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Lustigman v. Harris Publications, Inc.: New York Supreme Court Permits an At-Will Employee to Maintain a Cause of Action for Fraudulent Inducement Against the Employer

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Lustigman v. Harris Publications, Inc.: New York Supreme Court permits an at-will employee to maintain a cause of action for fraudulent inducement against the employer.

An irrefutable aspect of the at-will employment doctrine is that an employer has the unfettered right to discharge an employee for any cause,[1] unless this right is limited by some other means[2] or the employer's actions fall within the parameters of an

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[1] *See* Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 333, 506 N.E.2d 919, 920, 514 N.Y.S.2d 209, 211 (1987) (stating that absent agreements to contrary, any at-will employee may be terminated at any time); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 300, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983) (stating that where employment is for indefinite time, it is terminable at any time for any or no reason). The right to terminate unilaterally the employment relationship for any or no cause is a right of both the employer and employee. *See Murphy*, 58 N.Y.2d at 300, 448 N.E.2d at 89, 461 N.Y.S.2d at 235; *see also Sabetay*, 69 N.Y.2d at 333, 506 N.E.2d at 920, 514 N.Y.S.2d at 211; Jeffrey S. Klein & Nicholas J. Pappas, *Employee Handbooks: Risks and Rewards*, N.Y. L.J., Feb. 5, 1996, at 3 (stating that absent agreement for specific duration, employer and employee may terminate relationship at any time for any reason with or without notice).

[2] One way to limit the employer's right to terminate an at-will employee is through the existence of an express provision in an employment manual or handbook. *See Murphy*, 58 N.Y.2d at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237 (discussing fact that employee may be limited in termination rights by express provisions in handbook); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 466, 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (noting that at-will presumption can be rebutted by " 'circumstances showing different intention' ") (citations omitted); *see also* Klein & Pappas, *supra* note 1, at 3 (discussing implications to employer for failing to comply with handbook policies). *Weiner* established a high standard to meet for employees alleging an employer's manual effectively reflects an intent to restrict the right to terminate only for just cause. *See Sabetay*, 69 N.Y.2d at 334-35, 506 N.E.2d at 921-22, 514 N.Y.S.2d at 212 (noting "because of the explicit and difficult pleading burden, post-*Weiner* plaintiffs alleging wrongful discharge have not fared well"); *see also* Joseph DeGiuseppe, Jr., Weiner v. McGraw-Hill, Inc., *Ten Years After*, 19 WESTCHESTER B. J. 227, 234 (1992) (remarking that "[s]ince the *Sabetay* decision, the overwhelming majority of New York State court cases have rejected causes of action based on *Weiner*."); Klein & Pappas, *supra* note 1, at 3 (indicating some New York courts have limited *Weiner* to facts). First, the employee must show he/she was induced to leave his/her previous employment by the assurance that he/she would only be terminated for cause. *See Weiner*, 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. Second, the employee must demonstrate that the employer's "assurance was incorporated into the employment application." *Id.* Third, the employee must prove that in reliance on the assurance, he/she turned down other employment opportunities. *Id.* Finally, the employee must demonstrate that he/she was instructed to follow strictly the procedures outlined in the employee manual. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. Subsequent courts have inter-

anti-discrimination statute.[3] When an individual is hired for an indefinite term, the presumption of at-will employment arises.[4] The consequence of this presumption is that an at-will employee has no cause of action for breach of contract when the employer terminates or modifies the employment relationship.[5] New York continues to be a strong at-will employment state.[6] While other

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preted the fourth element to mean that the employment manual must contain an express just cause termination provision. *See Sabetay*, 69 N.Y.2d at 336, 506 N.E.2d at 922-23, 514 N.Y.S.2d at 213 (finding that limitation in employee handbook on employer's right to discharge must be expressly stated).

[3] *See* Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381-87 (1994) (providing eligible employees with total of 12 weeks paid or unpaid leave); National Labor Relations Act, 29 U.S.C. §§ 151-69 (1994) (regulating unfair labor practices by employers and discussing employees' rights); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1994) (discussing wage regulations); Age Discrimination in Employment Act §§ 4, 12, 29 U.S.C. §§ 623, 631 (1994) (prohibiting covered employers from discriminating against employees who are at least 40 years old); Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (1994) (proscribing employment discrimination on basis of race, color, religion, sex, and national origin); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000c (1994) (amending 42 U.S.C. § 2000e to include pregnancy within sex discrimination); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (1994) (providing that employer of 15 or more employees cannot discriminate against "a qualified individual with a disability because of the disability"); *see also* N.Y. EXEC. LAW § 296 (McKinney Supp. 1997) (detailing unlawful discriminatory practices); N.Y. LAB. LAW § 740 (McKinney Supp. 1997) (providing limited protection to whistle-blowing employees). For more discussion of New York's very limited whistle-blowing statute, see Remba v. Federation Employment and Guidance Servs., 149 A.D.2d 131, 134-35, 545 N.Y.S.2d 140, 142 (1st Dep't 1989) (indicating whistle-blower statute does not apply to employers' white collar crime), *aff'd*, 76 N.Y.2d 801, 559 N.E.2d 655, 559 N.Y.S.2d 961 (1990); Leibowitz v. Bank Leumi Trust Co., 152 A.D.2d 169, 180, 548 N.Y.S.2d 513, 520 (2d Dep't 1989) (noting that Labor Law § 740 protects employees from retaliation for disclosing or threatening to disclose employer's activities that are "a substantial and specific danger to the public health or safety").

[4] *Murphy*, 58 N.Y.2d at 300, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.

[5] *See* Parker v. Borock, 5 N.Y.2d 156, 159, 156 N.E.2d 297, 298, 182 N.Y.S.2d 577, 579 (1959) (holding that plaintiff has no cause of action for breach of contract since employment contract was terminable at-will); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895) (adopting Wood rule which states that general hiring, without time of employment specified, is indefinite hiring and therefore terminable at-will).

[6] *See* Laurie P. Cohen & Wade Lambert, *Firms' Right to Fire 'At-Will' Is Bolstered*, WALL ST. J., Jan. 8, 1990, at B3, *available in* 1990 WL-WSJ 593706 (stating that "New York has tended to favor the right of employers to terminate employees 'at-will' "); Michael G. Radigan, *Avoiding Wrongful Discharge Actions*, N.Y. L.J., Apr. 4, 1994, at S1 (indicating that employers "can take comfort in the New York courts' general adherence to the traditional rule of at-will employment, which has been substantially vitiated in many other states"); Richard J. Reibstein, *The Emergence of 'Truth in Hiring' Claims*, N.Y. L.J., May 19, 1993, at 1 (noting that at-will employment doctrine is "firmly entrenched in New York").

states have vitiated the doctrine with the recognition of significant exceptions, New York has continuously refused to do so.[7] In accordance with this traditional adherence to the employment

[7] Numerous other states have recognized three main exceptions to the at-will employment doctrine. These exceptions are: (1) violation of public policy; (2) implied contract; and (3) implied covenant of good faith and fair dealing. *See* James L. Payne & Kevin M. Smith, *Establishing the Boundaries of Wrongful Discharge: California's* Foley *Decision*, EMPLOYEE RELATIONS L.J. 3547, June 22, 1989, *available in* 1989 WL 2419561 (indicating that, as of 1988, 34 states recognized public policy exception, 32 states recognized implied contract exception, and 13 states recognized implied covenant exception); *see also* Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, INDUS. & LAB. REL. REV. 644, July 1, 1991, *available in* 1991 WL 2813484 (providing table of exceptions and year in which particular states adopted exception). Despite the developments in other states, the New York Court of Appeals has continually refused to recognize the tort of abusive or wrongful discharge, *see Murphy*, 58 N.Y.2d at 302, 448 N.E.2d at 89, 461 N.Y.S.2d at 236, an implied obligation of good faith and fair dealing, *id.* at 304-05, 448 N.E.2d at 91, 461 N.Y.S.2d at 237, and public policy exceptions, *id.* at 301-2, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235-36; *see also* Klein & Pappas, *supra* note 1, at 3 (stating that New York has refused to expand employer's liability to at-will employees). The court's rationale for denying recognition of these exceptions is that the legislature is better equipped to make such decisions. *Sabetay*, 69 N.Y.2d at 336, 506 N.E.2d at 923, 514 N.Y.S.2d at 213; *Murphy*, 58 N.Y.2d at 301, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235. *But cf.* N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1997) (prohibiting retaliatory firing by public employers); N.Y. EXEC. LAW § 296 (McKinney 1993 & Supp. 1997) (creating general prohibition of invidious discrimination in employment); N.Y. JUD. LAW § 519 (McKinney 1997) (prohibiting employers from firing employees due to jury service); N.Y. LAB. LAW §§ 215, 740 (McKinney Supp. 1997) (crafting whistle-blower statute).

In addition to the three main exceptions to employment at-will, some states permit the employee to assert promissory estoppel in order to defeat the employer's statute of frauds defense. *See* Pickell v. Arizona Components Co., 902 P.2d 392, 395 (Colo. Ct. App. 1994) (stating that at-will employee may have claim for promissory estoppel), *rev'd on other grounds*, 1997 WL 27173 (Colo. 1997). *But see* Cunnison v. Richardson Greenshields Sec., Inc., 107 A.D.2d 50, 53, 485 N.Y.S.2d 272, 276 (1st Dep't 1985) (stating change of job does not alone create presumption of promissory estoppel); Ginsberg v. Fairfield-Noble Corp., 81 A.D.2d 318, 321, 440 N.Y.S.2d 222, 225 (1st Dep't 1981) (holding change of job does not necessarily implicate promissory estoppel).

One important, but narrow, exception that New York does permit is found in *Wieder v. Skala*, 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992). In *Wieder*, the Court of Appeals held that there is an implied understanding between a law firm and an associate that each will comply with the Code of Professional Responsibility reporting requirements. *Id.* at 635-36, 609 N.E.2d at 108-09, 593 N.Y.S.2d at 755-56. Due to this implied contractual provision, an associate who was discharged for insisting on reporting professional misconduct had a valid breach of contract claim. *Id.* at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. For a brief discussion on *Wieder's* possible application to other professionals, see Sandra J. Mullings, Wieder v. Skala: *A Chink in the Armor of the At-Will Doctrine or a Lance for Law Firm Associates?*, 45 SYRACUSE L. REV. 963, 992 (1995) (asserting that *Wieder* should be applied to other professions which are subject to standards of conduct and rules of ethics).

at-will rule, New York courts have been reluctant to permit an employee to maintain a lawsuit upon theories of either fraudulent inducement or intentional misrepresentation.[8] Nevertheless, in *Lustigman v. Harris Publications, Inc.*,[9] the New York State Supreme Court, New York County permitted a fraudulent inducement claim to stand by denying an employer's motion to dismiss for failure to state a cause of action.[10]

In *Lustigman*, the defendant ("Harris Publications") began recruiting the plaintiff ("Lustigman") in May of 1995 for the position of editor-in-chief of the magazine *Outdoor Gear*.[11] According to Lustigman, a Harris Publications representative intentionally misrepresented that sufficient financial resources had been set aside to publish the magazine for one year.[12] Upon expiration of the one-year trial period, the viability of the magazine was to be evaluated.[13] Lustigman accepted the offer of employment, but less than two months later Harris Publications suspended the issuance of the magazine and discharged her.[14] Lustigman subsequently commenced an action alleging breach of contract and fraudulent inducement to enter into the employment relationship.[15] Thereafter, Harris Publications brought a

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[8] *See* Dalton v. Union Bank of Switzerland, 134 A.D.2d 174, 176, 520 N.Y.S.2d 764, 766 (1st Dep't 1987) (holding that plaintiff stated no cause of action for fraudulent misrepresentation because it was "restatement of the first cause of action for breach of contract"); Brumbach v. Rensselaer Polytechnic Inst., 126 A.D.2d 841, 843, 510 N.Y.S.2d 762, 764 (3d Dep't 1987) (stating that fraud cannot be basis for separate cause of action because alleged fraud directly related to breach of contract claim); Kotick v. Desai, 123 A.D.2d 744, 746, 507 N.Y.S.2d 217, 219 (2d Dep't 1986) (noting that "addition[al] allegation[s] of scienter will not transform a breach of contract action into one to recover damages for fraud"). *But see* Navaretta v. Group Health, Inc., 191 A.D.2d 953, 954, 595 N.Y.S.2d 839, 840 (3d Dep't 1993) (recognizing at-will employee's cause of action for fraudulent misrepresentation); Backer v. Lewit, 180 A.D.2d 134, 139, 584 N.Y.S.2d 480, 483 (1st Dep't 1992) (holding that at-will employee could maintain cause of action for fraud); *see also* Monaco v. Saint Mary's Hosp. of Troy, Inc., 184 A.D.2d 985, 985-86, 585 N.Y.S.2d 589, 590 (3d Dep't 1992) (implying that at-will employee can maintain action for fraudulent misrepresentation).

[9] N.Y. L.J., Mar. 18, 1996, at 28, col. 3 (Sup. Ct. N.Y. County 1996).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Lustigman*, N.Y. L.J., Mar. 18, 1996, at 28, col. 3.

[15] *Id.* Lustigman brought four other causes of action. *Id.* The first cause of action was breach of contract. *Id.* The breach of contract claim was found to be barred by the statute of frauds because the duration of the oral agreement was alleged to be one year. *Id.* Another cause of action advanced by Lustigman was for negligent misrepresentation. *Id.* at 28, col. 4. This claim was dismissed, however, because it

motion to dismiss for failure to state a cause of action, arguing that the breach of contract claim was barred and that the fraudulent inducement claim is not an acknowledged cause of action in the realm of at-will employment. Furthermore, the defendant contended that even if the cause of action existed, Lustigman failed to allege that the misstatements addressed existing facts, rather than mere future expectations.[16]

Relying on the Third Department's decision in *Navaretta v. Group Health, Inc.*,[17] the *Lustigman* court found that although the statute of frauds barred the breach of contract claim,[18] Lustigman sufficiently alleged a cause of action for fraudulent inducement.[19] Specifically, Lustigman alleged: (1) that Harris Publications had told her that the magazine had the necessary financial resources to publish for at least one year;[20] (2) that Harris Publications had no intention of publishing the magazine for this length of time;[21] and (3) that Lustigman relied to her detriment on the misrepresentations when she decided to quit

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lacked the primary element that there be a "special relationship between plaintiff and defendant." *Id.* Lustigman also brought a claim to recover damage to her career and professional reputation. *Id.* Justice Lobis dismissed this cause of action because it was incorporated in the fraudulent inducement claim. *Id.* Lastly, the court refused to dismiss the last cause of action for quantum meruit. *Id.*

[16] *Lustigman*, N.Y. L.J., Mar. 18, 1996, at 28, col. 3.

[17] 191 A.D.2d 953, 595 N.Y.S.2d 839 (3d Dep't 1993). In *Navaretta*, the employer informed the prospective employee, during the interview phase, that part of the training would involve certain tests. *Id.* at 953, 595 N.Y.S.2d at 840. The plaintiff expressed concern over the examinations because "she did not test well." *Id.* The interviewer instructed her "not to worry" because the tests were unimportant. *Id.* In fact, the tests were "pivotal" to employment. *Id.* The plaintiff quit her former job and subsequently went to work for the defendant employer. *Id.* After the plaintiff failed three examinations, she was discharged. *Id.* The Third Department stated that despite the plaintiff's at-will employee status,

> she [was] not suing defendant based on a breach of her employment contract but on a tort claim that defendant's agent fraudulently misrepresented facts to induce her into entering into employment.... Such a cause of action is cognizable if specific enough ... and if the plaintiff alleges misstatements of existing fact as opposed to expressions of future expectation.

Id. at 954, 595 N.Y.S.2d at 840 (citations omitted).

[18] *Lustigman*, N.Y. L.J., Mar. 18, 1996, at 28, col. 3 (stating that breach of contract claim was barred by statute of frauds because contract duration was alleged to be one year). The New York statute of frauds generally provides that any agreement, promise, or undertaking which is not by its terms to be performed within one year from its making is void unless it is in a signed writing. N.Y. GEN. OBLIG. LAW § 5-701(a)(1) (McKinney Supp. 1997).

[19] *Lustigman*, N.Y. L.J., Mar. 18, 1996, at 28, col. 3.

[20] *Id.*

[21] *Id.* at 28, col. 4.

her previous job in order to join the defendant's organization.[22] The court carefully noted the distinction between a claim that the defendant breached a contract to employ her for a year and a claim that the defendant misrepresented that the magazine would be published for one year.[23]

While the decision to permit the cause of action for fraudulent inducement in *Lustigman* was unconventional in New York, many other state courts have acknowledged the claim in similar circumstances.[24] The employer's misrepresentation of existing fact concerning a material aspect of the position in conjunction with the subsequent enticement of the plaintiff to rely detrimentally on the misstatement by accepting the employment offer constitute the gravamen of the fraudulent inducement theory.[25] Alternatively, an employer may be liable under this theory when the employer fraudulently coaxes a current at-will employee to

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[22] *Id.*

[23] *Id.*

[24] *See* Kidder v. AmSouth Bank, N.A., 639 So.2d 1361, 1363 (Ala. 1994) (holding that at-will employee could maintain action for fraudulent inducement against employer based upon alleged misrepresentations made prior to accepting employment); Interstate Freeway Servs., Inc. v. Houser, 835 S.W.2d 872, 874 (Ark. 1992) (holding that employer was deceitful when it hired plaintiff to "do the initial hard work of opening the restaurant with the hidden intent of installing his own workers ... after the initial start-up work had been completed"); Lazar v. Superior Ct., 909 P.2d 981, 985 (Cal. 1996) (holding that employers who wrongfully terminate at-will employees should not be immune from tort liability); Plane v. Uniforce MIS Servs. of Georgia, Inc., 479 S.E.2d 18, 19, 21 (Ga. Ct. App. 1996) (holding that genuine issue of material fact existed as to intentional misrepresentation and fraud when employer allegedly falsely told prospective employee that it secured consulting contract with another organization in order to induce him to accept its employment offer); Johnson v. George J. Ball, Inc., 617 N.E.2d 1355, 1361, 1363 (Ill. App. Ct. 1993) (holding that cause of action for fraudulent inducement can be maintained); Webber v. Frelonic Corp., No. 92-1437, 1994 WL 878830, at *4 (Mass. Oct. 7, 1994) ("An action for negligent or fraudulent misrepresentation stands separately from any breach of contract claim."); Stowman v. Carlson Co., 430 N.W.2d 490, 493 (Minn. Ct. App. 1988) (implying that at-will employee may have cause of action based on fraudulent inducement); *see also* Deborah S. Adams & David A. Skidmore, Jr., *Employees May Recover for Businesses' Broken Promises*, NAT'L L.J., Sept. 16, 1996, at B7 (discussing potential cause of action based on fraudulent inducement). *But see* Mehling v. Dubois Cty Farm Bureau Coop. Ass'n., 601 N.E.2d 5, 8 (Ind. Ct. App. 1992) (holding that permitting at-will employees to maintain fraudulent inducement claims would, in effect, permit circumvention of statute of frauds); Whiteco Indus., v. Kopani, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987) (indicating no claim of fraudulent inducement may be brought by at-will employees).

[25] *See* Adams & Skidmore, Jr., *supra* note 24, at B7 ("Under this theory, an employer can be held liable for lying to a prospective employee about an important aspect of a job if the employee detrimentally relies upon the promise by taking the job.").

remain with the organization after the employee has received offers of superior employment opportunities.[26]

The *Lustigman* court correctly denied the employer's motion to dismiss for failure to state a cause of action. Although New York courts historically have declined to acknowledge the fraudulent inducement claim by at-will employees, based on the view that such claim merely represents a change in form rather than substance,[27] there are inherent distinctions between breach of contract and fraudulent inducement claims.[28]

Fraudulent inducement is a tort completely independent of a breach of contract claim.[29] The most significant demarcation between the two causes of action remains the notion that efficient breaches of contract are encouraged,[30] while fraud is morally reprehensible.[31] The elements necessary to establish a prima facie

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[26] *See* Cole v. Kobs & Draft Adver., Inc., 921 F. Supp. 220, 223, 225 (S.D.N.Y. 1996) (indicating that suit not barred after plaintiff informed supervisor of intention to accept competitor's offer and supervisor strongly advised plaintiff to accept counteroffer of salary increase, promotions, and "a great future"); Garnier v. J.C. Penney Co., 863 F. Supp. 139, 143 (S.D.N.Y. 1994) (denying employer's motion for summary judgment of employee's claim of fraudulent inducement to remain in defendant's employ); Shaddix v. United Ins. Co. of America, 678 So. 2d 1097, 1098 (Ala. Civ. App. 1995) (stating that plaintiff was induced by "certain company employees" to remain with current employer). *But see* Garwood v. Sheen & Shine, Inc., 175 A.D.2d 569, 570, 572 N.Y.S.2d 237, 237-38 (4th Dep't 1991) (holding that current employee could not maintain cause of action for fraudulent inducement).

[27] *See supra* notes 6-7 and accompanying text (discussing New York courts' adversity toward causes of action based on fraudulent inducement).

[28] *See* Stewart v. Jackson & Nash, 976 F.2d 86, 88-89 (2d Cir. 1992) ("[U]nder New York law '[i]t is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable .... Thus, fraud in the inducement of a written contract is not merged therein so as to preclude an action for fraud.' ") (quoting 60 N.Y. JUR. 2D *Fraud and Deceit* § 206, at 740 (1987)).

[29] *See* Lazar v. Superior Ct., 900 P.2d 981, 985 (Cal. 1996) (stating that "plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. 'If it is enforceable, the [plaintiff] ... has a cause of action in tort as an alternative at least ....' ") (quoting RESTATEMENT (SECOND) OF TORTS § 530(1), cmt. c (1976)); *see also* Dalton v. Union Bank of Switzerland, 134 A.D.2d 174, 176, 520 N.Y.S.2d 764, 766 (1st Dep't 1987) (stating fraud that relates to breach of employment contract is not valid claim).

[30] *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 31-38 (2d ed. 1989) (providing examples in which breaches are efficient); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1, at 89-96 (4th ed. 1992) (examining role of economics in contract law).

[31] *See* N.Y. DEBT. & CRED. LAW § 273-a (McKinney 1990) (fraudulent conveyances by insolvents); N.Y. DEBT. & CRED. LAW § 274 (McKinney 1990) (fraudulent conveyances by business persons); N.Y. DEBT. & CRED. LAW § 275 (McKinney 1990) (fraudulent conveyances by persons about to incur debt); N.Y. GEN. BUS. LAW §§

case of fraudulent inducement include: (1) a material misrepresentation by the defendant; (2) falsity of the statement; (3) knowledge by the defendant that the statement was false; (4) detrimental reliance by the plaintiff on the misstatement; and (5) injury to the plaintiff.[32]

The first and third elements will be the most difficult obstacles for disgruntled employees to overcome. With respect to the first element, the misstatements must be comprised of "existing fact" or collateral misrepresentations to be actionable;[33] mere "expressions of future expectations" or promissory misrepresentations will not support a fraud claim.[34] The *Lustigman* case il-

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349, 350, 399-p(9) (McKinney 1988) (proscribing false advertising and other deceptive acts); N.Y. PENAL LAW art. 158 (McKinney Supp. 1997) (welfare fraud); N.Y. PENAL LAW § 165.20 (McKinney 1988) (fraudulently obtaining signature); N.Y. PENAL LAW art. 170 (McKinney 1988) (forgery); N.Y. PENAL LAW art. 176 (McKinney 1988) (insurance fraud); N.Y. PENAL LAW art. 190 (McKinney 1988) (other frauds); N.Y. SOC. SERV. LAW § 145-b(2) (McKinney 1992) (Medicaid fraud); N.Y. WORK. COMP. LAW § 96 (McKinney 1994) (penalties for fraudulent practices); N.Y. WORK. COMP. LAW § 114 (McKinney 1994) (penalties for false representations); *see also* Lazar v. Superior Ct., 909 P.2d 981, 990 (Cal. 1996) ("In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future."); Applebaum v. Applebaum, 84 N.Y.S.2d 505, 508 (Sup. Ct. Kings County 1948) ("[F]raud ... is criminal in its essence and involves moral turpitude at least ....").

[32] *See* Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 407, 151 N.E.2d 833, 835, 176 N.Y.S.2d 259, 262 (1958).

> The essential constituents of the action [for fraud] are fixed as representation of a material existing fact, falsity, *scienter*, deception and injury .... Accordingly, one 'who fraudulently makes a misrepresentation of intention for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction' is liable for the harm caused by the other's justifiable reliance upon the misrepresentation.

Id. at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262 (citations omitted); *see also* Johnson v. George J. Ball, Inc., 617 N.E.2d 1355, 1361 (Ill. App. Ct. 1993) (recognizing that plaintiff would not have entered into contract but for misrepresentation).

[33] *Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262; *see also* George N. Stepaniuk, Note, *The Statute of Frauds as a Bar to an Action in Tort for Fraud*, 53 FORDHAM L. REV. 1231, 1251 n.122 (1985) (describing collateral misrepresentation as containing "a condition necessary to performance of the underlying contract").

[34] *Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262; *see also* Cleffi v. Crescent Beach Club, 222 A.D.2d 642, 643, 636 N.Y.S.2d 102, 103 (2d Dep't 1995) (holding that plaintiff/employee cannot maintain fraud action when it "is premised upon breach of contractual duties and the allegations supporting the action do not concern representations which are collateral or extraneous to the agreement"); Guterman v. RGA Accessories, Inc., 196 A.D.2d 785, 786, 602 N.Y.S.2d 116, 117-18 (1st Dep't 1993) (same).

There is one situation in which a promise of future performance can be actionable under fraudulent inducement. "While '[m]ere promissory statements as to what

lustrates the difference between the two forms of misrepresentation. The collateral misrepresentation of existing fact occurred when Harris Publications informed Lustigman that the corporation had committed the necessary financial resources to publish the magazine for a one-year trial period.[35] In contrast, the promissory misrepresentation was that Harris Publications would employ Lustigman for one year.[36] The maintenance of a fraudulent inducement claim hinges on this crucial distinction. Only the collateral misrepresentation gives rise to the fraudulent inducement claim because the collateral misrepresentation was not a term of the 'contract' voided by the statute of frauds.[37] Thus, if an employee's claim contains only allegations of promissory misrepresentations, no cause of action for fraudulent in-

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will be done in the future are not actionable', ... if a promise was actually made with a preconceived and undisclosed intention of not performing it," a fraudulent inducement action may lie. Sabo v. Delman, 3 N.Y.2d 155, 160, 143 N.E.2d 906, 908, 164 N.Y.S.2d 714, 716 (1957).

[35] *Compare* Stewart v. Jackson & Nash, 976 F.2d 86, 89 (2d Cir. 1992) (stating that law firm's misrepresentation that it "had recently secured a large environmental law client" and "was in the process of establishing an environmental law department" were collateral misrepresentations), *and Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262 (noting seller of goods told buyer it had " 'available and uncommitted supplies and productive capacity of aluminum ingot' " and "had entered into no binding commitments which could in the future reduce such" supplies), *and* Urban Holding Corp. v. Haberman, 162 A.D.2d 230, 231, 556 N.Y.S.2d 337, 339 (1st Dep't 1990) (reinstating defendant's counterclaim for fraudulent inducement because "[defendant's] allegations do not relate solely to contractual obligations ... they clearly regard alleged deceptions which occurred previous to the formation of contracts"), *with* Garwood v. Sheen & Shine, Inc., 175 A.D.2d 569, 569-70, 572 N.Y.S.2d 237, 237 (4th Dep't 1991) (stating employer told employee "that he was satisfied with the plaintiff's job performance and would continue the plaintiff as an employee as long as plaintiff performed his job"), *and* Brumbach v. Rensselaer Polytechnic Inst., 126 A.D.2d 841, 843, 510 N.Y.S.2d 762, 764 (3d Dep't 1987) (noting university representation to professor that she was "tenure-tracked" was not statement of existing fact "but rather one of a possible future contingency").

[36] *Cf. Stewart*, 976 F.2d at 89 (stating that law firm's misrepresentations to prospective employee during recruiting that she "would head the environmental law department" and "[would] be expected to service the firm's substantial existing environmental law client" were merely promissory misrepresentations); *Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262 (relating that seller told buyer "it was its intention to make available and to sell to the [buyer] the number of pounds specified for a period of five years").

[37] *See Stewart*, 976 F.2d at 88 (recognizing that "where a contract or transaction was induced by false representations, the representations and the contract are distinct"); *Channel Master*, 4 N.Y.2d at 408, 151 N.E.2d at 836, 176 N.Y.S.2d at 263 (asserting that deliberate, oral misrepresentation of fact is actionable); Stepaniuk, *supra* note 32, at 1251 (arguing that plaintiff who can prove misrepresentations collateral to oral promise should be allowed recovery).

ducement exists because such a claim would simply be a restatement of the previously barred breach of contract cause of action.[38]

The other difficult element necessary to establish a prima facie fraudulent inducement claim is that of scienter, which requires the defendant to have made the misrepresentation with knowledge of its falsity.[39] During the pleading stage, the plaintiff must state these facts with particularity in the complaint.[40] During litigation, the inclusion of the scienter element becomes even more crucial because plaintiffs often encounter difficulties in proving fraudulent intent.[41] A plaintiff shoulders this burden of having to prove scienter by the clear and convincing standard.[42] Consequently, the plaintiff is compelled to produce evidence which clearly contradicts any assertion that the speaker had no knowledge the misstatement was false.

The remaining elements of a fraudulent inducement claim also hinder the ability to make out a prima facie case, but these elements are much easier to surmount. First, plaintiffs must show that they reasonably relied on the misrepresentations to their detriment. This reasonable reliance component relates

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[38] *Channel Master*, 4 N.Y.2d at 408, 151 N.E.2d at 836, 176 N.Y.S.2d at 263; *see* Stepaniuk, *supra* note 33, at 1251-52 n.122 (recognizing that under approach in *Channel*, proof of collateral misrepresentation entitles plaintiff to recover full extent of damages, while "fraudulent nonperformance of an oral promise" limits plaintiff's recovery to incurred pecuniary loss). Clearly, if the employer in *Lustigman* never represented that it had set aside the financial resources, but only promised to employ the plaintiff for one year, there would be no cause of action for fraudulent inducement. The reason is that the words 'I will employ you for one year' are both promissory misrepresentations and essential terms of the employment contract that is void under the statute of frauds. Hence, these words cannot support a fraud claim.

[39] *See Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262 (acknowledging that assertion of present intention qualifies as statement of "material existing fact, sufficient to support a fraud action").

[40] N.Y. C.P.L.R. 3016(b) (McKinney 1991) ("Where a cause of action or defense is based upon misrepresentation, fraud ... the circumstances constituting the wrong shall be stated in detail.").

[41] *See, e.g.*, Sanyo Electric, Inc. v. Pinros & Gar Corp., 174 A.D.2d 452, 453, 571 N.Y.S.2d 237, 238 (1st Dep't 1991) (finding that plaintiff failed to show fraudulent intent).

[42] Plaintiffs bringing a claim for fraud, or fraudulent inducement, must prove their case by clear and convincing evidence, and not simply by a preponderance of the evidence. *See* Sorbaro Co. v. Capital Video Corp., 168 Misc. 2d 143, 148, 646 N.Y.S.2d 445, 449 (Sup. Ct. Dutchess County 1996) (finding that plaintiff sustained requisite burden of proof); Applebaum v. Applebaum, 84 N.Y.S.2d 505, 508 (Sup. Ct. Kings County 1948) (asserting that "presumption of honesty prevails unless overcome by *irresistible* evidence").

back to the distinction between collateral and promissory misrepresentations. Reliance on collateral misrepresentations will satisfy the reasonableness requirement.[43] In contrast, reliance on promissory misrepresentations will not reasonable because such misrepresentations deal with expressions of future expectations.[44] In addition, an employee wishing to establish a prima facie case must show damages.[45] While the traditional types of damages awarded to tort victims include punitive damages, a victim of fraudulent inducement should be able to recover only compensatory damages.[46] The primary reason behind the exclusion of punitive damages is that fraudulent inducement implicates a private, not public, wrong.[47] Comformably, an employer who wrongfully induces a prospective employee to reject other offers of employment should not be ordered to pay punitive damages.[48] Finally, an employee deciding to sue on the fraudulent inducement theory faces both the stricter pleading requirements[49] and the higher burden of proof associated with claims of

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[43] *See Channel Master*, 4 N.Y.2d at 407-09, 151 N.E.2d at 385-86, 176 N.Y.S.2d at 261-63 (explaining statement that something was to be done made by person who lacked intention to follow through is actionable).

[44] *See* Bower v. Atlis Sys., Inc., 182 A.D.2d 951, 953, 582 N.Y.S.2d 542, 544 (3d Dep't 1992) (classifying defendant's assurance of employment as "expression of future expectation" and not as "impartation of false information"); Golden v. Donna Karan Co., N.Y. L.J., Mar. 3, 1995, at 27, col. 2 (Sup. Ct. N.Y. County 1995) (denying recovery based on fraud due to absence of justifiable reliance on oral promise).

[45] *Channel Master*, 4 N.Y.2d at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 262.

[46] *See* Navaretta v. Group Health, Inc., 191 A.D.2d 953, 955, 595 N.Y.S.2d 839, 841 (3d Dep't 1993) (stating that employee "could conceivably recover for loss of benefits and salary connected with her *former* employment, as opposed to that which she would have received if her employment with defendant had continued"); Backer v. Lewit, 180 A.D.2d 134, 140, 584 N.Y.S.2d 480, 483 (1st Dep't 1992) (holding that plaintiff can recover compensatory damages).

[47] *See, e.g.*, Kelly v. DeFoe Corp., 223 A.D.2d 529, 529, 636 N.Y.S.2d 123, 124 (2d Dep't 1996) ("It is well settled that punitive damages may not be awarded to redress a private wrong, and, accordingly, that such damages are not available 'in the ordinary fraud and deceit case.' ") (citations omitted). In an action for fraud, punitive damages may only be awarded if the fraud was gross, directed at the general public, and involved a high degree of moral culpability. *Id.*

[48] *See Backer*, 180 A.D.2d at 139, 584 N.Y.S.2d at 483 (holding that fraudulent inducement "is not a case for punitive damages"); Lustigman v. Harris Publications, Inc., N.Y. L.J., Mar. 18, 1996, at 28, col. 3 (Sup. Ct. N.Y. County 1996) (striking plaintiff's punitive damage claim because complaint alleged only private wrong). *But see* Reibstein, *supra* note 6, at 1 (citing Colorado and Connecticut cases awarding $450,000 and $10.1 million respectively, including punitive damages).

[49] *See* Cleffi v. Crescent Beach Club, 222 A.D.2d 642, 643, 636 N.Y.S.2d 102, 103 (2d Dep't 1995) ("plaintiff's allegations of fraud are merely conclusory in nature"); *accord* Lazar v. Superior Ct., 909 P.2d 981, 988 (Cal. 1996) (pointing out that permitting fraudulent inducement claim does not create potential tort liability in every

this sort.[50] Together, these elements should prevent parties from commencing frivolous actions.

The numerous burdens placed upon a plaintiff alleging fraudulent inducement should alleviate concerns that the recognition of an at-will employee's right to sue the employer under this theory will result in a further erosion of the at-will employment doctrine.[51] The unencumbered right of the employer to terminate an at-will employee will not be affected by the recognition of the fraudulent inducement or misrepresentation claim.[52] The crux of the fraudulent inducement theory lies in the manner and method the employer utilizes in recruiting the employee,[53]

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termination case because fraud must be specifically pleaded); *see also* William L. Kandel & Lloyd C. Loomis, *Fraud Claims and the Employment Relationship: The Unsettling Resurgence of a Tort*, EMPLOYEE RELATIONS L.J., Sept. 1, 1996, *available in* 1996 WL 10191747 (noting that "[o]ut of a sense of fairness to defendants, the law imposes safeguards which make fraud difficult to plead or prove"). *But see* David Faustman, *State Supreme Court Is Still Micromanaging Employer-Worker Issues*, BUS. J. (San Jose), June 17, 1996, *available in* 1996 WL 10047255 (opining that *Lazar* decision "blows a mile-wide hole in the protection erected ... from allegations of unlimited tort damages. Fraud is easy to allege, and often difficult to disprove."). As to any slippery slope arguments that could be made, it has been stated that the Court of Appeals "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 ...." Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 314, 448 N.E.2d 86, 97, 461 N.Y.S.2d 232, 243 (1983) (Meyer, J., dissenting) (quoting Tobin v. Grossman, 24 N.Y.2d 609, 615, 301 N.Y.S.2d 554, 558, 249 N.E.2d 419, 422).

[50] *See supra* note 39-42 and accompanying text (noting plaintiff's burden of proof in maintaining cause of action for fraud).

[51] The at-will employee's cause of action for fraudulent inducement and unfounded breach of contract claim might be based on the same promise. *See* Kandel & Loomis, *supra* note 49 at *1. In the fraudulent inducement claim, the misrepresentation was made "with a preconceived and undisclosed intent not to perform" and the injury to the employee occurred *prior* to employment. *Id.* In the non-existent breach of contract claim, however, the employee would allege his or her *termination* from employment was wrongful based on a statement of future expectation that did not materialize. *Id.*

[52] *See* Pickell v. Arizona Components Co., 902 P.2d 392, 398 (Colo. Ct. App. 1994) ("A claim for fraudulent inducement to contract may be asserted in an at-will employment situation because it is not inconsistent with the employer's right to terminate the employment at any time."), *rev'd on other grounds*, 1997 WL 27173 (Colo. 1997); *see also supra* note 37-38 and accompanying text (discussing distinction between breach of contract and misrepresentation).

[53] *See Lazar*, 909 P.2d at 986 (noting that misrepresentation made for fraudulent inducement claim is "designed to induce the employee to alter detrimentally his or her position in some other respect" and is not "aimed at effecting his termination ... of employment"); *see also* Gilbert M. Roman, *Misrepresentations Can Cost Employers Plenty*, ROCKY MTN. NEWS, Mar. 31, 1996, *available in* 1996 WL 7563334 (providing example of typical fraudulent inducement scenario).

not the fashion in which the employee was ultimately discharged.[54] Thus, the employer will continue to retain the unfettered right to fire the employee for any reason and, in fact, can even misrepresent the reason for the discharge;[55] the employer, however, will not be able to lie blatantly to the prospective or current employee who possesses a more lucrative job offer.[56] In effect, to hold that at-will employees cannot sue their employers on the basis of fraudulent inducement denies the employees a remedy afforded other tort victims outside the at-will employment context and immunizes dishonest employers from liability for their intentional fraudulent conduct.[57] Accordingly, appropriately pleaded fraudulent inducement claims ought to be recognized within the sphere of at-will employment.

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[54] *See* Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 298, 448 N.E.2d 86, 87, 461 N.Y.S.2d 232, 233 (1983) (stating that at-will employee was allegedly fired for informing employer he had become aware of "illegal account manipulations"); Zolotar v. New York Life Ins. Co., 172 A.D.2d 27, 29, 576 N.Y.S.2d 850, 851 (1st Dep't 1991) (noting that employer informed employee he was terminated without cause when employer actually had cause); Dalton v. Union Bank of Switzerland, 134 A.D.2d 174, 175-76, 520 N.Y.S.2d 764, 765-66 (1st Dep't 1987) (stating that plaintiff was discharged because he was not bringing in profits); *cf.* Serow v. Xerox Corp., 166 A.D.2d 917, 918, 560 N.Y.S.2d 575, 576 (4th Dep't 1990) (indicating that employer of at-will employee has no fiduciary duty to reveal that any admissions employee made during investigation would not be disclosed to district attorney).

[55] *See Lazar*, 909 P.2d at 987 (stating that employer can be outright deceptive about reason for termination because employer has "[the] *power to accomplish* [it] *forthrightly*") (emphasis added).

[56] *See id.* (noting that "the alleged perpetrator of the fraud *lacks* the power to accomplish his objective without resort to duplicity") (emphasis added).

[57] *See* Shaddix v. United Ins. Co. of America, 678 So. 2d 1097, 1100 (Ala. Civ. App. 1995) ("Any other result would allow ... employers to defraud their employees with impunity, relying upon the employment-at-will doctrine to provide them with virtual immunity in actions arising within the scope of the employment contract."); Adams & Skidmore, Jr., *supra* note 24, at B7 (" 'To hold otherwise would give employers carte blanche to make fraudulent promises of job security to induce individuals into short-term employment.' ") (quoting Franz v. Iolab Inc., 801 F. Supp. 1537, 1542 (E.D. La. 1992)).

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