



## Episode 18: “Can I Ask That, Bonus Episode: Exception to At-Will Employment in NYS”

Speakers: Ari Kwiatkowski, Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hey, guys, welcome back. This is “Can I Ask That? Applications, Handbooks, and At-Will Employment.” This is a bonus episode—if you listened to our last couple of segments, you’ve heard us talk about what you can and can’t ask in the context of employee applications, interviews, job postings, and last week I went through, what you should and can and must and should not include in your employee handbook. So this is a perfect episode to put a little bit of a pin in that, a period at the end of the sentence. And I’m going to share with you an exception to the at-will employment doctrine in New York that I think you guys should definitely be aware of. But before we dig into that, it is a solo episode today. It’s just me. You know, I’ve done a few of these, and I usually always try to give an interesting fact just so there’s equal treatment since I subject my guests to giving us an interesting fact. So, I was thinking about it last night, and what I want to share with you is I have an interest in languages. When I was younger, you guys could probably tell from my last name, my family is Polish. When I was younger, we spoke a lot of Polish at home, if not mostly Polish, because my grandparents lived with us and they were Polish. You know, when I was going through school, I learned French. I’d say I’m pretty proficient in French, and I am actually teaching myself Italian because I have an upcoming trip to Italy in a couple of months. So the nerd in me thinks that that’s interesting. Hopefully you guys think it’s a little bit interesting, but that is my interesting fact about myself for today, my interest and I hope affinity for languages. So now that we got that out of the way, guys, let’s dig in.

**[Ari]:** If you’re an employer or if you’re an employee in New York, you know that employment in New York is “at will.” What is “at-will employment”? If you’re an employer, you probably already know this, but that means that an employment relationship in New York can be terminated at any time, either by the employer or by the employee. And there really is a presumption that there is no employment contract or no agreement for a specific period of time unless you have an employment contract for a period of time that’s determinable and you have your employees sign such an employment contract. So general rule in New York, as we all know, employment is at will. But there is a limited exception to this and I wanted to bring this to your guys attention, because we spent the last couple episodes talking about, you know, employment applications and things that you shouldn’t ask or you can’t ask or you must not ask and, you know, employee handbooks and things that you should include and maybe you want to think about including or you don’t need to include. So there is a very, very limited exception recognized in New York to the at-will doctrine, excuse me, at-will employment doctrine. And it’s not a statutory exception. It was actually an exception that was created by the Court of Appeals in the ‘80s. So basically the case I’m talking about is *Weiner v. McGraw-Hill*. And in that case, the plaintiff worked for a competitor of McGraw-Hill and McGraw-Hill basically wanted the plaintiff to come and work for its company. So basically, McGraw-Hill recruited the plaintiff. The plaintiff came and worked for McGraw-Hill. So in this case, of course, McGraw-Hill required the plaintiff to fill out an employment application. There was a piece in the employment application or statement in the employment application that basically said that if the plaintiff was hired, he would be subject to the requirements and responsibilities, etc., in the company’s employee handbook. The company’s employee handbook contained a provision that stated

that employees would only be terminated for just cause. So, you know, kind of a common thing to include in an employee handbook. We see them a lot in the traditional labor world. But basically the handbook said, listen, you can only be terminated for just cause and only just cause. So after being employed for a number of years, the plaintiff was terminated and he argued that he was terminated without just cause. And I should note that the facts in this case were really specific because the plaintiff had also demonstrated that he had essentially given up other job opportunities or declined other job opportunities over the years because, you know, he had relied on the provision in the employee handbook that he would only be terminated for just cause. So basically, in this case, the plaintiff did not sign an employment agreement. It basically was there was an employment application that said your job would be governed by the employee handbook. And then there was a provision in the employee handbook that said that employees would only be terminated for just cause. So just to make that clear, no employment, no explicit employment agreement. Notwithstanding, the plaintiff sued McGraw-Hill for wrongful termination and basically McGraw-Hill moved to dismiss the case. And basically, McGraw-Hill argued that New York is an at-will employment doctrine state, and there was no employment agreement here. So what are we arguing about? This is McGraw-Hill arguing to the court. And basically, you know, the case went all the way up to the Court of Appeals which for the non-legal beagles who are listening, that is New York's highest court. And basically, the Court of Appeals, based on the facts in this case, found that there was an implied employment contract and basically set a standard for when that could be the case. And the Court of Appeals said an implied contract may be found where and I'm quoting "the employee was induced to leave his prior employment by the assurance that his new employer would not discharge him without just cause. That assurance is incorporated into the employment application, and the employment is subject to a personnel or employee handbook which provides that an employee may be terminated only for just and sufficient cause." So basically, in this case, the Court of Appeals denied the employer, McGraw-Hill's motion to get rid of the case and said, you know, we recognize that New York is an at-will employment state and that means that either the employee or employer can terminate the relationship at any time. But under the facts of this case, where there are some assurances in the employee handbook and the employee relied on those assurances and foregoing other opportunities, there may be an implied employment contract under these circumstances. So you may be thinking, Ari, that's all well and good. You know, this is a case from the '80s, why are you telling us about this? Well, I'm telling you about this because obviously, you know, it fits neatly with what we've been talking about and that it implicates some material that's included in employment applications and material that's included in employee handbooks. But I'm telling you this because I actually have a case right now where this is an issue and we made a pre-answer motion to dismiss, which, you know, again, for non-legal beagles, that means there's been no evidence exchanged in the case. You know, you haven't had any discovery, no depositions, but the court actually denied our motion and said maybe there's enough, maybe there's enough here. So you know, and when I say I have a similar case representing an entity that does not have employment agreements as a matter of course. And, you know, the plaintiff has argued that there is a claim for wrongful termination based on the indicia or elements set forth in this McGraw-Hill decision.

**[Ari]:** So, you know, I question and I don't think that the plaintiff in the case I'm working on will ultimately be successful. But, you never know. And I think it's just it's a very, very specific niche argument. And given what we've talked about over the last few weeks and in the last couple of segments, I just really wanted to give you guys a heads up, just take a look at your employment applications, take a look at your employee handbook, and just keep that in mind. So, again, very specific set of circumstances. Just a really interesting tidbit. And I definitely wanted to make sure that we're giving our listeners all the tools they need to successfully lay out the rights and responsibilities, duties in their employee handbooks and to avoid any issues in the hiring process. So thanks so much for tuning in, guys. I just wanted to come in hot with that quick tidbit. Thanks so much for listening. I will see you next week. Talk to you then.

**[Ari]:** The Labor & Employment Podcast is available on [barclaydamon.com](http://barclaydamon.com), YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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