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## EMPLOYMENT LAW

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### A Niche Within a Niche

Handling employment claims involving attorneys

**A**n attorney is general counsel at the BIG corporation. He was asked by the CEO to head a team to review issues involving BIG's environmental compliance at its New Jersey facilities. He wrote a confidential memo to BIG's Chief Operating Officer addressing several violations of state and federal environmental regulations. In the memo, he criticizes the company's environmental practices and recommends that the company immediately remediate these environmental problems. The remediation, however, will cost BIG millions of dollars. The attorney was severely chastised for writing the memo and claims that he was ultimately fired for it. The attorney wants to retain you to prosecute a whistleblower claim on his behalf.

Another attorney has been a partner in a medium size law firm for the past 25 years. He has a history of alcoholism and just disclosed to some of his partners that he has been attending a rehab program for the past six months, but claims that he is "off the bottle."

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Recently, friction grew between the attorney and some of his partners over the manner in which he handled a number of matters for important firm clients. As a result, the firm voted to expel him. He wants to retain you because he believes his disability is what motivated the firm to terminate him.

It is always a compliment when a fellow attorney or law firm retains your services. However, before taking on either of the above matters, whether for the attorney or the employer, recognize that, over the past quarter century, employment law has developed into a niche practice area requiring particular expertise. Handling employment claims involving counsel is even more specialized.

#### Privileged Communications

The above hypotheticals are typical of fact patterns involving counsel as litigants. With regard to the first example, where an in-house counsel seeks legal protection as a whistleblower, there is a split in the law. Most jurisdictions, including New Jersey, have held that in-house attorneys have standing to prosecute whistleblower and wrongful discharge claims against their former employers. In these cases, the critical issue often becomes to what extent the former in-house attorney may use infor-

mation protected by the attorney-client privilege to support such claims against his or her employer.

In *Parker v. M&T Chemicals, Inc.*, 236 N.J. Super. 451 (App. Div. 1989), a former in-house attorney brought suit against M&T and his supervisors under the New Jersey Conscientious Employee Protection Act (CEPA), alleging that he was demoted and ultimately constructively discharged because of his objections to the company's theft of trade secrets from a competitor sanctioned by his superiors. The employer moved to dismiss the action claiming an implied exemption from CEPA because plaintiff was employed as an in-house attorney. Defendants alleged that the professional relationship between a company and its in-house counsel would be compromised if CEPA applied to in-house attorneys. See *id.* at 458. The Appellate Division ruled against the employer, holding that in-house attorneys have standing under CEPA. It found "no constitutional or practical necessity to declare [CEPA] unconstitutional insofar as an in-house attorney's claims for money damages and fees arising from wrongful retaliation during the in-house employment relationship are concerned." *Id.* at 463.

The Appellate Division in *Parker* also rejected the employer's contention that disclosure of confidential communications "inherently conflicts with the assertion of a claim under [CEPA] and that entertaining such a cause of action is somehow inimicable to the healthy subsistence of attorney-client relationships in general." *Id.* at 462. The *Parker*

court noted that under N.J.S.A. 2A:84A-20(2)(a) and relevant New Jersey case law, the attorney-client privilege does not protect communications in aid of a commission of a crime or fraud. The Appellate Division, however, did not decide the scope or extent of the disclosure of privileged communications, holding that these issues must be resolved by the trial court on a case-by-case basis. See *id.* at 463.

In *Kachmar v. Sunguard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997), a former in-house attorney sued her employer for sex discrimination and retaliatory discharge under Title VII, alleging that Sunguard terminated her for "feminist campaigning" on behalf of female employees in a number of instances. As in *Parker*, the employer in *Kachmar* argued that the claims should be dismissed because they would implicate attorney-client privileged communications and other confidential information relating to the in-house attorney's representation of the company. There, the Third Circuit Court of Appeals held that in lawsuits brought by in-house counsel, concerns about the disclosure of client confidences alone would not warrant dismissal of the in-house attorney's action. See *id.* at 181. The court balanced the need to protect client confidences with the in-house attorney's right to pursue her claims, recognizing that a trial court may use a number of devices at its disposal (i.e., sealing, protective orders and in camera proceedings) to permit the in-house attorney to submit the necessary proofs while restricting the unnecessary disclosure of client confidences. See *id.* at 182.

In short, the case law in New Jersey supports the prosecution of whistleblower and discrimination claims by in-house counsel, although counsel's use of privileged information to prove their claims will be determined on a case-by-case basis. This should be contrasted with seminal cases in several jurisdictions, such as California, Massachusetts and Texas, where it has been held that these claims may only be maintained if the claims can be proven without breaching the attorney-client privilege.

See *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994); *GTE Prod. Corp. v. Stewart*, 653 N.E. 161 (Mass. 1995); *Willy v. Coastal States Mgt. Co.*, 939 S.W.2d 193 (Tx. Ct. App. 1997).

#### Partners In Name Only

An attorney in a private firm may be precluded from asserting discrimination and other statutory claims against his or her former firm for another reason. If the attorney is a shareholder or partner in the firm, the attorney may be considered to be the "employer" under the employment statute in question.

There are no reported New Jersey state court decisions involving a law firm partner's ability to sue under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq. Based on reported decisions in other jurisdictions, however, the courts in this state will likely examine the structure of the firm's partnership, as well as the economic realities of being a partner in that specific firm when determining whether the plaintiff is an "employee" or "employer" for purposes of the NJLAD.

In *Hull v. Rose, Schmidt, Hasley & Disalle P.C.*, 700 A.2d 996 (Pa. Sup. Ct. 1997), a former law firm partner brought a disability claim (alcoholism) under the Pennsylvania Human Relations Act (PHRA), against the firm and its individual members after they voted to expel him. Like the NJLAD, the PHRA is silent with regard to whether a law firm partner is considered an "employee" or "employer" under the statute. *Id.* at 999. In *Hull*, the court found that plaintiff shared in the firm's profits, contributed capital to the firm, managed and controlled significant portions of its business, generated new business and was potentially liable for the firm's debts. These attributes, the court concluded, are commonly associated with the term "employer" and, therefore, found that plaintiff was ineligible to seek relief under the PHRA.

Realizing that not all law firm partners or shareholders are equal and that

some have no management powers, especially in larger firms which could have hundreds of members, some courts have recently held that an individual who might be classified as a partner under state partnership laws may still be classified as an "employee" under antidiscrimination statutes. Therefore, partners who are far from the center of power at their firm can take some solace. They may be entitled to sue if they suffer employment discrimination.

In *Simpson v. Ernst & Young*, 850 F.Supp. 648 (S.D. Ohio 1994), plaintiff, although technically one of the accounting firm's 2,200 partners, had little say in how the firm was run. Simpson had no role in hiring, firing or compensation decisions. He also had no share of the accounting firm's profits and didn't vote to elect its management committee. Simpson alleged that Ernst & Young fired him to make room for younger partners and to avoid paying pension benefits. After a federal judge concluded that Simpson was no different than an ordinary employee, a jury found in his favor. The Sixth Circuit affirmed, 100 F.3d 436 (6th Cir. 1996), and, despite the urging of 16 major law firms, the Supreme Court refused to disturb the ruling.

In a more recent decision, *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), the Seventh Circuit permitted the United States Equal Employment Opportunity Commission to conduct discovery with regard to whether 32 demoted partners in the law firm of Sidley Austin were "employees" within the meaning of the federal Age Discrimination in Employment Act (ADEA). There, the court determined that partners are not always "employers," noting that the Sidley Austin firm consisted of more than 500 partners yet all of the management powers were in the hands of a small, unelected and self-perpetuating executive committee. See *id.* at 703. Comparing the 32 demoted partners to executive-level employees in large corporations, the Seventh Circuit said the fact that the partners served administrative functions did not distin-

guish them from corporate executives.

Corporations have committees and the members of the committees are employees; this does not make them employers. Nor are the members of the committees on which the 32 served elected; they are appointed by the executive committee. The 32 own some of the firm's capital, but executive-level employees often own

stock in their corporations. *Id.* at 703.

While the court, however, held it was premature to conclude that the 32 demoted Sidley Austin partners were, in fact, employees within the meaning of the age discrimination laws, it found that there was enough doubt about whether they should be considered the "employer" under the ADEA to entitle the EEOC to conduct discovery on the issue. See *id.* at 707.

Law firms and other professional organizations are closely watching the EEOC's action to see whether the court ultimately finds that the Sidley partners are "employees" for coverage purposes under the ADEA. One thing is certain, however. Law firms which concentrate power in a few partners while holding out other partners in name only (by giving them no say in management, compensating them like the staff, etc.), currently face potential exposure under the antidiscrimination laws. ■