Court of Appeals of the State of New York

Murphy v. American Home Prod

58 N.Y.2d 293 (N.Y. 1983) · 461 N.Y.S.2d 232 · 448 N.E.2d 86
Decided Mar 29, 1983

Argued January 10, 1983

Decided March 29, 1983

Appeal from the Appellate Division of the Supreme Court in the First Judicial Department,
294 BEATRICE SHAINSWIT, J. *294

Melvyn I. Weiss, Richard M. Meyer and *Jeremy*
296 *Heisler* for appellant. *296 *Samuel W. Murphy, Jr., Paul A. Crotty* and *David L. Suggs* for respondent.
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JONES, J.

This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature. Nor does the complaint here state a cause of action for intentional infliction of emotional distress, for prima facie tort, or for breach of contract. These causes of action were, therefore, properly dismissed. Appellant's cause of action based on his claim of age discrimination, however, should be reinstated. The period of time for commencement of a judicial action for unlawful discrimination in employment is the three-year period of CPLR 214 (subd 2) and not the one-year period prescribed in subdivision 5 of section 296 of the Executive Law.

Plaintiff, Joseph Murphy, was first employed by defendant, American Home Products Corp., in 1957. He thereafter served in various accounting positions, eventually attaining the office of assistant treasurer, but he never had a formal contract of employment. On April 18, 1980, when he was 59 years old, he was discharged.

Plaintiff claims that he was fired for two reasons: because of his disclosure to top management of
298 alleged accounting *298 improprieties on the part of corporate personnel and because of his age. As to the first ground, plaintiff asserts that his firing was in retaliation for his revelation to officers and directors of defendant corporation that he had uncovered at least $50 million in illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan, as well as in retaliation for his own refusal to engage in the alleged accounting improprieties. He contends that the company's internal regulations required him to make the disclosure that he did. He also alleges that his termination was carried out in a humiliating manner.

As to the second basis for his termination, plaintiff claims that defendant's top financial officer told him on various occasions that he wished he could fire plaintiff but that, because to do so would be illegal due to plaintiff's age, he would make sure by confining him to routine work that plaintiff did not advance in the company. Plaintiff also asserts that a contributing factor to his dismissal was that he was over 50 years of age.

On April 14, 1981, plaintiff filed a summons in the present action with the New York County Clerk pursuant to CPLR 203 (subd [b], par 5). The summons described the action as a suit "to recover

damages for defendant's wrongful and malicious termination of plaintiff's employment". Another summons and a complaint were served on defendant on June 5, 1981. The complaint set up four causes of action. As his first cause of action, plaintiff alleged that his discharge "was wrongful, malicious and in bad faith" and that defendant was bound "not to dismiss its employees for reasons that are contrary to public policy". In his second cause of action, plaintiff claimed that his dismissal "was intended to and did cause plaintiff severe mental and emotional distress thereby damaging plaintiff". His third claim was based on an allegation that the manner of his termination "was deliberately and viciously insulting, was designed to and did embarrass and humiliate plaintiff and was intended to and did cause plaintiff severe mental and emotional distress thereby damaging
299 plaintiff". In his *299 fourth cause of action, plaintiff asserted that, although his employment contract was of indefinite duration, the law imposes in every employment contract "the requirement that an employer shall deal with each employee fairly and in good faith". On that predicate he alleged that defendant's conduct in stalling his advancement and ultimately firing him for his disclosures "breached the terms of its contract requiring good faith and fair dealing toward plaintiff and damaged plaintiff thereby". Plaintiff demanded compensatory and punitive damages.

Following a stipulation extending defendant's time to answer or to move with respect to the complaint, defendant moved on July 27, 1981 to dismiss the complaint on the grounds that it failed to state a cause of action and that the fourth cause of action was barred by the Statute of Frauds. Defendant contended that plaintiff was an at-will employee subject to discharge at any time, that New York does not recognize a tort action for abusive or wrongful discharge, and that the prima facie tort and intentional infliction of emotional distress claims were unavailable and insufficient.

On October 16, 1981, plaintiff served an amended complaint with his opposing papers on the motion. The amended complaint, among other things, added a fifth cause of action, alleging that plaintiff was denied advancement due to his age which constituted "illegal employment discrimination on the basis of age in violation of New York Executive Law § 296".

Special Term denied defendant's motion to dismiss the wrongful discharge tort claim but granted the motion as to the causes of action for breach of contract, prima facie tort, intentional infliction of emotional distress, and age discrimination. Although the court noted that New York had not yet adopted the doctrine of abusive discharge, it declined to put plaintiff out of court before he had had opportunity by means of disclosure procedures to elicit evidence which might put his claim on firmer footing. Special Term held the cause of action for breach of contract barred by the Statute of Frauds. As to the second and third causes of action the court ruled that plaintiff's allegations as to the manner of his dismissal were
300 not sufficient to *300 support causes of action for intentional infliction of emotional distress or for prima facie tort. Finally, applying the one-year period set out in the Executive Law (§ 297, subd 5), Special Term ruled that plaintiff's age discrimination claim was untimely because the amended complaint was served over a year after his dismissal and could not be related back to the original complaint because "[n]othing in either summons or the first complaint gave notice to the defendant of the age discrimination cause of action" (112 Misc.2d 507, 511).

On cross appeals, the Appellate Division modified, to the extent of granting the motion to dismiss the first cause of action, and otherwise affirmed the order of Special Term. The court noted that it does not appear that New York recognizes a cause of action for abusive discharge and that, in any event, plaintiff had failed to show the type of violation of penal law or public policy that has been held sufficient in other jurisdictions

to support a cause of action for abusive discharge. According to the appellate court, plaintiff's charge that the corporation's records were not kept in accordance with generally accepted accounting principles appeared to involve a dispute over a matter of judgment as to the proper accounting treatment to be given the terms involved and not a dispute over false book entries. As to the other causes of action, the court ruled that Special Term had properly dismissed them either for failure to state a cause of action, failure to comply with the Statute of Frauds or, regarding the age discrimination claim, failure to assert it within the statutory time period (88 A.D.2d 870). We modify the order of the Appellate Division from which plaintiff appeals by reinstating the fifth cause of action for age discrimination and otherwise affirm.

With respect to his first cause of action, plaintiff urges that the time has come when the courts of New York should recognize the tort of abusive or wrongful discharge of an at-will employee. To do so would alter our long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason (see *Martin v*
301 *New York Life* *301 *Ins. Co.,* 148 N.Y. 117; *Parker v Borock,* 5 N.Y.2d 156). Plaintiff argues that a trend has emerged in the courts of other States to temper what is perceived as the unfairness of the traditional rule by allowing a cause of action in tort to redress abusive discharges. He accurately points out that this tort has elsewhere been recognized to hold employers liable for dismissal of employees in retaliation for employee conduct that is protected by public policy. Thus, the abusive discharge doctrine has been applied to impose liability on employers where employees have been discharged for disclosing illegal activities on the part of their employers (*Sheets v Teddy's Frosted Foods,* 179 Conn. 471; *Palmateer v International Harvester Co.,* 85 Ill.2d 124; *Harless v First Nat. Bank in Fairmont,* 246 S.E.2d 270 [W Va]), where employees have been terminated due to their service on jury duty (*Nees v Hocks,* 272 Or. 210), and where employees have been dismissed because they have filed workers' compensation claims (*Kelsay v Motorola, Inc.,* 74 Ill.2d 172; *Frampton v Central Ind. Gas Co.,* 260 Ind. 249). Plaintiff would have this court adopt this emerging view. We decline his invitation, being of the opinion that such a significant change in our law is best left to the Legislature.

Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature. In addition to the fundamental question whether such liability should be recognized in New York, of no less practical importance is the definition of its
302 configuration if it is to be recognized. *302

Both of these aspects of the issue, involving perception and declaration of relevant public policy (the underlying determinative consideration with respect to tort liability in general, see, e.g., *Pulka v Edelman,* 40 N.Y.2d 781; Prosser, Torts [4th ed], § 3, pp 14-16) are best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in

any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps some time ago, between employer and employee in reliance on existing legal principles are to be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only, or at least so the Legislature might conclude.

For all the reasons stated, we conclude that recognition in New York State of tort liability for what has become known as abusive or wrongful discharge should await legislative action.[1] *303

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[1] Employees in New York have already been afforded express statutory protection from firing for engaging in certain protected activities (e.g., Judiciary Law, § 519 [prohibiting discharge of employee due to absence from employment for jury service]; Executive Law, § 296, subd 1, par [e] [barring discharge of employees for opposing unlawful discriminatory practices or for filing a complaint or participating in a proceeding under the Human Rights Law]; Labor Law, § 215 [proscribing discharge of employee for making a complaint about a violation of the Labor Law or for participating in a proceeding related to the Labor Law]).

In fact, legislation has been proposed but not adopted which would protect employees who have been terminated for taking actions which benefit the general public or society in general (e.g., 1981 N.Y. Assembly Bill A 2566), for disclosure of violations of law or regulation which pose a substantial and impending danger to public health or safety (e.g., 1982 N.Y. Senate-Assembly Bill S 9566, A 12451), or for disclosure of certain illegal or hazardous activities of their employers (e.g., 1983 N.Y. Senate Bill S 1153).

Plaintiff's second cause of action is framed in terms of a claim for intentional infliction of emotional distress. To survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v Maloney* (43 N.Y.2d 553, 557), that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd [1]). Comment *d* to that section notes that: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". The facts alleged by plaintiff regarding the manner of his termination fall far short of this strict standard. Further, in light of our holding above that there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress (cf. *Fischer v Maloney,* 43 N.Y.2d 553, 557-558, *supra*).

Plaintiff's third cause of action was also properly dismissed. If considered, as plaintiff would have us, as intended to allege a prima facie tort it is deficient inasmuch as there is no allegation that his discharge was without economic or social justification (*Morrison v National Broadcasting Co.,* 24 A.D.2d 284, 287, revd on other grounds 19 N.Y.2d 453; see *Drago v Buonagurio,* 46 N.Y.2d 778, 779). Moreover, we held in *James v*

Board of Educ. (37 N.Y.2d 891, 892), which also involved the exercise of an unrestricted right to discharge an employee, that: "Plaintiff cannot, by the device of an allegation that the sole reason for the termination of his employment by these public officials acting within the ambit of their authority was to harm him without justification (a contention which could be advanced with respect
304 to almost any such termination), *304 bootstrap himself around a motion addressed to the pleadings". Nor does the conclusory allegation of malice by plaintiff here supply the deficiency. As with the intentional infliction of emotional distress claim, this cause of action cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee.

Plaintiff's fourth cause of action is for breach of contract. Although he concedes in his complaint that his employment contract was of indefinite duration (inferentially recognizing that, were there no more, under traditional principles his employer might have discharged him at any time), he asserts that in all employment contracts the law implies an obligation on the part of the employer to deal with his employees fairly and in good faith and that a discharge in violation of that implied obligation exposes the employer to liability for breach of contract. Seeking then to apply this proposition to the present case, plaintiff argues in substance that he was required by the terms of his employment to disclose accounting improprieties and that defendant's discharge of him for having done so constituted a failure by the employer to act in good faith and thus a breach of the contract of employment.

No New York case upholding any such broad proposition is cited to us by plaintiff (or identified by our dissenting colleague), and we know of none. New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced (e.g., *Wood v Duff-Gordon,* 222 N.Y. 88; *Pernet v Peabody Eng. Corp.,* 20 A.D.2d 781). In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that
305 an *305 inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent. In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.

Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration. Thus, in *Weiner v McGraw-Hill, Inc.* (57 N.Y.2d 458), cited by plaintiff, we recently held that, on an appropriate evidentiary showing, a limitation on the employer's right to terminate an employment of indefinite duration might be imported from an express provision therefor found in the employer's handbook on personnel policies and procedures. Plaintiff's attempts on this appeal to bring himself within the beneficial scope of that holding must fail, however. There is here no evidence of any such express limitation. Although general references are to be found in his brief in our court to an employer's "manual", no citation is furnished to any provision therein pertinent to the employer's

right to terminate his employment, and the alleged manual was not submitted with his affidavit in opposition to the motion to dismiss his complaint.

Accordingly, the fourth cause of action should have been dismissed for failure to state a cause of
306 action.[2] *306

[2] **[4]** Both courts below dismissed this cause of action under the Statute of Frauds. This appears to have been error, inasmuch as the contract of employment was not one which by its terms could not have been performed within one year (General Obligations Law, § 5-701, subd a, par 1) and does not otherwise come within the reach of the Statute of Frauds (*Weiner v McGraw-Hill, Inc.,* 57 N.Y.2d 458, 463).

We reject the view of the dissenter that a good faith limitation should now be judicially engrafted on what in New York has been the unfettered right of termination lying at the core of an employment at will (*Weiner v McGraw-Hill, Inc.,* 57 N.Y.2d 458, 467 [dissenting opn]). We do so for precisely the reasons which persuade him as well as the other members of the court that we should now refrain from judicial recognition of the tort action for abusive discharge. As the dissenter is at pains to note, there has been much criticism of the traditional conception of the legal obligations and rights which attach to an employment at will. It may well be that in the light of modern economic and social considerations radical changes should be made. As all of us recognize, however, resolution of the critical issues turns on identification and balancing of fundamental components of public policy. Recognition of an implied-in-law obligation of good faith as restricting the employer's right to terminate is as much a part of this matrix as is recognition of the tort action for abusive discharge. We are of the view that this aggregate of rights and obligations should not be approached piecemeal but should be considered in its totality and then resolved by the Legislature (see at pp 301-302, *supra*).

As to his fifth cause of action for age discrimination, plaintiff correctly contends that in dismissing this cause of action as barred by the Statute of Limitations the courts below applied the wrong statute. They invoked the one-year period prescribed in subdivision 5 of section 297 of the Executive Law: "Any complaint filed pursuant to this section must be * * * filed within one year after the alleged unlawful discriminatory practice". The Legislature clearly intended this restriction to apply to complaints of discrimination filed with the Division of Human Rights under subdivision 1 of section 297 of the Executive Law. The issue presented in this case is whether it was intended that the one-year period should also apply to civil actions brought under subdivision 9 of section 297.[3]

[3] Subdivision 9 provides "Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a."

Initially it is to be observed that a civil action is not instituted by the "filing of a complaint". Rather a civil action is commenced by service, delivery, or filing of a summons (or in some instances by an order for a provisional remedy) (CPLR 203, subd [b]). More significant, there are persuasive reasons why provision should be made for different periods of time within which claims for unlawful discrimination may be made — one
307 for administrative *307 relief, the other for judicial remedy. The procedures, practices, and remedies, indeed the entire perspective of administrative intervention under the Human Rights Law, differ radically from the traditional course of judicial adjudication. Moreover, in this instance, subdivision 9 expressly provides that where the division, on the grounds of administrative convenience, dismisses a complaint filed with it, the complainant may then bring a civil suit. This possibility suggests the practical desirability if not necessity of staggered periods of limitation, with a longer period fixed for the commencement of civil actions. (Relief in the reverse order is not permitted; initiation of a civil action forecloses all recourse to the Division of Human Rights [§ 297, subd 9].) We conclude, therefore, that the one-year period of subdivision 5 was intended to apply only to the filing of complaints with the Division of Human Rights.

In enacting subdivision 9 of section 297, the Legislature created a new cause of action not previously cognizable, but, in doing so, provided no specific period of limitations for such action. Consequently the institution of civil actions to recover damages for unlawful discriminatory practices under subdivision 9 is governed by the three-year period of limitations prescribed in CPLR 214 (subd 2) applicable to "an action to recover upon a *liability,* penalty or forfeiture created or imposed by statute" (emphasis added; contrast *State of New York v Cortelle Corp.,* 38 N.Y.2d 83, 86 [holding that statutory provisions did not create "new claims but only provide particular remedies and standing in a public officer"]). It was, therefore, error to dismiss plaintiff's cause of action for age discrimination as barred by the one-year period prescribed in subdivision 5 of section 297.

For the reasons stated, the order of the Appellate Division should be modified, with costs, to reinstate plaintiff's fifth cause of action for age discrimination.

JONES, J.

Chief Judge COOKE and Judges JASEN, WACHTLER, FUCHSBERG and SIMONS concur with Judge JONES; Judge MEYER dissents in part and votes to further modify by reinstating the fourth cause of action in a separate opinion.

Order modified, with costs to appellant, by reinstating the fifth cause of action and, as so
316 modified, affirmed. *316

MEYER, J. (dissenting in part).

The harshness of a rule which permits an employer to discharge with impunity a 30-year employee one day before his pension vests (see
308 *308 *United Steelworkers of Amer., Local No. 1617 v General Fireproofing Co.,* 464 F.2d 726; and *Savodnick v Korvettes, Inc.,* 488 F. Supp. 822) or for no other reason than that he filed a compensation claim (2A Larson, Workmen's Compensation Law, § 68.36), the bizarre origin of the termination-at-will rule,[1] the change of economic and constitutional philosophy that has occurred since its adoption,[2] the exclusion of a substantial segment of the working community from its effects through "just cause" limitations upon the right to fire resulting from collective bargaining, and the inconsistency of the rule not only with the common law of England and with earlier New York decisions but also with the law of most industrial countries of the world,[3] have caused an outpouring of judicial and scholarly writings intended to ameliorate, if not abolish, the

309 rule.[4] I *309 agree with the majority that we should not now adopt the tort remedies proposed in those writings, because such remedies are essentially grounded in public policy, the declaration of which is a function of both the Legislature and the courts, because the New York Legislature has not been reticent in the area,[5] and because of the difficulty encountered by the courts adopting such remedies in articulating the exact nature of the public policy which will bring them into play (compare *Adler v American Std. Corp.,* 291 Md. 31, with *Hinrichs v Tranquilaire Hosp.,* 352 So 2d 1130 [Ala]; and see De Giuseppe, 10 Ford Urban
310 LJ, at p 36 ff). *310

1 *Martin v New York Life Ins. Co.* (148 N.Y. 117, 121) accepted as correct the rule stated in section 136 of Wood, Master and Servant (2d ed) that "the fact that the compensation is measured at so much a day, month or year does not necessarily make such hiring a hiring for a day, month or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed". Though later stated to have been "deliberately adopted, all the judges concurring, to settle the differences of opinion which had prevailed in the lower courts" (*Watson v Gugino,* 204 N.Y. 535, 541-542), *Martin's* adoption of the rule may fairly be characterized as bizarre in light of (1) Wood's concession that "In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year", (2) the contrary statement of the rule in *Adams v Fitzpatrick* (125 N.Y. 124) in reliance upon the English cases cited at pages 128 and 130 and the New York cases cited at page 130 (see, also, *Davis v Gorton,* 16 N.Y. 255; and *Bleeker v Johnson,* 51 How Prac 380), (3) the fact, documented in the Annotation at 11 ALR 469, 476, and in a number of the articles referred to in footnote 4 below, that Wood's rule was not supported by any of the cases cited by him, and (4) the logical inconsistency of a rule the ultimate statement of which is that "permanent employment means nothing more than that the employment is to continue indefinitely and until one or the other of the parties wishes for some good reason to sever the relation" (*Arentz v Morse Dry Dock Repair Co.,* 249 N.Y. 439, 444).

2 The concept that a restriction upon an employer's right to terminate was a violation of due process (*Adair v United States,* 208 U.S. 161; *Coppage v Kansas,* 236 U.S. 1) has long since given way to decisions upholding the constitutionality not only of various labor acts but also of restrictions upon discharge for reasons of race, sex, age, political affiliation and the like (see n 5 below).

3 (Report of Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal, 36 Record of Assn of Bar of City of New York [hereafter "Committee Report"] 170, 175 ff.)

4 (Committee Report, *op. cit.;* Blades, Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power, 67 Col L Rev 1404; Blumrosen. Workers' Rights Against Employers and Unions: Justice Francis — A Judge For Our Season, 24 Rutgers L Rev 480; Christiansen, A Remedy for The Discharge Of Professional Employees Who Refuse To Perform Unethical Or Illegal Acts: A Proposal In Aid Of Professional Ethics, 28 Vand L Rev 805; Conway, Protecting The Private Sector At Will Employee Who "Blows The Whistle": A Cause Of Action Based On Determinants Of Public Policy, 1977 Wis L Rev 777; De Giuseppe, Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits, 10 Ford Urban LJ 1; Feerick, Continued Erosion of Employment-At-Will, NYLJ, Feb. 4, 1983,

p 1, col 1; Feinman, Development of the Employment at Will Rule, 20 Am J Leg Hist 118; Gelb, Non-Statutory Causes of Action For an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship, 24 N.Y. L School L Rev 743; Glendon and Lev, Changes In the Bonding of the Employment Relationship: An Essay on the New Property, 20 BC L Rev 457; Harmon and Kolko, Developments In the Law Covering Abusive Discharges, NYLJ, Aug. 26, 1982, p 1, col 3; Madison, Employee's Emerging Right To Sue For Arbitrary Or Unfair Discharge, 6 Employee Relations LJ 422; Mathews, A Common Law Action for The Abusively Discharged Employee, 26 Hastings LJ 1435; Peck, Unjust Discharges From Employment: A Necessary Change In The Law, 40 Ohio St LJ 1; Peck, Some Kind of Hearing For Persons Discharged From Private Employment, 16 San Diego L Rev 313; Shapiro and Tune, Implied Contract Rights To Job Security, 26 Stanford L Rev 335; Shemaria-Weber, A Remedy for Malicious Discharge of the At-Will Employee, 7 Conn L Rev 758; Summers, Individual Protection Against Unjust Dismissal: Time For A Statute, 62 Va L Rev 481; Travis, Abusive Discharge Cases To Test Common-Law Rule, NYLJ, Sept. 24, 1982, p 1, col 2; Vernon and Gray, Termination At Will — The Employer's Right to Fire, 6 Employee Relations LJ 25; Weyand, Present Status of Individual Employee Rights, NYU 22d Annual Conf on Labor, p 171; Willis, Contracts — Employee's Discharge Motivated By Bad Faith, Malice or Retaliation Constitutes a Breach of an Employment Contract Terminable at Will, 43 Ford L Rev 300; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, 93 Harv L Rev 1816; in addition to the articles listed, pertinent annotations will be found at 51 ALR2d 742; 63 ALR3d 979; 93 ALR3d 659; 9 ALR4th 329; 12 ALR4th 544.)

The judicial writings are too numerous to list, but see Committee Report (at p 211, n 130) and De Giuseppe (10 Ford Urban LJ, at p 23, n 101).

[5] (E.g., Civil Rights Law, §§ 47-a, 79-i; Civil Service Law, §§ 75-76; CPLR 5252; Election Law, § 17-154, subd 3; Executive Law, §§ 292, 296; General Obligations Law, § 5-301; Labor Law, § 27-a, subd 10; § 662, subd 1; § 704, subd 8; §§ 736, 880, subd 3; Military Law, §§ 317, 318; Workers' Compensation Law, § 120.) A "whistle-blower" bill (A 12451; S 9566) failed to pass the 1982 Legislature, but has been reintroduced at the present session (Legislative Gazette, Feb. 7, 1983, p 9).

I agree also with so much of the majority opinion as holds the fourth cause of action not barred by the Statute of Frauds and the fifth cause of action not barred by the Statute of Limitations. I cannot, however, accept the majority's refusal to follow precedent decisional law recognizing an implied-in-law obligation on the part of the employer not to discharge an employee for doing that which the employment contract obligated him to do or to differentiate between that existing contract obligation and the public policy laden tort of abusive discharge (at pp 305-306, n 2). Plaintiff's complaint alleges that "defendant's internal regulations * * * required that plaintiff report any deviation from proper accounting practice to defendant's top management" and that he was dismissed as a result of his doing just that. Because those allegations sufficiently state a cause of action for breach of contract not only under decisions of other States[6] but as a matter of New York law as well, I dissent from the majority's affirmance of the dismissal of the fourth cause of action.

[6] (*Pugh v See's Candies,* 116 Cal.App.3d 311; *Cleary v American Airlines,* 111 Cal.App.3d 443; *Magnan v Anaconda Inds.,* 37 Conn. Sup. 38; *Higdon Food*

Serv. v Walker, 641 S.W.2d 750 [Ky]; *Fortune v National Cash Register Co.,* 373 Mass. 96; *Toussaint v Blue Cross Blue Shield of Mich.,* 408 Mich. 579; *Gates v Life of Mont. Ins. Co.,* 638 P.2d 1063 [*Mont*]; *Cloutier v Great Atlantic Pacific Tea Co.,* 121 N.H. 915; *Pierce v Ortho Pharm. Corp.,* 84 N.J. 58; *Rees v Bank Bldg. Equip. Corp. of Amer.,* 332 F.2d 548 [applying Mo law]; but see *Whittaker v Care-More, Inc.,* 621 S.W.2d 395 [Tenn].) For discussion of the implied obligation of good faith as a limitation upon the right to terminate an at-will employee see Committee Report (at p 182 ff; De Giuseppe, 10 Ford Urban LJ, at p 24; Glendon and Lev, 20 BC L Rev, at pp 471-472; Madison, 6 Employee Relations LJ, 422; Note, 93 Harv L Rev 1816; Comment: Employment Contracts — Implied Covenant of Good Faith, 62 Mass. LQ 241).

I do not gainsay that *Martin v New York Life Ins. Co.* (148 N.Y. 117), however questionable its origin and continued existence, is the New York rule concerning employment contracts of unspecified duration. So in *Haines v City of New York* (41 N.Y.2d 769, 772) we took pains to point out that unlike other contracts of unspecified duration, as to which the law will imply that the parties "intended performance to continue for a reasonable time", that rule "[f]or compelling policy reasons * * * has not been, and should not be, applied to contracts of employment". But the policy reasons behind refusing to read a durational
311 term into *311 employment contracts do not require reading out of such contracts the "implied covenant of fair dealing and good faith" which "is implicit in all contracts" (*Van Valkenburgh, Nooger Neville v Hayden Pub. Co.,* 30 N.Y.2d 34, 45; accord *Kirke La Shelle Co. v Armstrong Co.,* 263 N.Y. 79, 87) and is "a contractual obligation of universal force which underlies all written agreements" (*Brassil v Maryland Cas. Co.,* 210 N.Y. 235, 241).

I refer not to the promise that each party will use reasonable efforts to carry out the contract purpose, which may be implied-in-fact from the contract negotiations to establish consideration though the writing be "imperfectly expressed" in that respect (*Wood v Duff-Gordon,* 222 N.Y. 88, 91), but to the covenant implied by the law that the parties will not "frustrate the contracts into which they have entered" and that one party will "not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (*Grad v Roberts,* 14 N.Y.2d 70, 75) or that may hinder or obstruct his doing that which the contract stipulates he should do (*Patterson v Meyerhofer,* 204 N.Y. 96, 101).

Under this principle it was held in *Meyerhofer* that by entering into a contract to purchase from plaintiff property which defendant knew plaintiff would have to buy at a foreclosure sale in order to convey, defendant impliedly agreed that she would do nothing to prevent him from acquiring the property at such sale and, having outbid him at the sale, was liable to him for the difference between the contract price and the price she paid to the referee in foreclosure. Indeed, more than 100 years ago we applied the principle to a broker's commission contract, though terminable at will, holding in *Sibbald v Bethlehem Iron Co.* (83 N.Y. 378, 384) that "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will *subject only to the ordinary requirements of good faith"* (emphasis supplied; see, also, *Goodman v Marcol, Inc.,* 261 N.Y. 188; *Carns v Bassick,* 187 App. Div. 280). And though a broker's employment is occasional
312 rather than continuous, we have recognized *312 the role of good faith even as it relates to continuous employment, saying in *Arentz v Morse Dry Dock Repair Co.* (249 N.Y. 439, 444) with respect to a claimed contract of permanent employment of a general manager that "Plaintiff was not obliged to stay with the defendant for life,

neither was defendant obliged to employ him beyond the time when *in good faith* it had no further use for his services" (emphasis supplied).

The principle, moreover, is espoused by the Restatement of Contracts, Second (§ 205), which flatly states that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," and which in Comment *e* and the Reporter's Notes thereto indicates its application to the "abuse of a power * * * to terminate the contract" (at p 102) including "an express power to terminate a contract at will" (at p 104). It is recognized as well in section 1-203 of the Uniform Commercial Code and by Williston, Contracts (3d ed, §§ 670, 1295), which tells us in section 1295 (vol 11, p 39) that: "Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied." The same reasoning that reads into an output contract the requirement that the manufacturing plant continue to perform in good faith (*Feld v Levy Sons,* 37 N.Y.2d 466, 471) and into the contract of an employee hired to invent that the resulting patent belongs to the employer (*Cahill v Regan,* 5 N.Y.2d 292, 296) though no express provision to such effect be contained in the contract requires reading into the contract the present plaintiff alleges a provision that he will not be terminated for doing that which the parties have expressly contracted he shall do.[7] To be borne in mind is the fact that we deal not *313 with a contract which by its expressed term authorizes the employer to terminate without cause, but with one in which, because no durational term has been expressed, the law implies a right of termination. In the latter situation only the strongest of policy reasons can sustain reading the *implied* right of termination as a limitation upon the *express* obligation imposed upon the employee (see Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv L Rev 369, 399-401; Summers, General Duty of Good Faith — Its Recognition and Conceptualization, 67 Cornell L Rev 810, 827; Summers, "Good Faith" In General Contract Law and the Sales Provisions of The Uniform Commercial Code, 54 Va L Rev 195, 251).

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[7] Ironically, the employer's implied absolute right to terminate at-will employment for any reason or for no reason had its origin in the necessity of according the *employer* mutuality with the right of the *employee* to quit his job at any time (Blades, 67 Col L Rev, at p 1419). Logically, of course, the same principle of mutuality requires that if, as plaintiff alleges and must prove in order to succeed, defendant's contract with him required him to report to defendant's top management any deviation from proper accounting practice, plaintiff's employment not be terminated because he did so.

There is, moreover, no compelling policy reason to read the implied obligation of good faith out of contracts impliedly terminable at will. To do so belies the "universal force" of the good faith obligation which, as we have seen, the law reads into "all contracts." Nor can credence be given the *in terrorem* suggestion that to limit terminable-at-will contracts by good faith will drive industry from New York (see *Weiner v McGraw-Hill, Inc.,* 57 N.Y.2d 458, 469 [dissenting opn]). That is no more than speculation and hardly appears acceptable in the face of (1) the recognition without apparent industrial exodus of the even more burdensome tort remedy for discharge of at-will employees by such industrial States as California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, Pennsylvania and Wisconsin (see Committee Report, at p 211, n 130; and De Giuseppe, 10 Ford Urban LJ, at p 23, n 101), and (2) the responses reported in Ewing, What Business Thinks About Employee Rights, a Harvard Business Review survey of employers reprinted in Individual Rights In The Corporation: A Reader On Employee Rights (Westin Salisbury eds), at page 21. The

more particularly is this so because collective bargaining "just cause" provisions, which impose a greater burden on employers than does a good faith limitation (see *Toussaint v Blue Cross Blue Shield of Mich.,* 408 Mich. 579) have not done so,
314 and *314 because employers can obtain a large measure of protection by expressly reserving in the employment contract the right to terminate without cause.[8]

[8] Such a contract is not per se unconscionable (*Zapatha v Dairy Mart,* 381 Mass. 284).

The fact that the Legislature has limited at-will discharge in the several ways listed in footnote 5 above but has not expressly established a breach of contract action for termination of at-will employment which violates the implied-in-law obligation of good faith provides no reason to await action by the Legislature. The at-will rule was created by the courts and can properly be changed by the courts but, more importantly, as demonstrated above, the rule has for at least a century been subject to the "universal force" of the good faith rule. The Legislature, therefore, had no reason before the present decision to believe that action on its part was required.

Nor ought we succumb to any "floodgates" argument. "This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden on the courts" (*Tobin v Grossman,* 24 N.Y.2d 609, 615; accord Prosser, Torts [4th ed], p 51). The argument is, moreover, specious. It is plaintiff's burden if he is to avoid summary judgment to come forward with admissible evidence that he was terminated because he reported, as required, a deviation from proper accounting practice (*Gelder Med. Group v Webber,* 41 N.Y.2d 680, 684) and it will be his burden to establish that fact before the jury (see *Goodman v Marcol, Inc.,* 261 N.Y. 188, *supra; Sibbald v Bethlehem Iron Co.,* 83 N.Y. 378, 390, *supra; McDonnell Douglas Corp. v Green,* 411 U.S. 792). And though the burden of going forward, once plaintiff establishes a prima facie case, will shift to defendant (see *Matter of Axel v Duffy-Mott Co.,* 47 N.Y.2d 1, 9; cf. *Mt. Healthy City Bd. of Educ. v Doyle,* 429 U.S. 274, 287; Committee Report, at p 195), it will remain the plaintiff's burden to convince the jury that he was fired for the reason he alleged, not the employer's burden to convince them that he had
315 other good cause to fire the employee (see *315 Blades, 67 Col L Rev, at p 1429). True, the evidence presented by an employer in such a situation will normally be of other cause to fire, but there is no reason to believe that under proper instruction from the court as to burden of proof (cf. PJI 4:31) a jury cannot be trusted to determine the good faith issue thus presented as they now regularly do in all the other good faith situations presented to them.

It may well be that plaintiff's fourth cause of action will not survive a motion for summary judgment or, if it does, will not succeed before a jury. To dismiss it at this stage, on the pleadings alone, is, however, wholly inconsistent with the prior holdings of this and other courts with respect to the implied-in-law obligation of good faith. I therefore, cannot vote for doing so.