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Washington Supreme Court: In-House Counsel Can Sue for Wrongful Discharge

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In a case of first impression in Washington, the Supreme Court held that former in-house counsel can sue their employers for wrongful discharge. *Karstetter v. King County Corrections Guild*, __ Wn.2d __, 444 P.3d 1185, 2019 WL 3227311 (July 18, 2019), was before the Supreme Court after a motion to dismiss by the defendant had been denied by the trial court and then reversed by the Court of Appeals. Therefore, the initial pleadings below framed the narrow legal issue before the Supreme Court.

In those pleadings, the plaintiff alleged that he had worked for the defendant as an in-house counsel for over 20 years on a succession of five-year contracts that included a termination clause providing him with an opportunity to correct any behavior the defendant deemed "inappropriate." Although the plaintiff eventually formed his own law firm, he argued that he essentially remained in-house counsel. The plaintiff was later terminated by the defendant without affording him the notice and opportunity to correct provided in the termination clause. The plaintiff also asserted he was fired for cooperating with the investigation of a whistle-blower complaint.

As noted, the trial court denied the defendant employer's motion to dismiss the plaintiff's breach of contract and wrongful discharge claims but the

Court of Appeals reversed. At the Supreme Court, the employer primarily argued that as a lawyer, the in-house counsel could be fired for any reason without redress under RPC 1.16(a)(3)—requiring a lawyer to withdraw when discharged—and associated decisional law from the traditional attorney-client context essentially finding that a client can terminate a lawyer at any time and for any reason.

A six-member majority of the Supreme Court disagreed. Relying heavily on the California Supreme Court's decision in *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994), the Washington Supreme Court majority concluded that the relationship between an in-house counsel and the employer must be assessed as an employee-employer relationship as well as an attorney-client one. The majority reasoned that RPC 1.16 standing alone did not expressly prohibit a wrongful discharge claim by in-house counsel, acknowledging that "[t]oday's legal employees operate differently from private sector attorneys." 444 P.3d at 1190. The three-member dissent argued that in-house attorneys should be treated the same as their private practice counterparts and, therefore, should not have a legal remedy for their discharge.

In a footnote, the majority flagged but did not address what may be a more practical problem in this context: the extent to which former in-house counsel

may reveal privileged or otherwise confidential information in litigating a wrongful discharge claim. In doing so, the majority cited *In re Schafer,* 149 Wn.2d 148, 66 P.3d 1036 (2003), where the Supreme Court rejected a "whistle-blower" exception to lawyer confidentiality. RPC 1.6(b)(5) includes an exception permitting a lawyer to "reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." The ABA in Formal Opinion 01-424 (2001) concluded that a wrongful discharge action by a former in-house counsel fit within the meaning of "claim" as used in the corresponding ABA Model Rule on which Washington RPC 1.6 is patterned generally. The ABA opinion cautioned, however, that the scope of the exception was narrow and that "[t]he measures necessary to protect information that may be disclosed will be unique to each situation." *Id.* at 4. The ABA opinion counseled that lawyers in this situation should consider using available procedures such as sealed filings and *in camera* review to protect continuing client confidentiality. In sum, although *Karstetter* allows wrongful discharge claims by former in-house counsel (at least on its asserted facts), the specific path for litigating them remains an open question in Washington.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.