

The Uncertain Legacy of *Wieder v. Skala*

BY RONALD C. MINKOFF

Twelve years ago, when the Court of Appeals decided *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992), it seemed like the dawn of a new age. Combining contract and legal ethics principles, the Court eschewed New York's venerable "termination at will" doctrine and fashioned a new cause of action for lawyers only: a claim of wrongful discharge based on the action of an employer law-firm in requiring an employee-attorney to violate the Code of Professional Responsibility (the "Code" or the "New York Code"). But since then, while wrongful discharge lawsuits by attorneys have become a growth industry in other jurisdictions [see, e.g., *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164, 876 P.2d 487 (1994)], claims based on *Wieder* have fared less well in New York.

The *Wieder* Decision

The plaintiff in *Wieder* was an associate at the New York City law firm of Feder, Kasovitz, Isaacson, Weber and Skala (the "Feder Firm"). In early 1988, he asked the Feder Firm to handle the closing on his new cooperative apartment. The Feder Firm assigned another associate, identified in the opinion only as "L.L.," to the matter. According to the complaint, L.L. neglected his work, and made several misrepresentations to conceal his wrongdoing. *Id.* at 631-32.

When *Wieder* learned of this, he notified two members of the Feder Firm, who allegedly acknowledged that L.L. was a "pathological liar." *Id.* at 632. When *Wieder* demanded that the Feder Firm report L.L. to the Disciplinary Committee, the Feder Firm "declined to act" and offered to make good any financial losses *Wieder* had suffered as long as *Wieder* did not report the matter himself. *Id.* *Wieder* met with the Disciplinary Committee anyway, but later withdrew his complaint when the Feder Firm indicated it would fire him if he pursued it. *Id.*

The Feder Firm ultimately reported the misconduct, but two partners allegedly "continuously berated [*Wieder*] for having caused them" to do so. *Id.* *Wieder* remained employed by the Feder Firm until he filed a major motion in a litigation he had been handling. Two days later, he was fired. His wrongful termination lawsuit quickly followed.

In moving to dismiss, the Feder Firm invoked the "employment at will" doctrine, which permits an employer to fire an employee for any reason or no reason, unless barred by anti-discrimination statutes or an express contract. *Id.* at 633, citing *Murphy v. American Home Prods.*, 58 N.Y.2d 293, 300 (1983). The Court of Appeals rejected this argument, and fashioned a new cause of action available only to lawyers. The Court ruled that the relationship between a lawyer-employee and her employer law-firm is "distinctive," because she is not just an employee of the firm, but also an "independent officer[] of the court responsible in a broader public sense for [her] professional obligations." *Id.* at 635. Accordingly, the contractual relationship between the lawyer-employee and the employer law-firm features an implied condition "that both the associate and the firm in conducting the practice will do so in accordance with

the ethical standards of the profession." *Id.* at 636. Given that Wieder was required by DR 1-103 to report L.L.'s misconduct, the Feder Firm breached the implied contract by ordering him not to fulfill that professional obligation. As the Court stated:

"[B]y insisting that plaintiff disregard DR 1-103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment." *Id.* at 636-37.

In ruling in Wieder's favor, however, the Court left several unanswered questions. For example, the Court made clear that not every "provision of the Code of Professional Responsibility should be incorporated as an implied-in-law term in every contractual relationship between and among lawyers," and that only the violation of "primary professional rules" may result in liability. *Id.* at 637-38. But which provisions of the Code are "primary," and which are not? Also, Wieder had actively attempted to report the matter to the Disciplinary Committee. Would a claim still be available if Wieder had just threatened to report, or had limited his reporting to the firm's management committee? Finally, how much of a causal relationship must there be between the threat and the termination? What if, for example, the attorney-employee committed other misconduct that would, on its own, justify termination?

The Rojas Case

The first, and perhaps most bizarre, test of the *Wieder* doctrine came in *Rojas v. Debevoise & Plimpton*, 167 Misc. 2d 451, 634 N.Y.S.2d 358 (Sup. Ct., N.Y. Co., 1995). Rojas was an associate assigned to work on the Debevoise & Plimpton "Cuban Task Force" under the supervision of partner Mario Baeza. Rojas accompanied Baeza to a meeting with Eduardo Martinez-Borbonet, a member of the Cuban mission to the United Nations, and was also told about other contacts with Cuban officials. Several months later, Rojas received a call from two FBI agents claiming they were conducting an investigation as to whether Baeza's dealings with Cuba violated the Trading With the Enemy Act. Rojas told what she knew, and later set up a meeting with Martinez-Borbonet at which she, at the FBI's suggestion, wore a small recording device. *Id.* at 453-54. She eventually told Debevoise what she had done, and she was fired.

Rojas sued for wrongful termination, basing her claim on *Wieder*. Her lawsuit was dismissed, since she had failed to allege that she had been "faced with the choice . . . of continued employment or possible suspension or disbarment for violation of an ethical obligation." *Id.* at 455. The court noted that Rojas "had no legal or ethical obligation to become an FBI informant or to surreptitiously record a face to face meeting with a foreign diplomat," and that she had not been instructed to comply with the FBI's independent investigation by the firm. *Id.* Though Rojas argued that she was required by various Code provisions to answer the FBI's questions honestly, the court, citing *Wieder*, noted that not all Code violations give rise to a claim, particularly where, as here, Rojas' "actions were, in fact, unrelated or extrinsic to the central purpose of the relationship between the parties"- the practice of law. *Id.* at 455-56.

The Hunton & Williams Cases

Much closer to *Wieder* were *Geary v. Hunton & Williams*, 684 N.Y.S.2d 207, 257 A.D.2d 482 (1st Dep't 1999) and *Kelly v. Hunton & Williams*, 1999 WL 408416 (E.D.N.Y. June 17, 1999), cases which arose when several Hunton & Williams associates approached firm management to report their suspicions that a partner, Scott Wolos, had falsified his bills. Unknown to the associates, and apparently to those in charge of the

firm, several members of the litigation department - where Wolas and the associates also worked - had invested profitably with Wolas for several years. (Wolas' investment plan turned out to be a Ponzi scheme which later unraveled, when Wolas was forced to flee in order to escape criminal prosecution.) These partners, aware of the associates' complaints, began to criticize them in annual reviews, and testified favorably for Wolas in an internal investigation that cleared him of any wrongdoing. Two of the associates, Hal Geary and Peter Kelly, were terminated soon after. Geary sued in state court, and Kelly in federal court; both asserted breach of contract claims based on *Wieder*. The courts came out with seemingly inconsistent results.

In *Geary*, the First Department upheld the dismissal of the *Wieder* claim, noting that the firm had terminated Geary before he raised any concerns about Wolas' billing practices. *Geary*, 257 A.D.2d at 482-83. But the court went further:

"To the extent plaintiff has raised any issue of fact as to when he was terminated, the record establishes that he neither reported the partner to the Disciplinary Committee, expressed no intention to make such a report, nor believed that he was personally obligated to make such a report." *Id.* at 483.

In other words, retaliation for making a complaint to the firm, rather than a disciplinary body, may not form the basis for a *Wieder* claim, especially if the plaintiff did not believe that DR 1-103(A) required him to report.

Kelly fared better in federal court, even though he had not yet been admitted to the Bar when the relevant events occurred, had not threatened to report Wolas to the Disciplinary Committee, and had been told only that he would receive a negative job reference if he continued to press the issue. The court found, first, that the *Wieder* doctrine applies to associates not yet admitted to practice, since those associates, like associates who actually gain admission, are "hired to practice law, and this objective was the only basis for the employment relationship." *Kelly* at *8, citing *Wieder*, 80 N.Y.2d at 638. Moreover, "[t]he state bar may be unable to kick an unadmitted attorney off the roll of attorneys [for violating the Code of Professional Responsibility], but it can certainly keep him from getting on it." *Id.* At *8. Second, the court ruled that retaliation for reporting to the firm is just as coercive as what took place in *Wieder*; indeed, "it necessarily implies an effort to impede post-termination reporting to the Disciplinary Committee." *Id.* at *9. Finally, although the only threat Kelly received was that he would receive an unfavorable job reference - a threat which came after he was asked to leave - this was just as devastating as a threat of termination, since "a law firm's unfavorable reference can effectively prevent the attorney from obtaining the type of employment he seeks." *Id.*

The *Kelly* court struggled to distinguish *Geary*, finding that the sole basis for the dismissal of Geary's claim was that he had been terminated before he reported any misconduct, while Kelly had been terminated afterwards. *Id.* As for the broader language contained in *Geary*, the court simply rejected it, "declin[ing] to read [it] as holding that an actual or threatened report to the Disciplinary Committee is a prerequisite to a successful claim under *Wieder*." *Id.* at *10. Indeed, the court noted that the trial judge in *Geary* (whose decision the Appellate Division affirmed) had ruled the opposite way. *Id.*

Other Cases

The basic themes explored in *Geary* and *Kelly* echo in other cases involving *Wieder* claims. For example, courts have been reluctant to approve *Wieder* claims where the attorney plaintiff may not have been practicing law at the time of the alleged threats. See, e.g., *Goel v. Indotronix Intern. Corp.*, 293 A.D.2d 648, 740 N.Y.S.2d 648 (2d Dep't 2002) (*Wieder* claim fails because "[t]he documentary evidence established that the plaintiff was suspended from the practice of law throughout his employment with the defendant"); *Waldman v. NYNEX Corp.*, 1999 WL 292634 (Sup. Ct. N.Y. Co., January 8, 1999) (court denies motion to dismiss *Wieder* claim by in-house attorney in collection department, finding issues of fact as to whether "the collection unit... 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") (emphasis in original).

Courts also have rejected *Wieder* claims when the termination decision was made before the alleged threat, and when other reasons for termination existed. See *Bainton v. Baran*, 287 A.D.2d 317, 731 N.Y.S.2d 161 (1st Dep't 2001) (in affirming dismissal of *Wieder* claim, court holds: "plaintiff was not expected to choose between continuing his partnership and unethical behavior, since he engaged in the conduct that allegedly resulted in his termination before speaking with his partners and, moreover, explicitly admits in his complaint that an additional motivation for his expulsion was his partners' belief that his productivity had diminished").

Nevertheless, there are several decisions which expand *Wieder* in new and important directions. For example, in *Waldman*, *supra*, the trial court denied a motion to dismiss a complaint brought by an in-house NYNEX attorney. This attorney worked in the collection department, and alleged that he had been fired in retaliation for telling his superiors that NYNEX's collection practices violated the Federal Debt Collection Practices Act and applicable state laws. *Waldman*, 1999 WL 292 634 at *1-2. Indeed, in contrast to *Geary* and *Bainton*, the court upheld the claim even though NYNEX alleged that it had another ground for terminating plaintiff: that plaintiff had violated company policy - and the New York Code - by having a conflict of interest. *Id.* at *3.

Even more significant is *Lichtman v. Estrin*, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dep't 2001), the only case in which the First Department has upheld a *Wieder* claim by an attorney. There, the plaintiff was an associate working for Melvyn Estrin, a personal injury attorney indicted for bribing insurance adjusters. Estrin told plaintiff that even if he was disbarred or suspended, he would continue his involvement in his law practice by "coming into the office at night" and "having lunch' with associates." *Id.* at 326 (citations omitted). Plaintiff objected, and was terminated shortly thereafter. The court rejected Estrin's argument that his supposed plan was too vague to constitute an improper threat, and in any event did not implicate any specific provision of the Code, noting that the plaintiff arguably had a duty to report Estrin's statement to the Disciplinary Committee under DR 1-103(A). Thus, the court neatly fit this unique factual situation under the rubric of *Wieder*.

So, the *Wieder* rule survives - even if it does not exactly thrive. Courts continue to hew very closely to *Wieder's* central holding that the defendant employer's alleged threat has to impair the plaintiff's ability to discharge his or her duty to report under DR 1-103(A). *Wieder* claims remain available to those plaintiffs who can tailor their allegations to fit this requirement.

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