THE EMPLOYMENT AT WILL DOCTRINE IS ALIVE AND WELL IN NEW YORK

by Paul T. Shoemaker

The basic principle of employment law in the United States is that employment is "at will". This rule means 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 Products Corp., 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235 (1983).

Under the laws of the State of New York, and of most states, "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." Murphy, supra, 58 N.Y.2d at 305, 461 N.Y.S.2d at 237.

The Murphy case was decided in 1983, at a time when many voices were calling for expansion of the rights of employees and liberalization of the laws in general to favor the rights of individuals and to make them more readily enforceable. The New York State Court of Appeals declined, however, to liberalize the established law regarding employment at will. Instead, the Court of Appeals reaffirmed the existing principle and stated that it was the province of the Legislature, not of the Court, to evaluate the relevant considerations and make a change in the "at will" nature of employment, if it chose to do so.

The exceptions to employment at will to which the Court of Appeals referred can be significant. They include cases where a statute proscribes discrimination or where there is a limitation in a

contract of employment (such as a collective bargaining agreement) on the right of the employer to terminate an employee. Many employees in many situations are protected by statutory or contract rights. In addition, government employees enjoy the protection of the civil service laws. Many states also have "whistleblower" statutes which limit the right of an employer to terminate an employee because the employee disclosed information about the employer's misdeeds.

Nevertheless, despite the scope of the exceptions, most employees are subject to termination "at will".

This rule contrasts with the rule applicable in other countries, where an employer is not free to terminate an employee at any time for any reason or for no reason. It is sometimes said that this makes it easier to do business in the United States and reduces the burdens on the exercise of free enterprise. Of course, in today's world, the burden of "at will" employment clearly falls more severely on the employee than it does on the employer.

Sometimes it's said that the doctrine is appropriate because it is a "two-way street" in the sense that the employer is free to fire the employee at any time and the employee is free to leave the employment at any time. Again, however, in the real world, where unemployment is high and finding a new job can be difficult, that does not strike most people as an equal trade off.

Subsequent to the decision of the Court of Appeals in the Murphy case, there have been numerous attempts by plaintiffs to get the courts in New York to create other exceptions to the employment at will doctrine, but most of them have failed.

In 1992, however, the Court of Appeals did rule that a law firm associate who alleged that he was fired for insisting that his firm comply with the rules governing the conduct of attorneys had a valid claim for wrongful termination of his employment. Wieder v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992).

The Court of Appeals stated that it was intrinsic to the relationship between an attorney and his law firm that, in conducting the firm's legal practice, both the attorney and the firm would do so in compliance with prevailing rules of conduct and professional ethical standards. The Court of Appeals placed particular significance on the fact that the Code of Professional Responsibility requires lawyers to report instances of misconduct which come to their attention. The plaintiff in the Wieder case alleged that he had been fired because he had reported lawyer misconduct which violated the Code of Professional Responsibility.

The Court of Appeals cited the unique nature of the legal profession and the reporting requirement, and concluded that it would be in aid and furtherance of the central purpose of the agreement of the parties to find that the employer law firm could not terminate the employment of the associate because of his actions in compliance with governing ethical standards.

When, however, the Court of Appeals recently was asked to extend that holding to cover the compliance officer of a hedge fund who alleged that he had been fired because he complained about improper stock trades that benefited the owner of the hedge fund, the Court of Appeals declined to do so. Sullivan v. Harnisch, 19 N.Y.3d 259, 946 N.Y.S.2d 540 (2012).

The Sullivan Court attempted to distinguish its reasoning in the Wieder case, but it is not at all clear that the two situations are distinguishable in any meaningful way.

In Sullivan, the Court of Appeals held that compliance with the securities laws, and the reporting of violations, was not central to the functioning of the hedge fund in the same way that compliance with the ethical standards for lawyers was central to the practice of law. There does not appear, however, to be any logic to this distinction. Persons engaged in the securities industry are subject to requirements of reporting violations which come to their attention.

Moreover, the Court of Appeals in Sullivan sought to distinguish that case from the Wieder case on the grounds that the compliance officer had many functions whereas a lawyer always functions as a lawyer. As the dissent by Chief Judge Lippman in Sullivan noted, that is not an appropriate basis on which to make a distinction. If such a distinction were permitted, an unscrupulous employer could simply give any person potentially subject to the Wieder exception additional job titles and/or functions, thereby opening up a loophole which would permit the Wieder exception to be defeated.

For the time being, the Wieder holding continues to be a narrow exception to employment at will. The much more substantial exceptions are those mentioned above (statutory or contractual rights). In any case of termination, whether one is the employer or the employee, one needs to evaluate all of the possible exceptions in deciding on the best course of action – that is, for the employer, whether and how to terminate the employee and, for the employee, whether and how to contest the termination.

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