

## New York Court of Appeals Creates an Exception to Employment At-Will Doctrine for Attorneys Who Blow the Whistle on Unethical Colleagues

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*New York Court of Appeals creates an exception to employment at-will doctrine for attorneys who blow the whistle on unethical colleagues*

For almost a century, New York courts have adhered to the common-law doctrine of at-will employment.<sup>1</sup> This doctrine presumes an employment relationship to be terminable by either party, for any reason, at any time, leaving the employee with no legal redress against the employer for wrongful discharge.<sup>2</sup> State courts in many jurisdictions have fashioned various contract and tort law exceptions to this rule, such as the public policy exception,<sup>3</sup> the implied contract exception,<sup>4</sup> the covenant of good faith

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<sup>1</sup> See *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895). *Martin* was the seminal employment at-will decision in New York. *Id.* In holding that the plaintiff's hiring was at-will and terminable at any time by the defendant employer, the court stated: "[T]he 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." *Id.* (citing HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT ¶ 134 (2d ed. 1877)). See generally Peter S. Partee, *Special Project: Reversing the Presumption of Employment At Will*, 44 VAND. L. REV. 689, 690 (1991) (discussing origin of at-will employment doctrine).

<sup>2</sup> See, e.g., *Parker v. Borock*, 5 N.Y.2d 156, 159, 156 N.E.2d 297, 298, 182 N.Y.S.2d 577, 579 (1959) (discharging employee from employment at-will would not give rise to cause of action for breach of contract); *Arentz v. Morse Dry Dock and Repair Co.*, 249 N.Y. 439, 444, 164 N.E. 342, 344 (1928) (using phrase "permanent employment" at time of hiring does not create obligation to employ plaintiff beyond time which defendant has use for plaintiff's services); *Martin*, 148 N.Y. at 121, 42 N.E. at 417 ("[H]iring of the plaintiff was a hiring at-will and the defendant was at liberty to terminate the same at any time."); *Grozek v. Ragu Foods, Inc.*, 63 A.D.2d 858, 858, 406 N.Y.S.2d 213, 214 (4th Dep't 1978) (stating that employee without term agreement may be discharged at any time, with or without cause); *Chase v. United Hosp.*, 60 A.D.2d 558, 559, 400 N.Y.S.2d 343, 344 (1st Dep't 1977) (finding letter of employment without fixed term gave employer right to discharge employee at any time); see also Partee, *supra* note 1, at 690 (estimating that "up to seventy-five million employees are subject to this harsh dismissal standard").

<sup>3</sup> The public policy exception, adopted by a majority of the states, allows an at-will employee to maintain a tort or contract action against his employer for discharge that contravenes public policy. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936 (1983) ("[E]stablishing a claim under this doctrine requires that a 'clearly defined and well-established public policy' be threatened by the defendant's action." (quoting *Ward v. Frito-Lay, Inc.*, 290 N.W.2d 536, 538 (Wis. Ct. App. 1980))); see also Partee, *supra* note 1, at 693-99; Susan Topper Travis, *Abusive-Discharge Cases to Test Common-Law Rule*, N.Y.L.J., Sept. 24, 1982, at 1; see, e.g., *Peterman v. International Board of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959) (holding discharge of at-will employee because of his refusal to commit perjury was illegal and against state policy).

and fair dealing exception,<sup>5</sup> as well as statutory exceptions.<sup>6</sup> In 1982, in *Weiner v. McGraw Hill, Inc.*, the New York Court of Appeals recognized the implied contract exception to the at-will doc-

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New York has rejected the public policy exception on the grounds that the legislature, not the judiciary, should bear responsibility for reforming the at-will doctrine. See, e.g., *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 336, 506 N.E.2d 919, 923, 514 N.Y.S.2d 209, 213 (1987) ("[S]ignificant alteration of employment relationships . . . is best left to the Legislature."); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 302, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232, 236 (1983) ("If the rule of nonliability for termination of an at-will employment is to be tempered, it should be accomplished through a principled statutory scheme [not judicial intervention].").

<sup>4</sup> See *Partee*, *supra* note 1, at 697-98. Under this exception, certain types of employer conduct or statements are held to create an implied promise of tenure, which may rise to the level of contractual obligations. *Id.* Courts have found this exception to exist when assurances have been placed in employee manuals stating that an employee would not be fired except for good reason, or when employees are able to show detrimental reliance to support an inference of intent to create job security. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980) (holding that policy statements in employee handbook give rise to implied contractual rights). *But cf.* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816, 1820 (1980) [hereinafter *Wrongful Discharge*] (noting that courts are generally reluctant to find such implied assurances).

<sup>5</sup> See *Wrongful Discharge*, *supra* note 4, at 1821. Some courts recognize an employer obligation not to discharge in bad faith, or imply a contractual duty to terminate only in good faith. *Id.* This implied covenant is the broadest exception to the at-will doctrine and has been rejected by a majority of jurisdictions on grounds that it will unreasonably restrict an employer's right to terminate employment. See, e.g., *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (1980) (holding that after 18 years of service employer could not fire employee and deny him benefits without good cause); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (holding cause of action existed under covenant of good faith and fair dealing exception where employer fired employee to avoid paying large commission); see also *Partee*, *supra* note 1, at 698.

<sup>6</sup> See, e.g., N.Y. LAB. LAW § 740(2)(a) (McKinney 1993). The Whistleblower Statute, promulgated in 1984, prohibits retaliatory discharge of employees who report illegal activities of their employers. *Id.* This law, however, protects only those employees who report "violation[s] of law, rule or regulation." *Id.* Moreover, coverage is limited to those violations which pose "a substantial and specific danger to the public health or safety." *Id.*; *Remba v. Federation Employment and Guidance Serv.*, 149 A.D.2d 131, 134, 545 N.Y.S.2d 140, 142 (1st Dep't 1989) (ruling that white-collar crime and fraudulent billing not covered by statute because they do not present danger to public health); *Liebowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dep't 1989) (holding that forced resignation for reporting employer's allegedly fraudulent activity does not meet requirements of "Whistleblower Statute"); see also N.Y. LAB. LAW § 740 *Primary Objectives* (statute covers situations in which employee notices dangerous health hazard at workplace, reports it to authorities, and is later fired for doing so); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1143 (1989) (statute affords protection only in restricted set of circumstances, and has little, if any, effect in protecting at-will employees against retaliatory discharge). Ten states have enacted Whistleblower statutes. *Partee*, *supra* note 1, at 701 n.92.

trine.<sup>7</sup> Subsequent cases, however, have construed the *Weiner* exception extremely narrowly, confining its application to factually identical situations.<sup>8</sup> Moreover, in 1983, the Court of Appeals unequivocally restated its adherence to the at-will doctrine by announcing that “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.”<sup>9</sup> In the wake of

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<sup>7</sup> 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). The court listed four factors that created the implied contract exception: (1) plaintiff was induced to join the company with oral assurances of discharge for just cause only; (2) this assurance was written in the employee handbook; (3) detrimental reliance in plaintiff’s rejection of other offers of employment; (4) the company’s repeated instructions to proceed in strict compliance with the personnel handbook by firing subordinates for just cause only. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. The court stated that neither the “subjective 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 trying to attain’” would determine whether the presumption of at-will employment had been overcome. *Id.* at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (quoting *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1977)).

<sup>8</sup> See *Minda & Raab*, *supra* note 6, at 1144-46 (detailing strict, post-*Weiner* enforcement of at-will employment doctrine by New York judiciary). By rigorously insisting that all facts fit within the unique “four factors” listed in the *Weiner* decision, New York courts have stripped the *Weiner* exception of all effect. See, e.g., *Wexler v. Newsweek, Inc.*, 109 A.D.2d 714, 715, 487 N.Y.S.2d 330, 331 (1st Dep’t 1985) (finding policy in employee manual not enough to sustain cause of action for breach of contract because facts not identical to those of *Weiner*); *Rizzo v. International Bd. of Teamsters, Local 237*, 109 A.D.2d 639, 641, 486 N.Y.S.2d 220, 221 (1st Dep’t 1985) (insisting plaintiff comply with “operative facts” of *Weiner* before she could bring action for breach of implied contract); *Citera v. Chemical Bank*, 105 A.D.2d 636, 637, 481 N.Y.S.2d 694, 696 (1st Dep’t 1984) (stating “general policy statements and supervisory guidelines” in defendant’s manual not enough to imply obligation of just cause firing).

<sup>9</sup> *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 305, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983). In *Murphy*, the plaintiff was discharged after 23 years of service because he disclosed accounting improprieties. *Id.* The court was urged to recognize the public policy and the implied covenant of good faith exceptions to the at-will doctrine. *Id.* at 299-300, 448 N.E.2d at 88-89, 461 N.Y.S.2d at 234-36. The court rejected the public policy argument on the grounds that New York law does not recognize the tort of abusive discharge and that the legislature is best suited to reform the law. *Id.* at 299, 448 N.E.2d at 88, 461 N.Y.S.2d at 234.

Four years later, this decision in favor of the status quo was reaffirmed. *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987). The plaintiff alleged that he was wrongfully discharged because he refused to participate in illegal tax avoidance schemes and then “blew the whistle” on those who did. *Id.* at 332-33, 506 N.E.2d at 920, 514 N.Y.S.2d at 210. The plaintiff tried to maintain a cause of action for breach of implied contract based on written company policies requiring employees to report unethical conduct to management. *Id.* at 332, 506 N.E.2d at 920, 514 N.Y.S.2d at 211. Adhering to precedent, the court dismissed the cause of

this reaffirmation, an at-will employee who refused to act illegally or unethically had no recourse against his former employer for retaliatory discharge.<sup>10</sup> Recently, however, in *Wieder v. Skala*,<sup>11</sup> the New York Court of Appeals penetrated this previously impervious doctrine by holding that, despite the at-will status of employment, an attorney who has been fired by a law firm in alleged retaliation for the attorney's insistence that the firm report a colleague's unethical conduct may sustain an action for breach of contract.<sup>12</sup>

The plaintiff, an associate in a New York law firm, was hired in 1986.<sup>13</sup> In early 1987, he purchased a condominium, and the firm assigned one of his colleagues to represent him at the closing.<sup>14</sup> The assigned attorney, however, neglected the plaintiff's transaction, and when questioned by the plaintiff, made "false and fraudulent material misrepresentations" regarding it.<sup>15</sup> The attorney in question later admitted in writing that he had committed malpractice not only upon the petitioner, but upon several of the firm's clients.<sup>16</sup> Although the partners of the firm were aware of this attorney's misconduct, they failed to report him to the Appellate Division Disciplinary Committee, as required by the New

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action for breach of implied contract because the employees' manual did not contain the specific assurances listed in *Weiner. Id.* at 336, 506 N.E.2d at 923, 514 N.Y.S.2d at 213. It also refused to recognize an implied covenant of good faith in employment contracts because such an obligation was inconsistent with the employer's right to terminate the employment at any time. *Id.* at 335-36, 506 N.E.2d at 922, 514 N.Y.S.2d at 212-13. The court reasoned that "a covenant of good faith can be implied only where the implied term is consistent with other mutually agreed upon terms in the contract." *Id.* at 335, 506 N.E.2d at 922, 514 N.Y.S.2d at 212. Accordingly, the court concluded that "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 336, 506 N.E.2d at 922, 514 N.Y.S.2d at 213 (quoting *Murphy*, 58 N.Y.2d at 304-05, 448 N.E.2d at 91, 461 N.Y.S.2d at 237). Basing its decision on "stare decisis principles and sound contractual and policy reasons," the court in *Sabetay* affirmed the at-will employment doctrine as the law in New York. *Id.* at 337, 506 N.E.2d at 923, 514 N.Y.S.2d at 213.

<sup>10</sup> See, e.g., *Sabetay*, 69 N.Y.2d at 329, 506 N.E.2d at 919, 514 N.Y.S.2d at 209; *Murphy*, 58 N.Y.2d at 293, 448 N.E.2d at 86, 461 N.Y.S.2d at 232. In both cases, the Court of Appeals dismissed actions for wrongful discharge brought by at-will corporate employees alleging that they were terminated in retaliation for their refusal to participate in, and subsequent disclosure of, unlawful or unethical acts of their co-employees and employers. *Sabetay*, 69 N.Y.2d at 329, 506 N.E.2d at 919, 514 N.Y.S.2d at 209; *Murphy*, 58 N.Y.2d at 293, 448 N.E.2d at 86, 461 N.Y.S.2d at 232.

<sup>11</sup> 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992).

<sup>12</sup> *Id.* at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757.

<sup>13</sup> *Id.* at 631, 609 N.E.2d at 106, 593 N.Y.S.2d at 753.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 632, 609 N.E.2d at 106, 593 N.Y.S.2d at 753.

<sup>16</sup> *Wieder*, 80 N.Y.2d at 632, 609 N.E.2d at 106, 593 N.Y.S.2d at 753.

York Code of Professional Responsibility (the "Code").<sup>17</sup> Only upon the plaintiff's repeated insistence<sup>18</sup> did they reluctantly file a complaint.<sup>19</sup> Three months later, the plaintiff was fired.<sup>20</sup>

Mr. Wieder brought suit against the law firm for retaliatory discharge.<sup>21</sup> The New York State Supreme Court, New York County, dismissed the complaint, reasoning that: the plaintiff was no different from any other at-will employee, the facts pleaded did not come within the *Weiner* exception,<sup>22</sup> New York law did not recognize any public policy exception to the at-will employment doctrine,<sup>23</sup> and the plaintiff was not protected by the Whistleblower Statute.<sup>24</sup> The Appellate Division, First Department affirmed the dismissal.<sup>25</sup>

In a unanimous decision, the Court of Appeals reversed the rulings of the lower courts and held that Wieder could maintain a cause of action for breach of contract despite his at-will status,<sup>26</sup> thus forming a new exception to New York's current employment

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<sup>17</sup> N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103(A) (McKinney 1990) [hereinafter CODE]. DR 1-103(A) provides that "[a] lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge . . ." *Id.* (emphasis added). Failure to report is in itself an ethical violation. See N.Y.S.B.A. Comm. on Professional Ethics, Formal Op. 1990-93 (1990).

<sup>18</sup> *Wieder*, 80 N.Y.2d at 632, 609 N.E.2d at 106, 593 N.Y.S.2d at 752. The partners tried to dissuade the plaintiff from filing a complaint by offering to reimburse his losses. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 632, 609 N.E.2d at 106, 593 N.Y.S.2d at 753.

<sup>21</sup> *Wieder v. Skala*, 144 Misc. 2d 346, 544 N.Y.S.2d 971 (Sup. Ct. N.Y. County 1989). Plaintiff argued that "the public policy of protecting against improper activities by attorneys" constituted an exception to the at-will rule; alternatively, he argued that he came within the realm of the Whistleblower Statute. *Id.* at 347, 544 N.Y.S.2d at 972.

<sup>22</sup> See *supra* note 8 and accompanying text (discussing rigid adherence by New York courts to "four factors" of *Weiner* before recognizing implied contract exception to at-will doctrine).

<sup>23</sup> *Wieder*, 144 Misc. 2d at 347-48, 544 N.Y.S.2d at 972-73.

<sup>24</sup> *Id.* The trial court found the Whistleblower Statute to be inapplicable because "the alleged refusal of the law firm to report [the assigned attorney] to the Disciplinary Committee cannot be said to be an 'activity, policy or practice of the employer . . . which . . . presents a substantial and specific danger to the public health or safety.'" *Id.* at 349, 544 N.Y.S.2d at 973 (quoting N.Y. LAB. LAW § 740(2)(a) (McKinney 1988)); see also *supra* note 6 (discussing Whistleblower Statute and its limitations).

<sup>25</sup> *Wieder v. Skala*, 168 A.D.2d 355, 563 N.Y.S.2d (1st Dep't 1990).

<sup>26</sup> *Wieder*, 80 N.Y.2d at 637, 609 N.E.2d at 109, 593 N.Y.S.2d at 757.

at-will doctrine.<sup>27</sup> Writing for the court, Judge Hancock based this exception on the rules of the Code, specifically DR 1-103(A), which imposes a mandatory reporting obligation on a lawyer who has knowledge of another lawyer's transgressions.<sup>28</sup> The court, recognizing that failure to comply with this reporting requirement could result in disbarment,<sup>29</sup> noted that lawyers themselves are responsible for maintaining standards of ethical and lawful conduct within the legal profession according to the rules of professional responsibility.<sup>30</sup> Recognizing the significance of this self-regulatory function to the practice of law, the court determined that the rules of professional conduct were so fundamental to the associate-law firm relationship that they formed the "core and, indeed, the only purpose" of their association.<sup>31</sup> These considera-

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<sup>27</sup> *Id.* at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 755 (finding "decisions in *Murphy* and *Sabetay* . . . not controlling").

<sup>28</sup> *Id.* at 636, 609 N.E.2d at 108, 593 N.Y.S.2d at 755-56; *see also* Kim D. Ringler, *Lawyer's Obligation to Report Professional Misconduct*, N.Y. L.J., Sept. 20, 1984, at 3 ("In New York every attorney is . . . bound to comply with DR 1-103(A) which is designed both to prevent and to remedy violations of the Code of Professional Responsibility."); Geoffrey C. Hazard, Jr., "Squeal Rule" Considered for Change, N.Y. L.J., Mar. 26, 1990, at 13 (noting that DR 1-103, also known as 'squeal rule', is "an across-the-board legal obligation").

<sup>29</sup> *Wieder*, 80 N.Y.2d at 636, 609 N.E.2d at 108, 593 N.Y.S.2d at 756. Attorneys who fail to comply with the reporting requirement of DR 1-103(A) have been penalized with sanctions ranging from one year suspension to disbarment. *See, e.g., In re Dowd*, 160 A.D.2d 78, 559 N.Y.S.2d 365 (2d Dep't 1990) (five year suspension for attorneys who knew of colleague's unethical conduct and failed to report it); *In re Lefkowitz*, 105 A.D.2d 161, 483 N.Y.S.2d 281 (1st Dep't 1984) (failure to report partners' misconduct resulted in disbarment of nonreporting associate).

According to one commentator, strict enforcement by the courts has led to an increased amount of complaints of peer misconduct, a fact which signifies greater adherence to, and awareness of, the obligations of the Code. *See* David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough*, 31 ARIZ. L. REV. 657, 670 (1989).

<sup>30</sup> *Wieder*, 80 N.Y.2d at 637, 609 N.E.2d at 109, 593 N.Y.S.2d at 756; *see also* Olsson, *supra* note 29, at 658 ("One of the privileges of the legal profession is self-regulation . . . [which] requires lawyers and judges to share the responsibility of maintaining the standards of ethics and competence within the profession."). The self-policing function of the legal profession is critical because lawyers themselves, not the general public, are best able to detect a fellow attorney's misconduct, and the reporting obligation is vital in order to maintain a high level of professionalism. *See* Ringler, *supra* note 28, at 3; *see also* Michael J. Gentile, *Reporting Misconduct By Other Lawyers*, N.Y. L.J., Oct. 23, 1984, at 2 ("[Lawyers] are themselves completely responsible for maintaining the public's confidence in the integrity of the Bar and, by extension, the integrity of the legal system.").

<sup>31</sup> *Wieder*, 80 N.Y.2d at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 755. Explaining the tight link between the duties of an associate as a member of the bar on the one hand, and as an employee of the firm on the other, the court determined that "associates are, to be sure, employees of the firm but they remain independent officers of the

tions led the court to conclude that DR 1-103(A) created an implied obligation between the parties that they would not prevent each other from practicing law in accordance with the rules of professional responsibility.<sup>32</sup> Accordingly, the court found that the law firm breached the implied obligation when it insisted that the associate, as their employee, violate DR 1-103(A).<sup>33</sup>

To support its decision, the court distinguished the employment of an associate by a law firm from the employment of a corporate employee.<sup>34</sup> The court focused on three primary distinctions: (1) an associate, as a member of the bar, has a different set

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court responsible in a broader public sense for their professional obligations." *Id.*; see also Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 266 (1985) (suggesting that if partner instructs associate to perform unethically, associate must disobey those instructions because associate has higher duty to adhere to Disciplinary Rules prescribed in Code).

<sup>32</sup> *Wieder*, 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. The court used the words "implied in law" and "obligation of good faith and fair dealing" interchangeably to mean an implied understanding between the parties that neither one would "intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part." *Id.* at 637, 609 N.E.2d at 109, 593 N.Y.S.2d at 756 (quoting *Patterson v. Meyerhoffer*, 204 N.Y. 96, 100, 97 N.E. 472, 473 (1912)). See generally *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933) ("[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . .").

The implied covenant of good faith, as applied to the at-will employment doctrine, is considered an implied obligation of the parties not to take unreasonable action and not to frustrate the agreements into which they have entered. See generally Harold Brown, *Good Faith and Fair Dealing Revisited*, N.Y.L.J., July 25, 1991, at 3.

The *Murphy* court acknowledged that "New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party may be implied, and if implied will be enforced." *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (emphasis added). The *Wieder* court found these "appropriate circumstances" which would justify the creation of an implied obligation of good faith in "the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757.

<sup>33</sup> *Wieder*, 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. The court reasoned that firing an associate because he reported a colleague's misconduct, as required by DR 1-103(A), "amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship." *Id.* The firm violated an implied obligation to practice law in accordance with the rules of professional conduct. *Id.* Thus, in order to prevent the firm from frustrating the purpose of the employment relationship, the court implied an obligation of good faith and fair dealing. *Id.* at 637, 609 N.E.2d at 109, 593 N.Y.S.2d at 756.

<sup>34</sup> *Id.* at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757 (distinguishing *Murphy* and *Sabetay*).

of responsibilities than a corporate employee;<sup>35</sup> (2) a law firm is not the same as a large corporation employer;<sup>36</sup> and (3) company rules allegedly requiring disclosure in prior New York cases involving corporate employees were not ethical rules of professional conduct governing both the corporation and its employees, whereas the Code governs all members of the bar, associates and law firms alike.<sup>37</sup> These distinctions, the court concluded, warranted the imposition of an implied good faith exception to the employment at-will doctrine for associates employed by law firms.<sup>38</sup>

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<sup>35</sup> *Id.* The court noted that in contrast to the managerial employees in *Murphy* and *Sabetay*, whose sole responsibilities were to their corporate employers, "[a]ssociates are . . . employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations." *Id.* at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 755; see also Gross, *supra* note 31, at 273 (discussing special ethical responsibilities of associates).

<sup>36</sup> *Wieder*, 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. The court observed that "[t]he defendants in . . . [*Murphy* and *Sabetay*] were large manufacturing concerns—not law firms engaged with their employee in a common professional enterprise, as here." *Id.*

<sup>37</sup> *Id.* "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." *Id.* (citations omitted).

The plaintiffs in *Murphy* and *Sabetay* contended that they were under a corporate duty to blow the whistle, but the court did not find those ethical considerations sufficiently significant to create an exception to the common-law rule of at-will employment. See *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 332-33, 506 N.E.2d 919, 921, 514 N.Y.S.2d 209, 210 (1987).

The employees in *Murphy* and *Sabetay* were involved in accounting. The plaintiff in *Murphy* "served in various accounting positions, eventually attaining the office of assistant treasurer." *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 297, 448 N.E.2d 86, 87, 461 N.Y.S.2d 232, 233 (1983). The plaintiff in *Sabetay* was "a director of financial projects." *Sabetay*, 69 N.Y.2d at 332, 506 N.E.2d at 920, 514 N.Y.S.2d at 210. Assuming these plaintiffs were certified public accountants, they would still not fall under the *Wieder* exception because accountants, unlike attorneys, are not governed by a code of professional conduct that imposes an affirmative duty to report peer misconduct. See, e.g., PUBLIC ACCOUNTANCY HANDBOOK ¶ 29.1 (1988).

<sup>38</sup> *Wieder*, 80 N.Y.2d at 637-38, 609 N.E.2d at 109-10, 593 N.Y.S.2d at 756-57. The court found the implied-in-law exception for associates since

[d]efendants, 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 but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession.

*Id.* But see *Partee*, *supra* note 1, at 699. This commentator criticized the good faith exception to the at-will doctrine and noted that the majority of courts have refused to imply this term into employment contracts. *Id.* *Partee* reiterates the reasons cited in *Murphy* for not imposing the good faith obligation into the employment context, namely:

The court reasoned that the associate who complies with a mandatory reporting requirement deserves special protection from undeserving retribution for his lawful conduct.<sup>39</sup>

Prior to this decision, many commentators had expressed the need to strongly encourage reluctant attorneys to shed their distaste for tattling.<sup>40</sup> It is submitted that the court created this exception to the at-will doctrine to encourage attorneys to comply with the reporting requirement of DR 1-103. By creating this exception, the court appears to be putting the interests of professional integrity above the objectives of the at-will employment doctrine. An associate who reports wrongdoing is now protected against retaliatory discharge and is relieved of the dilemma of having to choose between potential disbarment for remaining silent, and possible termination for blowing the whistle.

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that the covenant is an overbroad remedy, that its implication into at-will agreements would restrict unduly an employer's discretion in managing its work force; that it does not strike the appropriate balance of employer and employee interests; that it would subject all firings to judicial incursions . . . and finally, that the covenant would amount to the judicial imposition of a collective bargaining agreement, a move best left to the legislature.

*Id.*

The *Wieder* court found that in the case of a law firm employer and associate employee, "giving effect to the implied obligation would [not] have been 'inconsistent with' and 'destructive of an elemental term in the agreement,'" as was suggested in *Murphy*. *Wieder*, 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757 (quoting *Murphy*, 58 N.Y.2d at 304-05, 448 N.E.2d at 91, 461 N.Y.S.2d at 237).

<sup>39</sup> *Wieder*, 80 N.Y.2d at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. The justification for this special protection was in the Code, which governs both the associate's and the law firm's professional conduct: "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." *Id.*

<sup>40</sup> See, e.g., Olsson, *supra* note 29, at 665 (lawyers who blow whistle characterized as "snitch[es]"; reporting misconduct "seems to run counter to instinct and all basic social training"); Ringler, *supra* note 28, at 3 (noting that some lawyers are unaware of reporting obligation under DR 1-103(A)).

Statistical surveys confirm this reluctance to report. See, e.g., RICHARD J. ABEL, *AMERICAN LAWYERS* 144 (1989) ("[I]n a sample of Missouri lawyers, only 34 percent of rural and 71 percent of urban practitioners said they would report ethical infractions, and the proportions who actually had done so were . . . 11 and 27 percent respectively."); E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 99 (1976) ("[O]f the 142 complaints filed against members of the [Utah State] Bar in 1974, only eighteen were filed by lawyers; of the 135 complaints filed . . . in 1975, only sixteen were filed by lawyers."); see also David O. Burbank & Robert S. Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U. L. REV. 66, 100-01 (1974) (finding evidence of "cover-up" propensity amongst lawyers).

It is further suggested that this holding reflects a change in the judiciary's attitude towards enforcement of the reporting requirement; the *Wieder* court is sending a message to practitioners that the reporting obligation is taken seriously enough to warrant the creation of an exception to New York's strict adherence to the at-will employment rule.<sup>41</sup>

Although it may be argued that the court has followed the trend of some jurisdictions by recognizing an implied good faith exception to the at-will employment doctrine, it is suggested that the application of the *Wieder* exception will be limited to cases involving associates who were discharged from law firms for reporting wrongdoing.<sup>42</sup> This assumption is based on two factors: (1) the fate of the *Weiner* exception, which was so narrowly construed that it had minimal effect in modifying the at-will doctrine;<sup>43</sup> and (2) the *Wieder* court's effort to distinguish, rather than overrule, prior decisions in which it declined to protect whistle-blowing at-will employees from retaliatory discharge.<sup>44</sup>

Accordingly, in-house corporate counsel, for example, whose employers ask them to commit unlawful acts will probably not be protected by the *Wieder* exception; these attorneys' employers are not law firms, but corporate clients who are not bound by the

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<sup>41</sup> *Wieder*, 80 N.Y.2d at 636-37, 609 N.E.2d at 109, 593 N.Y.S.2d at 756 (discussing seriousness of reporting requirement under Code). See generally Olsson, *supra* note 29, at 667-75 (collecting scant case law involving alleged violation of duty to report). Olsson notes that in five of the cases, the courts treated the failure to report as a minor violation of ethical conduct, reflecting a lax attitude towards the reporting requirement. *Id.*

The change in attitude with regard to the reporting requirement came in *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988). The Illinois Supreme Court suspended an attorney for one year for failure to comply with DR 1-103(A). *Id.* Shortly thereafter, the Supreme Court, Appellate Division suspended an attorney for five years for failure to report unethical conduct of a fellow attorney. See *In re Dowd*, 160 A.D.2d 78, 80, 559 N.Y.S.2d 365, 367 (2d Dep't 1990). Most recently, the New York Court of Appeals in *Wieder* has stressed their policy that strict disciplinary measures will be taken against those attorneys who do not report when they are under a duty to do so. *Wieder*, 80 N.Y.2d at 636, 609 N.E.2d at 109, 593 N.Y.S.2d at 756.

<sup>42</sup> See *supra* note 5 and accompanying text (discussing covenant of good faith and fair dealing exception in employment at-will context).

<sup>43</sup> See *supra* notes 7-8 and accompanying text (explaining the *Weiner* decision and its continued narrow interpretation).

<sup>44</sup> See *Wieder*, 80 N.Y.2d at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 755 ("[E]mployment 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*."); see also *supra* note 9 and accompanying text.

Code.<sup>45</sup> Thus, it is submitted that an in-house attorney who sues for retaliatory discharge in New York will be limited by the constraints of the at-will employment doctrine.<sup>46</sup>

Although the *Wieder* case is undoubtedly an important step for attorneys employed by law firms, it should not be construed to extend beyond its particular facts and circumstances.<sup>47</sup> Notwithstanding its limited scope, however, it is suggested that the *Wieder* holding may provide guidance to other similarly situated employees whose professions are also governed by a code of ethics, and who may be improperly discharged for reporting peer violations of their respective codes.<sup>48</sup> Perhaps as a result of the *Wieder* decision, ethical standards will be enforced across an entire spec-

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<sup>45</sup> *Wieder*, 80 N.Y.2d at 637-38, 609 N.E.2d at 110, 593 N.Y.S.2d at 757. The court emphasized "that in conducting the firm's legal practice both *plaintiff and the firm* would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." *Id.* (emphasis added). The court distinguished the law firm defendant, who was bound by the Code, from corporate defendants in prior cases. *Id.* In addition, DR 1-103(A) pertains only to knowledge acquired that is "not protected as a confidence or secret." See *supra* note 17. Corporate employers are actually clients, therefore, the privilege of confidentiality would preclude the attorney from breaching his fiduciary duty towards his client. See, e.g., *Balla v. Gambro, Inc.*, 560 N.E.2d 1043 (Ill. 1990) (attorney-client privilege comes before duty to disclose improprieties). The general rule is that a client may terminate the relationship between himself and his attorney with or without cause. See *Herbster v. North Am. Co. for Life and Health Ins.*, 501 N.E.2d 343, 347 (Ill. 1986). This issue, however, is not the focus of this article. For a detailed discussion of retaliatory discharge of in-house counsel, see Elliot M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 27 (1991); Michael L. Clozen & Mark E. Wojcik, *Lawyers Out in the Cold*, A.B.A. J., Nov. 1, 1987, at 94.

<sup>46</sup> See *infra* note 47; see also *supra* note 9-10 and accompanying text (discussing termination of at-will employees by nonlegal employers).

<sup>47</sup> See *Wieder*, 80 N.Y.2d at 637, 609 N.E.2d at 109, 593 N.Y.S.2d at 756. The court stressed 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*." *Id.* (first emphasis added).

<sup>48</sup> See, e.g., AMERICAN MEDICAL ASSOCIATION: THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY ¶ 2 (1989) ("A physician shall deal honestly with patients and colleagues, and *strive to expose* those physicians deficient in character or competence, or who engage in fraud or deception.") (emphasis added); RULES OF THE BOARD OF REGENTS, Part 29—*Unprofessional Conduct* ¶ 29.3(a)(1) (1992). This provision governs architects and landscape architects, engineers, and land surveyors. *Id.* The rule prohibits "being associated in a professional capacity with any project or practice known to the licensee to be fraudulent or dishonest in character, or *not reporting knowledge* of such fraudulence or dishonesty . . ." *Id.* (emphasis added).

trum of professional fields, so that a medical doctor or professional engineer discharged for whistleblowing might have redress in court as well.

*Sharon Garb*