

## Associate At-Will Exception Extended To DR 1-102

BY LAZAR EMANUEL

In the recent case of *Connolly v. Napoli, Kaiser & Bern*, Sup.Ct. NY Cnty, No. 105224/05 (4/4/06), Justice Ronald T. Acosta extended the right of an at-will law firm associate to sue in contract for wrongful discharge after he refused to engage in a scheme by the law firm to conceal its misconduct in the disposition of a personal injury claim. The court relied on the Court of Appeals decision in *Wieder v. Skala*, 80 NY2d 628 (1992).

In *Wieder*, the Court of Appeals recognized an exception to the general New York principle that an employee-at-will may be discharged for any reason or no reason. The exception was applied in *Wieder* in the case of an at-will law firm associate who was discharged for insisting that the firm report another associate in the firm to the Appellate Division Disciplinary Committee for violations of the Disciplinary Rules and other misconduct.

The *Wieder* Court distinguished between at-will employees in other commercial or professional contexts and at-will associates in a law firm. Restating New York's basic doctrine that at-will employees may be discharged with or without cause, the Court said:

The employment at will doctrine is a judicially created common-law rule "that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason" (*Murphy v American Home Prod.*, 58 NY2d 293 [citing *Martin v New York Life Ins. Co.*, 148 NY 117]). In *Murphy*, this Court dismissed the claim of an employee who alleged he had been discharged in bad faith in retaliation for his disclosure of accounting improprieties. In so doing, we expressly declined to follow other jurisdictions in adopting the tort-based abusive discharge cause of action for imposing "liability on employers where employees have been discharged for disclosing illegal activities on the part of their employers", being of the view "that such a significant change in our law is best left to the Legislature" (*Murphy*, at 301).

The *Wieder* Court interpreted the decision in *Murphy* as a rejection of the argument that discharge of an at-will employee for disclosing improprieties of the employer requires the employer "to deal fairly and in good faith with the employee....In the context of such an [at will] employment, it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination" (quoting *Murphy*).

## Law Firm Associates Distinguished

However, the *Wieder* Court held, a law firm at-will associate is different from all other at-will employees.

As plaintiff points out, his employment as a lawyer to render professional services as an associate with a law firm differs in several respects from the employments in *Murphy and Sabetay* [*Sabetay v. Sterling Drug* (69 NY2d 329)]. The plaintiffs in those cases were in the financial departments of their employers, both large companies. Although they performed accounting services, they did so in furtherance of their primary line responsibilities as part of corporate management. In contrast, plaintiff's performance of professional services for the firm's clients as a duly admitted member of the bar was at the very core and, indeed, the only purpose of his association with defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation. It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claim.

We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm – the lawful and ethical practice of law.

### Facts In *Wieder*

Plaintiff *Wieder* was a law firm associate who was being represented in the purchase of a condominium by a fellow associate (L.L.) of the firm. After L.L. had neglected the transaction for several months and then had concealed the neglect with a series of lies, *Wieder* complained to two of the firm's senior partners. They acknowledged that L.L. was "a pathological liar". Ultimately, under continuing pressure from *Wieder*, the partners filed a report alleging various instances of misconduct by L.L., including forgery and misrepresentation. The partners then began to berate *Wieder* for having caused them to report the misconduct. Finally, after he had completed the motion papers in the firm's most important litigation, *Wieder* was fired.

The *Wieder* Court cited DR 1-103(A) in support of its decision to exclude at-will law firm associates from the general rule controlling at-will employment. DR 1-103(A) requires a lawyer who has knowledge of another lawyer's violation of DR 1-102 that raises "a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer" to report his knowledge to the authorities "empowered to investigate or act upon such violation." DR 1-102 defines the term "misconduct" and lists (DR 1-102(A)) seven categories of conduct forbidden to lawyers, including violation of a Disciplinary Rule and "any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

In reaching its decision, the *Wieder* Court said:

We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in *Murphy* and *Sabetay*. The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in *Murphy* and *Sabetay*. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied in law term in every contractual relationship between or among lawyers.

The defendants in the *Connolly* case, *supra*, cited the last sentence in this statement by the *Wieder* Court (“We believe, etc.”) to support their argument that the facts in *Connolly* were sufficiently different from the facts in *Wieder* as to require a different result.

### **Facts In Connolly**

Plaintiff Connolly was an at-will associate of the Napoli law firm. His employment contract was for an indefinite term and provided that either party could terminate the contract upon two weeks notice to the other party “for any reason or no reason whatsoever.” Connolly was assigned by the firm to represent a husband in a personal injury action and the wife on a derivative claim. The action was settled for \$850,000, and the firm prepared a release. As stated by Judge Acosta,

...the plaintiff husband spoke with Kaiser [one of the partners in the firm], who was heard to say, “I don’t care if you have to take it down to the car and have her sign it, she has to sign it.” The husband was then told by Kaiser to take the release into the bathroom and bring it back signed. A notarized release was eventually given to Connolly, who forwarded it to the defendant’s carrier.

Several months later, the Napoli firm received a letter from a lawyer representing the wife, who claimed that the case had been settled without the wife’s knowledge. The wife moved by order to show cause to vacate the settlement. Kaiser and his partner Bern prepared an affirmation for signature by Connolly stating that the release had been signed by the husband and the wife. Connolly refused to sign the affirmation and prepared his own. The firm proceeded to terminate his employment and Connolly sued, alleging that the termination was in response to his “refusal to allow himself to be drawn into the cover-up of defendants’ wrongful acts.”

Citing *Wieder*, Judge Acosta defined the issue before him as follows:

In the context of a motion to dismiss..., the issue in this case is whether the complaint sufficiently pleaded a breach of an implied-in-law obligation where although Connolly was not terminated for insisting that the firm comply with DR 1-103 as in *Wieder*, he was terminated instead for refusing to violate DR 1-102. The answer has to be yes.

## **Wieder Applied To DR 1-102**

Judge Acosta rejected the argument by defendant law firm that the *Wieder* Court intended to limit its decision to cases in which an “implied in law” obligation was imposed upon the law firm not to discharge an at-will associate for insisting that the firm comply with DR 1-103’s reporting requirements. Instead, the “implied in law” obligation not to discharge should be construed to extend to the refusal of an associate to engage in conduct prohibited by DR 1-102.

In a similar case, Judge Acosta argued, an associate was terminated for complaining about a partner’s billing practices (See, *Kelly v. Hunton & Williams*, 1999 WL 408416 (E.D.N.Y.)). In rejecting the law firm’s argument that *Wieder* did not apply, the district court said:

...if a law firm fires an associate in retaliation for reporting a lawyer’s misconduct to the firm, its action is inherently coercive and necessarily implies an effort to impede post-termination reporting to the Disciplinary Committee. Thus, a cause of action is available under *Wieder*. The associate’s stated intention to go to the disciplinary authorities may be powerful circumstantial evidence of the firm’s intention to punish and/or silence him or her, but it is neither dispositive nor necessary to the associate’s claim.

In *Lichtman v. Estrin*, 282 A.D.2d 326 (1st Dept. 2001), plaintiff associate alleged in his action for breach of contract that he was terminated because he “objected to and refused to participate in, the unlawful conduct proposed by a partner’s plan to continue practicing law after his anticipated suspension or disbarment.” Citing *Wieder*, the First Department held that plaintiff had stated a cause of action for violation by the law firm of an “implied-in-law” term of his employment by the firm, i.e., that the lawyers in the firm would conduct the firm’s practice in compliance with the rules, and that the firm would not impede the associate’s compliance.

Judge Acosta refused to dismiss plaintiff’s complaint for breach of contract. He also refused to dismiss the complaint as to the individual defendants, partners in the firm. The defendants argued that they were not individually liable under Partnership Law §26(b) for the debts of the partnership. However, Partnership Law §26(c) provides that a partner may be liable for wrongful conduct by himself or another partner, or by a person under his direct supervision and control.

Because under a motion to dismiss, a plaintiff’s allegations must be taken as true. Connolly’s complaint “clearly implicates Kaiser in misconduct and it states that Bern prepared the false affidavit which plaintiff refused to sign.” As to defendant Napoli, it would be premature to dismiss at this time, before discovery takes place, although the complaint merely alleges that he guided the firm’s operation and existence during the relevant period.

Judge Acosta dismissed Connolly’s claim for an accounting because he was not a partner in the firm as required under Partnership Law §44.

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