

Ex-GC Based Discrimination Suit on Confidential Data, Employer Says

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A former in-house counsel who claims he was fired because his supervisor had "a discriminatory animus toward Jewish people" must respond to allegations in a counterclaim from his former employer that he improperly disclosed confidential information in his court complaint, a Manhattan appellate court ruled Tuesday.

In an unsigned, unanimous opinion, an Appellate Division, 1st Department, panel concluded that the lawyer's obligation to the Loews Corporation was not overridden by the fact that he was an "at will" employee.

The ruling in *Keller v. Loews Corporation*, 102735/06, reversed a decision by Manhattan Acting Supreme Court Justice Debra A. James that had thrown out Loews counterclaim to the lawsuit filed by Elan Keller under city and state anti-discrimination laws.

The panel wrote that a lawyer employed "at will" nevertheless is charged with "a high degree of undivided loyalty" to his client, an obligation that survives the termination of the attorney-client relationship.

The panel consisted of Justices David B. Saxe, James M. Catterson Jr., Karla Moskowitz, Leland G. DeGrasse and Sheila Abdus-Salaam.

Keller was fired less than seven months after he was hired as a corporate tax planning counsel at Loews, a holding company, valued at \$29 billion. Among its holdings are Loews Hotels, CNA Financial, an insurance company and a natural gas company.

In his complaint, Keller, claimed his supervisor had "berat[ed]" him for not working "on high holidays in accordance with his religious practices" after learning he is Jewish.

According to Loews' brief, Keller was fired by his supervisor, Susan Becker, for poor performance. Among other things, the company said he "was too quick to respond, needed to be more detail oriented and failed to accomplish what he promised to do."

Becker was also named as a defendant in the case.

According to his complaint, Keller had spent six years working as a tax attorney, most recently before being hired by Loews at the American International Group. Loews offered him \$55,000 more than he had been earning at AIG, the complaint stated.

In resurrecting Loews' counterclaim, the appeals panel wrote that Keller had "failed to establish prima facie that he did not disclose confidential information or communications with Loews."

There was a factual issue to be resolved, the panel wrote, as to whether certain allegations in the complaint were based on confidential information Keller possessed as the company's tax counsel or upon information available from independent sources.

In its brief, Loews homed in on language in the complaint that stated the company had relied upon "a difficult and high profile analysis" Keller had prepared in deciding "not to 'spin off' or monetize its interest in its subsidiary, Loews Hotels Holding Corporation."

Keller resisted that characterization in his appellate brief stating that the allegations in the complaint were related to "generalized public facts" and "not one iota" of his work product had been disclosed.

Loews rebuffed that contention, asserting that none of the information it had identified as objectionable was publicly available at the time the complaint was filed on Feb. 28, 2006.

Alan Serrins, Keller's attorney, said the ruling creates a new and difficult hurdle for lawyers claiming their employers have discriminated against them.

"A discrimination claim always raises the issue of poor job performance," he said. "How can a lawyer show that a so-called legitimate non-discriminatory reason is pretextual if he can't demonstrate what work he performed?"

Loews and Becker were represented by **Elise M. Bloom** of Proskauer Rose.

