

NY's Highest Court Shields Hedge Fund From Liability For Terminating Chief Compliance Officer Who Complained Internally of Alleged Manipulative and Deceptive Trading Practices By Owners

by

Kevin J. O'Connor, Esq.*

On May 8, 2012, the New York Court of Appeals issued the latest decision to address whether an at will employee who complains internally of alleged illegal acts, has protection from firing.

In Sullivan v. Harnisch, 2012 N.Y. Slip Op. 03574, 2012 WL 1580602, New York's highest court ruled that the Chief Compliance Officer of a hedge fund who claims to have objected to "front running" (selling of stock by hedge fund owners/employees in anticipation of transactions by its own clients) was not entitled to protection from firing, and his claim for wrongful termination was dismissed. In Sullivan, the CCO had only complained internally and had not blown the whistle by contacting anyone outside the company with such allegations, such as the Securities & Exchange Commission ("SEC").

The fractured opinions of the majority and dissenting Justices in Sullivan demonstrate the difficulty in applying the judicially-created exception to the rule that New York common law does not recognize a cause of action for the wrongful discharge of an at-will employee. The Court previously ruled that there is an exception to this rule in a case such as where an attorney in a law firm objects internally to unethical behavior by a fellow attorney and is thereafter terminated. (Wieder v. Skala, 80 N.Y.2d 628 (1992)). In several cases rendered after Wieder, however, the Court has refused to broaden this rule to apply to other alleged fraudulent and improper acts that are objected to in the workplace. See, e.g., Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 332 (1987)(employee's objection to alleged "tax avoidance schemes and maintenance of slush funds" not sufficient to meet

exception); Horn v. New York Times, 100 N.Y.2d 85 (2003)(doctor claiming to be fired for refusing to violate patient confidentiality).

The Wieder exception appears to have been dealt a significant blow with this decision. Time will tell whether the New York Legislature will react to the Sullivan decision.

*O'Connor, an attorney admitted in New York, New Jersey and Pennsylvania, is a partner with the law firm Peckar & Abramson, P.C. and resident in its New Jersey office.