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the in-house bar association℠

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The Law of Inside Counsel

IV. THE IN-HOUSE LAWYER AS EMPLOYEE

Do in-house lawyers have the same rights concerning hiring, promotion, termination and similar decisions as other corporate employees? Or does their status as attorneys require different treatment? These questions have been addressed in a recent series of cases. While we will explore some of these cases in greater detail, some generalizations emerge.

First, lawyers do not give up their statutory employment rights. Thus, the federal courts have regularly held that the anti-discrimination statutes apply to in-house attorneys in the same way that they apply to other employees, and there is no special effect from the employee's status as an attorney. A similar result has been obtained under New Jersey's whistle blower statute.

Second, courts are willing to allow attorneys to bring breach of employment contract claims, although there is at least one court that has refused to do so. In general, courts seem to view breach of contract claims, either with respect to the notice, discipline and termination procedures or the need for cause to terminate, as less likely to involve issues implicating the attorney-client privilege than tort claims, eliminating the need to treat lawyers differently.

Third, courts are most divided on allowing claims for retaliatory discharge and similar torts. For example, retaliatory discharge for whistle blowing claims have been rejected as a matter of common law right.

A number of cases on this area are collected in Annotation, In-House Counsels' Right to Maintain Action for Wrongful Discharge, 16 A.L.R. 5th 239 and Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes, 52 A.L.R. 5th 405.

This topic has also recently been discussed in the academic literature. See Christopher L. Cain, Student Commentaries, What Constitutes Wrongful Discharge of In-House Attorneys?, 22 J. Legal Prof. 223 (Spring 1998). For a discussion of ethical dilemmas surrounding the corporate counsel's role as both legal and business advisor, see Sally R. Weaver, Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis, 46 Emory L.J. 1023 (Summer 1997).

A. New Jersey

The leading case in New Jersey is Parker v. M&T Chemicals, Inc., 236 N.J. Super. 451 (App. Div. 1989), where the appellate division affirmed the trial court's denial of a motion to dismiss a complaint brought by former in-house counsel at a chemical company under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 - 34:19-8, commonly called "The Whistle Blower's Act." In that case the corporation had somehow obtained transcripts from another case that were subject to a confidentiality order in that case. The in-house lawyer recommended against their use. He wrote a memorandum saying that he believed that the company was engaged in unlawful and fraudulent conduct. As a consequence of the memo, he said, the company retaliated against him, and ultimately, in his view, constructively discharged him.

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The court rejected the notion that allowing a lawyer to assert such a claim violated the New Jersey Supreme Court's exclusive right to regulate the practice of law. It held that because the statute applied to whistle blowers generally, whether lawyers or not, it was prima facie permissible. The court went on to note that the effect of the statute was consistent with the way the Supreme Court had actually exercised its powers, because the lawyer was required to disclose communications in the course of legal service sought or obtained in aid of commission of a crime or a fraud. R.P.C. 1.6(b)(2), 1.6(c)(1). It cited cases holding that that exception should be broadly construed. On the face of the complaint plaintiff's disclosure of what went on was not only permitted but actually required by the Supreme Court's regulation of attorneys, the appellate division found.

Finally, the appellate division noted that the in-house lawyer did not seek to be rehired, which would have raised questions under the ethical rules requiring a lawyer whose client no longer desires his services to withdraw from the representation. Rather the lawyer in that case simply sought damages for his termination before the end of his contract. The court believed that that was an available remedy.

The court reached this conclusion even though some years before, a different panel of the appellate division had held that a lawyer who happened to be a veteran could not assert his veteran's preference to prevent his discharge by a school board because of the ethical prohibition that an attorney withdraw whenever his client no longer wants him to represent it. Taylor v. Hoboken Bd. of Educ., 187 N.J. Super. 564 (App. Div.), certif. den., 95 N.J. 228 (1983).

In Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173 (3rd Cir. 1997), the Third Circuit which includes New Jersey, declined to follow the Illinois court in Balla (below at p. 61). It found that an in-house attorney is not barred by the attorney-client privilege from bringing an action against her employer for retaliatory discharge and sex discrimination under Title VII of the Civil Rights Act of 1991.

Contract claims against an employer are another area of concern for in-house counsel. In one New Jersey case, the courts found that an employment contract provision which required six months notice to terminate an attorney-client relationship was too onerous and void as against public policy. Cohen v. Radio-Electronics Officers Union, District 3, NMEBA 146 N.J. 140 (1996). In this case, the plaintiff signed an automatically renewable one-year contract to provide legal services as the general counsel for the defendant. The contract had a carefully negotiated provision which required the defendant to give the plaintiff six months notice before terminating the relationship. In exchange for this provision, the plaintiff agreed to reduced fees and 24-hour availability. However, the court determined that the termination provision was not compatible with New Jersey's public policy allowing a lawyer-client relationship to be terminated at-will. The court explained that the current contract would allow the plaintiff to collect fees for an extended period of time after the defendant terminated the relationship and retained new counsel. It did permit the lawyer to collect a one month "severance" fee.

B. New York

Oddly, there seems to be no recent reported case involving New York in-house counsel and termination. However, in Greenberg v. Remick, 230 N.Y. 70 (1920) the Court of Appeals held that a complaint alleging that plaintiff, who had been "employed . . . as [defendant's] attorney and legal advisor for a period of one year . . . at a compensation of $5,200 for a year, payable $100 weekly," who about six months later was terminated allegedly "without any reasonable cause" stated a claim for the unpaid portion of the year's retainer. It held this was "more in the nature of an ordinary contract between master and servant than one for professional employment." Id. at 75.

Roth v. Rural Const. Corp., 122 N.Y.S. 2d 147 (Civ. Ct. 1953) followed Greenberg by permitting recovery where an attorney generally retained by a corporation, but still permitted an outside practice, was terminated due to an internal corporate dispute. In Alpern v. Herwitz, 644 F.2d 943 (2d Cir. 1981) the Second Circuit relied on Greenberg in a case not involving legal practice.

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Determining when an employee acts a lawyer is difficult issue recently discussed by the New York Supreme Court. In denying a motion to dismiss, the court said that it was unclear whether the department that employed the plaintiff "contained only attorneys and functioned solely as an in-house law firm, or whether Plaintiff's duties were a mix, such that he was more in the nature of a mid-level manager." Waldman v. NYNEX Corp., New York Law Journal QDS: 22700679 (January 21, 1999).

In Waldman, the attorney-employee claimed he was fired for voicing concerns about the legality of his employer's debt collection practices. He argued that as a lawyer, he was bound by the Code of Professional Conduct and that the Code was incorporated into his relationship with his employer.

Waldman was relying on an exception to the general at-will employment rule established in Wieder v. Skala, 80 N.Y.2d 628 (1992). In Wieder, an associate at a law firm was fired after complaining to the firm's management about the professional fitness of an attorney at the firm. The associate argued that under the Code of Professional Responsibility, the firm had a responsibility to report the attorney to the Departmental Disciplinary Committee. The court said that the associate had a claim for breach of contract because it is implied in the employment relationship that the firm will conduct business in accordance with the rules of conduct and professional ethical standards. Id.

C. Other Jurisdictions

Illinois, for whatever reason, seems to be a hot bed of litigation on attorneys as employees. The leading case is Balla v. Gambro, 584 N.E. 2d 104 (Ill. 1991) where the Supreme Court of Illinois held that there was no remedy for retaliatory discharge of in-house counsel, reversing the Illinois appellate court and reinstating the judgment of the circuit court. The Supreme Court found that because Balla was not just an employee of Gambro, but also its general counsel, permitting him to sue because of his termination for reporting misbranded, imported dialyzers to the F.D.A., would shift the cost of his obligation to obey the rules of professional conduct, to Gambro. It also concluded that extending the tort would chill the openness of lawyer-client relations. At 584 N.E. 2d 104, 111, the court distinguishes some of the other cases involving whether an in-house counsel can sue. Another issue in this case was whether Balla was acting as a lawyer or as regulatory manager, and the court finds on the record before it that he was acting as a lawyer throughout.

Anastos v. Chicago Regional Trucking Association, 618 N.E. 2d 1049 (Ill. Appellate Ct. 1993) recently applied Balla. Plaintiff had been general counsel of a trucking association that merged with another. In early 1985, he entered into a written employment agreement with the merged association for 10 years at a minimum of $ 27,000 per year. On December 3, 1995, the association's Board of Directors discharged him, allegedly without cause. The intermediate appellate court, relying on the reasoning of Balla, concluded that a lawyer can be fired at any time, and there is no cause of action for prospective damages. A terminated lawyer is entitled only to quantum meruit for past actions. The Illinois line has as its oldest case Herbster v. North American Company for Life and Health Insurance, 501 N.E. 2d 343 (Appellate Ct. 1986), where the appellate court refused to recognize a tort of retaliatory discharge for a lawyer.

State law having failed people in Illinois, they have brought cases in federal court. For example, in Rand v. CF Industries, Inc., 42 F.3d 1139 (7th Cir. 1994), the Seventh Circuit affirmed the District Court's grant of summary judgment to the corporate employer on an age discrimination claim. The Seventh Circuit accepted without discussion the District Court's holding (797 F. Supp. 643 at 644-47) that nothing in Balla could prevent Age Discrimination in Employment Act claims by lawyers because that statute was a federal preemption of Balla. The District Court went on to analyze the record as lacking adequate evidence of age discrimination and the Circuit Court agreed. The District Court, on an issue not discussed in the appellate opinion, threw out a breach of contract claim, concluding that particularly in light of the public policy that lawyers could be terminated at will, the documents in the case did not provide clear evidence of anything other than at will employment. Neither oral assurances nor a hand book were adequate to remove the case from the at will rule.

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In Kierv v. Commercial Union Ins. Companies, 808 F.2d 1254 (7th Cir. 1987), the Seventh Circuit affirmed the District Court's setting aside a jury verdict in an age discrimination case brought by an in-house lawyer. The Seventh Circuit agreed that an in-house lawyer could, in principle, assert a claim under the Age Discrimination in Employment Act but went on to hold, on the facts brought out at trial, that plaintiff could not recover.

Similarly, in Stinneford v. Spiegel, Inc., 845 F. Supp. 1243 (N.D. Ill. 1994) the court granted summary judgment dismissing an age discrimination in employment claim brought by a former general counsel at Spiegel. The Court concluded that there was substantial evidence on the record that the senior management at Spiegel had simply lost confidence in their counsel, and that as a consequence they were permitted to fire him. Plaintiff had no evidence of age discrimination in the case.

Similarly, in Mourad v. Automobile Club Insurance Association, 465 N.W. 2d 395 (Mich. Court of Appeals 1991) the court held that the presence of an attorney-client relationship, and a lawyer's duty to withdraw at the client's behest, did not absolutely bar an action by the attorney for breach of an employment agreement. The record showed that the plaintiff's lawyer sometimes acted directly as counsel for the insured and sometimes as counsel for the insurance company. The court summarized its own holding:

> **"in sum, we hold that plaintiff can maintain an action for just cause contract on the basis of retaliatory demotion and constructive discharge stemming from his refusal to take action which would have violated the code of professional conduct. However, since the cause of action for retaliatory demotion and constructive discharge merged with the breach of contract claim, we set aside the jury verdict regarding these amounts and decline to address whether plaintiff can maintain a cause of action for retaliatory discharge from an employment at will contract. Further, we dismiss the jury award for intentional infliction of emotional distress and conspiracy." 465 N.W. 2d at 403.**

In Nordling v. Northern States Power Company, 478 N.W. 2d 498 (Minn. 1991), the Supreme Court of Minnesota held at 499, "in this case we decide that an employee who is an in-house attorney for his corporate employer is not, by reason of the attorney-client relationship, precluded from making a claim against the employer for wrongful discharge. We conclude, also, that plaintiff's claim for tortious interference be returned to the trial court for consideration." The trial court in Nordling had granted summary judgment motions dismissing claims based on defamation, implied-in-law covenant breach, and whistle blowing, and was affirmed by the intermediate appellate court. After reviewing the law on non-preemption of federal rights against discrimination by employers, the Minnesota Supreme Court reversed both lower courts, and concluded that a contract claim based on an employee handbook should likewise not be prohibited "provided, however, that the essentials of the attorney-client relationship are not compromised." Id. at 502. The court noted that in a contract case it is unlikely that privileged communications would be at the core. It was, however, "conceivabl[e], in a breach of contract suit, privileged communication may at times become relevant, particularly in a just cause termination." The court dealt with this issue by assuming that the trial court would decide, as it would normally, the scope and extent of any claim of privilege. The court went on to affirm no violation of the whistle blowing law because the plaintiff could point to no suspected violation of any federal or state law or rule by his employer.

In Golightly-Howell v. OCAW Intern. Union, 806 F. Supp. 921 (D. Col. 1992) the court noted there was no clear Colorado law on whether an employed attorney could sue for breach of contract. The court held that Title 7 claims are not barred, that a breach of contract claim for failure to follow procedures in a policy manual was not barred, and that a claim for breach of good faith and fair dealing was not barred by the plaintiff's status as a lawyer. Defendant's motion for summary judgment was denied.

In General Dynamics Corporation v. Superior Court, 876 P.2d 487 (Cal. 1994) the California Supreme Court held that status as an in-house counsel was no barrier to breach of contract and public policy tort claims against the client and the retaliatory discharge claim would be sustained. If a non-lawyer could have brought a claim, and there was no confidentiality issue specifically involved, the claim could be brought by a lawyer.

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Similarly, in Santa Clara County Counsel Attorneys Association v. Woodside, 869 P.2d 1142 (Cal. 1994) the California Supreme Court held that the Union for employed attorneys of Santa Clara County could sue the county for breach of its duty of good faith negotiation and fair dealing under California's public employee labor relations law. There is no bar because of the employee's status as lawyers to their bringing such a suit, the court held.

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998) held that firing a lawyer for breaking a confidence concerning alleged Title VII violations not a retaliatory firing prohibited by Title VII.

Shadwick v. Butler Nat'l Corp., 950 F. Supp. 302 (D. Kansas 1996) held that an employer's counterclaim for malpractice in an employee's suit for violation of the Kansas Wage Payment Act and Breach of Contract could proceed simultaneously in state and federal court.

McGonagle v. Union Fidelity Corp., 383 Pa. Super. 223 (1989) held that the discharge of a general counsel who refused to approve a mailing which he believed violated insurance laws of other states was not against public policy and did not support a claim for wrongful discharge by an at-will employee. See also Kachmar, above at 59.

Thus, lawyers do not lose their statutory rights, seem to have their contract rights to damages, and may be able to bring tort cases depending on the extent of potential impairment of privilege and the geographic jurisdiction.

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