STATE OF WISCONSIN
SUPREME COURT

DAWN M. SANDS,

Plaintiff-Respondent

Appeal No. 2008 AP 001703
Circuit Court Case No. 07-CV-991

vs.

MENARD, INC.,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION BY THE COURT OF APPEALS, DISTRICT III, ON APPEAL FROM THE CIRCUIT COURT OF EAU CLAIRE COUNTY, CASE NO. 07-CV-991, THE HONORABLE PAUL J. LENZ, PRESIDING

NON-PARTY BRIEF OF BYRON F. EGAN, Pro Hac Vice

Byron F. Egan
Texas Bar #06477000
JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3797

William F. Bauer
Wisconsin Bar #1007676
COYNE, SCHULTZ, BECKER & BAUER, S.C.
150 East Gilman Street, #1000
Madison, Wisconsin 53703-1495

December 14, 2009

TABLE OF AUTHORITIES

Cases

Rules

Other

NON-PARTY BRIEF

As the Court will have observed, the creation and evolution of the in-house legal department is a relatively recent phenomenon. Historically, business entities, just as individuals, received legal counsel from attorneys in private practice. It has only been in the latter half of the Twentieth Century that business entities have recognized the value of having skilled legal assistance available within the entity.

In the past, there may have been a stigma associated with being an in-house attorney, but more recently, attorneys of the stature of former Attorneys General Nicholas deB. Katzenbach and William Barr have led the legal departments of IBM and Verizon Communications, respectively. Ben W. Heineman, Jr., the former General Counsel of General Electric, was particularly focused on the level of accomplishment and professionalism necessary to provide effective in-house legal support for the modern American corporation.

As the role of in-house counsel has grown and evolved, the exact status of those in-house attorneys has been the subject of scrutiny and debate. Fortunately, much of that debate has now been resolved. In-house attorneys have the same professional duties and responsibilities as attorneys in private practice, and they are subject to the same canons of ethics and

professional codes. The American Bar Association's Model Rules of Professional Conduct include "the legal department of a corporation or other organization" within the definition of "firm" or "law firm," clearly signaling that in-house attorneys are to be subjected to the rules applicable to all other attorneys.[1]

While in-house counsel enjoy the same attorney/client relationship that attorneys in private practice have with their clients, in-house counsel also have the relationship of employer and employee, and those two separate relationships can be the source of tension as someone whose livelihood is tied to one employer must also respect and fulfill his or her professional duties as an attorney. This tension was addressed by the Illinois Supreme Court in *Balla v. Gambro.*[2] A medical appliance distributor was planning to sell equipment with parts not approved by the Food and Drug Administration, thus risking possible death or substantial bodily harm to the equipment's users. The company's general counsel disclosed his employer's planned illegal activity for which he was promptly fired. The general counsel then sued for damages arguing that without such a remedy, other in-house counsel might defer to their employers' illegal activities rather than lose their jobs. The Illinois Supreme Court rejected the general

[1] ABA Model Rule 1.0 (c)
[2] 145 Ill.2d 492, 584 N.E.2d 104 (1991)

counsel's cause of action on the basis that the general counsel had a professional duty to make the disclosure, and he would be in violation of the state's rules of professional conduct if he had not taken appropriate action. The Court went further and held "a client may discharge his attorney at any time, with or without cause. This rule applies equally to in-house counsel as it does to outside counsel." [3,4]

Gradually, views began to change as courts concluded that an absolute bar against in-house attorneys' claims for retaliatory discharge put those attorneys at an unfair disadvantage. Among the cases that analyzed the relationship between an in-house counsel and his or her employer was *Crews v. Buchman Laboratories International, Inc.* [5] In that case, the Tennessee Supreme Court reviewed prior precedent from across the country and rejected the "no cause of action" view expressed in *Balla v. Gambro, supra,* and also those cases that permitted a cause of action but only if it could be proven without disclosing client confidences.[6] Instead, the Tennessee Supreme Court concluded that an attorney could use confidential

---

[3] Ibid, 145 Ill.2d @ 503, 584 N.E.2d @ 109

[4] Other cases denying any cause of action for discharging in-house counsel include *Herbster v. North American Company for Life & Health Insurance*, 150 Ill.App.3d 21, 501 N.E. 2d 343 (1986), and *Douglas v. Dyn McDermott Petroleum Operations Co*., 144 F.3d 364(5th Cir.) reh'g denied, 163 F.3d 223 (1998), cert. denied, 525 U.S. 1068, 142 L.Ed. 2d 660, 119 S. Ct. 798 (1999)

[5] 78 S.W.3d 852 (Tenn. 2002)

[6] See, e.g., *GTE Products v. Steward*, 653 N.E. 2d 161 (Mass. 1995), and *Willy v. Coastal States Management Company*, 939 S.W.2d 193 (Ct. App.-Houston [1st Dist] 1996), writ withdrawn, 977 S.W.2d 566 (Tex. 1998).

client information against a former employer if disclosure was necessary to establish a claim or defense on behalf of the in-house attorney. The Court added a condition, to-wit: "[W]e emphasize that in-house counsel 'must make every effort practicable to avoid unnecessary disclosure of [client confidences and secrets], to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.' [ABA] Model Rule 1.6, Comment 19."[7] The ABA's Standing Committee on Ethics and Professional Responsibility reached a similar conclusion in its Formal Opinion 01-424. "The Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer is discharged for complying with her ethical obligations," but "must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed."[8] Similar results have followed in Utah[9] and Florida.[10]

Now that the right of an in-house attorney to sue his or her employer for retaliatory discharge in appropriate circumstances has been established in many jurisdictions across the country, it is necessary to consider the rights

---

[7] *Crews v. Buckman Laboratories Interactional Inc*., 78 S.W.3d @ 864; see also *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 5 P.3d 1031 (2000)
[8] ABA Formal Opinion 01-424 (2001), p.5
[9] *Spratley and Pierce v. State Farm Mutual Insurance Company, et al*, 2003 UT 39 (2003)
[10] *Alexander v. Tandem Staffing Solutions, Inc., et al*, Case No. 4D04-224 in the District Court of Appeal of the State of Florida (2004)

of those same attorneys in the context of statutory causes of action. Reinstatement with respect to attorneys is problematic. Apart from officers and directors, in-house attorneys are an entity's only employees who have a fiduciary relationship with their employers, and according to the Restatement of the Law Governing Lawyers, Third (Restatement), "[I]t may also be appropriate to take account of the lawyer's fiduciary duties when assessing the suitability of an otherwise available remedy."[11]

ABA Model Rule 1.16(a)(3) states, "[A] lawyer ... shall withdraw from the representation of a client if the lawyer is discharged." Comment 4 to the Model Rule makes clear that, "A client has the right to discharge a lawyer at any time, with or without cause ...." (emphasis added).[12]

The Restatement's Sec. 32(2)(c) is substantially similar: "[A] lawyer ... must withdraw from the representation of a client if the client discharges the lawyer." In each instance, mandatory verbs are used, i.e., the ABA says a lawyer "shall" withdraw, and the ALI says a lawyer "must" withdraw if discharged.

---

[11] American Law Institute Restatement of the law Governing Lawyers, Third (2000), §7, Comment b.

[12] The Texas rule is substantially similar to the ABA Model Rule except that the phrase "with or without cause" is in the rule itself, not just in the comment. Tex. Disc. R. Prof. Conduct 1.15(a)(3)(1989)

Speaking to the issue of an employer/client's right to discharge an employee/attorney, Comment b. to Section 32 of the Restatement includes the following:

> [W]hen a lawyer is also an employee of a client (for example, a lawyer employed as inside counsel by a corporation or government agency), the client's right to discharge the lawyer does not abridge the lawyer's entitlement to salary and benefits already earned. A lawyer-employee also has the same rights as other employees under applicable law to recover for bad-faith discharge, for example if the client discharged the lawyer for refusing to perform an unlawful act. Because of the importance of such a lawyer's role in assuring law compliance, the public policy that supports a remedy for such discharges is at least as strong in the case of lawyers as it is for other employees.... The power a client employer possesses over a lawyer-employee is substantial, compared to that of a client over an independent lawyer. Giving an employed lawyer a remedy for wrongful discharge does not significantly impair the client's choice of counsel.

As stated, the American Law Institute treatise recognized the right of an in-house attorney to sue for wrongful discharge while maintaining the employer's continued right to select counsel of its choice. Implicit in that rationale is that reinstatement is not a remedy that is available to in-house counsel even if counsel is the victim of a wrongful discharge.

As noted in my application to file a non-party brief in this case, the Court is faced with a case of first impression. I am not aware of any prior

case in which a lawyer was reinstated as a remedy for wrongful discharge.[13] Thus, the Court's decision may well become precedent nationwide with respect to the remedies and repercussions when in-house attorneys sue for wrongful discharge.

With respect to the remedy of lawyer reinstatement, there is little prior jurisprudence. In most cases involving claims of wrongful discharge of in-house attorneys, the question of reinstatement is never discussed. The first case that discussed the issue directly was *Parker v. M&T Chemicals, Inc.*[14] In that case, an in-house attorney brought suit under New Jersey's conscientious employee statute. The case was permitted to go forward as a claim for monetary damages. As to reinstatement, the court said:

> In the context of the case before us, our interpretation of the Act neither compels an employer-client to accept an unwanted employee-attorney by preventing his discharge at will nor threatens to discourage an ethics or fee dispute complaint. Our affirmance here and our construction of the Act compels a retaliating employer to pay damages to an employee attorney who is wrongfully discharged for refusing to join a scheme to cheat a competitor or, indeed, for any reason which is violative of law, fraudulent, criminal, or incompatible with a clear mandate of New Jersey's public policy concerning public health, safety or welfare.[15]

---

[13] An early administration order in the case of Donald Willy's claim for wrongful discharge from the Coastal Corporation organization included an order of reinstatement, but subsequent legal action superseded that order. Reinstatement was never discussed in the further development of the case. See Godfrey, Cullen M., "The Tao of Donald Willy," 58 Inst. on Oil and Gas Law, p. 55 (LexisNexis, 2007). *Cf. Willy v. Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005).

[14] 236 N.J. Super. 451, 566 A.2s 215 (1989)

[15] Ibid, 236 N.J. Super. At 456, 566 A.2d at 220

Subsequently, a California court reached the same conclusion. In *General Dynamics Corp. v. Superior Court*[16], the court wrote: "[U]nder circumscribed conditions, an in-house attorney may pursue a wrongful discharge claim for damages against his corporate employer even though a judgment ordering his reinstatement is not an available remedy."[17]

This case is before the Court because a general counsel brought a wrongful discharge claim against her former employer/client. Even though the former general counsel had not sought reinstatement, an arbitration panel awarded it. This action of the arbitrators should be viewed as a violation of fundamental public policy because it risks placing the former general counsel in breach of her professional duties under the code of professional responsibility that governs her conduct.

As discussed previously, an attorney has a fiduciary relationship with his or her client, even when the client is also his or her employer. Once the attorney/client relationship has been severed, the duty of good faith and fair dealing implicit in the fiduciary relationship cannot be restored by a third party fiat.

A basic tenet of the attorney/client relationship that exists throughout the United States is that a client has the absolute right to chose by whom

[16] 876 P.2d 487(Cal. App.-4th, 1994) (en banc)
[17] Ibid, 876 P.2d at 495

the client will be represented, and the client's attorney must honor the client's decision. While statutory remedies for retaliatory discharge may include reinstatement, an in-house attorney is professionally prohibited from seeking such reinstatement because it would violate the client's right to fire its attorney, with or without cause. Were the general counsel to accept reinstatement, she would be in immediate jeopardy of a disciplinary action for her ethical violation, and the arbitrators should not have placed her in that untenable situation.

The issue before the Court that may have a profound effect, well beyond the interests of the two parties in the case, is whether there is any circumstance, statutory or otherwise, in which a client can be compelled to accept representation from an in-house attorney in whom the client no longer has confidence, regardless of the reason. The public policy reasons that allow a client to discharge an attorney are too important to be compromised by allowing the arbitrators' award to stand.

Respectfully submitted,

_____

Bryon F. Egan, *Pro Hac Vice*
Texas Bar #06477000
Jackson Walker, L.L.P.
1 Main Street, Suite 6000
Dallas, Texas 75202-3797
(214) 953-5727

_____

William F. Bauer
Wisconsin Bar # 1007676
Coyne, Schultz, Becker & Bauer, S.C.
150 East Gilman Street, #1000
Madison, Wisconsin 53703-1495
(608) 255-1388

FORM AND LENGTH CERTIFICATION

I hereby certify that this Non-Party Brief of Byron F. Egan complies with the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a Non-Party Brief produced with a proportional serif font. The length of this Non-Party Brief is 2120 words.

Dated this 14th day of December, 2009.

William F. Bauer
Wisconsin Bar #1007676
COYNE, SCHULTZ, BECKER & BAUER, S.C.
150 East Gilman Street, #1000
Madison, Wisconsin 53703-1495
(608) 255-1388

Byron F. Egan
Texas Bar #06477000
Jackson Walker, L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3797
(214) 953-5727

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy if this Non-Party Brief which complies with the requirements of § 809(12). I further certify that this electronic brief is identical in content and format to the printed form of the Non-Party Brief filed as of this date. A copy of the certificate has been served with the paper copies of this Non-Party Brief filed with the Court and served on all parties

Dated: December 14, 2009

Byron F. Egan
Texas Bar #06477000
Jackson Walker, L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3797
(214) 953-5727

William F. Bauer
Wisconsin Bar #1007676
COYNE, SCHULTZ, BECKER & BAUER, S.C.
150 East Gilman Street, #1000
Madison, Wisconsin 53703-1495
(608) 255-1388

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2009, I served copies of the Non-Party Brief of Byron F. Egan upon counsel for the parties by first class mail:

Charles K. Maier
Daniel R. Shulman
Julie L. Boehmke
Jeremy L. Johnson
Gray, Plant, Motty & Bennett, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis MN 55402

John P. Richie
Richie Wickstrom and Wachs, LLP
10 1 Putnam Street
P.O. Box 390
Eau Claire WI 54702

Beth Ermatinger Hanan
Shawn K. Stevens
Gass Weber Mullins L.L.C.
309 North Water St., 7th Floor
Milwaukee, WI 53202

Webster A. Hart
Terry L. Moore
Herrick & Hart, S.C.
116 West Grand Avenue
P.O. Box 167
Eau Claire, WI 54703-0167

William F. Bauer
Wisconsin Bar #1007676
COYNE, SCHULTZ, BECKER & BAUER, S.C.
150 East Gilman Street, #1000
Madison, Wisconsin 53703-1495
(608) 255-1388

Byron F. Egan
Texas Bar #06477000
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3797
(214) 953-5727