2.14 EXCEPTIONS TO THE EMPLOYEMENT-AT-WILL DOCTRINE: UNWRITTEN PERSONNEL POLICY REGARDING TERMINATION OF EMPLOYMENT

(Approved 12/01)

NOTE TO JUDGE

To be provided in conjunction with, or following, general instructions regarding wrongful termination of employment where plaintiff alleges that the employer breached an unwritten personnel policy.[1]

The plaintiff alleges that his/her employer maintained an unwritten personnel policy or practice regarding termination of employment. The plaintiff contends that this unwritten personnel policy or practice created a binding agreement that the defendant breached. Specifically, the plaintiff alleges that plaintiff's employment was terminated because the employer failed to follow an unwritten personnel policy or practice to the effect that [*here describe the policy*] and he/she sustained damages. The employer disputes these allegations.

To resolve this dispute, you must first determine whether the unwritten personnel policy or practice created a binding agreement between the plaintiff and the defendant. If you determine that the unwritten personnel policy or practice did

[1]This instruction is not applicable to cases in which a plaintiff has alleged that the employer breached a special oral agreement that the employer made with that particular plaintiff. In such instances, *see Shebar v. Sanyo Business Systems Corp.*, 111 *N.J.* 276 (1988).

not create a binding agreement between these parties, there has been no violation, and plaintiff is not entitled to damages.

A binding agreement is created by an unwritten personnel policy/practice when:

(1) the unwritten policy/practice contained an express or implied promise concerning the terms and conditions of employment; *and*

(2) the unwritten personnel policy/practice was pervasive and company-wide; *and*

(3) pronouncements regarding this unwritten personnel policy/practice were an accurate representation of the policy or practice and the employer had authorized the pronouncements to be made; *and*

(4) the unwritten personnel policy/practice created an environment in which employees reasonably expected the policy/practice would be enforced uniformly and fairly.

All four of these elements must be present for a binding agreement to be created. However, even if you find by a preponderance of the evidence that all four of these elements exist, there is no binding agreement if the employer has disseminated among the employees a clear disclaimer. The disclaimer must convey to the employee that the unwritten personnel policy/practice regarding termination

of employment does not constitute a binding agreement. If you find that there was an effective disclaimer, then the unwritten personnel policy/practice did not create a contract between the parties and plaintiff is not entitled to damages.

To be effective, a disclaimer's language must make clear that employment is terminable at will and the employer retains the absolute power to fire anyone at anytime with or without cause. Although no specific language is required, the disclaimer must convey this[2] message in straightforward terms and without confusing language.

The defendant contends that the following constitutes an effective disclaimer: [*here recite/describe the disclaimer language advanced by the defendant*].

If you find that a binding agreement *has* been created by the unwritten personnel policy/practice and that no effective disclaimer[3] not to be bound was

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[2]*See* note 3 to Model Civil Charge 2.12, "Personnel Manual Creating A Contract," for elements of an effective disclaimer.

[3]In *Woolley v. Hoffman-LaRoche*, 99 *N.J.* 284, *modified*, 101 *N.J.* 10 (1985), the Supreme Court appears to suggest a defendant could present some other proof of the employer's intent not to be bound by a personnel policy other than an effective disclaimer. However, there are no New Jersey cases that rely on (or even consider) any effective legally acceptable proof of an employer's intent other than a disclaimer, and, after the Supreme Court's decision in *Nicosia v. Wakefern Food Corp.*, 136 *N.J.* 401 (1994), it is unlikely that any proof, other than a written disclaimer, would be acceptable.

disseminated, then you must decide whether the employer failed to comply with its unwritten personnel policy, and thus violated a binding agreement.

If you find that plaintiff has proven all of his/her allegations, you are to return a verdict in favor of plaintiff. If, on the other hand, you find that the plaintiff has failed to prove one or more of these allegations, you are to return a verdict in favor of the defendant.

NOTE TO JUDGE

At this point charge damages.

Cases:

Gilbert v. Durand Glass Mfg. Co., Inc., 258 *N.J. Super.* 320 (App. Div. 1992).