UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARRA M. LAWSON & MELISSA LAWSON, Plaintiffs, -vs- NEW YORK BILLARDS CORP., d/b/a CHELSEA BAR & BILLARDS, LOUIS PALOUIS and ARISTOTLE HATZIGEORGIOU, Defendants.	Docket Number CV 02-1495 (JG)

BRIEF OF PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TREATISES

PRELIMINARY STATEMENT

Defendant NY Billiards Corporation ("NY Billiards") operates a restaurant – a cash business. It under-reported its income on its tax returns. To dispose of cash, it paid employees partly in cash. Arra Lawson, a Jehovah's Witness who had arrived in New York from rural Georgia only a few years earlier, wanted to make sure he could properly report his cash income to the IRS, which did not suit NY Billiards. When NY Billiards realized that Arra might reveal its tax cheating, its principals, the other defendants, lashed out. They summarily fired Arra. Then, after warning him that as a black man he was uniquely vulnerable to police abuse, they had him arrested by a friend in the police on false charges of theft. These charges were dismissed quickly, but not before Arra had the chance to sample a Manhattan lockup and an NYPD interrogation in his Sunday suit. The experience shattered him psychologically and made it impossible for him to find commensurate new employment.

But defendants could not abide the idea that Arra Lawson might not be intimidated enough to refrain from reporting them. Defendants pursued Arra, and their fairy-tale of gross misconduct and theft on his part, to disqualify him from unemployment benefits. Their story, however, was rejected by the Unemployment Board and two appellate panels after extensive testimony. The Lawsons then brought this action to recover damages for the harm done to them as a result of defendants' intentional, outrageous and damaging conduct.

This brief is filed in response to defendants' motion for summary judgment. As set out below, far from demonstrating the lack of a triable issue of fact to support plaintiffs' claims, defendants' submissions merely aggravate their already impressive record evasion, lies and changed stories. Based on the record[1] and the law, this Court should dismiss defendants' motion

[1] Plaintiffs' response to defendants' submissions is limited to defendants' brief and references to the properly authenticated record only. The Affirmation by defendants' counsel, consisting of argumentation (a *de facto* extension of the brief) and extensive hearsay, was not considered. "An attorney's affidavit not based on personal knowledge is an impermissible substitute for the personal knowledge of a party. United States v. Bosurgi, 530 F.2d

and allow the parties to proceed to trial and, finally, justice for the Lawsons.

STATEMENT OF FACTS[2]

> *The credible evidence establishes that the employer discharged the claimant for reasons best known to himself. Although the employer testified that he fired the claimant for being absent after warnings, he exhibited difficulty remembering the date of the alleged final absence and he could not recall when the claimant was last warned regarding the absenteeism. At the same time, the employer admitted that no written warning was given to the claimant with reference to his attendance, although the employer's own policy required such warning as a prerequisite to discharge. We find more credible the claimant's testimony that he was never reprimanded about his attendance, and that he was neither late nor absent. Accordingly, we conclude that there is insufficient evidence of any actions on the claimant's part which might constitute misconduct disqualifying misconduct. He was entitled to the unemployment benefits he received and he was not overpaid.*
>
> Matter of Lawson, A.L.J. Case No. 001-09221 [07/13/01]

Arra M. Lawson is a modest, unprepossessing 28-year-old black man, a Jehovah's Witness from rural Georgia who worked his way through a series of cooking jobs to excel at his craft. In May of 2000 he got his big break: A position as executive chef at Chelsea Bar & Billiards ("Chelsea Bar"), owned by defendant New York Billiards Corp. ("NY Billiards"). Chelsea Bar was a hip night spot featuring late night billiards and fine dining for young urban

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1105, 1111 (2d Cir.1976). An affidavit based on hearsay from counsel, unsupported by other competent proof, 'does not comply with Rule 56(e).' Mason Tenders District Council Pension Fund v. Messera, 958 F.Supp. 869, 891-92 (S.D.N.Y.1997). See also Sellers v. MC Floor Crafters, 842 F.2d 639, 643 (2d Cir.1988) ('a hearsay affidavit is not a substitute for the personal knowledge of a party')." Carnrite v. Granada Hosp. Group, Inc., 175 F.R.D. 439 (W.D.N.Y., Sep 12, 1997) (striking affidavit of counsel).

[2] Defendants' Local Rule 56.1 Undisputed Facts submission, rather than consisting of a bare recital of undisputed facts with reference to the record, is in fact argumentative and combative. It is recognized that such a "one-sided recitation of facts [makes a party's] Rule 56.1 statement useless." Baker v. Welch, 2003 WL 22901051, S.D.N.Y., Dec 10, 2003 at *5, n. 5. See, Yurman Design, Inc. v. Golden Treasure Imports, Inc., 275 F.Supp.2d 506, 509 (S.D.N.Y. 2003) ("The defendants' statement of undisputed facts does not contain undisputed facts, but is instead a collection of legal arguments"); Quiroga v. Fall River Music, Inc., 1998 WL 851574 (S.D.N.Y. Dec 07, 1998) at *2, n. 3 ("The statement is not to be used to extend counsels' briefs"). There are too many examples to cite, and the document speaks eloquently for itself, at least in this regard. No less significantly, it consists, as demonstrated by plaintiffs' Counter-Statement of Undisputed Facts, of more disputed facts than undisputed facts. In fairness, the Court should disregard this submission. It is recognized that such a "one-sided recitation of facts [makes a party's] Rule 56.1 statement useless." Baker v. Welch, 2003 WL 22901051, S.D.N.Y., Dec 10, 2003 at *5, n. 5.

professionals. NY Billiards offered Arra $70,000, to be paid partly in check and partly in cash, plus 5% of receipts from private parties, and medical and dental benefits. A.L. Dep. at 90.

While considering the offer, Arra and his wife, Melissa, asked the IRS if they were allowed to accept payments by cash. The IRS representative explained that Arra could take cash payments and that his employer would provide him with a form to declare the cash portion of his pay. Id. at 90-92. Satisfied, Arra accepted the offer. Arra reported for his new position with high hopes, and a few tools of his trade – as a professional chef Arra utilized some of his own equipment in the Chelsea Bar kitchen, such as ramekins (small dishes for baking and serving) mixing bowls, a clock radio and other small items, which management knew. Id.. at 133-135.

In June 2000, defendants Teli Hatzigeorgiou ("Teli") and Louis Paloubis ("Lou"), owners of NY Billiards, met with the Chelsea Bar staff to promulgate a new employee manual. AL Aff. at ¶6. The manual stated, "These rules are every employee's responsibility to follow, and each manager's responsibility to enforce." Exhibit A to ML Aff. The manual also contained an explicit, "progressive" termination clause on page 5, which reads as follows:

> Termination
> We have a progressive discipline system at Chelsea Bar and Billiards. Unless you commit any of the major violations listed above, you will not be fired without warning. The first time you break a rule you will be given a verbal warning, which may or may not go into your employee file. The second time you break the same rule you will be written up, and asked to sign off on your write up. If you break the same rule repeatedly you will be terminated. Also if you continue to break many different rules you risk being terminated.

Id. During the meeting, Arra asked about the termination clause. Hatzigeorgiou reiterated that no employee could be fired without a valid warning, written and oral, as stated in manual. Each employee was provided with two copies of the employee manual; one was signed and returned to management at the meeting, and the other was kept by the employee. Everyone was told that the signed acknowledgement would be placed in his file. Arra signed an acknowledgement and returned it, along with the attached copy of the manual, retaining the unsigned copy. AL Aff.

¶¶6-7, 9-13. The owners also discussed the implementation of an additional, separate document, an employee *handbook*. AL Aff. at ¶8. Unlike the employee manual, the employee handbook was for hourly employees, such as waiters, waitresses and cooks. Id. Management asked Arra to help write the employee handbook, which he subsequently did. AL Aff. ¶¶7-8.

In July or August 2000, Arra asked Hatzigeorgiou for the tax forms that the IRS had told him his employer would provide him to report the cash payments. AL Dep. at 150. "Why would you want to go to the IRS about money they did not know?" Hatzigeorgiou asked incredulously. Id. at 150-151. Arra explained the IRS's advice, adding, "I don't want to get in trouble with the IRS." Hatzigeorgiou was aghast. "You don't want trouble with the IRS," he said, adding ominously, "but if you're gonna make trouble for me, I'll make trouble for you." Hatzigerogiou stormed out of his office and dialed his cell phone as he walked out, cursing a blue streak. While still within Arra's earshot, he said to the person on the line, "This S-O-B is gonna call the IRS on us … I can't believe it … he's f---ing out of his mind." Id. at 151.

Arra later learned that Hatzigeorgiou was speaking to his accountant, Arno. Id. at 153. In the restaurant Arra had overheard numerous conversations between the two about how to hide money from the IRS – about how revenue from the pool tables was different from revenue from the bar and kitchen, and how to hide the different funds. Id. at 153-154. Arno told Hatzigeorgiou to "hide the money in some other place where the IRS won't be able to find it because it you get audited, they're gonna catch it and you guys have too much free cash floating here." Id. at 159. Paloubis would also say, while counting cash receipts, "You have to hide this from the IRS because if we ever get audited, we're f----ed." Id. at 161-162.

By October 2000, Arra had not received his medical benefits, nor the full amounts of his paycheck, nor the 5% of party revenues. Arra approached Hatzigeorgiou and asked to be paid entirely by check. Hatzigeorgiou responded, angrily, "You're back at that again? I thought we

settled that." He continued, "You're trying to be slick and get me to put this all in a check so you can report it to the – cause you plan on reporting to the IRS, right? You will be sorry if you keep on trying to play games with me and my money. I know a lot of people. I have a lot of friends and you will not work in the City again." Id. at 187. He denied Arra's request, never paid Arra the 5% percentage for parties. Id. at 140.

On December 9, 2000, Arra asked a Chelsea Bar accountant if he knew when the W-2 forms for the year 2000 would be available. Id. at 197. Later that day, Hatzigeorgiou accused Arra of "snooping around and having conversations with the accountant," and told Arra to "back off the whole thing with the IRS." Id. at 196. On Monday, December 11th, Hatzigeorgiou called Arra at home and fired him because "things were not working out." Id. at 193. Asked for details, he claimed that food was missing and free food was being given out from the kitchen. Arra reminded him that this had actually involved another employee, and had been resolved. Id. at 194. Hatzigeorgiou admitted that he fired Arra because he suspected that Arra had contacted the IRS. Id. at 198-199.

On December 12, 2000, Arra returned to Chelsea Bar to retrieve his personal belongings. Arra used a box to hold his personal belongings, including his uniform, his blow torch, kitchen tools, knives, and other items. A. Lawson Dep. at 211. Brian Lai, one of the managers, accompanied Arra the entire time. AL Aff. at ¶27. Paloubis then paid Arra part of the money that Chelsea Bar still owed him. Id. at ¶28. Before he left, Paloubis inspected the box, then held the door for Arra as he exited. AL Dep. at 213. Melissa Lawson, who had come with Arra and was waiting in the car, also looked in the box. ML Aff. at ¶¶6-9. Arra returned to Chelsea Bar on December 27th to get his final check from Paloubis, as arranged. Paloubis was not there. Arra called him. He told Arra that he could not make their appointment, and accused Arra of "snooping around" and trying to "start some trouble." He then said, "We told you that if

you make trouble for us, we'll make trouble for you," and that Arra would "be sorry" and would "never work in New York City again." Id. at ¶¶ 30-33; 38.

Arra was gone but his menu – his calling card – remained in the restaurant's display window, despite his request that it be removed. On January 1, 2001 Arra and his wife went to the Chelsea Bar at 7:00 AM, while it was closed, to photograph Arra's menu in the window, and encountered one of the cooks outside. Id. at ¶¶ 43-44. On January 2, 2001, Hatzigeorgiou called the Lawsons and told Melissa that he had connections with the police and would have Arra arrested for taking pictures outside Chelsea Bar. ML Aff. at ¶14. Arra was "young and black, and anyone would believe anything," Hatzigeorgiou told them, and "no one would care." Id. Arra called Hatzigeorgiou back and told him to stop threatening his wife. AL Aff. at ¶ 46. Hatizgeorgiou responded by reiterating that he had a "cop friend" and repeating his litany of threats. He added that he had had already called his police friend to have Arra arrested, saying, "You had your chance. But you had to come here taking pictures." Id. at ¶¶ 48-49.

On January 2, 2001, Hatzigeorgiou – and not Paloubis, as claimed repeatedly by defendants, see defendants' Statement of Undisputed Facts ¶ 47 – filed a police report at the 13th Precinct. Exhibit H. The Police Report shows Hatzigeorgiou as "Witness 1" and one David Drost as "Reporter,"[3] making no reference to Paloubis, and acknowledging that the "above witness" – who could only have been Hatzigeorgiou – "did telephone the above person," i.e., Arra. Thus Hatzigeorgiou made good on his promise and called his police friend, Roy Ruland, for a favor.

On January 8, 2001, while Arra was out, Melissa Lawson received a call from Ruland. He said Arra should call him at the 13th Precinct or else Ruland would "bust his balls." ML Aff. at ¶¶ 17-20. On his return, Arra called Ruland. Id. Ruland told Arra he was being

[3] Drost is not even listed as a witness on defendants' Rule 26 disclosure. Paloubis, who is not listed on the police report as a witness, did on the other hand swear out the criminal complaint. Def. Exh. J.

charged with stealing a milkshake machine, a pasta machine, and 24 ramekins from Chelsea Bar. Arra denied taking anything. Ruland told Arra that he knew Paloubis and Hatzigeorgiou personally, and that "if they told me that you took something, then you did." Ruland also instructed Arra to stop taking pictures of the Chelsea Bar and told Arra he could turn himself in peacefully or be humiliated by being arrested at home in front of his neighbors. Id. at ¶¶ 50-53.

The next morning, on January 9, 2001, Arra made a desk appearance at the 13th Precinct. Arra was made to wait inside an interrogation room until Ruland appeared and told Arra that he could not speak to him because Arra's attorney had called. Ruland then took Arra to a desk and started talking to him anyway. (Arra was never allowed to see his attorney.) Arra denied stealing anything. Ruland called Chelsea Bar from where he and Arra sat and apparently spoke to Paloubis, repeatedly addressing the other person on the line as "Lou." Arra was then handcuffed and taken to another room for fingerprints and a mug shot; he was handcuffed again and taken to a holding cell . AL Aff. at ¶60. While in the holding area, a plainclothes policeman repeatedly urged Arra to plead guilty, but Arra refused. Id. at ¶¶ 54-63. Some time after 7:00PM Arra was allowed to leave the station. He received a desk appearance ticket that ordered him to appear at the New York Criminal Court on February 9, 2001. He was never given access to his attorney, was denied the right to make a telephone call and not allowed to eat or drink. Id. at ¶¶ 65-68; ML Aff. at ¶¶23-27.

Following this experience, which was completely new to him, Arra went into a severe depression, and developed an uncontrollable trembling condition. His condition required treatment with antidepressant and anti-anxiety medication, which he continues to take. AL Aff. at ¶¶74-75, 87-90, 98, 119-129, 136-146. Not surprisingly, Arra and Melissa experienced a marked decrease in marital intimacy. Id. at ¶150; ML Aff. at ¶47.

Arra was arraigned on February 9, 2001, pleading not guilty to the charges of petit larceny. Arra appeared in New York Criminal Court on three dates, March 14, 2001, April 14, 2001 and May 14, 2001, without resolution. AL Aff. at ¶ 67. In June 2001, Arra met with the assistant district attorney, who shortly thereafter informed Arra's attorney that she was dismissing the case "in the interest of justice." The case was dismissed on the district attorney's motion on June 22, 2001. Id. at ¶ ¶ 82-83; See Exhibit K; A. Lawson Aff. ¶83,

Arra was approved to receive unemployment benefits. In April 2001, however, he received notice that his benefits were suspended based on defendants' claim that Arra was terminated due to misconduct. On July 12, 2001, Arra attended an unemployment appeal hearing before Administrative Law Judge Joseph Wolfermann of the New York State Unemployment Insurance Appeal Board (the "Unemployment Board"). At the hearing, Hatzigeorgiou testified under oath that Arra was terminated for "constant tardiness and not showing up for work" and "personal phone calls, health code violations, missing inventory, insubordination, failed duties of training and management and supervision." He stated, falsely, that Arra hard received numerous oral warnings. Id. at ¶¶ 100-104; Transcript of Unemployment Hearing ("Unemployment Tr.") at 53-54. Hatzigeorgiou placed into evidence three pages that he claimed was part of an employee manual, but they were not part of any employee manual in effect when Arra was executive chef at Chelsea Bar. AL Aff. at ¶¶ 108-111. Arra's attorney entered the employee manual that he had received at the June, 2000 meeting into the record. Hatzigeorgiou admitted under oath that this employee manual applied to Arra, and that by its terms Arra was entitled to written and verbal warnings before termination. Id. at ¶ 114. Arra prevailed at the unemployment hearing, in part because the ALJ found Hatzigeorgiou incredible. The ALJ's decision was upheld on two appeals by Chelsea Bar. Exhibit G to Cl. Aff.

LEGAL ARGUMENT

A summary judgment under Fed. R. Civ. P. may be granted only if there are no genuine issues of material fact which would prevent the moving party from being entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The foregoing statement of facts demonstrates that there is no shortage of facts standing between defendants and summary judgment. And as plaintiffs demonstrate below, these facts, applied to the law, demonstrate that defendants' motion should not be granted.

I. PLAINTIFF WAS ENTITLED TO THE BENEFIT OF THE EXPLICIT WARNING AND TERMINATION PROVISIONS SET OUT IN THE NEW YORK BILLIARDS EMPLOYEE MANUAL.

Faced with the devastating determination of the Unemployment Board that Arra Lawson was not, as defendants originally insisted, dismissed for misconduct and violation of the NY Billiards employee manual – and the serious questions raised about their candor before a legal tribunal – defendants have switched tacks. No longer do they claim that they sacked Arra because of misconduct. Now they say Arra had no contract, and could be fired at will. As shown below, this contention should be rejected, not only because it represents an impermissible change in defendants' position, but because Arra was given an employee manual by NY Billiards which set out specific procedures for termination which it did not follow.

1. The doctrine of collateral estoppel bars defendants from arguing that Arra Lawson did not receive an employee manual and that it did not apply to his employment relationship with New York Billiards.

Rejecting defendants' attempts to deprive Arra Lawson of unemployment compensation after wrongly firing him, in 2001 the Unemployment Insurance Appeal Board made findings of facts and issued an opinion in Arra's favor. Under the doctrine of collateral estoppel, defendants may not now argue that Arra never received an employee manual and that it did not govern his relationship with NY Billiards – issues which were decided, after a full hearing and appeals, by the Unemployment Board.

"Collateral estoppel has been applied to determinations rendered pursuant to the adjudicatory authority of an agency to decide cases before its tribunals employing procedures substantially similar to those used in a court of law," id. at 552, such as administrative hearings utilized by Unemployment Board. Ryan v. New York Telephone Co., 62 N.Y.2d 494 (New York 1984). In Ryan, the Court of Appeals ruled that, as here, collateral estoppel precluded relitigation of a prior administrative finding by the Unemployment Board of the basis of discharge, because a comparison of the material issues raised in the civil action with those resolved by the administrative determination demonstrated that the issue was identical and decisive in both proceedings, and the parties had had a full and fair opportunity to litigate the issue at the prior administrative hearing. See also, Matter of Rolle , 687 N.Y.S.2d 181 (App. Div. 1999) (findings of fact have collateral estoppel effect).

The reasons for Arra's termination were fully explored at the initial unemployment appeals hearing held on July 12, 2001 before an Administrative Law Judge (ALJ). Specifically, the ALJ read from defendants' submission to the Department of Labor stating the alleged reasons Arra was terminated. Unemployment Tr. at 53. Hatzigeorgiou testified at the hearing on the issue of Arra's termination. Id. at 54-55. Hatzigeorgiou about the history of Arra's hiring and about the employee handbook and employee manual. [4] Id. at 56; 61-2; 63, 19-24; 64; 65; 66-70.

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[4] Q: Sir I'm gonna ask you to look at this item here that I'm showing you. Do you recognize that?

A [Plaintiff]: Yes.

Q: It's an employee manual for your restaurant isn't that right?

A: Yes.

Q: And it has on the front page your logo and it says employee manual right?

A. Right.

Transcript of Hearing dated 7/12/01 at 61-62.

Arra also testified regarding these issues. Id. at 73-77. Hatzigeorgiou was also given an opportunity to cross-examine Arra. Id. at 78, 3-6. The ALJ made the following findings of fact:

> *The employer's handbook calls for employees to be given written warnings before termination of employment.* The claimant was not warned that coming late, or being absent could mean any form of discipline. The employer gave claimant a raise. On Monday, December 11, 2000 the claimant was not scheduled to work. The claimant was discharged by the employer. The employer stated that things were not working out.

ExhibitG to Cl. Aff., July 13, 2001 decision from Unemployment Insurance Appeal Board by ALJ (emphasis added). Defendants unsuccessfully appealed the ALJ's decision to the Appeal Board, once in October 2001 and again in November 2001. The October 2001 Appeal Board decision states that the ALJ "held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken," and ultimately held:

> Although the employer testified that he fired the claimant for being absent after warnings, he exhibited difficulty remembering the date of the alleged final absence and he could not recall when the claimant was last warned regarding absenteeism. At the same time, *the employer admitted that no written warning was given to the claimant with reference to his attendance, although the employer's own policy required such a warning as a prerequisite to discharge*. We find more credible the claimant's testimony that he was never reprimanded about his attendance, and that he was neither late nor absent.

November 5, 2001 Decision of the Board (emphasis added); Exh. G to Cl. Aff. Ultimately defendants had a full and fair opportunity to contest the agency determinations and must live with the Board's determination that (a) there was an employee manual and (b) it established a procedural prerequisite to discharge.

2. The plaintiffs have established the existence of a contract through the employee manual.

A breach of employment contract action requires (1) the existence of an express written policy limiting the employer's right to discharge, (2) that the employer made the employee aware of its express written policy limiting its right to discharge and (3) that the employee detrimentally relied on that policy in accepting or continuing employment. Baron v.

Port Authority of New York and New Jersey, 271 F.3d 81, 85 (2nd Cir. 2001) (denying relief because of explicit disclaimers in written materials). The existence of a contractual right limiting the employer's right to discharge is considered in "the totality of the circumstances," Gorrill v. Icelandair, 761 F.2d 847, 853 (2nd Cir. 1985), including the writings, the situation, the course of conduct of the parties and their objectives. Jones v. Dunkirk Radiator Corp., 21 F.3d 18, 22 (2nd Cir. 1994).

Defendants deny that there was an employee manual, sarcastically setting off the term in quotation marks. Def. Br. at 4. The record firmly demonstrates their error, as set forth above. The employee manual was part of the record of the unemployment appeal hearing held on July 12, 2001.[5] In fact, defendant Hatzigeorgiou testified that the exhibit he read into the record at that hearing *was* an employee manual. CITE Furthermore, a former manager at Chelsea Bar during Arra's entire tenure at Chelsea Bar, Brian Lai, confirms that this employee manual – and no other – was in effect during the time Arra was employed at Chelsea Bar. Brian Lai Aff. at ¶¶17-18. As set forth in detail below, this employee manual set out the terms of Arra's employment – terms that defendants materially violated.

3. The defendants made plaintiff aware of an express written policy that altered its right to discharge plaintiff.

Defendants attempt to distinguish the critical holding in Weiner v. McGraw-Hill, Inc., 57 N.Y. 2nd 458 (1982) on various grounds, ticking off a purported set of "elements" to suggest that the precise fact pattern of Weiner must be present in any case involving an employee manual. Courts in the Second Circuit, however, have repeatedly rejected any such attempt to

[5] Plaintiffs acknowledge that the copy of this manual submitted with this motion was apparently not served on defendants in this action prior to now. (Plaintiffs had previously supplied it to their original counsel but it was evidently neither served nor found in plaintiffs' case file.) It was, however, part of the record of the Unemployment hearing. Regrettably, plaintiff's previous counsel conducted no document discovery on plaintiffs' behalf, resulting in both the paucity of documentary evidence at plaintiff's disposal in this motion and this omission. This Court denied two requests by plaintiffs' present counsel at the very end of the discovery period to extend discovery by one month to remedy this omission, as well as a request that defendants produce documents identified in their own Rule 26 disclosures and requested on the record at depositions.

limit Weiner to so narrow a set of circumstances, much less a mindless "test." As Judge McKenna wrote in Wolde-Meskel v. Tremont Commonwealth Council, TCC, 1994 WL 167977 (S.D.N.Y., April 29, 1994):

> [T]he courts of the Second Circuit have been less hesitant [then New York state courts] to find occasion to construe New York employment doctrine more broadly in favor of plaintiffs seeking relief from allegedly wrongful termination.
>
> In Gorrill, the Second Circuit stated:
>
> > [i]f Weiner stands for anything, it stands for the proposition that the merits of a claim alleging breach of an employment contract are not to be determined by an application of a formula or checklist; instead the totality of facts giving rise to the claim must be considered.
>
> The Court believes the Circuit Court's construction to be eminently sound. Indeed, it seems that as a matter of practical understanding, the Weiner elements are too specific in nature to be properly construed as a generalizable test meant to cover all future allegations that an implied contract has supplanted the at-will rule. Bolstering this view is the Weiner court's own prefatory statement used to introduce the much-cited "elements": "... we find in the record, inclusive of plaintiff's own affidavit, sufficient evidence of a contract." Thus, it seems clear to the Court that the language of the Weiner court, although enumerated, merely summarized the evidence before the court and stated the findings upon which it based its conclusion that a contract governed the employment relation at issue in that case.

Wolde-Meskel, id. at *3-*4 (citations omitted). Here, too, an overall view of the facts of the case, the relationships among the parties, and the rationale of Weiner, can lead only to the conclusion that an employment contract existed between NY Billiards and its executive chef, Arra Lawson, and that defendants breached that contract.

a. Promulgation of the new manual modified the employment agreement.

Defendants argue that Weiner does not apply because in that case, the plaintiff was induced to accept employment with the defendant, Def. Br. at 4, while in contrast here the manual did not exist at the time Arra was hired, id. at 5. But plaintiffs do not dispute that Arra was hired as an employee at will. He was, however, **fired** while the employee manual and its terms were in effect. Brian Lai confirms that a meeting took place in June 2000, one month after

Arra commenced his employment with defendants, in which the employee manual was introduced to the entire staff. Courts in at-will jurisdictions recognize that the promulgation of an employee manual to existing personnel alters the nature of the employment agreement: "Absent a disclaimer, in some circumstances at-will employment can be *modified* by provisions in an employee manual, if the manual is widely distributed to the employees. . . . In such cases, the provisions in an employee handbook constitute an offer for a unilateral contract; *the employees' continuing to work, while under no obligation to do so, constitutes acceptance and sufficient consideration to make the employer's promise binding and enforceable*." 82 Am. Jur. 2d Wrongful Discharge § 22 (emphasis added). Thus, for example, the Supreme Court of West Virginia, like New York an at-will jurisdiction, explicitly relied on Weiner to find that an employee hired on an at-will basis can enforce termination provisions from a later-distributed employee manual. Cook v. Heck's Inc. 342 S.E.2d 453 (W.Va. 1986). Wrote the court:

> At will employment status may be contractually modified, either to establish a specific duration of the employment or to provide a measure of job security to covered workers. We agree with those courts that have found valuable consideration in the continued labor of workers who have in the past foregone their right to quit at any time. We conclude that a promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable.
>
> A common thread running through those cases where personnel manuals are viewed as contracts is the existence of a definite promise by the employer not to discharge the employee except for cause. For example, in … Weiner v. McGraw-Hill, Inc., supra, the employee handbook stated that the company would discharge employees only for just and sufficient cause and only after an effort was made to rehabilitate the employee. . . . In accordance with these and other authorities, we hold that an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.
>
> . . . The inclusion in the handbook of specified discipline for violations of particular rules accompanied by a statement that the disciplinary rules constitute a complete list is prima facie evidence of an offer for a unilateral contract of employment *modifying the right of the employer to discharge without cause*.

Id. at 373-4 (emphasis added; additional citations omitted).

Here the evidence establishes that NY Billiards held a meeting to introduce the new employee manual, which became the new terms of the employment contract. Arra never received any verbal or written warnings while employed at Chelsea Bar. AL Aff. at ¶94; A. Lawson Dep. at 101-104. Although he began searching for employment when defendants violated their agreement and failed to not pay him the agreed percentage of proceeds from parties, he never prepared for imminent unemployment because he had in fact been performing well, and he had never received any verbal or written warnings – warnings he had been promised in the employee manual and orally by management. For these reasons, defendants' attempt to distinguish this case based on the purported inducement aspect of Weiner is unavailing.

b. The employee manual contained explicit termination provisions.

Defendants' next stab at distinguishing Weiner is to claim that "the alleged 'employee manual' cited in plaintiff's complaint is merely general and vague prose regarding broad disciplinary expectations. . . . Notably, there is no prerequisite to the termination, for example prior discussions or warnings." Def. Br. at 4. In contrast to this characterization, plaintiffs will let the language of the employee manual speak for itself:

> Termination
>
> We have a progressive discipline system at Chelsea Bar and Billiards. Unless you commit any of the major violations listed above, you will not be fired with out warning. The first time you break a rule you will be given a verbal warning, which may or may not go into your employee file. The second time you break the same rule you will be written up, and asked to sign off on your write up. If you break the same rule repeatedly you will be terminated. Also if you continue to break many different rules you risk being terminated.

Cite (Arra Aff. and Herz. Testimony) The language from defendants' employee manual, cited above and read into evidence at the unemployment hearing by Hatzigeorgiou, is far more explicit

and detailed than the language relied on by the Weiner court[6]; it sets out not one but two warnings, including a written warning to be signed by the employee, than the language from the manual itself cited above. For this reason, defendants' insistence that the employee manual did not contain explicit termination provisions cannot be entertained seriously.

c. The employee manual governed Arra Lawson's employment relationship.

Defendants seek to evade the dire implications of the employee manual for their case by claiming that "the plain language of the 'employee manual' specifically excludes managerial staff." Def. Br. at 4. But while Arra was a salaried employee with responsibility for the kitchen, he was not a manager. Defendant Hatzigerogiou testified that there were four managers employed at Chelsea Bar, including Brian Lai; Arra was not one of them. CITE. Defendant Paloubis testified that there were two managers, including Lai. The policy handbook lists only Brian Lai and Jacob Chavez as the managers during the time that Arra worked at Chelsea Bar. See Exhibit 2 to A.L Aff.[7]

In any event, the employee manual does not contain the claimed limiting language. To the contrary, the first page of the employee manual states that, "These rules are every employee's responsibility to follow, and each manager's responsibility to enforce." See Exhibit C, page 1. Indeed, contrary to defendants' insistence that "plaintiff was never told that the handbook would govern his employment," Def. Br. at 10, defendant Hatzigeorgiou himself explicitly told Arra that the policy manual applied to him, and that Arra would not be fired unless he had received verbal and written warnings. AL Aff. at 3, ¶ 10.

4. The employment at will presumption does not apply when the employer

[6]The language found by the Weiner court to amount to an explicit termination provision read, "The company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee had been taken and failed. However, if the welfare of the company indicates that dismissal is necessary, then that decision is arrived at and is carried out forthrightly." Id. at 460-461.

[7] Contrary to the suggestion of defendants, Arra did not assist in writing the employee manual, only the employee *handbook*, which only applied to hourly workers. See AL Aff. at 2,¶¶ 7-8.

engages in a constitutionally impermissible purpose.

In Murphy v. American Home Products Corp., 58 N.Y.2d 293 (1983), the New York Court of Appeals enunciated a critical exception to the rule of at-will employment, namely termination for "a constitutionally impermissible purpose." Id. Defendants urge comparison to Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329 (1987), supposedly "decided upon strikingly similar facts as those at bar," Def. Br. at 8, in which relief was denied to the terminated plaintiff. In Sabetay, as here, the plaintiff alleged unlawful activities by his former employee. This, however, is where the similarity ends.

Unlike here, in Sabetay the plaintiff attempted to cobble together a written termination policy where nothing of the sort existed. The Sabetay plaintiff argued that various policies and statements on different documents coalesced to form an "implied agreement" not to dismiss an employee for certain activity. Id. at 332-3. But here there is an explicit termination policy in an official employee manual. Also, in Sabetay "The personnel manual was circulated to an extremely limited number of Sterling managerial employees solely for the purpose of determining posttermination benefits, and plaintiff was not one of those few employees authorized to receive a copy." Id. at 336. In contrast, here the employees received the manual, and the record is clear that Arra was given a copy to sign. AL Aff. at ¶11-12. Far from being "strikingly similar," Sabetay has only one thing in common with this case – the allegation of illegal activity. Even then, in Sabetay the motive for the termination was presumably denied. Here, in contrast, defendants admitted that they fired Arra because he was a risk to turn them into the IRS. AL Dep. Tr. at 198,23-25; 199,2-6.

In fact, notwithstanding defendants' objection, more applicable than Sabetay is Wieder v. Skala, 80 N.Y.2d 628 (1992). There, as here, the plaintiff was fired to prevent the revelation to public authorities of improper conduct, and the Court of Appeals ruled that a claim for wrongful termination would lie. While defendants are correct in stating that the decision

places weight on the fact that the employee attorney was an officer of the court, it did not rely on that fact in rendering its decision. Rather its rationale was that the "core" purpose of the contract – in that case, performance of duties as an attorney – included the reporting of unethical behavior. Following Wieder, U.S. District Judge McKenna ruled, in Wolde-Meskel, supra, that an accountant's claim for breach of his employment contract, in which he alleged that he was fired to prevent him from reporting unethical financial practices, id. at *2 , should not be dismissed. Id. at *5. See also, Mulder v. Donaldson, Lufkin & Jenrette, 623 N.Y.S.2d 560 (1st Dept.1995) (breach of employment contract where plaintiff was fired for threatening to report money laundering scheme). Other at-will jurisdictions are in accord. See, e.g., Riggs v. Home Builders Institute, 203 F.Supp.2d 1 (D.C. 2002) (C.F. Hogan, C.J.) (policy set forth in federal tax laws and regulations was sufficiently clear mandate of public policy to support claim for wrongful discharge of at-will employee in violation of public policy); Strozinsky v. School District of Brown Deer, 614 N.W.2d 443 (Wis. 2000) (public policy articulated in federal tax statutes applied to narrow public policy exception to the employment-at-will doctrine); Mariani v. Rocky Mountain Hosp. and Medical Service, 902 P.2d 429 (Colo.App.1994) (to support cause of action for wrongful discharge from at-will employment in violation of public policy, employee's obligations preclude any deception upon either state or federal government); Peterson v. Browning, 832 P.2d 1280 (Utah 1992) (falsifying tax and customs documents contravened state public policy, for purposes of public policy exception to at-will employment doctrine).

Given the foregoing authority, and as a matter of public policy and equity, this Court should follow the teaching of Wolde-Meskel and Murphy and decline to rule of that the firing of an employee protected by an explicit termination clause in an employee manual is, in New York, a bona fide method of covering up illegality.

II. PLAINTIFFS HAVE ESTABLISHED THE ELEMENTS FOR A MALICIOUS PROSECUTION CLAIM

Malicious prosecution consists of (1) commencement of a criminal proceeding; (2) its terminated in favor of the accused; (3) a showing that it lacked probable cause; and (4) a showing that the proceeding was brought out of actual malice. Cantalino v. Danner, 96 N.Y.2d 391, 407-408 (2001). Plaintiffs can prove all the elements of a malicious prosecution claim here.

1. Defendants initiated a criminal prosecution against plaintiff

A defendant who plays an active role in a meritless criminal prosecution, "such as giving advice and encouragement or importuning the authorities to act," has "initiated" that action for purposes of a claim of malicious prosecution. Brown v. Sears Roebuck & Co., 746 N.Y.S.2d 141, 146 (N.Y. 2002). In this case, defendants used their personal connections in the New York City Police Department to have Arra arrested and pressured to plead guilty to petit larceny charges without an arraignment hearing. Where, as here, a defendant has "initiated a criminal proceeding by providing false evidence to the police or withholding evidence that might affect the determination by the police to make an arrest," it has committed malicious prosecution. Id.

Defendants suspected that Arra had reported their tax evasion practices to the IRS. AL Aff. at ¶95. On January 2, 2001, the day after plaintiffs photographed Arra's menu displayed in defendants' window, defendant Hatzigeorgiou called the Lawsons and angrily told Melissa Lawson that a "cop friend" told him that if Arra did not stop taking pictures, Arra would be arrested. M. Lawson Dep. at 12, 8-19. When questioned whether the police had a right to arrest Arra for taking pictures, Hatzigeorgiou replied that he could fabricate a reason – especially when it involved a black man. "I can say anything I want to say about him and anybody will believe it. He's young and he's black. Anybody will believe it." Id. at 12, 21-24. Hatzigeorgiou told Arra as well that he had a "cop friend," and followed up with another call to Arra that he had already

arranged with his "cop friend" to have Arra arrested. Hatzigeorgiou had previously threatened Arra with arrest Arra while Arra worked for him. A Lawson Dep Tr. at 270, 18-28. The arresting officer, Roy Ruland, admitted that he knew Hatzigeorgiou and Paloubis "personally." AL Aff. at ¶ 39. Ruland telephoned Paloubis in Arra's presence and called him "Lou." Id. at ¶46. Ruland also told Arra that "Teli or Lou had made a complaint." A. Lawson Dep. at 237, 3-5.

Contrary to defendants' assertions, Defendants' Undisputed Facts at ¶ 13, Arra did not voluntarily "turn himself in" – an attempt to recast his arrest in tender terms. Rather, Arra responded to a call from Ruland, who threatened to beat and humiliate Arra if he did not come to the police department. In short, defendants may claim that they did nothing beyond file a criminal complaint, but they cannot argue that there is no triable issue of fact as to the question. In fact, defendants colluded with their "cop friend" Ruland to arrange for Arra's arrest, just as they promised to do. Paloubis' false statement to the police was the least of things. Because of defendants' machinations, Arra was arrested, held all day at the police station without food, and subjected to intense pressure from the police to plead guilty without an arraignment or attorney..

2. Defendants lacked probable cause to arrest Arra.

Probable cause for the initiation of criminal proceedings requires that "a reasonably prudent person would have believed the defendant guilty of the crime charged on the basis of the facts known to the defendant at the time the prosecution was initiated or which he then reasonably believed to be true." Mejia v. City of New York, 119 F. Supp.2d 232, 254 (E.D.N.Y. 2000). "Thus, information discovered by the malicious prosecution defendant after the arrest, but before the commencement of proceedings, is relevant to the determination of probable cause in cases where the prosecution follows a warrantless arrest." Id. As explained above, defendant Haztigerogiou's statements to Mr. and Mrs. Lawson that his "cop friend" told him that he could have Arra arrested for any reason because he was black and he was young, along with the

subsequent warrantless arrest and quick dismissal of charges, demonstrates that defendants lacked probable to cause Arra's arrest.

Additionally, among the items claimed missing in the police report, such as the knife sharpener and the ramekins, some were the Lawsons' personal belongings. A.L Dep at 244-245. Paloubis knew this because he examined the box with which Arra carried his property from the kitchen on December 12th and did not stop him or inquire about these items. Lawson Aff. ¶ 17. Brian Lai agrees that Arra removed only his own personal items from the Chelsea Bar kitchen. Lai Aff. ¶ 22. Significantly, the remaining items claimed to be missing were never moved from the premises. Paloubis admits that he spoke to Brian Lai after Arra retrieved his belongings, Paloubis Dep. at 49, and Lai, along with another employee, confirms that the milk shake machine and the pasta machine, claimed to be missing by Paloubis, in fact remained on the premises after Arra's termination. Lai Aff. ¶ 31 ; AL Dep. at 243-244. Further, in the police report, Hatzigeorgiou is listed as a witness to the alleged theft. Exhibit I to Cl. Aff. But neither Paloubis nor Hatzigeorgiou himself could confirm that he was an eyewitness. Rather, Hatzigeorgiou admitted that he was told about the theft by "managers and the kitchen staff." Hatz. Dep. at 52, 17-20. Indeed, the NYPD Complaint Report is such an imaginative work of fiction that even the dates were changed to protect the "innocent." Defendants' own Statement of Undisputed Facts asserts, correctly, that Arra was fired on Monday, December 11th and that the incident that led to Arra's arrest – his return to the restaurant – took place on Tuesday, December 12, 2000. Id. at ¶¶ 41,47. The Police Report, however, gives the incident as occurring at 9 PM on Sunday, December 10th. Aff. Cl. Exh. H. The Incident Information form produced by defendants, bearing Ruland's name on the top, also indicates confusion as to the "story": The dates of both the form and the occurrence are repeatedly crossed out and overwritten. Aff. Cl. Exh. I. These inconsistencies shed serious doubt on the validity of

defendants' criminal complaint and more than hint at an effort to justify after the fact a false arrest orchestrated by defendants with the assistance of Ruland.

3. Defendants initiated criminal proceedings against Arra out of actual malice.

As demonstrated above, defendants lacked probable cause to have Arra arrested. This alone warrants denying defendants' summary judgment motion.; "lack of probable cause generally raises an inference of malice sufficient to withstand summary judgment." Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 131 (2nd Cir. 1997). But the record is rich with direct proof of actual malice, shown by demonstrating that "defendant commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served." Caldarola v. DeCiuceis, 142 F. Supp.2d 444, 452 (S.D.N.Y. 2001). As set out above, defendants were angry at Arra. Paloubis told Arra , "We told you that if you make trouble for us, we'll make trouble for you." A. Lawson Dep.at ¶ 24. He and Hatzigeorgiou threatened that Arra would "never work again in New York City again" Id. at ¶26. Defendants were also angry at the Lawsons for taking pictures of Arra's menu. ML Aff. at 11, and they constantly accused him of "snooping". A. Lawson Dep. at 183; 186-189; 196. Defendants have demonstrated ample bad motives and plaintiffs can easily demonstrate actual malice.

4. The criminal proceedings were terminated in favor of plaintiff.

Arra pled not guilty to the charges of petit larceny.[8] The general rule is that "any final determination of a criminal proceeding in favor of the accused, such that the proceeding cannot be brought again, qualifies as a favorable determination for purposes of a malicious prosecution action." Smith- Hunter v. Harvey, 95 N.Y.2d 191,195 (2000). Further, "it makes no difference how the criminal proceeding is terminated, provided it is terminated, and at an end."

[8] The criminal case was dismissed on the district attorney's motion "in the interests of justice" on June 22, 2001. See Exhibit__. As a result, Arra's criminal records were sealed. Defendants had represented to this Court that Arra had pled guilty to petit larceny charges by accepting an "adjournment in contemplation of dismissal," AL Aff. at ¶ 85, though they have never proffered proper proof. This is a misrepresentation, and plaintiffs will move, during the pendency of this motion, to have the criminal court record in this matter unsealed subject to a protective order.

Id. Thus, the termination of a criminal proceeding against a plaintiff in the interest of justice may constitute a termination of the proceedings in his favor. Cantalino v. Danner, id. at 395 (dismissal of criminal charges against plaintiff was a favorable termination because it was not inconsistent with her innocence). In the case of dismissal in the interest of justice, "the question is whether under the circumstances of each case, the disposition was inconsistent with the innocence of the accused. Id. at 396. Here, Arra's criminal case was terminated, and no further prosecution of the alleged offense can proceed.

III. PLAINTIFF HAS ESTABLISHED A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress consists of four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing severe emotional distress; and (3) a causal connection between the conduct and injury; (4) severe emotional distress. Bender v. City of New York, 78 F.3d 787 (2nd Cir. 1996). All four elements are easily met under the fact of this case.

1. Defendants' collusion with the police to arrest Arra Lawson constituted extreme and outrageous conduct.

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. … 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". Murphy, at 303. Defendants met this requirement in spades. They did not merely supply information to the police. They conspired with them to have Arra arrested on false charges, with the menacing warning that they could do so because Arra was a young black man. Arra was arrested, detained by the police without food, humiliated by having job offers withdrawn because of his arrest record, and naturally mortified by

defendants' gross racist threats. This conduct is clearly "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 society," id., and satisfied the legal standard to make out a claim for infliction of emotional distress.

2. Defendants had the intent to cause Arra Lawson extreme emotional distress.

In addition to the record set out throughout this brief demonstrating defendants' intent to intimidate Arra, Hatzigeorgiou knew Arra to be a religious man and told Melissa Lawson that her husband was "self-righteous" for insisting on complying with IRS regulations. Defendants knew that Arra would be extremely distressed by a claim that he had committed theft, and more distressed about being arrested – which is why they did it.

3. There is a causal connection between the defendants' outrageous conduct and Arra's injury.

After his wrongful arrest, Arra 'became extremely depressed" and felt "degraded "by the experience of having been arrested to the point where he experienced feelings of "shame and a sense of "worthlessness." AL Aff. at ¶74; ML Aff. at ¶ 30. As a result of these feelings, Arra "slept many hours of the day 'from 12 to 16 hours a day." ML Aff. at ¶ 30. Arra also became 'extremely anxious" about looking for a job because he was constantly confronted with background checks that would reveal that he was arrested. Id. at ¶¶ 36-37. Further, Arra lost all interest in activities that he used to enjoy, such as basketball. As a result of Arra's wrongful termination, he was not able to seek timely medical attention for his depression because he did not have health insurance, and could not pay for it once he found it. M. Lawon Aff. at ¶31-32. Additionally, the unlawful arrest has negatively affected plaintiffs' marriage. Arra and his wife had a healthy and exciting personal life typical of a young married couple. Since the time of his termination from Chelsea Bar and his arrest, the Lawsons virtually never have intimate relations. AL Aff. at ¶¶ 148-49.

4. Arra Lawson suffered extreme emotional injuries because of defendants' conduct.

As a result of the arrest, Arra suffered severe anxiety that required the intervention of a psychiatrist. He takes medication to combat his depression and anxiety. AL Aff. at ¶ 138; ML Aff. at ¶46. Arra experienced uncontrollable trembling that almost caused him to have a car accident. Id. at ¶122. Further, Arra's uncontrollable trembling caused him to suffer second-degree burns from scalding water that spilled on him, ML Aff. ¶42-43, and more recently to cut his hands, which required surgery and physical rehabilitation. AL Aff. at ¶¶ 139-146. Defendants' actions and their effect on Arra Lawson easily make out a prima facie case of infliction of emotional distress there is a genuine question of fact.

CONCLUSION

For the foregoing reasons, plaintiffs request that this Court deny defendants' motion for summary judgment on the claims for breach of contract, malicious prosecution, and infliction of emotional distress.

Respectfully submitted,

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