NEW YORK COURT OF APPEALS ROUNDUP

'RED SCARE' RECORDS, AT-WILL DOCTRINE EXCEPTION, CONFRONTATION CLAUSE

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

JUNE 20, 2012

The Court of Appeals recently decided a Freedom of Information Law (FOIL) case of keen interest to historians and the press involving access to records of the Board of Education's decades-long "red scare" investigations of teachers. The court held that the identities of individuals who had been named in interviews could not be redacted. However the identities of interviewees who had been promised confidentiality could be redacted to protect their privacy, at least while they and their children are alive.

In an employment action, a divided court (5-2) held that a hedge fund was free to fire a compliance officer who had confronted the fund's CEO about alleged improper conduct because the officer was an at-will employee.

In a criminal action, the court addressed for the first time whether a defendant can open the door to the admission of evidence otherwise inadmissible under the confrontation clause, finding that a defendant can do so, and in the case before it did.

Interviewees' Privacy Rights

Lisa Harbatkin is a historian of the anti-communist era. In addition, she has a personal connection to the New York City Board of Education's hunt for communists and "unrepentant" former communists amongst its teachers between 1936 and 1962, as both of her parents were targets. Her mother was among the approximately 1,100 teachers interviewed as possible communists and/or to "name names," and her father was among the approximately 400 teachers who were fired or resigned as a result of the investigations. This month the court ruled in Harbatkin's five-year quest to obtain unredacted copies of the relevant files in *Matter of Harbatkin v. New York City Department of Records and Information Services*.

---

* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

In response to Harbatkin's FOIL request for copies of the files of the anti-communist investigations, the New York City Department of Records and Information Services collected a random sample of interview transcripts. A review of those transcripts revealed that in every case the assistant corporation counsel promised in nearly identical language that the interview was "a matter of strict confidence" and would not be the subject of any "publicity." In certain cases, the interviewee probed the matter further, sometimes expressing concern that family members might learn of their participation. In these cases, the assistant corporation counsel assured the individual that no one, including his or her family members, would ever learn of the fact of the interview.

The Department of Records initially redacted the files heavily to remove the name and identifying information concerning any individual who was either interviewed or mentioned in an interview, unless the person consented to being identified. It relied upon the FOIL exception to government agencies' obligation to produce records if disclosure "would constitute an unwarranted invasion of personal privacy." N.Y. Public Officers Law §87(2)(b). After Harbatkin objected, the department offered to provide her access to unredacted files on the condition that she not publish the names. She refused to agree, and commenced an Article 78 proceeding. Among other things, Harbatkin argued that without completely unredacted documents she would not be able to obtain interviewees' first-person accounts of the events.

The Court of Appeals' unanimous decision summarily rejected the argument that redaction in these circumstances was unconstitutional. Judge Robert Smith's opinion for the court instead focused upon the statutory issue.

FOIL contains seven types of disclosures that come within its personal privacy exception. That list is non-exclusive, however. When another type of disclosure is in dispute, a court must weigh the public and private interests at stake to resolve whether disclosure would be unwarranted. The court's balancing of interests here yielded a result that was reasoned, but that some may consider counterintuitive in this emotionally charged historical context, to wit, the court held that the Department of Records must disclose the identities of those named by others but not the identities of their accusers. The result also raises policy issues as it paves the way for public authorities to cloak certain activities from public disclosure by making promises of confidentiality. Such policy issues must be addressed by the Legislature, however.

The decision took note of the length of time that had elapsed since the investigations and the fact that public attitudes toward communists have softened over the decades. Although unstated, it may also have been in the back of the judges' minds that public attitudes toward those who assisted in the hunt for communists have hardened over time. The passage of time and changed attitudes diminished the privacy concerns for

those identified as potential communists, the court stated. Although disclosure of the identities of those accused might not be "completely harmless," Smith wrote, that fact "must be weighed against the claims of history. The story of the Anti-Communist Investigations…should be told as fully and as accurately as possible…." As a result, the identities of those mentioned in interviews could not be withheld by the Department of Records.

The result was different for those interviewed who had been promised confidentiality. Presumably only a few interviewees are still alive, but some of their children may be. Weighing the claims of history against the likelihood that disclosure might cause some small embarrassment to children of interviewees, the court found that the government's promise tipped the scales in favor of finding the privacy exception applies, at least for now. The court did hold out the possibility that at some point in the future the promise made "is so ancient that its enforcement would be pointless, but that time is not yet."

Employee at-Will Doctrine

The court reaffirmed in *Sullivan v. Harnisch* that New York's common law does not permit a wrongful discharge claim by an at-will employee except in the most limited circumstances. Here, because the plaintiff was employed at the defendant hedge fund as, among other things, chief compliance officer, his case was more susceptible to the application of an exception to the at-will doctrine recognized in *Wieder v. Skala*, 80 N.Y.2d 628 (1992), as shown by the dissent. Indeed, the majority explicitly left room for further exceptions beyond the lawyer/law firm employment relationship present in *Wieder*.

In fact, Joseph Sullivan was not a mere employee of the hedge fund. He also held 15 percent of its equity and served, in addition to chief compliance officer, as executive vice president, treasurer, secretary and chief operating officer. He did not have an employment agreement with the firm, however.

Sullivan was allegedly fired for two reasons. First, he objected to a proposal by his employer to eliminate his equity position. Second, he objected to sales of certain stocks in advance of fund clients' trades by William Harnisch, the hedge fund's majority owner, president and chief executive officer, from Harnisch's personal account and from the accounts of his family members. Such sales are called "front-running" because they take advantage of an opportunity from which clients are excluded. Sullivan was fired within days of his voicing his objections.

Sullivan argued that because he was a compliance officer in a securities firm a cause of action for wrongful termination should lie in his favor. The Supreme Court sustained

his wrongful termination claim, but the Appellate Division, First Department, reversed, dismissed the complaint and then granted leave to Sullivan to appeal to the court.

The court affirmed, 5-2, in an opinion by Judge Smith. In doing so, the court reviewed its prior opinions holding no wrongful discharge cause of action lies in favor of at-will employees, some of which involved allegations that the employee had objected to financial or other improprieties by the employer. In addition, the court pointed out, *Wieder* has been the sole exception to this rule in New York jurisprudence and the decision there was based upon the unique situation of a lawyer being discharged because of his insistence that his firm report professional misconduct by another lawyer at the firm. In *Wieder* the court had concluded that "the unique function of self-regulation belonging to the legal profession" justified the creation of a narrow exception to the at-will doctrine and permitted a wrongful discharge claim.

While acknowledging that compliance with federal laws and regulations by firms such as the employer here is overseen by compliance personnel, the court found that such federal laws and regulations did not provide a reason to make state common law more intrusive with respect to the employer-employee relationship.

Chief Judge Jonathan Lippman issued a strong dissent, joined in by Judge Carmen Beauchamp Ciparick, asserting that the majority's opinion undermines the exception to the at-will doctrine recognized in *Wieder*. Moreover, the dissent suggested, the majority opinion would cause compliance officers and others in like roles to "keep their heads down" and ignore possible illegal or unethical conduct that could cause "staggering losses to their employers' clients," in order to keep their jobs.

It appears to these writers that *Sullivan* raises a policy question: limit wrongful discharge suits in favor of at-will employees to the very narrow *Wieder* exception, or open New York's courts to many wrongful discharge suits predicated upon claims of employer wrongdoing of myriad varieties as to which an employee objected and it resulted in a retaliatory discharge. As *Sullivan* shows, the policy question is a close one.

Testimonial Evidence

Can a defendant open the door to the admission of evidence that would otherwise be excluded under the U.S. Constitution's confrontation clause? Yes, subject to a two-part inquiry that must be conducted on a case-by-case basis, under the court's ruling in *People v. Reid*.

Lamarr Reid and Shahkene Joseph were arrested for killing a man during a robbery. Joseph provided a confession in which he named Reid as his only accomplice. The trials of the two men were severed.

A principal theory of Reid's defense was that the police investigation had been inadequate. Defense counsel questioned a law enforcement officer to establish that investigators had not followed up on a lead that a third person who was never arrested, Charles McFarland, may have been involved. The prosecutor's cross-examination of the officer brought out both that McFarland had been mentioned by someone who was not present at the scene of the crime and that an eyewitness had stated that McFarland was not there. The defense objected, arguing that it was obvious to the jury that the eyewitness was Joseph and that the statement was testimonial in nature, making it inadmissible under the Confrontation Clause. On appeal, the People conceded that the agent's answer would have been inadmissible had the defense not opened the door to the testimony during its examination.

Judge Eugene Pigott Jr.'s opinion for the court first answered whether the door can ever be opened for admission of evidence otherwise barred by the confrontation clause. The court noted that the U.S. Supreme Court has ruled that it is possible to open the door for admission of statements taken in violation of *Miranda*, and observed that a contrary rule in the confrontation clause context could be subject to abuse and impede the truth-seeking goal of a trial. The court therefore joined the five federal circuit courts of appeal that have resolved the issue (the U.S. Court of Appeals for the Second Circuit has not yet addressed it) in holding that it is possible to open the door to admission of such evidence.

Next, the court set forth a two-part test for trial courts to apply in these circumstances: (1) to what extent the evidence or argument that opened the door is incomplete and misleading; and (2) what evidence is "reasonably necessary to correct the misleading impression." Applying this standard, the court concluded that the trial court had not abused its discretion in allowing into evidence the disputed testimony.