

Case Sequence:

Employment Law

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Martin v. New York Life Ins. Co.

Court of Appeals of New York

December 5, 1895, Argued ; December 19, 1895, Decided

No Number in Original

Reporter

148 N.Y. 117 *; 42 N.E. 416 **; 1895 N.Y. LEXIS 749 ***

Judges: Bartlett, J. All concur.

Opinion by: BARTLETT

Opinion

[*119] [**416] The plaintiff sued to recover salary at the rate of ten thousand dollars a year from the first day of May, 1892, until the first day of January, 1893, with interest.

The plaintiff entered the employ of the defendant in 1881, and was placed in charge of the [**417] real estate department at a salary of five thousand dollars a year. From the first of January, 1883, he received salary at the rate of sixty-five hundred dollars a year under an arrangement made in February, 1883. In February, 1884, the salary was increased to the rate of ten thousand a year, payable from January first, 1884. Salary was paid monthly. Without further agreement of any kind plaintiff continued in the discharge of his duties until April 13th, 1892, when he received a letter from the president of the defendant notifying him that his services would not be needed [***5] after April 30th, 1892.

Plaintiff replied to this letter April 14th, 1892, stating that he accepted the defendant's ultimatum. A week later he wrote a second letter in which he sought to explain the first one as follows, viz.: "What I meant then and what I mean now is that while I concede your power to dispense with my services after April 30th, I do not concede your power to break my contract with the company without making the company liable to me.

"I wish you to distinctly understand that my employment is, and has been since January 1st, 1884, a yearly one, at a salary of \$ 10,000 per year, commencing on January 1st, and that I am entitled to my salary for the balance of the year."

We are unable to agree with the learned General Term [*120] that the legal effect of these letters was to release both parties from the obligation of an existing

entire contract, if one did exist. The letter of the defendant was an absolute discharge of the plaintiff and cannot be regarded as a part of negotiations to abrogate an existing contract; the plaintiff's replies to that letter did not in any way affect the legal rights of the parties in this

aspect of the case.

The two questions presented [***6] by this appeal are, does the evidence establish a contract of hiring by the year, and, if not, does a general hiring import an employment by the year?

We do not think the plaintiff proved an original contract with defendant whereby he was employed to render service for a year; nor was the evidence so conflicting on this point as to have warranted the trial judge in submitting the question to the jury.

A verdict finding that such a contract was entered into by the parties would be set aside as unsupported by the evidence.

The correspondence between the plaintiff and defendant, already referred to, tends to show that plaintiff, when he wrote his first letter, did not consider he was rendering service under a contract by the year, and his assumption of that position in the second letter has the appearance of an afterthought.

It remains to consider the legal effect of a general hiring.

The learned counsel for the plaintiff argues that a general hiring means, as matter of law, an employment from year to year, and insists that his proposition is sustained by the decision of this court in *Adams v. Fitzpatrick* (125 N. Y. 124).

The case cited does not decide the point in question, [***7] although certain expressions in the opinion and reference to English cases might seem, upon a casual reading, to justify a contrary contention.

The referee found, however, that the parties originally contemplated a hiring for a year, and this court held that on the continuation of the employment after the expiration of the year, without further agreement, it

would be presumed that the parties had assented to renew the contract for a like period.

[*121] The present condition of the law as to the legal effect of a general hiring is thus stated by Mr. Wood in his work on Master and Servant (2d edition), § 136, as follows: "In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year * * * With us, the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. * * [***8] * A contract to pay one \$ 2,500 a year for services is not a contract for a year, but a contract to pay at the rate of \$ 2,500 a year for services actually rendered, and is determinable at will by either party. Thus it will be seen that the fact that the compensation is measured at so much a day, month or year does not necessarily make such hiring a hiring for a day, month or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had, at the rate fixed for the services actually rendered."

The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood and it has been adopted in a number of states. (*Evans v. St. L., I. M. & S. Ry. Co.*, 24 Mo. App. 114; *Finger v. Brewing Co.*, 13 Mo. App. 310; *De Briar v. Minturn*, 1 Cal. 450; *Haney v. Caldwell*, 35 Ark. 156, 168; *Prentiss v. Ledyard*, 28 Wis. 131.)

It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.

The order appealed from should be affirmed and judgment absolute [***9] ordered against the plaintiff upon the stipulation dismissing the complaint, with costs.

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Weiner v. McGraw-Hill

Court of Appeals of New York

September 1, 1982, Argued ; November 18, 1982, Decided

No Number in Origina

Reporter

57 N.Y.2d 458 *; 443 N.E.2d 441 **; 457 N.Y.S.2d 193 ***; 1982 N.Y. LEXIS 3821 ****; 33 A.L.R.4th 110; 118 L.R.R.M. 2689; 98 Lab. Cas. (CCH) P55,401

Judges: Chief Judge Cooke and Judges Jasen, Jones and Meyer concur with Judge Fuchsberg; Judge Wachtler dissents and votes to affirm in a separate opinion in which Judge Gabrielli concurs.

Opinion by: FUCHSBERG

Opinion

[*460] [**442] [***194] OPINION OF THE COURT

In a matter raising an issue of wide concern to employers and employees, we must decide whether, in the circumstances of this case, the plaintiff, though not engaged for a fixed term of employment, pleaded a good cause of action for breach of contract against his employer because, allegedly, he was discharged without the "just and sufficient cause" or the rehabilitative efforts specified in the employer's personnel handbook and allegedly promised at the time he accepted the employment.

The operative facts deserve emphasis. Taken most favorably to the plaintiff, as they must in the context of an appeal from an order made pursuant to CPLR 3211 (subd [a], par 7) ¹ (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506), they show that, in 1969, the plaintiff, Walton Lewis Weiner, a young man who four years [****6] earlier had entered upon a career in book publishing with another employer, Prentice-Hall, was invited to engage in discussions looking towards his joining the staff of the defendant, McGraw-Hill, Inc. In the course of these talks, McGraw's representative, aware of Weiner's position with Prentice-Hall, assured his prospect that, since his company's firm policy was not to

terminate employees without "just cause", employment by it would, among other things, bring him the advantage of job security. Concomitantly, the application Weiner thereafter signed and submitted, on a printed McGraw form, specified that his employment would be subject to the provisions of McGraw's "handbook on personnel policies and procedures". This reference as relevant here, represented that "[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 have been taken and failed. However, if the welfare of the company indicates that dismissal is necessary, [*461] then that decision is arrived at and is carried out forthrightly" (Handbook, § 8.20, par [8]).

[****7] These undertakings were important to Weiner, who alleges not only that he placed "good faith reliance" on them in leaving his existing employer, but in the process forfeited all his accrued fringe benefits and a salary increase proffered by Prentice-Hall to induce him to remain in its employ.

Following written approval, affixed at the foot of the application form by two members of the defendant's staff, one the interviewer and the other a supervisor, McGraw engaged Weiner's services. For [**443] [***195] the next eight years, so far as escalation in rank (to director of promotion services) and periodic raises in his level of compensation would seem to indicate, Weiner had every reason to believe he had, if anything, more than met the reasonable requirements of his new post. Other offers of employment he routinely rejected. Nevertheless, in February, 1977, he suddenly found himself discharged for "lack of application".

There ensued this litigation, by which, in a complaint speaking broadly in the language of breach of contract,

supplementary submissions to the end that plaintiff's allegations be given their most favorable intendment (*Arrington v New York Times Co.*, 55 NY2d 433, 442; *Guggenheimer v Ginzburg*, 43 NY2d 268, 272).

¹ Styled as one made pursuant to CPLR 3211 (subd [a], par 7) after joinder of issue, as permitted by CPLR 3211 (subd [e]), and never having been converted to one for summary judgment as permitted by CPLR 3211 (subd [c]), the motion required the court to examine any

the plaintiff seeks damages for his wrongful termination.² To support its CPLR 3211 (subd [a], par 7) motion to dismiss, defendant's argument [****8] was, and is, that there existed no contract of employment under which McGraw-Hill's evaluation of Weiner's job performance could be challenged in a court of law. In its view, the form signed by the parties was just an application for employment and nothing more. Defendant further contends that its oral promise of job security was in no way binding on it.

In upholding the complaint, Special Term merely made a point of distinguishing this case from ones like *Edwards v Citibank N.A.* (74 AD2d 553, app dsmd 51 NY2d 875), where the employee, unlike here, had not bound himself to the contents of a handbook. On appeal from this decision, a divided Appellate Division reversed, on [****9] the law, and granted the motion. In effect, the majority reasoned that, [*462] because Weiner's employment was one at will, his employer could release him arbitrarily and with impunity. Dissenting, Justice Kupferman would not agree, as he put it, that "an employee handbook on personnel policies and procedures is a corporate illusion, 'full of sound * * * signifying nothing'". (83 AD2d, at p 811.)

For the reasons which follow, we believe the plaintiff stated a cause of action.

Prefatorily, however, we note that the parties have supplemented the arguments they directed to the contract issue with ones which dwell, pro and con, on the effectiveness of a miscellany of such legal formulations as "abusive discharge", "implied promise of fair treatment" and "good faith", which some courts have applied, in the context of particular cases, to overcome

what they conceived to be the harsh effect of inflexibly strict enforcement of at-will employment agreements, under which by their terms either employer or employee may sever the relationship without cause and without notice.³ Without more, because we hold that plaintiff's complaint spelled out a cause of action in contract, this case [****10] does not present the occasion to address these theories.

Nevertheless, by way of background, [****11] it is of interest to observe that the at-will employment rule, which originated centuries ago as an adjunct to the law of master and servant in England,⁴ in later times was to [**444] [***196] find a receptive legal environment in *laissez-faire* nineteenth century [*463] America (see, especially, *Martin v New York Life Ins. Co.*, 148 NY 117).⁵ So strong indeed was the turn-of-the-century legal and socioeconomic philosophy that nurtured it that for long Federal constitutional law deferred to it as well (see, e.g., *Coppage v Kansas*, 236 U.S. 1, 13-14; *Adair v United States*, 208 U.S. 161, 174-175). But, significantly, starting approximately in the days of the Great Depression in the early nineteen thirties and continuing through the present, though political, scholarly and industrial agitation for modification of the rule to provide greater job security has been insistent, there is growing support for remedial legislative action (see Report of Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal, 36 Record of Assn of Bar of City of New York 170 [April, 1981]; Blades, Employment at Will vs. Individual Freedom: On [****12] Limiting the Abusive Exercise of Employer Power, 67 Col L Rev 1404, citing to Tannenbaum, A Philosophy of Labor, p 9; Feerick, Employment-At-Will Rule and Unjust Dismissal, NYLJ, Aug. 6, 1982, p 1, col 1).

² We deal here with the plaintiff's first cause of action alone. As originally drawn, the complaint contained three causes of action, but the second and third, theorizing Weiner's grievance in terms of tort, were dismissed for legal insufficiency. No appeal having been taken from their rejection, these do not demand our attention.

³ (See, e.g., *Toussaint v Blue Cross & Blue Shield of Mich.*, 408 Mich 579; *Pugh v See's Candies*, 116 Cal App 3d 311; *Cleary v American Airlines*, 111 Cal App 3d 443; *Fortune v National Cash Register Co.*, 373 Mass 96; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv L Rev 1816, 1824-1826; Note, A Common Law Action for the Abusively Discharged Employee, 26 Hastings LJ 1434, 1441; see, generally, Discharge of At-Will Employee, Ann., 12 ALR4th 544, which, interestingly, indicates that *Johnson v National Beef Packing Co.*, 220 Kan 52, and *Cederstrand v Lutheran Brotherhood*, 263 Minn 520, reflect a small minority's vestigial opposition to an ever growing "trend toward statutory and judicial rejection of the traditional

employment-at-will common-law rule"; Feerick, Employment-at-Will Rule and Unjust Dismissal, NYLJ, Aug. 6, 1982, p 1, col 1.)

⁴ As far back as 1562, England placed statutory limits upon the power of an employer to terminate an employee unless there was "reasonable cause to do so" (1 Blackstone's Commentaries, 131 [1878]). However, when transplanted to this country, the rule resumed its unconditional classical form (see De Giuseppe, Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits, 10 Ford Urban LJ 1, 3-4; see Feerick, Employment at Will, NYLJ, Oct. 5, 1979, p 1, col 1).

⁵ The holding in *Martin* was grounded essentially on a statement in Wood, Master and Servant (§ 136 [2d ed], 1886), in which, as subsequent commentators have pointed out, the author relied on no more than "scant authority of questionable value", the cases he cited having been decided "entirely on their facts and none stand squarely for the general proposition that an indefinite hiring is terminable at will" (De Giuseppe, *op. cit.*, 10 Ford Urban LJ, at p 6, and n 13).

[***13] Concentrating then on plaintiff's breach of contract approach alone, initially we dispose of any Statute of Frauds point. Though not raised by the defendant, Special Term thought it pertinent. Suffice it to say that the agreement between Weiner and McGraw-Hill, whether terminable at will or only for just cause, is not one which, "by its terms", could not be performed within one year and, therefore, is not one which is barred (General Obligations Law, § 5-701; *North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 175-176; see, generally, 28 ALR2d 878).

Turning now to substance, it is also clear that the fact that plaintiff was free to quit his employment at will, standing by itself, was not entitled to conclusory effect. Such a position proceeds on the oversimplified premise that, since the plaintiff was not bound to stay on, the [*464] agreement for his employment lacked "mutuality", thus leaving the defendant free to terminate at its pleasure. But this would lead to the not uncommon analytical error of engaging in a search for "mutuality", which is not always essential to a binding contract, rather than of seeking to determine the presence of consideration, which [***14] is a fundamental requisite. For, while coextensive promises may constitute consideration for each other, "mutuality", in the sense of requiring such reciprocity, is not necessary when a promisor receives other valid consideration (*Clausen & Sons v Hamm Brewing Co.*, 395 F2d 388; *Meurer Steel Barrel Co. v Martin*, 1 F2d 687, 688; *McCall Co. v Wright*, 198 NY 143, 153-154; see 1 Williston, Contracts [3d ed], § 105A, p 421 *et seq.*; 1A Corbin, Contracts, § 152, p 2 *et seq.*; 21 NY Jur 2d, Contracts, § 11, p 424).

As to consideration, any basic contemporary definition would include the idea that it consists of either a benefit to the promisor or a detriment to the promisee (*Holt v Feigenbaum*, 52 NY2d 291, 299). As elaborated in *Hamer v Sidway*, the seminal case on the subject, "[it] is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him" (124 NY 538, 545).

[**445] [***197] Far from consideration needing to be

coextensive or even proportionate, the value or measurability of the thing forbore or promised is not crucial so long as it is acceptable to the [***15] promisee. Thus, courts have not hesitated to find sufficient consideration not only in what is now the proverbial peppercorn (*Whitney v Stearns*, 16 Me 394), but in "a horse or a canary, or a tomtit if [the promisee] chose" (*Couldery v Bartrum*, 19 Ch D 394, 399 [Jessel, M.R.], both cited in 1 Corbin, Contracts, § 122, p 528). In fact, the detriment suffered or the thing promised need be of no benefit to the one who agreed to it. So, in *Hamer* what the plaintiff "suffered" was self-denial of liquor and tobacco, a sacrifice which prompted our court, quoting from Anson's Principles of Contracts (at p 63), to explain that it would "not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is [*465] of any substantial value to anyone" (*Hamer v Sidway, supra*, at p 545).⁶

[***16] Apt too in the circumstances before us now is the following comment by Corbin: "[If] the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him 'at will' after the employee has begun or rendered some of the requested service or has given any other consideration * * * This is true even though the employee has made no return promise and has retained the power and legal privilege of terminating the employment 'at will'. The employer's promise is supported by the service that has been begun or rendered or by the other executed consideration" (1A Corbin, Contracts, § 152, p 14). So understood, an agreement on the part of an employer not to dismiss an employee except for "good and sufficient cause only" and, if such cause was given, until the prescribed procedures to rehabilitate had failed, does not create an ineluctable employment at will.

These propositions in mind, we find in the record, inclusive of plaintiff's own affidavit, sufficient evidence of a contract and a breach to sustain a cause [***17] of action. First, plaintiff was induced to leave Prentice-Hall with the assurance that McGraw-Hill would not

applications of promissory estoppel involve the forbearance of a right or benefit by the promisee at the request of the promisor, thus placing them within the mainstream of contract law, their reliance on promissory estoppel was unnecessary (see, e.g., *Rosen v Guaranteed Sanitation*, 32 Misc 2d 698). Without more, therefore, the present case, contrary to plaintiff's assertions, is not an appropriate one in which to even consider, much less pass upon, his estoppel assertions.

⁶In the same vein, it has been put that "where the promisor makes a request, the only reliance which makes the promisor's failure to perform actionable is the promisee's doing what is requested and that reliance if detrimental is consideration and liability cannot be predicated on promissory estoppel" (Snyder, *More On Promissory Estoppel*, 26 Brklyn L Rev 41). In so saying, Professor Snyder points up the interesting fact that, because, on analysis, most reported

discharge him without cause. Second, this assurance was incorporated into the employment application. Third, plaintiff rejected other offers of employment in reliance on the assurance. Fourth, appellant alleged that, on several occasions when he had recommended that certain of his subordinates be dismissed, [*466] he was instructed by his supervisors to proceed in strict compliance with the handbook and policy manuals because employees could be discharged only for just cause. He also claims that he was told that, if he did not proceed in accordance with the strict procedures set forth in the handbook, McGraw-Hill would be liable for legal action. In our view, these factors combine to present a question for trial: Was defendant bound to a promise not to discharge plaintiff without just and sufficient cause and an opportunity for rehabilitation? (Cf. *Parker v Borock*, 5 NY2d 156, 159-160 [collective bargaining agreement provision prohibiting discharge "without good and sufficient cause" held binding on employer]**446] [***198] though the employee otherwise [****18] would have been one at will.)⁷

[****19] Finally, on the trial, it should, of course, be remembered that *Martin* itself, when, in 1895, it adopted New York's at-will rule, afforded it no greater status than that of a rebuttable presumption (148 NY, at p 121; see, also, Mandel, *Preparation of Commercial Agreements* [1978 ed], pp 164-165 [if no definite term is fixed by contract, a hiring at will is deemed to have resulted only "in the absence of circumstances showing a different intention"]). In determining whether such a presumption is overcome here, the trier of the facts will have to consider the "course of conduct" of the parties, "including their writings" (*Brown Bros. Elec. Contrs. v Beame Constr. Corp.*, 41 NY2d 397, 399) and their antecedent negotiations. Moreover, as *Brown* suggests (at p 400), it is not McGraw's subjective [*467] intent, nor "any single act, phrase or other expression", but "the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain", which will control.

Consequently, the order of the Appellate Division should be reversed and the order of Special Term reinstated.

⁷ As to the alarms sounded by the dissent concerning the possibility that this opinion, bespeaking nothing but traditional contract law principles, will move employers out of the State, suffice it that there is nothing to indicate that even California, Michigan, Massachusetts or other States which have adopted less conventional theories, have had any such experience. To this it well may be added that the Association of the Bar Report, which both this opinion and the dissent (dissent, p 469) find cite-worthy, has this to say: "Arbitrariness in the workplace may also be counterproductive in a larger sense, in

Dissent by: WACHTLER

Dissent

Wachtler, [****20] J. (dissenting). For almost a century, the common law of New York has provided that absent some form of contractual agreement between an employee and employer establishing a durational period, the employment is presumed terminable at the will of either party and the employee states no cause of action or breach of contract by alleging that he or she has been discharged (*Martin v New York Life Ins. Co.*, 148 NY 117). Plaintiff seeks to avoid the effect of this rule by alleging that a statement in defendant's personnel manual, entitled "McGraw-Hill and You", that employees would be dismissed "for just and sufficient cause only", together with a reference to the manual in a printed application form he signed when he applied to defendant for employment, constitutes an agreement by defendant to employ him "for the remainder of his working life".

In my view, as a matter of law, neither document alone nor in combination contains any language indicating that defendant intended to be bound by their contents. Thus no question of fact was presented for jury consideration and the court below properly dismissed the first cause of action for breach of contract. The employment in question was [****21] terminable at the will of either party and plaintiff has no cause of action against defendant for breach of contract simply because he was discharged.

The printed application form, entitled "employment application", spells out none of the critical terms of plaintiff's employment. No reference is made to the type of work plaintiff was being considered for, salary, or the duration of the hiring. In fact, nothing either explicitly or implicitly suggests that defendant has offered plaintiff a position or that plaintiff has accepted an offer of employment.

[*468] [**447] Significantly, the application form contains the words "do not write below

breeding a demoralized workforce and its own brand of inefficiency. Certainly the examples of Japan and Germany weaken the force of the contention that protection against arbitrary discharge necessarily undermines the productivity of an economy" (Report of Committee on Labor and Employment Law, 36 Record of the Assn of Bar of City of New York 170, 188-189, citing Vogel, *Japan as Number One, Lessons for America*, pp 131-157; Drucker, *The Job as Property Right*, Wall St J, March 4, 1980, p 24, col 4; Pascale, *Personnel Practices and Employee Attitude*, 31 *Human Relations* 597; Hallett, *Social Economy of West Germany*, p 90).

this [***199] line" directly beneath the space provided for the applicant's signature, and below the line is a space for the interviewer to record his name, followed by another section captioned "record of employment (to be completed by Requisitioner)". This space, along with another entitled "Additional Approval" are signed by company officials to record "Applicant employed as Senior Copywriter will begin work on October 20, 1969 at a salary of \$ 15,000 per year". (Plaintiff signed the form on Sept. 15, 1969.) It is evident from [****22] the layout of the form, then, that the signatures of the company officials were not part of the application and represent no contractual exchange between plaintiff and defendant. Those signatures and the statement that plaintiff has been employed are, rather, nothing more than a memorialization of the hiring event for internal record-keeping purposes.

Similarly, defendant's personnel manual expresses no intent that defendant be immutably bound by the document. Nor would one expect the manual to contain any strict promissory language, given that, as the court below noted, defendant could unilaterally amend or withdraw any of the provisions found there. Nothing in either the manual or the employment application form prohibited defendant from so modifying the manual in its sole discretion. "McGraw-Hill and You" is nothing more than a conglomerate of broad internal policy guidelines generally followed, none of which even slightly portend to enumerate the essential elements of a contract of employment between defendant and an employee. No language expressing an intent to be bound appears in the personnel manual, and no such intent can fairly be construed from any of the policy guidelines [****23] espoused.

Considerations of public policy also dictate against broad judicial construction of the documents in question to present a triable issue as to whether they constitute an employment contract. It has been suggested that restricting an employer's ability to discharge an employee for unsatisfactory performance will create additional inefficiency [*469] in the workplace in that the employer will forego dismissing an incapable employee in order to avoid the time and expense of litigation (Report of Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal, 36 Record of Assn of Bar of the City of New York 170, 188). A less savory result of imposing additional restrictions on the ability to discharge an employee, at least as far as the residents of this State are concerned, is that businesses and industry, the major employers in New York will simply move elsewhere.

In view of today's record high unemployment, and

considering that between 1975 and 1980 approximately 60,000 industry-related jobs in New York were lost as a direct result of business migration, I cannot join the majority's bestowal of contractual rights based upon documents [****24] which make it all too clear that no contractual rights were ever intended.

Accordingly, I respectfully dissent and vote to affirm.

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Murphy v. Am. Home Prods. Corp.

Court of Appeals of New York

January 10, 1983, Argued ; March 29, 1983, Decided

No Number in Original

Reporter

58 N.Y.2d 293 *; 448 N.E.2d 86 **; 461 N.Y.S.2d 232 ***; 1983 N.Y. LEXIS 2925 ****; 31 Fair Empl. Prac. Cas. (BNA) 782; 115 L.R.R.M. 4953; 98 Lab. Cas. (CCH) P55,407; 31 Empl. Prac. Dec. (CCH) P33,607

Judges: Chief Judge Cooke and Judges Jasen, Wachtler, Fuchsberg and Simons concur with Judge Jones; Judge Meyer dissents in part and votes to further modify by reinstating the fourth cause of action in a separate opinion.

Opinion by: JONES

Opinion

[*297] [**87] [***233] **OPINION OF THE COURT**

This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature. Nor does the complaint here state a cause of action for intentional infliction of emotional distress, for prima facie tort, or for breach of contract. These causes of action were, therefore, properly dismissed. Appellant's cause of action based on his claim of age discrimination, however, should be reinstated. The period of time for commencement of a judicial action for unlawful discrimination in employment is the three-year period of CPLR 214 (subd 2) and not the one-year period prescribed in subdivision 5 of section 297 of the Executive Law.

Plaintiff, Joseph Murphy, was first employed by defendant, American Home Products Corp., in 1957. He thereafter served in various accounting positions, [****12] eventually attaining the office of assistant treasurer, but he never had a formal contract of employment. On April 18, 1980, when he was 59 years old, he was discharged.

Plaintiff claims that he was fired for two reasons: because of his disclosure to top management of alleged accounting [*298] improprieties on the part of corporate personnel and because of his age. As to the first ground, plaintiff asserts that his firing was in retaliation for his revelation to officers and directors of defendant corporation that he had uncovered at least \$ 50 million in

illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income and allowed high-ranking officers to reap unwarranted bonuses from a management incentive plan, as well as in retaliation for his own refusal to engage in the alleged accounting improprieties. He contends that the company's internal regulations required him to make the disclosure that he did. He also alleges that his termination was carried out in a humiliating manner.

As to the second basis for his termination, plaintiff claims that defendant's top financial officer told him on various occasions that he wished [****13] he could fire plaintiff but that, because to do so would be illegal due to plaintiff's age, he would make sure by confining him to routine work that plaintiff did not advance in the company. Plaintiff [****234] also asserts that a contributing factor to his dismissal was that he was over 50 years of age.

[*88] On April 14, 1981, plaintiff filed a summons in the present action with the New York County Clerk pursuant to CPLR 203 (subd [b], par 5). The summons described the action as a suit "to recover damages for defendant's wrongful and malicious termination of plaintiff's employment". Another summons and a complaint were served on defendant on June 5, 1981. The complaint set up four causes of action. As his first cause of action, plaintiff alleged that his discharge "was wrongful, malicious and in bad faith" and that defendant was bound "not to dismiss its employees for reasons that are contrary to public policy". In his second cause of action, plaintiff claimed that his dismissal "was intended to and did cause plaintiff severe mental and emotional distress thereby damaging plaintiff". His third claim was based on an allegation that the manner of his termination "was [****14] deliberately and viciously insulting, was designed to and did embarrass and humiliate plaintiff and was intended to and did cause plaintiff severe mental and emotional distress thereby damaging plaintiff". In his [*299] fourth cause of action, plaintiff asserted that, although his employment contract was of indefinite

duration, the law imposes in every employment contract "the requirement that an employer shall deal with each employee fairly and in good faith". On that predicate he alleged that defendant's conduct in stalling his advancement and ultimately firing him for his disclosures "breached the terms of its contract requiring good faith and fair dealing toward plaintiff and damaged plaintiff thereby". Plaintiff demanded compensatory and punitive damages.

Following a stipulation extending defendant's time to answer or to move with respect to the complaint, defendant moved on July 27, 1981 to dismiss the complaint on the grounds that it failed to state a cause of action and that the fourth cause of action was barred by the Statute of Frauds. Defendant contended that plaintiff was an at-will employee subject to discharge at any time, that New York does not recognize a [****15] tort action for abusive or wrongful discharge, and that the prima facie tort and intentional infliction of emotional distress claims were unavailable and insufficient.

On October 16, 1981, plaintiff served an amended complaint with his opposing papers on the motion. The amended complaint, among other things, added a fifth cause of action, alleging that plaintiff was denied advancement due to his age which constituted "illegal employment discrimination on the basis of age in violation of New York Executive Law § 296".

Special Term denied defendant's motion to dismiss the wrongful discharge tort claim but granted the motion as to the causes of action for breach of contract, prima facie tort, intentional infliction of emotional distress, and age discrimination. Although the court noted that New York had not yet adopted the doctrine of abusive discharge, it declined to put plaintiff out of court before he had had opportunity by means of disclosure procedures to elicit evidence which might put his claim on firmer footing. Special Term held the cause of action for breach of contract barred by the Statute of Frauds. As to the second and third causes of action the court ruled that plaintiff's [****16] allegations as to the manner of his dismissal were not sufficient to [*300] support causes of action for intentional infliction of emotional distress or for prima facie tort. Finally, applying the one-year period set out in the Executive Law (§ 297, subd 5), Special Term ruled that plaintiff's age discrimination claim was untimely because the amended complaint was served over a year after his dismissal and could not be related back to the original complaint because "[nothing] in either summons or the first complaint gave notice to the defendant of the age discrimination cause of action" (112 Misc 2d 507, 511).

On cross appeals, the Appellate Division modified, to the extent of granting the motion to dismiss the first cause of action, and otherwise affirmed the order of Special Term. The court noted that it does not [***235] appear that New York recognizes a cause of action for abusive discharge and that, in any event, plaintiff had failed to show the type of violation of penal law or public [**89] policy that has been held sufficient in other jurisdictions to support a cause of action for abusive discharge. According to the appellate court, plaintiff's charge that [****17] the corporation's records were not kept in accordance with generally accepted accounting principles appeared to involve a dispute over a matter of judgment as to the proper accounting treatment to be given the terms involved and not a dispute over false book entries. As to the other causes of action, the court ruled that Special Term had properly dismissed them either for failure to state a cause of action, failure to comply with the Statute of Frauds or, regarding the age discrimination claim, failure to assert it within the statutory time period (88 AD2d 870). We modify the order of the Appellate Division from which plaintiff appeals by reinstating the fifth cause of action for age discrimination and otherwise affirm.

With respect to his first cause of action, plaintiff urges that the time has come when the courts of New York should recognize the tort of abusive or wrongful discharge of an at-will employee. To do so would alter our long-settled 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 (see *Martin v New York Life* [*301] *Ins.* [****18] *Co.*, 148 NY 117; *Parker v Borock*, 5 NY2d 156). Plaintiff argues that a trend has emerged in the courts of other States to temper what is perceived as the unfairness of the traditional rule by allowing a cause of action in tort to redress abusive discharges. He accurately points out that this tort has elsewhere been recognized to hold employers liable for dismissal of employees in retaliation for employee conduct that is protected by public policy. Thus, the abusive discharge doctrine has been applied to impose liability on employers where employees have been discharged for disclosing illegal activities on the part of their employers (*Sheets v Teddy's Frosted Foods*, 179 Conn 471; *Palmateer v International Harvester Co.*, 85 Ill 2d 124; *Harless v First Nat. Bank in Fairmont*, 246 SE2d 270 [W Va]), where employees have been terminated due to their service on jury duty (*Nees v Hocks*, 272 Ore 210), and where employees have been dismissed because they have filed workers' compensation claims (*Kelsay v Motorola, Inc.*, 74 Ill 2d 172; *Frampton v Central Ind. Gas Co.*, 260 Ind 249). Plaintiff would

have this court adopt this emerging view. We decline his invitation, [****19] being of the opinion that such a significant change in our law is best left to the Legislature.

Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature. In addition to the fundamental question whether such liability should be recognized in New York, of no less practical importance is the definition of its configuration if it is to be recognized.

[*302] Both of these aspects of the issue, involving perception and declaration of relevant public [****20] policy (the underlying determinative consideration with respect to tort liability in general, see, e.g., *Pulka v Edelman*, 40 NY2d 781; Prosser, Torts [4th ed], § 3, pp 14-16) are best and more appropriately explored [***236] and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine [**90] the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation,

rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Additionally, if the rights and obligations under a relationship forged, perhaps [****21] some time ago, between employer and employee in reliance on existing legal principles are to be significantly altered, a fitting accommodation of the competing interests to be affected may well dictate that any change should be given prospective effect only, or at least so the Legislature might conclude.

For all the reasons stated, we conclude that recognition in New York State of tort liability for what has become known as abusive or wrongful discharge should await legislative action.¹

[****22] [*303] Plaintiff's second cause of action is framed in terms of a claim for intentional infliction of emotional distress. To survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v Maloney* (43 NY2d 553, 557), that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd [1]). Comment *d* to that section notes that: "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". The facts alleged by plaintiff regarding the manner of his termination fall far short of this strict standard. Further, in light of our holding above that there is now no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in [****23] terms of a tort of intentional infliction of emotional distress (cf. *Fischer v Maloney*, 43 NY2d 553, 557-558, *supra*).

Plaintiff's third cause of action was also properly dismissed. If considered, as plaintiff would have us, as intended to allege a prima facie tort it is deficient

participating in a proceeding related to the Labor Law)).

In fact, legislation has been proposed but not adopted which would protect employees who have been terminated for taking actions which benefit the general public or society in general (e.g., 1981 NY Assembly Bill A 2566), for disclosure of violations of law or regulation which pose a substantial and impending danger to public health or safety (e.g., 1982 NY Senate-Assembly Bill S 9566, A 12451), or for disclosure of certain illegal or hazardous activities of their employers (e.g., 1983 NY Senate Bill S 1153).

¹ Employees in New York have already been afforded express statutory protection from firing for engaging in certain protected activities (e.g., Judiciary Law, § 519 [prohibiting discharge of employee due to absence from employment for jury service]; Executive Law, § 296, subd 1, par [e] [barring discharge of employees for opposing unlawful discriminatory practices or for filing a complaint or participating in a proceeding under the Human Rights Law]; Labor Law, § 215 [proscribing discharge of employee for making a complaint about a violation of the Labor Law or for

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inasmuch as there is no allegation that his discharge was without economic or social justification (*Morrison v National Broadcasting Co.*, 24 AD2d 284, 287, rev'd on other grounds 19 NY2d 453; see *Drago v Buonagurio*, 46 NY2d 778, 779). Moreover, [***237] we held in *James v Board of Educ.* (37 NY2d 891, 892), which also involved the exercise [**91] of an unrestricted right to discharge an employee, that: "Plaintiff cannot, by the device of an allegation that the sole reason for the termination of his employment by these public officials acting within the ambit of their authority was to harm him without justification (a contention which could be advanced with respect to almost any such termination), [*304] bootstrap himself around a motion addressed to the pleadings". Nor does the conclusory allegation of malice by plaintiff here supply the deficiency. As with the intentional [****24] infliction of emotional distress claim, this cause of action cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee.

Plaintiff's fourth cause of action is for breach of contract. Although he concedes in his complaint that his employment contract was of indefinite duration (inferentially recognizing that, were there no more, under traditional principles his employer might have discharged him at any time), he asserts that in all employment contracts the law implies an obligation on the part of the employer to deal with his employees fairly and in good faith and that a discharge in violation of that implied obligation exposes the employer to liability for breach of contract. Seeking then to apply this proposition to the present case, plaintiff argues in substance that he was required by the terms of his employment to disclose accounting improprieties and that defendant's discharge of him for having done so constituted a failure by the employer to act in good faith and thus a breach of the contract of employment.

No New York case upholding any such broad proposition [****25] is cited to us by plaintiff (or identified by our dissenting colleague), and we know of none. New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced (e.g., *Wood v Duff-Gordon*, 222

NY 88; *Pernet v Peabody Eng. Corp.*, 20 AD2d 781). In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an [*305] inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent. [****26] In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.

Of course, if there were an express limitation on the employer's right of discharge it would be given effect even though the employment contract was of indefinite duration. Thus, in *Weiner v McGraw-Hill, Inc.* (57 NY2d 458), cited by plaintiff, we recently held that, on an appropriate evidentiary showing, a limitation on the employer's right to terminate an employment of indefinite duration might be imported from an express provision therefor found in the employer's handbook on personnel policies and procedures. Plaintiff's attempts on this appeal to bring himself within the beneficial scope of that holding must fail, however. There is here no evidence of any such express limitation. Although general references are to be found in his brief in our court to an employer's "manual", no citation is furnished to any provision therein pertinent to the employer's right to terminate [***238] his employment, and [****27] the alleged manual was not submitted with his affidavit in opposition to the motion to dismiss his complaint.

[**92] Accordingly, the fourth cause of action should have been dismissed for failure to state a cause of action.

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² Both courts below dismissed this cause of action under the Statute of Frauds. This appears to have been error, inasmuch as the contract of employment was not one which by its terms could not have been performed within one year (General Obligations Law, § 5-701, subd a, par 1) and does not otherwise come within the reach of the Statute of Frauds (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 463).

We reject the view of the dissenter that a good faith limitation should now be judicially engrafted on what in New York has been the unfettered right of termination lying at the core of an employment at will (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 467 [dissenting opn]). We do so for precisely the reasons which persuade him as well as the other members of the court that we should now refrain from

[****28] [*306] As to his fifth cause of action for age discrimination, plaintiff correctly contends that in dismissing this cause of action as barred by the Statute of Limitations the courts below applied the wrong statute. They invoked the one-year period prescribed in subdivision 5 of section 297 of the Executive Law: "Any complaint filed pursuant to this section must be * * * filed within one year after the alleged unlawful discriminatory practice". The Legislature clearly intended this restriction to apply to complaints of discrimination filed with the Division of Human Rights under subdivision 1 of section 297 of the Executive Law. The issue presented in this case is whether it was intended that the one-year period should also apply to civil actions brought under subdivision 9 of section 297.³

[****29] Initially it is to be observed that a civil action is not instituted by the "filing of a complaint". Rather a civil action is commenced by service, delivery, or filing of a summons (or in some instances by an order for a provisional remedy) (CPLR 203, subd [b]). More significant, there are persuasive reasons why provision should be made for different periods of time within which claims for unlawful discrimination may be made -- one for administrative [*307] relief, the other for judicial remedy. The procedures, practices, and remedies, indeed the entire perspective of administrative intervention under the Human Rights Law, differ radically from the traditional course of judicial adjudication. Moreover, in this instance, subdivision 9 expressly provides that where the division, on the grounds of administrative convenience, dismisses a complaint filed with it, the complainant may then bring a civil suit. This possibility suggests the practical desirability if not necessity [***239] of staggered periods of limitation, with a longer period fixed for the commencement of civil actions. (Relief in the reverse order is not permitted; initiation of a civil action forecloses [****30] all recourse to the [**93] Division of Human Rights [§ 297,

judicial recognition of the tort action for abusive discharge. As the dissenter is at pains to note, there has been much criticism of the traditional conception of the legal obligations and rights which attach to an employment at will. It may well be that in the light of modern economic and social considerations radical changes should be made. As all of us recognize, however, resolution of the critical issues turns on identification and balancing of fundamental components of public policy. Recognition of an implied-in-law obligation of good faith as restricting the employer's right to terminate is as much a part of this matrix as is recognition of the tort action for abusive discharge. We are of the view that this aggregate of rights and obligations should not be approached piecemeal but should be considered in its totality and then resolved by the Legislature (see at pp 301-302, *supra*).

³ Subdivision 9 provides "Any person claiming to be aggrieved by an

subd 9).) We conclude, therefore, that the one-year period of subdivision 5 was intended to apply only to the filing of complaints with the Division of Human Rights.

In enacting subdivision 9 of section 297, the Legislature created a new cause of action not previously cognizable, but, in doing so, provided no specific period of limitations for such action. Consequently the institution of civil actions to recover damages for unlawful discriminatory practices under subdivision 9 is governed by the three-year period of limitations prescribed in CPLR 214 (subd 2) applicable to "an action to recover upon a *liability*, penalty or forfeiture created or imposed by statute" (emphasis added; contrast *State of New York v Cortelle Corp.*, 38 NY2d 83, 86 [holding that statutory provisions did not create "new claims but only provide particular remedies and standing in a public officer"]). It was, therefore, error to dismiss plaintiff's cause of action for age discrimination as barred by the one-year period prescribed in subdivision 5 of section 297.

For the reasons stated, the order of the Appellate Division should be [****31] modified, with costs, to reinstate plaintiff's fifth cause of action for age discrimination.

Dissent by: MEYER (In Part)

Dissent

Meyer, J. (dissenting in part). The harshness of a rule which permits an employer to discharge with impunity a 30-year employee one day before his pension vests (see [*308] *United Steelworkers of Amer., Local No. 1617 v General Fireproofing Co.*, 464 F2d 726; and *Savodnick v Korvettes, Inc.*, 488 F Supp 822) or for no other reason than that he filed a compensation claim (2A Larson, Workmen's Compensation Law, § 68.36), the bizarre origin of the termination-at-will rule,

unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a."

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¹ [****33] the change of economic and constitutional philosophy that has occurred since its adoption, ² the exclusion of a substantial segment of the working community from its effects through "just cause" limitations upon the right to fire resulting from collective bargaining, and the inconsistency of the rule not only with the common law of England and with earlier New York decisions but also with the law of most industrial countries of the world, ³ have caused an [***240] outpouring of judicial and scholarly

writings intended to ameliorate, if not abolish, [**94] the rule. ⁴ [****34] I [*309] [****32] agree with the majority that we should not now adopt the tort remedies proposed in those writings, because such remedies are essentially grounded in public policy, the declaration of which is a function of both the Legislature and the courts, because the New York Legislature has not been reticent in the area, ⁵ and because of the difficulty encountered by the courts adopting such remedies in articulating the exact

¹ *Martin v New York Life Ins. Co.* (148 NY 117, 121) accepted as correct the rule stated in section 136 of Wood, Master and Servant (2d ed) that "the fact that the compensation is measured at so much a day, month or year does not necessarily make such hiring a hiring for a day, month or year, but that in all such cases the contract may be put an end to by either party at any time, unless the time is fixed". Though later stated to have been "deliberately adopted, all the judges concurring, to settle the differences of opinion which had prevailed in the lower courts" (*Watson v Gugino*, 204 NY 535, 541-542), *Martin's* adoption of the rule may fairly be characterized as bizarre in light of (1) Wood's concession that "In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year", (2) the contrary statement of the rule in *Adams v Fitzpatrick* (125 NY 124) in reliance upon the English cases cited at pages 128 and 130 and the New York cases cited at page 130 (see, also, *Davis v Gorton*, 16 NY 255; and *Bleeker v Johnson*, 51 How Prac 380), (3) the fact, documented in the Annotation at 11 ALR 469, 476, and in a number of the articles referred to in footnote 4 below, that Wood's rule was not supported by any of the cases cited by him, and (4) the logical inconsistency of a rule the ultimate statement of which is that "permanent employment means nothing more than that the employment is to continue indefinitely and until one or the other of the parties wishes for some good reason to sever the relation" (*Arentz v Morse Dry Dock & Repair Co.*, 249 NY 439, 444).

² The concept that a restriction upon an employer's right to terminate was a violation of due process (*Adair v United States*, 208 U.S. 161; *Coppage v Kansas*, 236 U.S. 1) has long since given way to decisions upholding the constitutionality not only of various labor acts but also of restrictions upon discharge for reasons of race, sex, age, political affiliation and the like (see n 5 below).

³ (Report of Committee on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal, 36 Record of Assn of Bar of City of New York [hereafter "Committee Report"] 170, 175 ff.)

⁴ (Committee Report, *op. cit.*; Blades, Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power, 67 Col L Rev 1404; Blumrosen, Workers' Rights Against Employers and Unions: Justice Francis -- A Judge For Our Season, 24 Rutgers L Rev 480; Christiansen, A Remedy for The Discharge Of Professional Employees Who Refuse To Perform Unethical Or Illegal Acts: A Proposal In Aid Of Professional Ethics, 28 Vand L Rev 805; Conway, Protecting The Private Sector At Will Employee Who

"Blows The Whistle": A Cause Of Action Based On Determinants Of Public Policy, 1977 Wis L Rev 777; De Giuseppe, Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits, 10 Ford Urban LJ 1; Feerick, Continued Erosion of Employment-At-Will, NYLJ, Feb. 4, 1983, p 1, col 1; Feinman, Development of the Employment at Will Rule, 20 Am J Leg Hist 118; Gelb, Non-Statutory Causes of Action For an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship, 24 NY L School L Rev 743; Glendon and Lev, Changes In the Bonding of the Employment Relationship: An Essay on the New Property, 20 BC L Rev 457; Harmon and Kolko, Developments In the Law Covering Abusive Discharges, NYLJ, Aug. 26, 1982, p 1, col 3; Madison, Employee's Emerging Right To Sue For Arbitrary Or Unfair Discharge, 6 Employee Relations LJ 422; Mathews, A Common Law Action for The Abusively Discharged Employee, 26 Hastings LJ 1435; Peck, Unjust Discharges From Employment: A Necessary Change In The Law, 40 Ohio St LJ 1; Peck, Some Kind of Hearing For Persons Discharged From Private Employment, 16 San Diego L Rev 313; Shapiro and Tune, Implied Contract Rights To Job Security, 26 Stanford L Rev 335; Shemaria-Weber, A Remedy for Malicious Discharge of the At-Will Employee, 7 Conn L Rev 758; Summers, Individual Protection Against Unjust Dismissal: Time For A Statute, 62 Va L Rev 481; Travis, Abusive Discharge Cases To Test Common-Law Rule, NYLJ, Sept. 24, 1982, p 1, col 2; Vernon and Gray, Termination At Will -- The Employer's Right to Fire, 6 Employee Relations LJ 25; Weyand, Present Status of Individual Employee Rights, NYU 22d Annual Conf on Labor, p 171; Willis, Contracts -- Employee's Discharge Motivated By Bad Faith, Malice or Retaliation Constitutes a Breach of an Employment Contract Terminable at Will, 43 Ford L Rev 300; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, 93 Harv L Rev 1816; in addition to the articles listed, pertinent annotations will be found at 51 ALR2d 742; 63 ALR3d 979; 93 ALR3d 659; 9 ALR4th 329; 12 ALR4th 544.)

The judicial writings are too numerous to list, but see Committee Report (at p 211, n 130) and De Giuseppe (10 Ford Urban LJ, at p 23, n 101).

⁵ (E.g., Civil Rights Law, §§ 47-a, 79-i; Civil Service Law, §§ 75-76; CPLR 5252; Election Law, § 17-154, subd 3; Executive Law, §§ 292, 296; General Obligations Law, § 5-301; Labor Law, § 27-a, subd 10; § 662, subd 1; § 704, subd 8; §§ 736, 880, subd 3; Military Law, §§ 317, 318; Workers' Compensation Law, § 120.) A "whistle-blower" bill (A 12451; S 9566) failed to pass the 1982 Legislature, but has

nature of the public policy which will bring them into play (compare *Adler v American Std. Corp.*, 291 Md 31, with *Hinrichs v Tranquilaire Hosp.*, 352 So 2d 1130 [Ala]; and see De Giuseppe, 10 Ford Urban LJ, at p 36 ff).

[*310] I agree also with so much of the majority opinion as holds the fourth cause of action not barred by the Statute of Frauds and the fifth cause of action not barred by the Statute of Limitations. I cannot, however, accept the majority's refusal to follow precedent decisional law recognizing an implied-in-law obligation on the part of the employer not to discharge an employee for doing that which the employment contract obligated him to do or to differentiate between that existing contract obligation and the public policy laden tort of abusive discharge (at pp 305-306, n 2). Plaintiff's complaint [****35] alleges that "defendant's internal regulations * * * required that plaintiff report any deviation [***241] from proper accounting practice to defendant's top management" and that he was dismissed as a result of his doing just that. Because those allegations sufficiently state a cause of action for breach of contract not [**95] only under decisions of other States⁶ but as a matter of New York law as well, I dissent from the majority's affirmance of the dismissal of the fourth cause of action.

[****36] I do not gainsay that *Martin v New York Life Ins. Co.* (148 NY 117), however questionable its origin and continued existence, is the New York rule concerning employment contracts of unspecified duration. So in *Haines v City of New York* (41 NY2d 769, 772) we took pains to point out that unlike other contracts of unspecified duration, as to which the law will imply that the parties "intended performance to continue for a reasonable time", that rule "[for] compelling policy reasons* * * has not been, and should not be, applied to contracts of employment". But the policy reasons behind refusing to read a durational term into [*311] employment contracts do not require reading out of such contracts the "implied covenant of fair dealing and good faith" which "is implicit in all contracts" (*Van Valkenburgh, Nooger & Neville v Hayden Pub. Co.*, 30 NY2d 34, 45; accord *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87) and is "a contractual obligation of

universal force which underlies all written agreements" (*Brassil v Maryland Cas. Co.*, 210 NY 235, 241).

I refer not to the promise that each party will use reasonable efforts to carry out the contract purpose, which [****37] may be implied-in-fact from the contract negotiations to establish consideration though the writing be "imperfectly expressed" in that respect (*Wood v Duff-Gordon*, 222 NY 88, 91), but to the covenant implied by the law that the parties will not "frustrate the contracts into which they have entered" and that one party will "not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (*Grad v Roberts*, 14 NY2d 70, 75) or that may hinder or obstruct his doing that which the contract stipulates he should do (*Patterson v Meyerhofer*, 204 NY 96, 101).

Under this principle it was held in *Meyerhofer* that by entering into a contract to purchase from plaintiff property which defendant knew plaintiff would have to buy at a foreclosure sale in order to convey, defendant impliedly agreed that she would do nothing to prevent him from acquiring the property at such sale and, having outbid him at the sale, was liable to him for the difference between the contract price and the price she paid to the referee in foreclosure. Indeed, more than 100 years ago we applied the principle to a broker's commission contract, though terminable [****38] at will, holding in *Sibbald v Bethlehem Iron Co.* (83 NY 378, 384) that "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will *subject only to the ordinary requirements of good faith*" (emphasis supplied; see, also, *Goodman v Marcol, Inc.*, 261 NY 188; *Carns v Bassick*, 187 App Div 280). And though a broker's employment is [***242] occasional [*312] rather than continuous, we have recognized the role of good faith even as it relates to continuous employment, saying in *Arentz v Morse Dry Dock & Repair Co.* (249 NY 439, 444) with respect to a [**96] claimed contract of permanent employment of a general manager that "Plaintiff was not obliged to stay with the defendant for life, neither was defendant obliged to employ him beyond the time when *in good faith* it had no further use for his services" (emphasis supplied).

been reintroduced at the present session (Legislative Gazette, Feb. 7, 1983, p 9).

⁶ (*Pugh v See's Candies*, 116 Cal App 3d 311; *Cleary v American Airlines*, 111 Cal App 3d 443; *Magnan v Anaconda Inds.*, 37 Conn Sup 38; *Higdon Food Serv. v Walker*, 641 SW2d 750 [Ky]; *Fortune v National Cash Register Co.*, 373 Mass 96; *Toussaint v Blue Cross & Blue Shield of Mich.*, 408 Mich 579; *Gates v Life of Mont. Ins. Co.*, 638 P2d 1063 [Mont]; *Cloutier v Great Atlantic & Pacific Tea Co.*,

121 NH 915; *Pierce v Ortho Pharm. Corp.*, 84 NJ 58; *Rees v Bank Bldg. & Equip. Corp. of Amer.*, 332 F2d 548 [applying Mo law]; but see *Whittaker v Care-More, Inc.*, 621 SW2d 395 [Tenn].) For discussion of the implied obligation of good faith as a limitation upon the right to terminate an at-will employee see Committee Report (at p 182 ff; De Giuseppe, 10 Ford Urban LJ, at p 24; Glendon and Lev, 20 BC L Rev, at pp 471-472; Madison, 6 Employee Relations LJ, 422; Note, 93 Harv L Rev 1816; Comment: Employment Contracts -- Implied Covenant of Good Faith, 62 Mass LQ 241).

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The principle, moreover, is espoused by the Restatement of Contracts, Second (§ 205), which flatly states that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," and which in Comment *e* and the Reporter's [****39] Notes thereto indicates its application to the "abuse of a power * * * to terminate the contract" (at p 102) including "an express power to terminate a contract at will" (at p 104). It is recognized as well in section 1-203 of the Uniform Commercial Code and by Williston, Contracts (3d ed, §§ 670, 1295), which tells us in section 1295 (vol 11, p 39) that: "Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied." The same reasoning that reads into an output contract the requirement that the manufacturing plant continue to perform in good faith (*Feld v Levy & Sons*, 37 NY2d 466, 471) and into the contract of an employee hired to invent that the resulting patent belongs to the employer (*Cahill v Regan*, 5 NY2d 292, 296) though no express provision to such effect be contained in the contract requires reading into the contract the present plaintiff alleges a provision that he will not be terminated for doing that which the parties have expressly contracted he shall do.⁷ To be borne in [****40] mind is the fact that we deal not [*313] with a contract which by its expressed term authorizes the employer to terminate without cause, but with one in which, because no durational term has been expressed, the law implies a right of termination. In the latter situation only the strongest of policy reasons can sustain reading the *implied* right of termination as a limitation upon the *express* obligation imposed upon the employee (see Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv L Rev 369, 399-401; Summers, General Duty of Good Faith -- Its Recognition and Conceptualization, 67 Cornell L Rev 810, 827; Summers, "Good Faith" In General Contract Law and the Sales Provisions of The Uniform Commercial Code, 54 Va L Rev 195, 251).

[****41] There is, moreover, no compelling policy reason to read the implied obligation of good faith out of contracts impliedly terminable at will. To do so belies the "universal force" of the good faith obligation which,

as we have seen, the law reads into "all contracts." Nor can credence be given the *in terrorem* suggestion that to limit terminable-at-will contracts by good faith will drive industry from New York (see *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 469 [dissenting opn]). That is no more than speculation and hardly appears acceptable in the face of (1) the recognition without apparent industrial exodus of the even more burdensome tort remedy for discharge of at-will employees by such industrial States as California, Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, Pennsylvania and Wisconsin (see Committee Report, at p 211, n 130; and De Giuseppe, 10 Ford Urban LJ, at p 23, n 101), [***243] and (2) the responses reported in Ewing, What Business Thinks About Employee Rights, a Harvard Business Review survey of employers reprinted in Individual Rights In The Corporation: A Reader On Employee Rights (Westin & Salisbury eds), at page [**97] [****42] 21. The more particularly is this so because collective bargaining "just cause" provisions, which impose a greater burden on employers than does a good faith limitation (see *Toussaint v Blue Cross & Blue Shield of Mich.*, 408 Mich 579) have not done so, and [*314] because employers can obtain a large measure of protection by expressly reserving in the employment contract the right to terminate without cause.⁸

The fact that the Legislature has limited at-will discharge in the several ways listed in footnote 5 above but has not expressly established a breach of contract action for termination of at-will employment which violates the implied-in-law obligation of good faith provides no reason to await action by the Legislature. The at-will rule was created by the courts and can properly be changed by the courts but, more importantly, as demonstrated above, the rule has for at least a century been subject to the "universal [****43] force" of the good faith rule. The Legislature, therefore, had no reason before the present decision to believe that action on its part was required.

Nor ought we succumb to any "floodgates" argument. "This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden on the courts" (*Tobin v Grossman*, 24 NY2d 609, 615; accord

contract with him required him to report to defendant's top management any deviation from proper accounting practice, plaintiff's employment not be terminated because he did so.

⁸ Such a contract is not per se unconscionable (*Zapatha v Dairy Mart*, 381 Mass 284).

⁷ Ironically, the employer's implied absolute right to terminate at-will employment for any reason or for no reason had its origin in the necessity of according the *employer* mutuality with the right of the *employee* to quit his job at any time (Blades, 67 Col L Rev, at p 1419). Logically, of course, the same principle of mutuality requires that if, as plaintiff alleges and must prove in order to succeed, defendant's

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Prosser, Torts [4th ed], p 51). The argument is, moreover, specious. It is plaintiff's burden if he is to avoid summary judgment to come forward with admissible evidence that he was terminated because he reported, as required, a deviation from proper accounting practice (*Gelder Med. Group v Webber*, 41 NY2d 680, 684) and it will be his burden to establish that fact before the jury (see *Goodman v Marcol, Inc.*, 261 NY 188, *supra*; *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 390, *supra*, *McDonnell Douglas Corp. v Green*, 411 U.S. 792). And though the burden of going forward, once plaintiff establishes a prima facie case, will shift to defendant (see *Matter of Axel v Duffy-Mott Co.*, 47 NY2d [****44] 1, 9; cf. *Mt. Healthy City Bd. of Educ. v Doyle*, 429 U.S. 274, 287; Committee Report, at p 195), it will remain the plaintiff's burden to convince the jury that he was fired for the reason he alleged, not the employer's burden to convince them that he had other good cause to fire the employee (see [*315] *Blades*, 67 Col L Rev, at p 1429). True, the evidence presented by an employer in such a situation will normally be of other cause to fire, but there is no reason to believe that under proper instruction from the court as to burden of proof (cf. PJI 4:31) a jury cannot be trusted to determine the good faith issue thus presented as they now regularly do in all the other good faith situations presented to them.

It may well be that plaintiff's fourth cause of action will not survive a motion for summary judgment or, if it does, will not succeed before a jury. To dismiss it at this stage, on the pleadings alone, is, however, wholly inconsistent with the prior holdings of this and other courts with respect to the implied-in-law obligation of good faith. I therefore, cannot vote for doing so.

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Wieder v. Skala

Court of Appeals of New York

October 21, 1992, Argued ; December 22, 1992, Decided

No. 256

Reporter

80 N.Y.2d 628 *; 609 N.E.2d 105 **; 593 N.Y.S.2d 752 ***; 1992 N.Y. LEXIS 4240 ****; 8 I.E.R. Cas. (BNA) 132

Judges: Acting Chief Judge Simons and Judges Kaye, Titone and Bellacosa concur; Judge Smith taking no part.

Opinion by: Hancock, Jr., J.

Opinion

[*631] [**106] [***753] Plaintiff, a member of the Bar, has sued his former employer, [****6] a law firm. He claims he was wrongfully discharged as an associate because of his insistence that the firm comply with the governing disciplinary rules by reporting professional misconduct allegedly committed by another associate. The question presented is whether plaintiff has stated a claim for relief either for breach of contract or for the tort of wrongful discharge in violation of this State's public policy. The lower courts have dismissed both causes of action on motion as legally insufficient under CPLR 3211 (a) (7) on the strength of New York's employment-at-will doctrine. For reasons which follow, we modify the order and reinstate plaintiff's cause of action for breach of contract.

I.

In the complaint, which must be accepted as true on a dismissal motion under CPLR 3211 (a) (7), plaintiff alleges that he was a commercial litigation attorney associated with defendant law firm from June 16, 1986 until March 18, 1988. In early 1987, plaintiff requested that the law firm represent him in the purchase of a condominium apartment. The firm agreed and assigned a fellow associate (L.L.) "to do 'everything that needs to be done' ". For several months, L.L. neglected [*632] [****7] plaintiff's real estate transaction and, to conceal his neglect, made several "false and fraudulent material misrepresentations". In September 1987, when plaintiff learned of L.L.'s neglect

and false statements, he advised two of the firm's senior partners. They conceded that the firm was aware "that [L.L.] was a pathological liar and that [L.L.] had previously lied to [members of the firm] regarding the status of other pending legal matters". When plaintiff confronted L.L., he acknowledged that he had lied about

the real estate transaction and later admitted in writing that he had committed "several acts of legal malpractice and fraud and deceit upon plaintiff and several other clients of the firm".

The complaint further alleges that, after plaintiff asked the firm partners to report L.L.'s misconduct to the Appellate Division Disciplinary Committee as required under DR 1-103 (A) of the Code of Professional Responsibility,¹ they declined to act. Later, in an effort to dissuade plaintiff from making the report himself, the partners told him that they would reimburse his losses. Plaintiff nonetheless met with the Committee "to discuss the entire matter". He withdrew his [****8] complaint, however, "because the [f]irm had indicated that it would fire plaintiff if he reported [L.L.'s] misconduct". Ultimately, in December 1987--as a result of plaintiff's insistence--the firm made a report concerning L.L.'s "numerous misrepresentations and [acts of] malpractice against clients of the [f]irm and acts of forgery of checks drawn on the [f]irm's account". Thereafter, two partners "continuously berated plaintiff for having caused them to report [the] misconduct". The firm nevertheless continued to employ plaintiff "because he was in charge of handling the most important litigation in the [f]irm". Plaintiff was fired in March 1988, a few days after he filed motion papers in that important case.

[****9] Plaintiff asserts that defendants wrongfully discharged him as a result of his insistence that L.L.'s misconduct be reported as required by DR 1-103 (A). In his fourth cause of action, he alleges that the firm's

¹ DR 1-103 (A) provides: "A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1- 103 that raises a substantial question as to another lawyer's honesty,

trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

termination constituted a breach of the employment relationship. In the fifth cause of action, he claims that his discharge was in violation of public policy and [*633] constituted a tort for which he seeks compensatory and punitive damages.

Defendants moved to dismiss the fourth and fifth causes of action as legally insufficient pursuant to CPLR 3211 (a) (7). Supreme Court granted defendants' motion [**107] [***754] because his employment relationship was at will, holding:

"since [the] 'Whistleblowers Law' [Labor Law § 740] is not applicable to the facts of this case, and plaintiff has not pleaded facts to come within the exception set forth in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458 (1982), the rules governing the causes of action for wrongful discharge are those set forth in *Murphy [v American Home Prods. Corp.]* (58 NY2d 293)]. Accordingly, since under the facts pleaded herein, the law firm had the right to terminate plaintiff, the [***10] fourth and fifth causes of action are dismissed."

The Appellate Division affirmed. It also concluded that plaintiff failed to state a cause of action because, as an at-will employee, the firm could terminate him without cause. This Court granted leave to appeal.

II.

We discuss first whether, notwithstanding our firmly established employment-at-will doctrine, plaintiff has stated a legal claim for breach of contract in the fourth cause of action. The answer requires a review of the three cases in which that doctrine is fully explained.

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 Prods. Corp.*, 58 NY2d 293, 300, *supra* [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 [***11] 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" (*id.*, at 301). [*634]

With respect to the contract cause of action asserted in

Murphy, the Court held that plaintiff had not shown evidence of any express agreement limiting the employer's unfettered right to fire the employee. For this reason, the Court distinguished *Weiner v McGraw-Hill, Inc.* (57 NY2d 458, *supra*), where such an express limitation had been found in language in the employer's personnel handbook. Finally, in *Murphy*, the Court rejected the argument that plaintiff's discharge for disclosing improprieties violated a legally implied obligation in the employment contract requiring the employer to deal fairly and in good faith with the employee, explaining:

"No New York case upholding any such broad proposition is cited to us by plaintiff (or identified by our dissenting colleague), and we know of none. New York does recognize that in appropriate circumstances an obligation [***12] of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced (e.g., *Wood v Duff-Gordon*, 222 NY 88; *Pernet v Peabody Eng. Corp.*, 20 AD2d 781). *In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.* Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an 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" (*id.*, at 304-305 [emphasis added]).

[**108] [***755] Four years after *Murphy*, the Court decided *Sabetay v Sterling Drug* (69 NY2d 329). There, the Court dismissed the complaint of an employee who claimed he was fired for "blowing the whistle" and refusing to engage in improper and unethical activities. As in *Murphy*, the Court found no basis [***13] for an express limitation on the employer's right to discharge an at-will employee and, adhering to *Murphy* as a precedent, declined to base any such limitation on an implied-in-law obligation of dealing fairly and in good faith with its employee. [*635]

Not surprisingly, defendants' position here with respect to plaintiff's breach of contract cause of action is simple and direct, i.e., that: (1) as in *Murphy* and *Sabetay*, plaintiff has shown no factual basis for an express limitation on the right to terminate of the type upheld in *Weiner*; and (2) *Murphy* and *Sabetay* rule out any basis for contractual relief under an obligation implied-in-law. We agree that plaintiff's complaint does not contain allegations that could come within the *Weiner* exception

for express contractual limitations (*see, Weiner v McGraw-Hill, Inc., supra*, at 465). As to an implied-in-law duty, however, a different analysis and other considerations pertain.

In arguing that the law imposes no implied duty which would curtail their unlimited right to terminate the employment contract, defendants rely on the holding in *Murphy* that "[n]o obligation can be implied, however, [****14] which would be inconsistent with other terms of the contractual relationship ... [and] 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" (58 NY2d 293, 304- 305, *supra*; *accord, Sabetay v Sterling Drug, supra*, at 335-336). The decisions in *Murphy* and *Sabetay*, however, are not controlling here.

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*. 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 [****15] 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 [*636] 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.

The particular rule of professional conduct implicated here (DR 1-103 [A]), it must be noted, is critical to the unique function of self- regulation belonging to the legal [****16] profession. Although the Bar admission requirements provide some safeguards against the enrollment of unethical applicants, the Legislature has delegated the responsibility for maintaining the standards of ethics and competence to the Departments of the Appellate Division (*see, [**109] [***756] Judiciary Law § 90 [2]; and see, e.g., Rules of App Div, 1st Dept [22 NYCRR] § 603.2*). To assure that the legal profession fulfills its responsibility of self- regulation, DR 1-103 (A) places upon each lawyer and Judge the duty to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a "substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects". Indeed, one commentator has noted that, "[t]he reporting requirement is nothing less than essential to the survival of the profession" (Gentile, *Professional Responsibility--Reporting Misconduct By Other Lawyers*, NYLJ, Oct. 23, 1984, at 1, col 1; at 2, col 2; *see also, Olsson, Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough*, 31 Ariz L Rev 657, 658-659).²

[****17] Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (*see, e.g., Matter of Dowd*, 160 AD2d 78). Thus, by 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 [*637] between continued employment and his own potential suspension and disbarment. 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

² *See also, Matter of Rowe* (80 NY2d 336, 340 ["The Code of Professional Responsibility ... counsels that ... (l)awyers play a critical role in sustaining the rule of law and ... the courts are charged

with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct ... Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in (the Bar) warrants disciplinary action"]).

contractual relationship between or among [****18] lawyers.

It is the law that in "every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (*Patterson v Meyerhofer*, 204 NY 96, 100; *see, e.g., Arc Elec. Constr. Co. v Fuller Co.*, 24 NY2d 99, 103- 104; *Wakefield v Northern Telecom*, 769 F2d 109, 112, *mod after remand* 813 F2d 535). The idea is simply that when A and B agree that B will do something it is understood that A will not prevent B from doing it. The concept is rooted in notions of common sense and fairness (*see*, Farnsworth, *The Law of the Contract* § 7.16, at 524 [1982]). "What courts are doing [when an omitted term is implied]", Professor Corbin explains, "whether calling the process 'implication' of promises, or interpreting the requirements of 'good faith', as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations" (3 Corbin, *Contracts* § 570, 1992 Supp. at 411).

Just such fundamental understanding, though [****19] unexpressed, was inherent in the relationship between plaintiff and defendant law firm (*see also, Wakefield v Northern Telecom*, 769 F2d 109, 112, *supra* ["Implied contractual obligations may coexist with express provisions which seemingly negate them where *common expectations or the relationship of the parties* as structured by the contract so dictate" (emphasis added))). Defendants, a firm of lawyers, hired plaintiff to practice law and this objective was the only basis for the employment relationship. Intrinsic to this relationship, of course, was the unstated [**110] [****757] but essential compact that in conducting the firm's [*638] legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.

From the foregoing, it is evident that both *Murphy* and *Sabetay* are markedly different. The defendants in those cases were large [****20] manufacturing concerns--not

law firms engaged with their employee in a common professional enterprise, as here. In neither *Murphy* nor *Sabetay* was the plaintiff required to act in a way that subverted the core purpose of the employment. The company rules underlying the firing of *Murphy* and *Sabetay* were not, as in this case, general rules of conduct and ethical standards governing both plaintiff and defendants in carrying out the sole aim of their joint enterprise, the practice of their profession (*see*, *Judiciary Law* § 90 [2]; *and see, e.g., Rules of App Div, 1st Dept* [22 NYCRR] § 603.2). Unlike *Murphy* and *Sabetay*, giving effect to an implied understanding--that in their common endeavor of providing legal services plaintiff and the firm would comply with the governing rules and standards and that the firm would not act in any way to impede or discourage plaintiff's compliance--would be "in aid and furtherance of [the central purpose] of the agreement of the parties" (*Murphy v American Home Prods. Corp.*, *supra*, at 304). Thus, the case is distinguishable from *Murphy* and *Sabetay* where giving effect to the implied obligation would [****21] have been "inconsistent with" and "destructive of" an elemental term in the agreement (*id.*, at 304-305). We conclude, therefore, that plaintiff has stated a valid claim for breach of contract based on an implied-in-law obligation in his relationship with defendants.

III.

Plaintiff argues, moreover, citing our decision in *Cohen v Lord, Day & Lord*³ (75 NY2d 95, 101), that the dictates of public policy in DR 1-103 (A) have such force as to warrant [*639] our recognition of the tort of abusive discharge pleaded in the fifth cause of action. While the arguments are persuasive and the circumstances here compelling, we have consistently held that "significant alteration of employment relationships, such as the plaintiff urges, is best left to the Legislature" (*Sabetay v Sterling Drug, supra*, at 336 [citing *Murphy v American Home Prods. Corp., supra*, at 301-302]). We believe that the same rationale applies here. In 1984, the Legislature enacted a "Whistleblower" statute (*Labor Law* § 740, added by L 1984, ch 660, § 2). We have noted that, although the present "statute has been criticized by commentators for not affording sufficient safeguards against [****22] retaliatory discharge (*see, Minda and Raab, Time for an Unjust Dismissal Statute in New York*, 54 Brooklyn L Rev 1137, 1138, 1182-1187 [1989]; Dworkin and Near, *Whistleblowing Statutes: Are They Working?*, 25 Amer Bus LJ 241, 253 [1987]), any

³ In *Cohen*, the Court held that a term in a law firm partnership agreement which conditions payment of earned but uncollected partnership revenues upon a withdrawing partner's refraining from

practicing law in competition with the firm restricts the practice of law in violation of DR 2-108 (A) and is, therefore, unenforceable as against public policy.

additional protection must come from the Legislature" (*Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801, 803).

Accordingly, the judgment [***758] appealed from and the order of the Appellate Division brought up for review should be modified, with costs to plaintiff, by denying defendant's motion to dismiss the fourth cause of action and, as so modified, affirmed. [***23]

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Sullivan v. Harnisch

Court of Appeals of New York

March 22, 2012, Argued; May 8, 2012, Decided

No. 82

Reporter

19 N.Y.3d 259 *; 969 N.E.2d 758 **; 946 N.Y.S.2d 540 ***; 2012 N.Y. LEXIS 984 ****; 2012 NY Slip Op 3574; 33 I.E.R. Cas. (BNA) 1451; 77 A.L.R. Fed. 2d 675; 2012 WL 1580602

Judges: Opinion by Judge Smith. Judges Graffeo, Read, Pigott and Jones concur. Chief Judge Lippman dissents in an opinion in which Judge Ciparick concurs.

Opinion by: Smith, J.

Opinion

[*261] [***541] [**759] Smith, J.

We held in *Murphy v American Home Prods. Corp.* (58 NY2d 293, 448 NE2d 86, 461 NYS2d 232 [1983]), and have several times reaffirmed, that New York common law does not recognize a cause of action [2] for the wrongful discharge of an at-will employee. We decline in this case to make an exception to that rule for the compliance officer of a hedge fund.

I

Plaintiff, Joseph Sullivan, was, according to his complaint, a 15% partner in two affiliated firms, defendants Peconic Partners LLC and Peconic Asset Managers LLC (collectively called Peconic, and colloquially referred to as a hedge fund). He was also, the complaint alleges, Peconic's "Executive Vice President, Treasurer, Secretary, Chief Operating Officer and Chief Compliance Officer." Defendant William Harnisch was the majority owner, Chief Executive Officer and President.

Sullivan was fired after a dispute with Harnisch. The dispute was in part about money: the complaint [****2] alleges that the dismissal occurred within hours after a lawyer for Sullivan contacted Peconic's counsel to voice objections to a proposed agreement that would have eliminated Sullivan's ownership interest. The complaint also alleges, however, that there was another motive for the dismissal that is more relevant to this appeal: objections raised by Sullivan, in his capacity as Chief [*262] Compliance

Officer, to certain sales of stock by Harnisch for his personal account and the accounts of members of his family.

According to the complaint, these stock sales amounted to "front-running"--selling in anticipation of transactions by the firm's clients--and enabled Harnisch to take advantage of an opportunity from which the clients were excluded. The complaint alleges that Sullivan "confronted" Harnisch about these improper trades, "voiced objection to them, and insisted that they be reversed or otherwise properly addressed." Harnisch refused, and yelled at Sullivan for raising the subject. Sullivan was fired days later.

Sullivan asserted nine causes of action against Harnisch and Peconic, of which only one is now before us. That claim says that Sullivan was fired because he "spoke out" about "manipulative [****3] and deceptive trading practices," and that his dismissal violated "a company policy to prohibit retaliation" for such conduct. The complaint, however, does not identify any statement of this "company policy"; it infers the existence of the policy from Peconic's obligations under the securities laws and the firm's own Code of Ethics to avoid improper transactions, and from Sullivan's duty as Chief Compliance Officer to see that those obligations were performed. The gist of Sullivan's claim is that the legal and ethical duties of a securities firm and its compliance officer justify recognizing a cause of action for damages when the compliance officer is fired for objecting to misconduct.

On defendants' motion for summary judgment, Supreme Court held this claim to be legally sufficient, but the Appellate Division reversed and dismissed the claim (*Sullivan v Harnisch*, 81 AD3d 117, 915 NYS2d 514 [1st Dept 2010]). The Appellate Division granted leave to appeal, and we now affirm. [3]

[***542] [**760] II

Murphy held that, absent violation of a constitutional

requirement, statute or contract, "an employer's right at any time to terminate an employment at will remains unimpaired" (58 NY2d at 305). In *Murphy*, we applied that rule [****4] to dismiss the claim of a plaintiff who said he was fired "because of his disclosure to top management of alleged accounting improprieties on the part of corporate personnel" (*id.* at 297-298). We reached similar results in *Sabetay v Sterling Drug* (69 NY2d 329, 332, 506 NE2d 919, 514 NYS2d 209 [1987]), where the plaintiff claimed "that he was discharged because he refused to participate" in illegal conduct [*263] including "tax avoidance schemes and maintenance of slush funds," and in *Horn v New York Times* (100 NY2d 85, 790 NE2d 753, 760 NYS2d 378 [2003]), where a doctor claimed that she was fired for refusing to violate patient confidentiality. Plaintiff's claim here is also barred unless something in this case justifies an exception to the rule we stated in *Murphy*.

In general, as we pointed out in *Horn*, American courts, including our own, "have proved chary of creating common-law exceptions to the rule and reluctant to expand any exceptions once fashioned" (*id.* at 91). Indeed, we have recognized an exception only once, in *Wieder v Skala* (80 NY2d 628, 609 NE2d 105, 593 NYS2d 752 [1992]). The plaintiff in *Wieder* was a lawyer who claimed to have been dismissed by his law firm "because of his insistence that the firm comply with the governing disciplinary rules by reporting [****5] professional misconduct" committed by one of the plaintiff's colleagues (*id.* at 631). We held his claim good against a motion to dismiss, in an opinion that stressed both the ethical obligations of members of the bar and the importance of those obligations to the employment relationship between a lawyer and a law firm. We said:

"[P]laintiff'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. . . . [P]laintiff'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 [****6] the profession" [4] (80 NY2d at 635-636).

We also referred in the *Wieder* opinion to "the unique function of self-regulation belonging to the legal profession" (*id.* at 636), and said that

"these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the [*264] 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*" (*id.* at 637).

It is obvious from the quoted language that we intended the exception to the at-will doctrine we recognized in *Wieder* to be a narrow one. The Appellate Division in [***543] [**761] this case said that *Wieder* is "sui generis" (81 AD3d at 123), but we do not need to go that far to decide this case. Assuming that there are some employment relationships, other than those between a lawyer and a law firm, that might fit within the *Wieder* exception, the relationship in this case is not one of them.

Sullivan stresses the importance of compliance officers in the overall scheme of federal securities regulation to which the two Peconic firms, registered investment advisers, are subject. The Securities and Exchange Commission (SEC) has found that "it is critically [****7] important for funds and advisers to have strong systems of controls in place" (Final Rule: Compliance Programs of Investment Companies and Investment Advisers, SEC Release Nos. IA-2204, IC-26299, § I, available at <http://www.sec.gov/rules/final/ia-2204.htm>), and requires each registered adviser to designate a chief compliance officer who will be responsible for administering policies and procedures designed to prevent violations of federal law and regulations (17 CFR 275.206 [4]-7 [a], [c]). From this, Sullivan reasons that compliance with securities laws was central to his relationship with Peconic in the same way that ethical behavior as a lawyer was central in *Wieder* to the plaintiff's employment at a law firm. But the analogy fails.

Important as regulatory compliance is, it cannot be said of Sullivan, as we said of the plaintiff in *Wieder*, that his regulatory and ethical obligations and his duties as an employee "were so closely linked as to be incapable of separation" (*Wieder*, 80 NY2d at 635). Sullivan was not associated with other compliance officers in a firm where all were subject to self-regulation as members of a common profession. Indeed, Sullivan was not even a full-time compliance officer. He had four other titles at Peconic, [****8] including Executive Vice-President

and Chief Operating Officer, and was, according to his claim, a 15% partner in the business. It is simply not true that regulatory compliance, in the words of *Wieder*, "was at the very core and, indeed, the only purpose" of Sullivan's employment. [5]

[*265] It is beyond dispute that compliance with extensive federal regulations--overseen, at firms like Peconic, by compliance officers--is an integral part of the securities business. But the existence of federal regulation furnishes no reason to make state common law governing the employer-employee relationship more intrusive. Congress can regulate that relationship itself, to the extent that it thinks the objectives of federal law require it. Indeed, after the events involved in this case, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub L 111-203, 124 Stat 1376 [2010], codified at various sections of United States Code), which provides whistleblower protection, including a private right of action for double back pay, for employees who are fired for furnishing information about violations of the securities laws to the SEC (Dodd-Frank Act § 922 [a], 15 USC § 78u-6). That statute [****9] seems not to apply to conduct like that alleged in Sullivan's complaint; Sullivan does not claim to have blown a whistle--i.e., to have told the SEC or anyone else outside Peconic about Harnisch's alleged misconduct--but only to have confronted Harnisch himself. Nothing in federal law persuades us that we should change our own law to create a remedy where Congress did not.

Accordingly, the order of the Appellate Division should be affirmed with costs, and the certified question answered in the affirmative.

Dissent by: LIPPMAN

Dissent

[***544] [**762] LIPPMAN, Chief Judge (dissenting). In the wake of the devastation caused by fraudulent financial schemes—such as the Madoff ponzi operation, infamous for many reasons including the length of time during which it continued undetected—the courts can ill afford to turn a blind eye to the potential for abuses that may be committed by unscrupulous financial services

companies in violation of the public trust and the law. In the absence of conscientious efforts by those insiders entrusted to report and prevent such abuses of investors, such behavior can run rampant until a third party outside the company discovers it and takes action. The message that will be taken from the majority's [****10] decision is self-evident: if compliance officers (and others similarly situated) wish to keep their jobs, they should keep their heads down and ignore good-faith suspicions or evidence they may have that their employers have engaged in illegal and unethical behavior, even where such violations could cause or have caused staggering losses to their employers' clients. The majority's conclusion that an investment adviser like defendant Peconic has every right to fire its compliance officer, simply for [*266] doing his job, flies in the face of what we have learned from the Madoff debacle, runs counter to the letter and spirit of this Court's precedent, and facilitates the perpetration of frauds on the public.

Because the majority unduly narrows the scope of a purposefully and carefully crafted exception to the doctrine of at-will employment, and unfathomably permits the termination of a hedge fund's chief and deputy chief compliance officers in the midst of their investigation of the CEO's allegedly "manipulative and deceptive trade practices that include[d] [6] illegal 'front-running' in violation of federal and state securities laws,"¹ I respectfully dissent.

The majority concedes that "there are some employment relationships, other than those between a lawyer and a law firm, that might fit within the *Wieder* exception," (majority op at 264), but erroneously concludes that such a relationship did not exist in this case. Nevertheless, the decision of the Court undermines the exception to the at-will employment doctrine (as recognized in *Wieder v*

Skala, 80 NY2d 628, 609 NE2d 105, 593 NYS2d 752 [1992], and reaffirmed in *Horn v New York Times*, 100 NY2d 85, 790 NE2d 753, 760 NYS2d 378 [2003]), by excluding arbitrarily hedge fund compliance officers from the protections extended to lawyers working in law firms. In so doing, hedge fund managers are given [****12] carte blanche to terminate the very employees who are charged with the critical statutorily

complaint alleges that by making these trades, Harnisch violated a provision in the code of ethics prohibiting Peconic from "taking advantage of investment opportunities belonging to a client without recommending or effecting a suitable transaction in that security for the client."

¹ This allegation is included in Sullivan's [****11] complaint. Sullivan also alleges that he relied on and was bound by Peconic's internal code of ethics when he "refus[ed] to engage in securities violations" and instead chose to speak out about certain trades he alleges were "improper [and] apparently illegal." Specifically, the

mandated role² of ensuring adherence to ethical and legal obligations, for doing the jobs they were hired to do. These protections must exist not only to decrease the likelihood that such employees will succumb to pressures to ignore or violate their obligations for fear of termination, but also to protect the public.

[***545] [**763] Our decisions in *Wieder* and *Horn* provide guideposts for determining whether an employment relationship falls within [*267] the exception to the general rule³ As applied to plaintiff [7] Sullivan, chief among these considerations are that his sole function as compliance officer was to ensure compliance with the applicable internal and external ethical and legal requirements, his employer was bound by the same obligations, and his job as a compliance officer entailed fundamental self-regulatory functions.

In *Wieder*, we held that the plaintiff law firm associate's "central professional purpose" for associating with the employer was "the lawful and ethical practice of law" (*Wieder*, 80 NY2d at 636). Sullivan's central purpose as a compliance officer was to ensure that his employer adhered to the regulations governing hedge funds. In other words, it was Sullivan's responsibility to make certain that Peconic engaged in the lawful and ethical provision of investment adviser services.

As the Supreme Court correctly reasoned below in this case, "Sullivan and [Peconic] were engaged in a 'common professional enterprise' and 'were mutually bound to follow' both the Code [of Ethics] and any federal or state securities [****14] laws at issue." Sullivan's position is comparable to that of the plaintiff lawyer in *Wieder* and in stark contrast to that of the plaintiff doctor in *Horn*, who was not covered by the *Wieder* exception, in part because while as a physician she had certain obligations to the New York Times employees with whom she interacted, those obligations were not shared by her non-medical employer. Here, Sullivan and his employer shared certain fundamental ethical and legal responsibilities that they were bound to respect in their dealings with and on behalf of Peconic's clients.

Just as the plaintiff in *Wieder* was engaged in a self-regulating profession, the practice of law, Sullivan's job

responsibilities at Peconic involved substantial self-regulatory aspects. This was not the case in *Horn*, wherein the Court held that "the principle of physician-patient confidentiality . . . is not a self-policing rule critical to professional self-regulation" (100 NY2d at 96).

[*268] The majority attempts to distinguish this case from *Wieder*. However, the purportedly material distinctions identified fail to appropriately take into account the principles we expounded upon in *Wieder*. The Court erroneously finds it to be [****15] relevant that Sullivan "had four other titles at Peconic" (majority op at 264). That is not a logical basis upon which to justify the different treatment of the plaintiff in *Wieder* as compared to Sullivan. If that were a valid distinction, then an unscrupulous employer wishing to avoid the application of the *Wieder* exception in a case in which it would otherwise apply would shield itself by giving any person potentially subject to the exception additional job titles and/or functions. Nothing in *Wieder* [8] suggests that we intended to create such a loophole. [***546] [**764] That said, where an employee is merely peripherally responsible for informing his or her employer (or others) of violations of certain obligations, that person is unlikely to be covered by the *Wieder* exception. This is not such a case. Within Sullivan's role as a compliance officer, his sole duty was to ensure compliance with the applicable provisions of law and ethical rules and Peconic was also bound to adhere to the same rules in providing services to its clients. And, of course, in order to succeed, plaintiff would have to prove that he was terminated due to his actions as Chief Compliance Officer, not in some other capacity at Peconic.

Perhaps [****16] the majority's emphasis on Sullivan's multiple roles is drawn from the language of our decision in *Horn*, where we implicitly recognized that the plaintiff doctor's primary job function was not the ethical and lawful provision of medical treatment to New York Times employees, but rather that her main role was to "apply[] her professional expertise in furtherance of her responsibilities as a part of corporate management" (100 NY2d at 95). However, it cannot similarly be said that Sullivan's primary role as Chief Compliance Officer was anything other than to ensure the ethical and lawful

² Pursuant to 17 CFR 275.206 (4)-7 (a),(c), a registered investment adviser must designate a Chief Compliance Officer.

³ It is noteworthy that in *Wieder*, we were cognizant of the problems inherent in a contractual relationship wherein a person requires another to carry out certain tasks and then [****13] proceeds to prevent that person from completing those duties: "when A and B

agree that B will do something it is understood that A will not prevent B from doing it. The concept is rooted in notions of common sense and fairness" (*Wieder*, 80 NY2d at 637). We found that "[j]ust such fundamental understanding, though unexpressed, was inherent in the relationship between plaintiff and defendant law firm" (*id.*). That is no less true of the relationship between a compliance officer and a hedge fund.

provision of investment adviser services. In *Horn*, we noted that "Horn was employed as the Associate Medical Director of the Times' in-house Medical Department, where whatever medical care and treatment she rendered was provided only to fellow employees and only as directed by her employer" and that she alleged that she was responsible for determining whether "injuries suffered by Times employees were work-related, thus making the employees eligible for Worker's Compensation payments" (*Horn*, 100 NY2d at 95 [internal quotation marks omitted]). We found [*269] that "[w]hen Horn made assessments as to whether a [****17] Times employee had suffered a work-related illness or injury, she was surely calling upon her knowledge as a physician, but not just for the benefit of the employee" (*id.*). Here the Chief Compliance Officer position was created in order to protect Peconic's clients from ethical and legal violations. Additionally, Peconic had the same responsibility to its clients as did Sullivan. In *Horn*, the New York Times may have had certain responsibilities to its employees, but it was not a provider of medical services and it was therefore not subject to the same rules and regulations governing the relationship between physicians and patients.

Much is made of the fact that Sullivan was not a member of a firm of compliance officers (*see* majority op at 264), leading to the erroneous conclusion that he was not situated similarly to the plaintiff in *Wieder*, who was an attorney working for a firm of attorneys. The plaintiff in *Wieder* was an employee of a business that represented clients and was bound to follow certain stringent legal and ethical rules. Similarly, Sullivan was an employee of a business that was subject to certain legal and ethical obligations to its clients and his reason for being, as [****18] a compliance officer, was to ensure that in providing services to those clients, those rules were followed at all times. [9]

The majority suggests that, going forward, employees in Sullivan's position can look to federal whistleblower protections. But the common law should protect compliance officers from retaliatory termination from the inception of their investigations into suspected wrongdoing, even before they make any reports to the government, without the need for recourse to federal statutes or, for that matter, to state statutes.

[***547] [**765] The Court's decision concludes that "[n]othing in federal law persuades us that we should change our own law to create a remedy where Congress did not" (majority op at 265). The clear implication of this statement is that in order for hedge fund compliance officers to be entitled to the same protections as attorneys working in law firms, these protections must be conferred

by statute. This approach creates a problem for legislators to solve where none existed previously. Prior to today, it was unnecessary for either Congress or this State's Legislature to create a new rule to protect employees like Sullivan. The at-will employment doctrine and the *Wieder* [****19] exception, both of which are creatures of common law, provide clear guidance. Rather than alluding to the possible creation of a new statutory remedy, this Court should instead properly apply *Wieder*.

[*270] The majority unwisely limits the exception to the at-will employment doctrine that we identified in *Wieder*. In so doing, it creates a great potential for abuse in the financial services industry. I respectfully dissent and would reinstate the second cause of action in the complaint.

Judges Graffeo, Read, Pigott and Jones concur with Judge Smith; Chief Judge Lippman dissents in a separate opinion in which Judge Ciparick concurs.

Order affirmed, etc.

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