his employer's agreement to pay him $175,000 in base pay, plus a guaranteed bonus of $175,000 to be paid in late 2003 or early 2004. In February 2004, according to the employee, his employer asked him to forgo the agreed-upon bonus for a year and accept it instead for work to be performed in 2004. The employment application signed by the employee expressly recited that his employment, compensation, and benefits were at will, as did an employee handbook

1-5:6 Renewal of Contracts

Under New York common law, when an employee is hired for a term of one year at a yearly salary, and the employee continues in employment on the same terms after the year ends, a presumption arises that the parties have agreed to a contract of employment for another year on the same terms.[135] No writing is required to memorialize the extension, and therefore the Statute of Frauds is unavailable as a defense.[136] If the original contract is for a term greater than one year, the courts will imply a renewal only from year to year thereafter.[137]

The presumption is one of fact, and can be rebutted by demonstrating that the parties did not intend to allow a contract to renew automatically.[138] For example, a plaintiff's post-employment receipt of an employment manual stating that the employment is at will and terminable by either party has been held to be sufficient to rebut this presumption.[139] The presumption also does not apply if the employee's continued employment is on different terms than the original agreement, e.g., if there are material changes in hours, responsibilities, or salary in subsequent years.[140]

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he received. The Court of Appeals ruled that the absence of any signed writing concerning the bonus did not bar the employee's bonus claim. It held that, since the oral employment agreements described by the employee—i.e., both his initial employment in 2003 in exchange for a guaranteed salary and bonus, and his agreement to work for an additional year in 2004 in exchange, in relevant part, for a deferred bonus—could be performed within a year, the Statute of Frauds did not bar this claim. *Cf. Silipo v. Wiley*, 138 A.D.3d 1178, 30 N.Y.S.3d 716 (3d Dep't 2016) (holding that employee stated claim for unjust enrichment based upon allegations that employer promised to pay her a "bonus" to provide assistance with the sale of the business that fell outside her normal job duties).

135. *See Cinefot Int'l Corp. v. Hudson Photographic Indus.*, 13 N.Y.2d 249, 246 N.Y.S.2d 395 (1963); *Adams v. Fitzpatrick*, 125 N.Y. 124 (1891).

136. *See Cinefot Int'l Corp. v. Hudson Photographic Indus.*, 13 N.Y.2d 249, 252, 246 N.Y.S.2d 395, 397 (1963) ("No one really doubts the nonapplicability of the Statute of Frauds defense.").

137. *See Borne Chem. Co. v. Dictrow*, 85 A.D.2d 646, 648, 445 N.Y.S.2d 406, 411 (2d Dep't 1981).

138. *See Goldman v. White Plains Ctr.*, 11 N.Y.3d 173, 177, 867 N.Y.S.2d 27, 30 (2008); *Borne Chem. Co. v. Dictrow*, 85 A.D.2d 646, 648, 445 N.Y.S.2d 406, 411 (2d Dep't 1981).

139. *See Curren v. Carbonic Sys., Inc.*, 58 A.D.3d 1104, 1108, 872 N.Y.S.2d 240, 243 (3d Dep't 2009).

140. *See, e.g., Schiano v. Marina, Inc.*, 103 A.D.3d 462, 960 N.Y.S.2d 20 (1st Dep't 2013) (holding that employment agreement did not automatically renew where, in subsequent years, plaintiff's base pay changed and she did not work exclusively for the division that hired her); *Geller v. Reuben Gittelman Hebrew Day Sch.*, 34 A.D.3d 730, 731, 826 N.Y.S.2d 103, 104 (2d Dep't 2006) ("Nor did the alleged oral agreement constitute a renewal of the earlier written contract . . . since the purported material terms (i.e., as to salary and the amount of services required) differ.") (citations omitted); *Curren v. Carbonic Sys., Inc.*,

The common-law rule cannot be used to imply that there was mutual and silent assent to automatic contract renewal when the parties' written agreement expressly obligates them to enter into a new contract to extend the term of employment.[141] Once the written employment contract expires, without any agreement as to future terms of employment, the parties' employment relationship becomes one for an indefinite term, i.e., employment at will.[142]

1-6 EMPLOYEE HANDBOOKS

An employee handbook or employment policy manual may create contractual obligations for the employer, including limitations on the employer's right to terminate the employee. New York courts "recognize an action for breach of contract when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment."[143] At

58 A.D.3d 1104, 1108, 872 N.Y.S.2d 240, 244 (3d Dep't 2009) ("the several salary increases instituted at times other than in August of each year constituted changes in material terms of the contract, further supporting the finding that the parties did not intend the contract to automatically renew"); *People's United Ins. Agency v. Bentivegna*, 42 Misc. 3d 1229(A), 986 N.Y.S.2d 868 (Table), 2014 N.Y. Misc. LEXIS 754, at *9 (Sup. Ct., Suffolk Cty. Feb. 11, 2014) ("To the extent that the renewal doctrine remains viable, it is applicable only where the continued employment was on the same terms as that specified in the original contract of employment . . . and where such contract did not otherwise provide a mechanism for renewal.") (citations omitted).

141. *See Goldman v. White Plains Ctr.*, 11 N.Y.3d 173, 178, 867 N.Y.S.2d 27, 30 (2008). In *Goldman*, the parties entered into a written, two-year employment agreement. The agreement contained a provision requiring the parties to negotiate a renewal of the employment arrangement before the contract was set to expire. The agreement further stated that, if it was allowed to expire at the end of the two-year term, the employer had no further obligations other than compensating the employee for accrued salary and benefits. The contract also stated that it could be modified only in a writing signed by both parties. When the agreement expired without being renewed, the employee continued in her employment. Thereafter, she was terminated. The Court of Appeals ruled that, under the parties' written agreement, the employment relationship became at-will once the two-year term expired without renewal.

142. *Goldman v. White Plains Ctr.*, 11 N.Y.3d 173, 178, 867 N.Y.S.2d 27, 30 (2008). *See also A Great Choice Lawncare & Landscaping, LLC v. Carlini*, 167 A.D.3d 1363, 1364, 91 N.Y.S.3d 575, 577 (3d Dep't 2018); *Holahan v. 488 Performance Grp., Inc.*, 140 A.D.3d 414, 414, 33 N.Y.S.3d 214, 216 (1st Dep't 2016) (holding that where employment agreement unambiguously provided that any extension needed to be in writing, and there was no writing extending the agreement, plaintiff became an at-will employee at expiration of stated term of employment); *Wood v. Long Island Pipe Supply, Inc.*, 82 A.D.3d 1088, 919 N.Y.S.2d 183 (2d Dep't 2011) (holding that there was no automatic renewal where the parties' contract expressly required them to enter a new contract to extend plaintiff's employment).

143. *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 316, 727 N.Y.S.2d 383, 386 (2001) (citing *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982)). *Accord Maas v. Cornell Univ.*, 94 N.Y.2d 87, 93, 699 N.Y.S.2d 716, 719 (1999); *De Petris v. Union*

least one trial court has held that an employer may state a claim for breach of contract against the employee based upon allegations that it was damaged by the employee's violation of an employment manual that formed part of the parties' contract.[144]

1-6:1 Reliance Test

Existence of a handbook or manual, standing alone, does not create a contractual obligation. The court, or the trier of fact, must look to the totality of circumstances to determine whether the handbook or manual creates valid and enforceable obligations.[145]

A critical element is the employee's reliance upon the policy in accepting employment.[146] Factors that bear on whether the employer, through its handbook or other written policies, contractually bound itself not to discharge the employee except for good cause or in accordance with certain specific employment procedures include: (1) whether the employee accepted employment based upon an assurance that it was the employer's policy not to terminate employees except for cause or in accordance with specified procedures; (2) whether the employee turned down other job offers in reliance upon such assurances; and (3) whether the written employment offer or job application given to the employee stated that the employment was subject to the employee's

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Settlement Ass'n, 86 N.Y.2d 406, 410, 633 N.Y.S.2d 274, 276 (1995). *See also Monaco v. N. Y. Univ.*, 145 A.D.3d 567, 568, 43 N.Y.S.3d 328, 329 (1st Dep't 2016) ("petitioners, tenured faculty members of respondent New York University's School of Medicine, have sufficiently alleged that the policies contained in respondent's Faculty Handbook, which form part of the essential employment understandings between a member of the Faculty and the University, have the force of contract"; finding that "petitioners have sufficiently alleged that they had a mutual understanding with respondent that tenured faculty members' salaries may not be involuntarily reduced. Additionally, petitioners have sufficiently alleged that they reasonably relied on oral representations by respondents that their salaries would not be involuntarily reduced") (internal quotation marks and citation omitted).

144. *See Pozner v. Fox Broad. Co.*, 59 Misc. 3d 897, 74 N.Y.S.3d 711 (Sup. Ct., N.Y. Cty. 2018) (holding that employer stated claim based upon alleged violation of company sexual harassment policies that were incorporated by reference into employee's contract).

145. *See Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 467, 457 N.Y.S.2d 193, 198 (1982); *Lapidus v. N.Y. City Chapter of N.Y.S. Ass'n for Retarded Children, Inc.*, 118 A.D.2d 122, 129, 504 N.Y.S.2d 629, 632 (1st Dep't 1986).

146. *See De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 410, 633 N.Y.S.2d 274, 276 (1995) ("Mere existence of a written policy, without the additional elements identified in *Weiner* [*v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982)], does not limit an employer's right to discharge an at-will employee or give rise to a legally enforceable claim by the employee against the employer.").

handbook or other written policies and procedures providing such protections.[147]

An employee who accepts employment *before* the employer adopts an employment handbook or other written policies concerning pre-termination procedures or grounds for termination ordinarily may not claim to have relied detrimentally upon such policies so as to create an enforceable contract.[148] However, courts have recognized that, in some circumstances, the alleged reliance need not necessarily occur at the time of hiring.

For example, one court has held that where the employment manual both requires that the employee reports misconduct and promises that the employer will not retaliate against the employee for doing so, the employee may seek to establish that he detrimentally relied upon such a policy, even if he does not allege that he accepted employment in reliance upon such a policy. Such alleged reliance, at the pleading stage, may support a claim for breach of contract based on the employee's claim that he was terminated for reporting a colleague's misconduct.[149]

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147. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 460, 457 N.Y.S.2d 193, 194 (1982). In *Weiner*, the plaintiff alleged that, at the time of his recruitment, he was assured that the employer's policy was not to terminate employees without "just cause." He signed and submitted a form job application stating that his employment was subject to the employer's handbook on personnel policies and procedures, which stated that the employer would "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." The employee further alleged that he accepted the offer of employment initially based on assurance that he would not be terminated except for just cause; that he had turned down other job offers through the years in reliance on this policy; and that he himself had been told on several occasions that he would expose the employer to legal liability if he did not follow the handbook's procedures in dealing with his own subordinates. The Court of Appeals held that the foregoing facts were sufficient to entitle the employee to a trial as on the issue of whether the employer was contractually bound not to discharge plaintiff without just and sufficient cause and an opportunity for rehabilitation.

148. *De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 410, 633 N.Y.S.2d 274, 276 (1995). *Accord Waddell v. Boyce Thompson Inst. for Plant Research, Inc.*, 92 A.D.3d 1172, 1173-74, 940 N.Y.S.2d 331, 333 (3d Dep't 2012) ("It is undisputed that the Whistleblower Policy had not been implemented until several months after plaintiff began employment with defendant. As such, Supreme Court correctly found that the essential element of detrimental reliance in accepting employment was lacking.").

149. *O'Neill v. N.Y. Univ.*, 97 A.D.3d 199, 202, 944 N.Y.S.2d 503, 506 (1st Dep't 2012) (holding that plaintiff stated a claim for breach of contract where he was terminated after reporting a colleague's suspected research misconduct in reliance upon an employment manual that required him to report suspected research misconduct and that promised "that there will be no retaliation against you if you raise concerns or questions about misconduct or report violations"). *See also Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 308, 623 N.Y.S.2d 560, 564 (1st Dep't 1995) (holding that reliance is established where plaintiff "did aggressively pursue the true facts about a money-laundering scheme and a

1-6:2 Guidelines Versus Promises

A manual that merely provides a set of non-binding guidelines and that expressly states that the employment relationship is at will, does not create any limitation on the employer's right of discharge. For example, the Court of Appeals has held that a code of conduct encouraging employees to report fraud or illegal conduct without fear of reprisal did not constitute a binding contract on which the employee could reasonably rely so as to bring a claim for retaliatory termination, where the code of conduct further stated that (1) the employment relationship was at-will, (2) the at-will employment relationship could not be modified except in a written agreement signed by the employer and the employee, (3) the code itself "is not a contract of employment and does not create any contractual rights," and (4) the code of conduct could be modified and changed at any time, without notice.[150]

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presumed attempted 'cover up' upon the express written promise of the employer that there would be no retribution for reports of violations of law, regulations or other irregularities"); *Joshi v. Trs. of Columbia Univ. in City of N.Y.*, No. 17-cv-4112 (JGK), 2018 WL 2417846 (S.D.N.Y. May 29, 2018) (permitting university faculty member, who was hired in 1997, to proceed with claim based on breach of non-retaliation policy adopted in 2014, on which he relied in reporting concerns about a colleague's research). *But see Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 727 N.Y.S.2d 383 (2001) (holding that code of conduct encouraging employees to report fraud or illegal conduct without fear of reprisal was not an enforceable contract where the code expressly stated that it is not a contract of employment, does not create any contractual rights between the employer and the employees, and could be changed at any time).

150. *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 727 N.Y.S.2d 383 (2001). *See also Taub v. Columbia Univ. in City of N.Y.*, 149 A.D.3d 413, 414, 52 N.Y.S.3d 10, 12 (1st Dep't) ("[t]he Faculty Handbook explicitly states that it is not a contract"), *leave to appeal denied*, 29 N.Y.3d 990, 53 N.Y.S.3d 256 (2017); *Cohen v. Nat'l Grid USA*, 142 A.D.3d 574, 576, 36 N.Y.S.3d 686, 688 (2d Dep't 2016) ("Provisions contained in company policy manuals which, like the one in this case, can be amended or withdrawn unilaterally, do not constitute enforceable obligations owing from an employer to its employees absent a showing of a regular practice by the employer to provide the benefits now claimed, the employee's knowledge of the practice, and his or her reliance upon such practice as evidenced by accepting or continuing employment as a result thereof."); *LaDuke v. Hepburn Med. Ctr.*, 239 A.D.2d 750, 754, 675 N.Y.S.2d 810, 813 (3d Dep't 1997) (holding that employer's utilization of a voluntary pre-termination grievance procedure does not preclude its reliance upon the at-will doctrine); *Gomariz v. Foote, Cone & Belding Commc'ns, Inc.*, 228 A.D.2d 316, 317, 644 N.Y.S.2d 224, 225 (1st Dep't 1996) ("[t]he handbook prominently stated, in an explicit disclaimer, that it did not constitute an employee contract, and therefore did not place an express contractual limitation upon the employer's unfettered right to terminate that at-will employment"); *Weiping Liu v. Indium Corp. of Am.*, No. 6:16-cv-01080 (BKS/TWD), 2019 WL 3825511, at *24 (N.D.N.Y. Aug. 15, 2019) ("While [p]olicies in a personnel manual specifying the employer's practices with respect to the employment relationship, including the procedures or grounds for termination, may become a part of the employment contract, conspicuous disclaiming language in an employee handbook preserves [the employer's] . . . at will employment relationship with its employees as far as the provisions in an employee

Similarly, a handbook that only purports to set forth what pre-termination procedures the employees could "realistically expect" the company to follow does not constitute a binding contract to follow those procedures.[151]

By contrast, an appellate court found that allegations that a written employment policy "was the product of a lengthy negotiation and bargaining process" between a university and its faculty was "indicative of a bilateral agreement" reached between the two, and thus was sufficient to state a claim for breach of appointment and reappointment procedures set forth in the policy.[152]

A federal court has held that, where a "Non-Retaliation Policy" upon which a university faculty member claims to have relied did not contain an express reservation of rights disclaiming the contractual force of its contents, and the online version of a related "Research Misconduct Policy" did not display the reservation of rights conspicuously within its text, the faculty member stated a breach of contract claim based upon alleged retaliation by the university following his reporting of concerns with research published by another faculty member.[153]

1-6:3 Contractual Limitations on Pre-Termination Procedures

Separate and apart from limitations on the grounds for discharge, an employer may limit its right to terminate an employee by agreeing to follow a particular set of pre-termination procedures, such as written warnings or internal grievance procedures.[154] If such an agreement exists, the employer must demonstrate substantial

handbook are concerned.") (internal quotation marks and citations omitted; brackets in original).

151. *De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 410, 633 N.Y.S.2d 274, 276 (1995).

152. *Shirazi v. N.Y. Univ.*, 143 A.D.3d 602, 602, 40 N.Y.S.3d 65, 66 (1st Dep't 2016) (internal quotation marks and citation omitted).

153. *Joshi v. Trs. of Columbia Univ. in City of N.Y.*, No. 17-cv-4112 (JGK), 2018 WL 2417846, at *6 (S.D.N.Y. May 29, 2018).

154. *See Shirazi v. N.Y. Univ.*, 143 A.D.3d 602, 603, 40 N.Y.S.3d 65, 67 (1st Dep't 2016) (holding that discharged university faculty member, allegedly terminated based on alleged misconduct, adequately alleged a claim for breach of contract "based on her termination without the benefit of the disciplinary procedures set forth in Title IV of NYU's Faculty Handbook").

or reasonable compliance with its stated internal policies and procedures.[155]

The mere existence of a written progressive discipline policy, however, does not in itself create an enforceable contract. The employee must demonstrate additional factors that would make the contract binding, e.g., that the employee detrimentally relied upon the existence of the policy in accepting employment or that the employer bound itself to follow this procedure with respect to plaintiff.[156] An employment manual that clearly states that it merely provides guidelines, for example, does not give rise to an enforceable contract.[157]

New York courts have held that an employee of a corporation, or of a private college or university, who claims to be aggrieved by the employer's failure to adhere to its internal disciplinary procedures or rules, may seek review in a special proceeding pursuant to New York Civil Practice Law and Rules Article 78.[158] However, because the demand to adhere to mandatory procedures is in the nature of a mandamus petition to perform a ministerial act required by law, the statute of limitations is four months from the date the employee receives notice of the act that is the subject of the complaint.[159] To the extent the employee has a claim for breach of

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155. *See Hanchard v. Facilities Dev. Corp.*, 85 N.Y.2d 638, 628 N.Y.S.2d 4 (1995) (finding that employer substantially complied with progressive discipline policies in its manual, and that assuming a disciplinary hearing was required in order to sustain its termination decision, the employee could not complain because the employee failed to request such a hearing); *Matter of Pena v. Port Auth. of N.Y. & N.J.*, 107 A.D.3d 433, 965 N.Y.S.2d 875 (1st Dep't 2013) (holding that employer reasonably complied with its own regulations concerning employee discipline).

156. *See De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 633 N.Y.S.2d 274 (1995) (holding that employee could not seek to enforce pre-termination procedures in handbook where he accepted employment before handbook was adopted).

157. *See De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 633 N.Y.S.2d 274 (1995) (holding that employee could not seek to enforce pre-termination procedures in handbook that only purported to set forth what procedure the employees could "realistically expect" the company to follow); *LaDuke v. Hepburn Med. Ctr.*, 239 A.D.2d 750, 754, 675 N.Y.S.2d 810, 813 (3d Dep't 1997) ("any reliance on the contents of the handbook cannot be determinative, particularly where, as here, it clearly stated that it was not an employment contract but merely a set of guidelines which could be changed by the hospital").

158. *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 719 (1999); *De Petris v. Union Settlement Ass'n*, 86 N.Y.2d 406, 411 n.*, 633 N.Y.S.2d 274, 277 n.* (1995); *Hanchard v. Facilities Dev. Corp.*, 85 N.Y.2d 638, 642, 628 N.Y.S.2d 4, 6 (1995).

159. *See In re Shirazi v. N.Y. Univ.*, 2014 WL 1620933 (Sup. Ct., N.Y. Cty. Apr. 14, 2014), *rev'd on other grounds,* 143 A.D.3d 602, 40 N.Y.S.3d 65 (1st Dep't 2016).

contract, based upon the employer's violation of an enforceable contractual obligation, that claim may be the subject of a hybrid plenary action and Article 78 proceeding.[160]

[160] *See O'Neill v. N.Y. Univ.*, 97 A.D.3d 199, 213, 944 N.Y.S.2d 503, 513 (1st Dep't 2012) (noting distinctness of Article 78 and breach of contract claims). *Accord Shirazi v. N.Y. Univ.*, 143 A.D.3d 602, 602, 40 N.Y.S.3d 65, 66 (1st Dep't 2016) (same).