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Message From the Chair

by Domenick Carmagnola

Welcome to the first digital version of *The Labor & Employment Law Quarterly*, a new twist to our renowned publication. Many thanks to Anne Bancroft and Claudia Reis for shepherding this transition, and for working with the bar association to create our new look. Thanks also to Kate Coscarelli, the director of media relations communications for the New Jersey State Bar Association, for her invaluable assistance and input. We hope you enjoy our new look and format, and the continued excellence, quality and timeliness of our articles. Enjoy, and welcome to the digital age of the *Quarterly*!

As excited as I am about the *Quarterly*, I am equally as disappointed in recent events regarding the annual Public Employee Relations Commission (PERC) Conference. As a number of you know, substantial time and effort was invested by me and a number of our members to ensure that the PERC Conference would take place this year. Indeed, the conference is an invaluable benefit to both sides of the table, and the effort to organize it and put it on is a worthwhile endeavor. At our recent meeting of the section's executive board, I was happy to report that our efforts had paid off. By now, however, you have likely heard that the PERC Conference will not take place this year.

It appears that individuals and organizations associated with our members, and possibly some members as well, have employed an agenda to use the section and its benefits, such as seminars, as the platform for politics and self-promotion. Personal agendas will inevitably, and in my view, negatively impact this section's mission and collegiality. Beyond that, selfish agendas are not without far-reaching consequences. For example, the bar association makes significant financial commitments to plan events such as the PERC Conference. Here, the financial penalty in the contract with the hotel was substantial. But for considerable effort by leadership and staff to find avenues to recoup and offset otherwise significant monetary penalties, the cancellation might have had a significant economic consequence on our section and the bar association. Going forward, our requests to have events, and for financial support, will likely be reviewed in detail, and approved with reservations, conditions or even limitations.

So what went wrong? The PERC Conference has always been the perfect example of education, cooperation and unity among employment lawyers. Consistent with that result, our bylaws provide:

> The purpose of this Section shall be:
> **a)** To promote a more thorough understanding among members of the Bar of the legal problems encountered in the field of labor industrial and employment relations;
> **b)** To provide to members of the Bar, particularly those interested in labor-management relations, a means whereby that interest may be shared with others in programs of study and discussion or by means of reports, articles or conferences;
> **c)** To conceive and implement studies, programs, conferences and seminars in cooperation with local Bar Associations, union organizations and educational institutions or other interested groups including but not limited to annual conferences with the NLRB, PERC and other governmental agencies;
> **d)** To provide for the establishment of regular or special committees to report on legislative or administrative matters dealing with the labor and industrial relations field;
> **e)** To publish on a regular basis the *New Jersey Labor & Employment Law Quarterly*;
> **f)** To undertake such other activities as the Section may decide upon to further its basis purposes.

Indeed, our goal should be to work together, in an effort to further this mission. While we are all advocates, and have every right to express our opinions and act in the best interests of our clients, should it be at the expense of an organization and events that are intended to give everyone a voice and an opportunity to be heard? Is it better to shut down the vehicle of information, or to have the opportunity to speak and be heard?

While at the helm of this section, I will do my best to promote its mandates and foster its mission. As part of that promise, I am providing fair warning that I will work equally hard to eradicate what may be efforts to interfere with that mission or individual agendas designed to undermine the foundation of what I view as the best section of the state bar. I take pride in the section, as should each and every one of our members. We all should embrace the idea of cooperation and unity. Self-centered interests will ultimately lead to conflict, and undermine unified goals and efforts. In short, the purpose of our section and what we promote is an opportunity for labor and management to share viewpoints and have discussions and discourse on legal issues that are relevant to our practice. As such, a boycott of our events or efforts to interfere with them does nothing but hurt the event and the section, and eliminate an opportunity for a discussion of the issues that are relevant.

My request to each of you is to contemplate the unthinkable—meetings where management and labor lawyers cannot co-exist in a unified section. I can tell you as someone who has spent many years involved in this section, and enjoyed the benefits and camaraderie of labor and management attorneys alike, the prospect is terrible. This section provides a wealth of resources and benefits beyond newsletters and materials. While vehicles such as the *Quarterly* and seminars will further enhance the value to our members, the true wealth of this section is the people and their relationships. It would truly be sad if that were to change.

As always, please let me know if you have any suggestions for meetings, events, seminars, committees, and the like, or if you or someone you know would like to become more involved in the section and to help foster our mission.

Editor's Message

by Anne Ciesla Bancroft

In this issue of the *Quarterly*, our authors provide thoughtful and practical advice to practitioners on both sides of the employment law bar. Maureen Binetti discusses the considerations for plaintiff's counsel, defense counsel and mediators when punitive damages are at issue in a case. Jed Marcus reviews the ethical considerations involved in protecting clients' secrets and avoiding conflicts of interest. Dena B. Calo and Alexander L. D'Jamoos explain the new New Jersey Trade Secrets Act and its implications for New Jersey employers.

The *Quarterly* continues its analysis of the Dodd-Frank Act with a discussion by Lynne Anne Anderson and Meredith R. Murphy. In addition, Anthony Limitone Jr. provides a thoughtful discussion of the enforceability of restrictive covenants in the context of a change in control. Christopher Lenzo shares his concerns regarding the breadth of judicial authority in *remittitur* decisions after *He v. Miller*. Evan Lison counsels practitioners on how to avoid spoliation of evidence. Finally, Stacey A. Cutler and Kathleen L. Kirvan compare the union and company perspectives on the National Labor Relation Board's final rule on election procedures.

In the discrimination context, Laura K. DeScioli lays out the roadmap, provided by Verizon's settlement with the Equal Employment Opportunity Commission, for drafting and implementing attendance and leave policies that are compliant with the Americans with Disabilities Act. James M. McDonnell clarifies that not getting the job an applicant subjectively prefers is not an adverse employment action sufficient to support a discrimination/retaliation claim. In addition, Robert Szyba explains the ministerial exception to anti-discrimination law.

Claudia Reis, Curtis Fox and Jay Becker address the plaintiff's and employer's different perspectives on the impact of *White v. Starbucks* on claims under the Conscientious Employee Protection Act. Jon Green gets to say "I told you so" as he discusses the New Jersey Supreme Court affirmation of the use of contingency enhancements in *Walker v. Giuffre* in his follow up to last year's article on this topic.

Finally, the *Quarterly* has a new look! In addition, going forward, the NJSBA will publish the *Quarterly* online only. We welcome your comments about the new appearance and online format, as well as your articles and continued support! ■

Inside this issue

When Employers Get Punished: Punitive Damages in Employment Law Cases

by Maureen S. Binetti

The question whether, and by how much, an employer may be 'punished' by an award of punitive damages in an employment law case is not an easy one to answer, whether it be from the employer's, employee's, or mediator's perspective. The law in this area is always evolving, as evidenced by recent appellate cases, while juries continue to punish employer-defendants after trial victories by employees on liability and compensatory damages, as shown by a recent Essex County verdict. This article will explore the types of cases in which punitive damages have been awarded by juries, as well as those in which the appellate courts have ruled on verdicts, in order to give practical guidance to practitioners who must evaluate the potential for punitive damages and give advice to their clients, as well as mediators of employment disputes who may be faced with these issues.

The Legal Framework for Punitive Damages

Both the New Jersey Law Against Discrimination (LAD) and the Conscientious Employee Protection Act (CEPA) provide for punitive damages. While the LAD and CEPA are specifically exempted from the cap provision of the Punitive Damages Act (PDA) (see discussion, *infra*.), the procedural criteria for punitive damages under the PDA apply.[1] These criteria are:

1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
2) The defendant's awareness [or] reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
4) The duration of the conduct or any concealment of it by the defendant.[2]

When a punitive damage award is made, a trial judge is required to determine whether the jury's award is "reasonable" and "justified in the circumstances of the case;" if not, the judge must reduce or eliminate the award.[3]

The LAD and CEPA do not "substantially alter the common law regarding punitive damages."[4] To be exceptional, the defendant's conduct must "ris[e] to the level of wanton or reckless conduct." In other words, the plaintiff must demonstrate "exceptional or outrageous action to recover such damages,"[5] and must offer "proof that the offending conduct [was] especially egregious."[6]

"'Our cases indicate that the requirement [of willfulness or wantonness] may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences.'"[7] "The key to the right to punitive damages is the wrongfulness of the intentional act."[8] Under the PDA, a plaintiff must prove his or her entitlement to punitive damages by clear and convincing evidence.[9] Additionally, in such cases, punitive damages only may be assessed against an employer if there was "actual participation by upper management or willful indifference."[10]

In *Cavuoti v. N.J. Transit Corp.*,[11] the state Supreme Court defined which management employees are considered "upper management," such that their actions can give rise to punitive damages. The *Cavuoti* Court held that the definition of "upper management" is not limited to the "uppermost-tier of employees."[12] The Court adopted a "functional" analysis, focusing on an employee's job duties and the scope of authority vested in the manager.[13] A management employee must have "sufficient authority so that the imposition of damages against the employer is fair and reasonable."[14]

The Court further explained upper management as follows:

> *[U]pper management would consist of* those responsible to formulate the organization's anti-discrimination policies, provide compliance programs and insist on performance (its governing body, its executive officers), and *those to whom the organization has delegated the responsibility to execute its policies in the workplace, who*

set the atmosphere or control the day-to-day operations of the unit (such as heads of departments, regional managers, or compliance officers). For an employee on the second tier of management to be considered a member of "upper management," *the employee should have either (1) broad supervisory powers over the involved employees, including the power to hire, fire, promote, and discipline or (2) the delegated responsibility to execute the employer's policies to ensure a safe, productive and discrimination-free workplace.*[15]

When such instructions were not given, significant punitive damages awards have been reversed.[16]

While the PDA's cap on punitive damages (a five-to-one ratio to compensatory damages) does not apply to LAD or CEPA cases, courts use this provision to assess the reasonableness of punitive damages awards under those statutes. Indeed, defendants, and the courts, have utilized the U.S. Supreme Court's due process punitive damages holding in *BMW of N. Am. Inc. v. Gore*,[17] as well as the guidance of the New Jersey Supreme Court in *Baker v. Nat'l State Bank*,[18] to challenge punitive damage awards on due process grounds on a "ratio" to compensatory damages basis.[19]

The *Gore* factors, reiterated more recently in *State Farm Mut. Auto Ins. Co. v. Campbell*,[20] are:

1) the degree of reprehensibility of the defendant's misconduct;

2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[21]

The PDA factors are similar. In addition, the PDA instructs that the profitability of the conduct, when it terminated, and the financial condition of the defendant shall be considered.[22] The state Supreme Court applied the *Gore* standard in *Baker*, *supra*, when it declared that: "to ensure that any award of punitive damages bears 'some reasonable relation' to the injury inflicted," courts reviewing punitive-damage awards in LAD cases should apply: 1) the PDA's "general requirements for procedural and substantive fairness," and 2) "*Gore*'s three constitutional factors."[23]

What is Egregious, Reprehensible Conduct?

In *Campbell*, the Court instructed that the degree of reprehensibility of a defendant's conduct is the most important factor in deciding the reasonableness of a punitive damages award.[24] Courts are to consider whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated acts or was an isolated incident; and the harm was the result of intentional malice, treachery, or deceit; or mere accident.[25] These factors, as well as the related factors under the PDA, also appear to capture the types of actions juries find justify punitive damages awards in LAD and CEPA cases, and that the appellate courts have upheld.

Deceit

In *Rendine v. Pantzer*, the Supreme Court sustained the jury's award of punitive damages for each plaintiff. The defendants had given the pregnant plaintiffs unqualified promises that their positions would be available upon their return from leave, but nonetheless terminated them within days of their planned return to work.[26] Moreover, the defendants promoted other employees to fill the plaintiffs' positions while they were out on leave. The Court found that the jury could have reasonably concluded the "defendants never intended that [the plaintiffs] return to work, [and]… had embarked on a course of conduct designed to mislead plaintiffs and other company employees into believing that the company's motives and intentions were honorable."[27] The Court thus concluded that there was "no doubt" the proofs were sufficient to sustain a punitive damage award.[28]

Thus, the New Jersey courts tend to find egregious behavior where an employer is deceitful and uses trickery. For example, in *McConkey v. Aon Corporation*, the Appellate Division held the defendant's act of lying about the security of a prospective job, which induced the plaintiff to leave a secure position from which he was ultimately terminated because of the company's sale, was enough to sustain a punitive damages verdict.[29] There were no additional acts by the employer from which the punitive damages claim stemmed. The Appellate Division, in upholding the punitive damages award in *McConkey*, emphasized the fact that it found it egregious that the employer intentionally disregarded the plaintiff's

career aspirations in misrepresenting to him the stability of his new position.[30] The Appellate Division agreed with the trial court that such conduct was sufficiently egregious to justify a punitive damages award.[31]

In *Baker v. National State Bank*, the Appellate Division upheld a jury's punitive damages award, although the award was six times the plaintiffs' compensatory damages award.[32] The defendant in *Baker* selected the plaintiffs for termination and then searched for reasons to justify their terminations.[33] The defendant "set about to trash the reputation of one of the plaintiffs."[34] In order to do so, the defendant subjected the plaintiffs to "false and insulting allegations and her character and reputation were impugned."[35] The defendant fabricated poor performance of the plaintiffs, including placing notes in plaintiffs' personnel files.[36] The defendants actions involved "trickery and deceit,"[37] and justified punitive damages.

A Pattern or Practice of Illegal Conduct

In addition to the cases cited above, most recently, in *Saffos v. Avaya, Inc.*,[38] the Appellate Division severally reduced the plaintiff's punitive damages award. While doing so, the court nevertheless found a substantial punitive damages award justified primarily because, "although the harm was economic, Avaya disregarded the mental health of defendant and other older workers[39] when Werner, with his supervisor's acquiescence, mounted a deliberate, systematic campaign to terminate the employment of the division's older employees, including plaintiff, under the pretext of poor performance, and then covered up his unlawful age discrimination, with advice of management, by using a sham PIP procedure, which Avaya did not officially employ, and which was never instituted when younger employees undeniably violated similar company policies....Werner further created a hostile work environment by excluding older workers from meetings and lunches. The plaintiff was certainly financially vulnerable, as the termination of his employment wrecked havoc with his standard of living and his financial security. Werner's conduct and Avaya's indifference to it involved repeated actions and not mere accidents."[40]

The Court continued: "[e]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."[41] Additionally, the conduct violated long-established and clear statutory mandates under the LAD. Thus, under *Campbell*, *Gore*, and *Baker*, the defendants' actions were "reprehensible, despite the absence of physical harm."[42]

Similarly, in *Mancini v. Twp. of Teaneck*, the Court, while reducing part of the $1 million emotional distress award (to $625,000) as duplicative, sustained a $500,000 punitive damages award based upon the fact that a pattern and practice of sexual harassment and retaliation had persisted for almost 20 years.[43]

Retaliation; Public Policy

Retaliation claims arguably are the most dangerous types of claims for defendants, particularly when they involve a plaintiff who makes a complaint regarding conduct harmful to other employees, and/or to the public, and even more so if the complaint raises health or safety concerns, rather than complaining about conduct directed against the plaintiff him or herself. LAD plaintiffs who stand up against illegal discrimination directed against a group of which they are not a member, and CEPA plaintiffs who try to remediate practices that injure the public, appear to resonate most with juries, as reflected in large verdicts, including for punitive damages.

Indeed, arguably, by its very nature retaliation is the intentional, malicious punishment of the plaintiff, and thus meets the 'egregious' requirement for punitive damages. It thus may be seen as 'more than' a 'mere' act of discrimination, including a discriminatory termination, which courts have held is not enough to warrant punitive damages. As the court stated long ago in *Weiss v. Parker Hannifan Corp.*,[44] "a plaintiff must show more than the minimum conduct necessary to prove the underlying cause of action before an award of punitive damages becomes appropriate. If this were not the case, punitive damages would be awarded, even required, whenever a party proved a discrimination claim under the LAD."[45]

However, in both *Abbamont v. Piscataway Twp. Bd. of Educ.*[46] and *Mehlman v. Mobil Oil Corp.*,[47] the state Supreme Court allowed punitive damages awards in CEPA cases involving health and safety concerns. In *Abbamont*, school children were exposed to noxious fumes in shop; in *Mehlman*, toxic chemicals were used by the defendant in Japan. Indeed, in *Mehlman*, the Court upheld a $3.5 million punitive damages award when the compensatory award was virtually the same amount.[48]

Physical or Emotional 'Torture'

Cases of extreme physical and/or emotional harassment often result in large emotional distress awards, as well as substantial punitive damage verdicts. Indeed, in *Saffos*, *supra*, the Court, citing *Gore*, held that emotional distress damages often contain a punitive element, and so found in that case. It then eliminated from the compensatory damages award the emotional distress damages component in fixing what it deemed to be a proper ratio of punitive to compensatory damages of five to one.[49] Regardless of the propriety of that result, it is clear egregious behavior may result in substantial emotional distress damages, as well as punishment of the offender for such conduct.[50]

The best, and most recent, example of this result is what is believed to be the largest single plaintiff LAD verdict in New Jersey to date, a verdict by an Essex County jury in Dec. 2011 in *Specchio, et al v. New Penn Motor Express, Inc.*, et al. In a case brought under the LAD for a hostile work environment based on perceived sexual orientation, as well as common law claims, the jury awarded plaintiff Scott Specchio $22.7 million in total damages.

New Penn Motor Express, Inc., which is part of YRC Worldwide, Inc., employed Specchio as a dispatcher. Specchio contended his supervisor subjected him to anti-gay slurs on a daily basis over a period of years, including calling him a "faggot" and "homo," among other highly offensive comments.

Specchio further contended that his supervisor physically abused him on a daily basis over a period of years, which included striking him, shoving him into walls, writing on his bare head with a marker, and slamming his wheeled chair into a desk from behind. Finally, Specchio alleged that the New Penn supervisor belittled the tragic death of his brother in an automobile accident. A young man, Specchio was rendered totally disabled and was receiving Social Security disability as a result of the defendant's actions.

The jury awarded Specchio approximately $4.6 million in economic and emotional distress damages, in addition to a $15 million punitive damage award, under the LAD. The jury also awarded Specchio $1 million for assault and battery, and $2 million for intentional infliction of emotional distress.

When Claims Do Not Go to the Jury

On the other side of the coin, many punitive damages claims never even get to the jury, as the court decides as a matter of law that the evidence is insufficient to meet the threshold for such damages.[51] Anecdotal evidence, as well as unpublished opinions, tend to support the conclusion that trial courts often will preclude the jury from hearing the punitive damages issues (in bifurcated trials under the PDA). It is clear that something more than 'mere' discrimination, even if termination of employment results, is needed to be considered 'especially egregious.'

Conclusions and Practical Advice

What conclusions can be drawn from the above cases? Perhaps the easiest is that jurors may not be able to define it, or even understand the legal definition contained in the jury charge, but they know it when they see it. Whether the appellate courts agree is another story. The visceral reaction laypersons may have to deceit and trickery, patterns of abusive behavior, and retaliation will be tempered by courts concerned with ratios and 'excessive' verdicts.

Thus, plaintiff's counsel should be cautious in assuming the facts they deem to be egregious will be seen by trial and appellate courts the same way. Conversely, defense counsel should be wary of cases falling under the categories listed above, as evidenced not only by recent large verdicts, but recent appellate cases allowing large punitive damages awards, even where a 'ratio' analysis was applied.

From the perspective of a mediator of employment disputes, it is important that, except in *clearly egregious* cases, plaintiffs and their counsel not factor in punitive damages for purposes of determining an appropriate settlement amount. However, the risk of such damages, even if deemed to be relatively low, should be a factor defendants and their counsel consider in evaluating the benefits of settlement, particularly at an early stage. All attorneys involved in employment law clearly need to keep a close watch on verdicts, as well as the evolving case law in this area. ■

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Endnotes

1. N.J.S.A. 2A:15-5.14(c).
2. N.J.S.A. 2A:15-5.12(b).
3. N.J.S.A. 2A:15-5.14(a).
4. *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 500 (App. Div.), *certif. denied*, 136 N.J. 298 (1994) *Id*. ("[P]unitive damages are only to be awarded in exceptional cases even where the LAD has been violated.") *Id*. at 500-01 (*citing Weiss v. Parker Hannifan Corp.*, 747 F. Supp. 1118, 1135 (D.N.J. 1990)).
5. *Maiorino v. Schering-Plough Corp*, 302 N.J. Super. 323, 353 (App. Div. 1997).
6. *Rendine v. Pantzer*, 141 N.J. 292, 314 (1995) (LAD) (citation and internal quotation marks omitted); *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 419 (1994) (CEPA).
7. *Rendine*, *supra*, 141 N.J. at 314 (*quoting Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962)).
8. *Nappe v. Anschelewitz, Barr, Ansell & Bonello,* 97 N.J. 37, 49 (1984).
9. N.J.S.A. 2A:15-5.12.
10. *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 625 (1993) (citation omitted). *See also Maczik v. Gilford Park Yacht Club*, 271 N.J. Super. 439, 446 (App. Div.) *certif. denied*, 138 N.J. 263 (1994) ("Unlike compensatory damages, punitive damages under LAD can be imputed to an employer or other entity only 'in the event of actual participation by upper management or willful indifference.'" (citation omitted)).
11. 161 N.J. 107 (1999).
12. *Id*. at 130.
13. *Id*.
14. *Id*. at 128-29.
15. *Id*. at 128-29. [Emphasis Added].
16. *See, e.g., Maiorino v. Schering-Plough Corp.*, 302 N.J. Super. 323, 368-69 (App. Div. 1997); *Lockley v. Turner*, 344 N.J. Super. 1, 19-22 (App. Div. 2001).
17. 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).
18. 161 N.J. 220 (1999).
19. *See Saffos v. Avaya, Inc.*, 419 N.J. Super. 244 (App. Div. 2011) (court reduced punitive damages award to five-to-one ratio to compensatory damages, after reducing compensatory damages to eliminate their emotional distress component). *See also Maiorino v. Schering-Plough, Corp.*, *supra*, 302 N.J. Super. at 355-58 ($8 million punitive damages award deemed "excessive," "manifestly outrageous," and result of jury passion and prejudice because evidence of how plaintiff was terminated (in public place) was improperly allowed in punitive damages phase).
20. 538 U.S. 408, 123 S. Ct. 151 to 155 L. Ed. 2d 585 (2003).
21. *Campbell*, *supra*, 538 U.S. at 418, 123 S. Ct. at 1520, 155 L. Ed. 2d at 601 (*citing Gore*, *supra*, 517 U.S. at 575, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826).
22. N.J.S.A. 2A:15-5.12 (c).
23. *Id*. at 229, 231. N.J.S.A. 2A:15-5.12(b).
24. *Id*. at 419, *citing Gore*, *supra*, 517 U.S. at 575.
25. *Id*., *Gore, supra*, at 577.
26. 141 N.J. 292 (1995).
27. *Id*. at 316.
28. *Id*. *See also Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 563 (1989) (egregious behavior consisted of upper management three times denying handicapped employee promotion based upon his handicap, and plaintiff began to receive less positive performance reviews after he complained about how he was treated; Third Circuit held "clearly enough evidence for the issue of punitive damages to be presented to the jury.")
29. 354 N.J. Super. 25, 55 (App. Div. 2002).
30. *Id*.
31. *Id*.
32. 353 N.J. Super. 145 (2002).
33. *Id*. at 154.
34. *Id*.
35. *Id*. at 155.
36. *Id*. at 154.
37. *Id*. at 156.
38. 419 N.J. Super. 244 (App. Div. 2011).
39. The defendants in *Saffos* urged that the jury could not consider the impact of its actions on other older workers; however, the Court held that the jury was free to consider that impact on the issue of reprehensibility, *citing Philip Morris U.S.A. v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064, 166 L. Ed. 2d 940, 949 (2007) ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible[.]"). *Id*. at 267 n. 8.
40. *Id*. at 267.
41. *Gore*, *supra*, 517 U.S. at 576-77, 116 S. Ct. at 1599, 134 L. Ed. 2d at 827 (citation omitted).

42. *Saffos*, *supra*, 419 N.J. Super. at 267-68.
43. 349 N.J. Super. 527, 568 (App. Div. 2002) (subsequent irrelevant history omitted).
44. 747 F. Supp. 1118 (D. N.J. 1990).
45. *Id*. at 1136. *See also Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 501 (App. Div. 1994); *Delli Santi v. CAN Ins. Companies*, 88 F. 3d 192, 207 (3d Cir. 1996).
46. 163 N.J. 14 (1999).
47. 153 N.J. 163 (1998).
48. *Id*. at 166. *See also Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010) ($4.565 million punitive damages award upheld in LAD discrimination/retaliation case).
49. *Id*. at 269.
50. *See Mancini*, *supra*; *Lockley*, *supra*.
51. *See, e.g., Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 273 (App. Div. 1996) (trial court's dismissal of punitive damages claim upheld in LAD case, even where discrimination claim sufficient to go to jury; "especially egregious" or "willfully indifferent" behavior by upper management not shown); *Blume v. Denville Twp. Bd. of Educ.*, 334 N.J. Super. 13, 41-42 (App. Div. 2006) (affirming jury verdict of discriminatory termination under LAD, but also affirming trial court's refusal to submit punitive damages claim to jury because defendant's conduct was unlawful, but not especially egregious).

The Ethical Lawyer: Diligence and Judgment in the Practice of Law

by Jed Marcus

The theme for this article is 'diligence,' that is, the attorney's obligation in different contexts to act diligently in protecting his or her client's secrets and avoiding conflicts of interest. In one case, a court held a defense attorney in a Fair Labor Standards Act (FLSA) case was held to have waived the attorney/client privilege because he failed to rectify the inadvertent disclosure diligently and in a timely manner. In another, a court disqualified the plaintiff's law firm because the firm, having hired an associate from the adversary's law firm, failed, among other things, to screen the associate from the case properly. Each of these cases teaches the importance of paying attention to the rules.

Waiving the Privilege

First to be addressed is the diligence required to protect the attorney/client privilege from waiver, which implicates several Rules of Professional Conduct (RPCs). RPC 1.6(a) of the RPCs mandates that "[a] lawyer shall not reveal information relating to the representation of a client" unless the client gives permission or other exceptions apply. Comment 16 to RPC 1.6 states that, "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer."[1] Also, Comment 17 states, "[t]he lawyer must take reasonable precautions to prevent [transmitted communications] from coming into the hands of unintended recipients."[2]

If an attorney inadvertently emails confidential information to an adversary, the court will generally consider the following factors to determine if a waiver occurred: 1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2) the number of inadvertent disclosures; 3) the extent of the disclosure; 4) any delay and measures taken to rectify the disclosure; and 5) whether the overriding interests of justice would or would not be served by relieving the party of its error.[3]

Jacob v. Duane Reade, Inc.[4] is a recent example of what can go wrong when the sending attorney fails to act quickly after learning that he or she has inadvertently sent privileged material during discovery. In *Jacob*, defense counsel inadvertently sent a two-page email containing confidential information later determined by a federal magistrate to be partially protected by the attorney/client privilege. However, the magistrate in this Fair Labor Standards Act action also determined that counsel had waived the privilege by failing to rectify the inadvertent disclosure diligently.

The two-page email in question described a meeting during which issues relevant to the case were discussed and, among other things, identified a person only as "Julie" as having attended. The information first popped up during the deposition of the vice president of human resources, who was questioned about the email's contents. Defense counsel did not assert a privilege or attempt to identify the "Julie" referred to in the email. Only later did defense counsel determine that the email contained privileged information because "Julie" was actually an in-house attorney who gave information and legal advice on the issue in dispute. Only then did defense counsel notify plaintiffs' attorneys that the email was privileged and demand that all copies be returned. Plaintiffs' counsel refused, arguing the email was a business document not protected by privilege, and that, in any event, privilege had been waived.

The court did not doubt that the disclosure of the email was inadvertent, crediting defense counsel with taking reasonable steps to prevent the disclosure of privileged information. It found, however, that defense counsel failed to act promptly to rectify the disclosure of the privileged email. Even when defense counsel became aware of the email, which, on its face, suggested a privilege, he allowed a witness to be deposed about it, failed to make efforts to ascertain the identify of "Julie," and failed to raise a privilege objection or demand the email's return for more than two months.[5] Concluding that the attorney/client privilege was waived, the court refused to compel the employees to return the partially privileged email document.

What about the lawyers in *Jacob* who received the errant email? There are, in fact, several RPCs that bear upon the responsibility of the attorney who receives email or electronic documents that may contain confidential information, none of which were discussed in the decision. The specific rule is RPC 4.4(b), which requires "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[6]

Another rule the court did not address was RPC 1.3, which, while requiring that "[a] lawyer shall act with reasonable diligence and promptness when representing a client," also instructs the lawyer at Comment 1 "to exercise reasonable discretion in determining the means by which a matter should be pursued." The rule also cautions that a "lawyer is not bound...to press for every advantage that might be realized for a client."[7]

Finally, the court could have mentioned in passing RPC 3.2, which provides that "[a] lawyer…shall treat with courtesy and consideration all persons involved in the legal process."[8]

Certainly, defense counsel could have acted more promptly to rectify the inadvertent disclosure. But at the same time, the court could have, but failed to, balance defense counsel's obligations with those imposed upon plaintiffs' counsel by RPCs 1.3, 3.2 and 4.4.[9] In the end, however, the result may have been the same; it is hard to treat as secret information material that was fully discussed in various depositions.

Firm Disqualification

A lack of diligence in screening lawyers can also result in a violation of the RPCs and disqualification. *Martin v. Atlanticare* brought this point home when U.S. Magistrate Judge Joel Schneider disqualified a plaintiff's law firm because, having hired an associate from the adversary's law firm, it failed, among other things, to screen the associate from the case adequately.[10]

The question before the court was whether the plaintiff's firm in this discrimination, retaliation, and wage and hour lawsuit was disqualified because it employed a "side-switching attorney," that is, an associate who previously worked for the adversary in the instant case. To answer that question, the court analyzed two relevant RPCs, Rules 1.9 and 1.10(c).

RPC 1.10(c) instructs, in relevant part that a lawyer who becomes associated with a firm cannot represent a client in a matter in which that lawyer is disqualified unless: 1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility; 2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and 3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.[11]

RPC 1.9, which governs duties to former clients, states that "a lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."[12]

Here, the court had no difficulty disqualifying the associate from representing plaintiffs pursuant to RPC 1.9, finding the associate worked on the case in question when she worked for defense counsel.[13] The more important issue for purposes of this article was whether the associate's disqualification was imputed to the plaintiff's law firm. The court, after a careful examination of the facts, determined the associate had primary responsibility for the case,[14] thus declared the plaintiff's firm disqualified. However, even if the associate did not have primary responsibility for the case, her firm would have been disqualified because it failed to properly screen the associate, thereby violating RPC 1.10(c)(2).

While RPC 1.10(c)(2) indicates that the disqualified lawyer must be screened from any participation in the matter and the screening must be timely, RPC 1.10(f) instructs the diligent attorney that in order to screen the disqualified attorney from the case properly, it must, among other things, establish written procedures, acknowledged in writing by the disqualified attorney, that effectively remove him or her from any participation in the matter.[15]

So what happened in *Martin*? Although the firm represented to the court that it had orally instructed the associate not to touch the file or otherwise have anything to do with the case, it admitted that it did not have a written screening policy, a violation of RPC 1.10(f).[16] The court noted that "if the purpose of a screening procedure is to protect information the isolated lawyer is required to protect, written procedures should be in place before a disqualified lawyer starts work. At a minimum, the procedures should be in place when the employment starts, not after the disqualified lawyer leaves the firm."[17]

The firm failed RPC 1.10 in other respects as well.

The screening procedures, such as they were, were also deemed inadequate. There was no evidence that the case files were physically separated from the firm's other files. They were not specifically secured or "kept under lock and key," the firm's employees did not acknowledge in writing the procedures, and the associate was not locked out of the files on the firm's computer system.[18] Moreover, the firm did not give prompt written notice of the associate's employment to the defendants. Instead, defense counsel learned of the associate's employment with the plaintiff's firm only when he saw her name on the firm's letterhead.[19]

Conclusion

It is easy to second guess another lawyer who, in the thick of battle, makes a mistake, especially one that finds its way onto a published court decision. These cases should be read not from the perspective of armchair quarterbacks but from the perspective of students wise enough to learn from the mistakes of others. What *Jacob* and *Martin* teach in the particular is one thing, but what they can more broadly stand for is another—that lawyers must practice this "learned art"[20] with as much diligence and care as possible.

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Endnotes

1. RPC 1.6, Comment 16.
2. RPC 1.6, Comment 17.
3. *Apioishev v. Columbia University in City of New York*, No. 09 Civ. 6471, 2012 WL 208998, at *11 (S.D.N.Y. Jan. 23, 2012); *Maldonado v. New Jersey*. 225 F.R.D. 120, 130–31. (D.N.J. 2004).
4. No. 11 Civ. 0160 (S.D.N.Y. Feb. 28, 2012).
5. *Id*. slip op. at 12.
6. RPC 4.4.(b).
7. RPC 1.3, Comment 1.
8. RPC 3.2.
9. RPCs 1.3, 3.2 and 4.4.
10. Civil Case No. 10-6793 (D.N.J. Oct. 25, 2011).
11. RPC 1.10(c).
12. RPC 1.9.
13. *Id*., slip op. at 8.
14. *Id*., slip op. at 14.
15. RPC 1.10(f).
16. *Id*. slip op. at 24.
17. *Id*.
18. *Id*. slip op. at 25. See *Opalinski v. Robert Half International Inc*., Civil Action No. 10-2069, 2011 WL 1042762 (D.N.J. March 18, 2011) for a screening policy deemed acceptable.
19. *Id*. slip op. at 25-26, fn. 21.
20. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing Co. and ABA, 1953), p.5.

New Jersey Passes Law to Protect Trade Secrets from Misappropriation

by Dena B. Calo and Alexander L. D'Jamoos

Governor Chris Christie signed the New Jersey Trade Secrets Act (NJTSA)[1] into law on Jan. 9, 2012. The new law empowers owners who protect their trade secret (often employers) to seek injunctive relief and damages for misappropriation of that trade secret by improper means. The NJTSA is particularly useful in enforcing non-compete and employment agreements, and will be an additional cause of action in future non-compete/restrictive covenant litigations.

By passing this law, New Jersey became the 47th state to codify the basic principles of common law trade secret protection set forth in the Uniform Trade Secrets Act (UTSA), which the National Conference of Commissioners on Uniform State Laws adopted in 1979. New York, Massachusetts and Texas remain the only states that have not passed a law regarding the misappropriation of trade secrets.

Under the law, a trade secret is any form of information that derives current or potential economic value from not being commonly known, where the holder of the information has undertaken to maintain its secrecy.[2] Unlike trademarks and patents, which are covered by the Lanham (Trademark) Act,[3] federal law does not protect trade secrets. Prior to the passage of the NJTSA, in New Jersey only common law and, under certain circumstances, the Computer Related Offenses Act,[4] protected trade secrets.

The Legislature took care to preserve New Jersey's century-old trade secret common law when enacting the NJTSA. The NJTSA expressly states that the "rights, remedies and prohibitions provided under this act are in addition to and cumulative of any other right, remedy or prohibition provided under the common law or statutory law of the State," and will only "supersede conflicting tort, restitutionary, and other law of the State providing civil remedies for misappropriation of a trade secret."[5]

Like the UTSA, New Jersey's trade secret law creates a private cause of action for *actual* or *threatened* misappropriation of trade secrets by improper means. However, because the New Jersey common law expanded protection of confidential information beyond traditional trade secrets misappropriation law, the NJTSA defines trade secrets more broadly than the UTSA. The NJTSA defines a trade secret as:

> Information, held by one or more people, without regard to form, including a formula, pattern, business, data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:
> **(1)** Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> **(2)** Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6]

As required by the statute, the holder of a trade secret must take "reasonable" steps to maintain the secrecy of the trade secret, which means that a company must have systems and policies in place to ensure that information is kept confidential.[7]

As explained above, the NJTSA only prohibits the misappropriation of trade secrets through improper means, which is defined as:

> Theft, bribery, misrepresentation, breach or inducement of a breach of an express or implied duty to maintain the secrecy of, or to limit the use or disclosure of, a trade secret, or espionage through electronic or other means, access that is unauthorized or exceeds the scope of the authorization, or other means that violate a person's rights under the law of this State.[8]

In this regard, to protect a trade secret, its holder must create an environment that limits accessibility of the trade secret, and establish policies to limit the use and disclosure of the trade secret by its own employees and agents.

Misappropriation occurs when the trade secret is acquired by a person who knows (or has reason to know) that the trade secret was acquired by improper means. Misappropriation also occurs when a trade secret is used or disclosed, without express or implied consent of the trade secret owner, by a person who used improper means to acquire the knowledge of the trade secret or knew (or had reason to know) that the knowledge of the trade secret was derived or acquired through the improper means of another.[9]

Conversely, the statute expressly allows competitors to acquire a trade secret through reverse engineering, independent invention and other means. However, if the trade secret was acquired through misappropriation, the misappropriator cannot use as a defense that at the time the trade secret was obtainable by proper means.[10]

The most significant aspects of the NJTSA are its broad remedial provisions. These remedies include injunctive relief, damages for actual loss and unjust enrichment, punitive damages for willful misappropriation, and attorneys' fees and cost for the prevailing party, as further explained below.[11]

The statute provides for the entry of injunctive relief for actual or threatened misappropriation.[12] To protect a trade secret, a court may extend an injunction for additional reasonable time to prevent the wrongdoer from deriving a commercial advantage from the misappropriation. In exceptional circumstances, such as a material and prejudicial change of position, the court may condition future use of the trade secret upon payment of royalties. The NJSTA directs courts to preserve the secrecy of an alleged trade secret by reasonable means consistent with the rules of court.

Damages for breaches of the NJTSA include both the actual loss caused by the misappropriation and unjust enrichment caused by the misappropriation that is not taken into account in computing the actual loss.[13] Damages caused by misappropriation can also be assessed by the imposition of liability for reasonable royalties for the unauthorized disclosure or use of the trade secret.[14] Punitive damages, in an amount not exceeding twice any damage award, are recoverable for willful and malicious misappropriation.[15]

Attorneys' fees and costs, including fees for experts, can be awarded to the prevailing party if the misappropriation was willful and malicious. However, attorneys' fees and costs and expert fees can be awarded against the claimant (often the employer in restrictive covenant cases) if the claim of misappropriation is made in bad faith.[16]

The NJTSA also establishes several important parameters for its application. The new statute does not apply to misappropriation occurring before the effective date of Jan. 9, 2012, nor will it be applied to continuing misappropriation of trade secrets that began prior to Jan. 9, 2012, even though the misappropriation continues after the date.[17] The NJTSA has a three-year statute of limitations beginning with the discovery of the misappropriation or when the misappropriation should have been discovered by the exercise of reasonable diligence.[18] The NJTSA is subject to the requirements of the Tort Claims Act, protecting any public entity or employee that is a defendant in an action brought under the NJTSA.[19]

How can employers protect against employee misappropriation? The most effective protection for employers is to require employees with access to trade secrets and other confidential information to sign restrictive covenants containing reference to the new NJTSA and its broad remedial provisions. Employers should also implement effective practices to protect confidential business information and restrict access by departing employees. In addition, the new statute underscores the importance of developing and maintaining proactive trade secrets protection programs, including clear policies and practices. Employers should review their policies and practices to make sure they are in line with the requirements of the NJTSA and amend their policies to state clearly that violations of any restrictive covenant or misappropriation of trade secrets by improper means would subject the employee to a claim under the NJTSA and common law. ■

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Endnotes

1. N.J.S.A. 56:15-1 to -9.
2. N.J.S.A. 56:15-2.
3. 15 U.S.C. § 1051 *et seq.*
4. N.J.S.A. 2A:38A-3(a).
5. N.J.S.A. 56:15-9.
6. N.J.S.A. 56:15-2.
7. N.J.S.A. 56:15-2.
8. N.J.S.A. 56:15-2.
9. N.J.S.A. 56:15-2.
10. N.J.S.A. 56:15-2.
11. N.J.S.A. 56:15-3, -4, and -6.
12. N.J.S.A. 56:15-3.
13. N.J.S.A. 56:15-4(a).
14. N.J.S.A. 56:15-4(a).
15. N.J.S.A. 56:15-4(b).
16. N.J.S.A. 56:15-6.
17. Section 10 of L. 2011, c. 161.
18. N.J.S.A. 56:15-8.
19. N.J.S.A. 56:15-9(c).

Dodd-Frank: Picking Up Where SOX Fell Short

by Lynne Anne Anderson and Meredith R. Murphy

Retaliation continues to be the most prevalent employment litigation claim. The passage of the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[1] further expands protection for whistle-blowers.[2] Yet, while there has been an undeniable trend to provide alleged whistle-blowers increased opportunity and incentive to file claims, the legislation and resulting regulations still provide core defenses that will continue to resonate with fact finders, whether administrators, judges or juries.

Dodd-Frank's Expansion of SOX

In 2002, Congress passed the Sarbanes-Oxley Act (SOX)[3] in response to Enron and other scandals. SOX encouraged employee reporting of fraud and securities-related violations as a means to protect shareholders from losses due to financial misconduct. Despite the initial ominous predictions of SOX opening the litigation floodgates and having whistle-blower claims irreparably damaging corporate reputations, employers have been relatively successful in defending SOX claims. As expected, the plaintiffs' bar vociferously complained that SOX protections needed reinforcement. The tipping point came with the 2009 financial crisis. As a result, Congress passed Dodd-Frank in 2010.

The most publicized aspect of Dodd-Frank is the 'bounty' provision. Section 922 amends the Securities Exchange Act to require the Securities and Exchange Commission (SEC) to pay an award to individuals who provide "original information" to the SEC regarding *all* securities laws, including violations of the Foreign Corrupt Practices Act, that lead to imposition of sanctions in excess of a million dollars. The bounty reward is substantial: The SEC has the discretion to award the whistle-blower up to 30 percent of the total amount of sanctions imposed.[4]

However, for employment lawyers Dodd-Frank's impact on retaliation litigation is the real news. Dodd-Frank undercuts key defenses previously available to employers in SOX litigation. For example, employers successfully defended SOX claims on the basis of statutes of limitations and failure to exhaust administrative remedies. In response, Dodd-Frank extended from 90 to 180 days the time for financial services employees to file a SOX complaint with the Occupational Safety and Health Administration (OSHA).[5]

On another front, although SOX covers publicly traded companies, it generally did not extend to private subsidiaries/affiliates. Dodd-Frank expands SOX to cover the private subsidiaries or affiliates of publicly traded companies whose financial information is included in consolidated financial statements.[6] In addition, while SOX whistle-blowers could file in federal district court if the Department of Labor (DOL) did not issue a final administrative order within 180 days, they did not have a clear right to a jury trial. Dodd-Frank provides that right.[7]

Dodd-Frank also prohibits pre-dispute arbitration agreements, as well as other waivers of SOX rights.[8] As the courts begin to issue rulings, a split in authority has already emerged regarding the retroactivity of Dodd-Frank's ban on pre-dispute arbitration agreements. In March 2011, in *Pezza v. Investors Capital Corp.*, a decision issuing from the District of Massachusetts, the court concluded that the arbitration bar has retroactive applicability, finding Congress considered the potential unfairness of retroactive application but nonetheless determined that it is an "acceptable price to pay for the countervailing benefits."[9] However, the District of Nevada and Southern District of Texas reached different conclusions in *Henderson v. Masco Framing Corp.*[10] and *Holmes v. Air Liquide USA LLC*.[11] Both of these decisions found that retroactive application of the arbitration bar would impair the rights of the parties who had previously agreed to arbitrate SOX claims.

Dodd-Frank's New Private Rights of Action

Not only does Dodd-Frank expand protections for SOX whistle-blowers, it affords a new private right of action to employees of *all* employers who believe they suffered an adverse employment action because they provided information to the SEC, participated in a SEC investigation or proceeding based on information provided by the employee, or engaged in any protected

activity under SOX.[12] Moreover, employees in such actions are not required to exhaust administrative remedies as mandated by SOX, and can directly file in federal court.[13] And there is an expansive statute of limitations under which employees may file within six years after the violation occurred, or three years after they knew or reasonably should have known of material facts, provided the complaint is filed within 10 years of the alleged violation.[14]

In Section 1057, Dodd-Frank also creates a private cause of action for financial services employees who suffer adverse employment actions because of reporting suspected unlawful conduct related to provision of consumer financial products or services.[15] Financial services employees who claim retaliation under Section 1057 have 180 days to file a claim with the Occupational Safety and Health Whistleblower Protection Program, and can then remove the claim to federal court if the DOL fails to issue a final order within 210 days of filing. The Section 1057 anti-retaliation provisions apply to companies that extend credit, service or broker loans, provide financial advisory services, real estate settlement services or property appraisals, or work with consumer financial products or services.

An area of emerging litigation is the question of what constitutes "providing information" to the SEC, federal authority or law enforcement. In *Egan v. Trading Screen, Inc.*,[16] the Southern District of New York applied a very expansive interpretation. The reported facts show that Egan, the employer's head of U.S. sales, did not personally report to the SEC, but instead made an internal complaint about financial misconduct by the CEO that was subsequently investigated by a law firm hired by the board of directors. Egan was interviewed, and it appears the law firm then decided to report some of the information he provided to the SEC. Egan then argued in his whistle-blower action that the law firm's ultimate disclosure to the SEC of information he provided qualified him as a whistle-blower under the act.[17] The employer argued that the absence of reference to such indirect reporting in the statute indicated a lack of legislative intent to cover an internal complaint.

The court did not disagree, but nevertheless held that the requirement to directly report conflicted with Dodd-Frank's general protection of whistle-blower disclosures that do not require direct reporting to the SEC.[18] The court concluded Egan was not required to personally report to the SEC, and he "acted jointly" with the investigating attorneys in an effort to provide information to the SEC regarding the CEO's alleged misconduct. The court ultimately dismissed Egan's claim, without prejudice, because he did not specifically allege the law firm had actually reported the CEO's misconduct to the SEC. However, the court gave Egan the opportunity to refile to include that allegation.

SEC Final Rules

As required by the Dodd-Frank Act, the SEC and Commodities Futures Trading Commission (CFTC) have adopted final rules implementing whistle-blower programs and anti-retaliation protections.[19] During the comment period, concerns were raised that employees were being incentivized to report potential violations to the SEC rather than to their employers. In response, provisions were added to encourage internal reports, including giving the SEC discretion to reduce a bounty award if the employee failed to make use of an employer's internal compliance procedures.[20] However, the regulations still do not require whistle-blowers to first report internally. Moreover, Dodd-Frank whistle-blowers may internally report perceived violations and still be bounty-eligible if they also report to the SEC within 120 days.[21]

When defining a "possible violation," the SEC refused to require that the potential violation be "material." Instead, it adopted the more lenient standard that the information "should indicate a facially plausible relationship to some securities law violation," but also included the "gate keeping" language that "frivolous submissions would not qualify for whistle-blower status."[22]

The regulations also address defenses common to retaliation claims. For example, to satisfy the "reasonable belief" component, the employee must demonstrate a subjective, genuine belief that the information reveals a possible violation, and this belief must be one a similarly situated employee might reasonably possess.[23] In addition, consistent with the legal premise that whistle-blower status should not be conferred on any employee whose job it is to identify, investigate and respond to internal concerns/complaints, the regulations specify that individuals will not qualify as whistle-blowers if they are senior personnel or other individuals who are responsible for compliance or internal audits, or for performing investigations of reported concerns.[24] Also, employers still have an opportunity to obtain summary judgment dismissal of these cases when the facts clearly demonstrate a reason other than retaliation was the basis for the adverse or "unfavorable" personnel action.

Expanded Whistle-Blowing Protection for Healthcare Employees

Section 1079B of Dodd-Frank expands the scope of protected activity and protected individuals covered by the False Claims Act's (FCA) anti-retaliation provision.[25] The FCA provides that employees of healthcare providers who receive reimbursements via Medicare or Medicaid, who perceive their employer has committed financial fraud against the government, may file a "qui tam" action on behalf of the government, and are then entitled to a percentage of any recovery, typically between 18 and 25 percent. Section 1079B amends the FCA to broaden the definition of potential whistle-blowers. Current and former employees, as well as vendors/independent contractors, are covered.

While FCA only applies to financial fraud committed against the government, Dodd-Frank applies to any type of financial fraud committed by a company that falls within the jurisdiction of the SEC or CFTC, including claims for mischarging for goods or services not provided, off-label marketing of pharmaceuticals, and defective pricing.

Dodd-Frank also provides, in response to a recent U.S. Supreme Court ruling that required plaintiffs to apply the most closely analogous state statute of limitations, that an employee has up to three years to bring a civil action for retaliation under the FCA.[26]

The Practical Impact of Dodd-Frank on Company Operations

While Dodd-Frank does not impose new obligations to establish codes of conduct or ethics programs, such programs are still mandated by SOX. Also, it is important to remember that Dodd-Frank's whistle-blower protections are not limited to financial institutions. To encourage self-reporting, and limit liability, employers should adopt and implement codes of conduct/compliance programs for all employees, and emphasize that all employees should feel comfortable reporting questionable behavior without fear of retaliation. An open-door corporate culture, responsive to internal complaints, clearly protects against retaliation claims filed by disenfranchised and maligned employees. Equally important, such a culture allows companies to proactively identify and self-report violations of criminal laws, such as the Foreign Corrupt Practices Act, fraud and abuse laws, etc. In addition, the Department of Justice will consider the presence of an effective corporate compliance program in evaluating an action in response to criminal misconduct by employees. For purposes of evaluating the integrity of a compliance program, the federal sentencing guidelines outline the components of an effective corporate compliance program.[27]

Conclusion

Clearly, Dodd-Frank provides new opportunities for purported whistle-blowers, and there will be an increase in filed claims. However, employers will continue to rely on some of the same defenses that have allowed them to successfully defend SOX claims in the past. ■

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Endnotes

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
2. Additionally, the Patient Protection and Affordable Care Act (PPACA), 29 U.S.C. § 218c, as amended by Pub. L. No. 111-148, 124 Stat. 119 (2010) (PPACA) creates a cause of action for employees who report abuses, waste or fraudulent conduct with regard to the delivery of healthcare or consumer healthcare coverage. This new cause of action affects all employers subject to the relevant mandates under the act. While the constitutionality of PPACA has been challenged in federal courts nationwide, the whistle-blower provision has not yet been interpreted by the courts.
3. Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201, *et seq.*; Pub. L. 107-204, 117 Stat. 745.
4. Release No. 34-64545, Implementation of the Whistle-Blower Provisions of section 21F of the Securities Exchange Act of 1934 (May 25, 2011).

5. Dodd-Frank Act § 922c(1)(A)(i), 124 Stat. at 1848.
6. Dodd-Frank Act § 929A, 124 Stat. at 1852.
7. Dodd-Frank Act, § 922c(1)(b), 124 Stat. at 1848.
8. Dodd-Frank Act, § 1514A(e)(2).
9. 767 F. Supp. 2d 225 (D. Mass. 2011).
10. No. 11-88, 2011 WL 3022535 (D. Nev. July 22, 2011).
11. No. 11-2580, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012).
12. Dodd-Frank Act, § 922a(h)(1), 124 Stat. at 1845-46. The CFTC anti-retaliation provisions have a two-year statute of limitations. The CFTC has included a "Guidance with Respect to the Protection of Whistleblowers Against Retaliation" DFA Section 742(h)(1).
13. Dodd-Frank Act § 922a(h)(1), 124 Stat. at 1845-46.
14. Dodd-Frank Act. § 922a(h)(1)(B)(iii), 124 Stat. at 1846.
15. Dodd-Frank Act § 1057, 124 Stat. at 2031.
16. No. 10-8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
17. 15 U.S.C. Section 78u-6(a)(6). A whistle-blower is defined as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." (emphasis added).
18. *See*, *generally*, 15 U.S.C. Section 78u-6(h)(1)(A)(iii).
19. SEC Final Rules Release 17 C.F.R. pts 240, 249; CFTC Final Rules Release, 17 C.F.R. pt, 165. It bears noting that the CFTC final rules substantially parallel the SEC rules.
20. 17 C.F.R. § 240.21F-2(b)(2).
21. 17 C.F.R. § 240.21F-4(b)(7).
22. SEC Final Rules Release, 76 Fed. Reg. at 34,302.
23. 76 Fed. Reg. at 34,303.
24. See 17 C.F.R. Section 240.21F-4(iii)(A-D).
25. Dodd-Frank Act § 1079B(c)(2), 124 Stat. at 2079.
26. Dodd-Frank Act § 1079(B)(c)(2).
27. http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/8b2_1.htm.

Enforceability of Restrictive Covenants After a Change in Control

by Anthony Limitone Jr.

The termination of employees after the change in control of the employer raises a number of questions regarding the enforceability of non-compete agreements and similar restrictive covenants. In general, the enforceability of a restrictive covenant is affected by numerous factors, including reasonableness, choice of law, and consideration. Several additional factors come into play in the context of a change of control. The two most important are: 1) the structure of the transaction leading to the change in control,[1] and 2) the terms of the agreement embodying the restrictive covenant. The circumstances surrounding the employee's termination will, to a lesser extent, affect the restrictive covenant's enforceability. This article will discuss each of these factors.

Purchase and Sale of Stock

Frequently, a purchaser acquires control over an employer by purchasing a controlling number of the employer's shares of stock. In this situation, the acquired company continues under its old name, but is controlled by a new owner. When confronted with this type of transaction, the Third Circuit held in *Zambelli Fireworks Manufacturing Co., Inc. v. Wood*,[2] that the new owner-employer could enforce any non-compete or non-solicitation clause because there had been no change in the corporate identity of the employer. This conclusion rested on the "basic tenet of corporate law that a change in stock ownership is merely a transfer of shareholder rights which does not, in and of itself, normally affect the existence of the corporate entity."[3]

Although *Zambelli* was decided under Pennsylvania law, the result should be the same under New Jersey law. The court in *Department of Transportation v. PSC Resources, Inc.*,[4] said that:

> Where a corporation is acquired by the purchase of all of its outstanding stock, the corporate entity remains intact and retains its liabilities, despite the change of ownership.

The conclusion probably is no different when the original employer is a partnership and some of the partners sell their interests to an existing partner or to a third party. In New Jersey, a partnership is a legal entity separate and distinct from its partners.[5] Moreover, a transfer of a partner's transferable interest in the partnership does not by itself cause dissolution and winding up of the partnership business.[6] Therefore, the transfer of the partnership interest would be analogous to the transfer of corporate shares, and have no effect on the enforceability of the restrictive covenants.

With respect to limited liability companies, two Pennsylvania courts have held that a transfer of a member's interest to a different person does not affect the enforceability of an employee's non-compete agreement. The courts found that the purchase of membership units of a limited liability company (LLC) was analogous to a sale of corporate sales, and therefore the identity of the employer did not change.[7] Although there are no New Jersey cases in point, there is every reason to believe that the state's courts would reach the same conclusion, since in New Jersey an LLC is an entity separate and distinct from its members.[8]

Sale of Assets

The sale of assets creates a more complicated situation. When there is a sale of assets, the seller transfers some or all of its assets to the purchaser. Some or all of the seller's employees also start to work for the purchaser. Therefore, the purchaser becomes the new employer of the seller's employees. The seller, however, continues in existence and remains responsible for its liabilities.

The terms of the employment contract, as well as the terms of the contract of sale, will have a decisive effect on the enforceability of any restrictive covenant when there is a sale of assets. In any sale of assets, the employment contract will be treated as an asset of the seller, which has to be assigned to the buyer if the buyer is going to have any right to enforce it. Therefore, the first question that must be answered is whether the employ-

ment contract permits the assignment of the contract. Some employment contracts stipulate that the employee may not be assigned without his or her consent; this type of clause frequently appears in employment contracts for physicians and veterinarians. When an employment contract contains this type of clause, the employer may not assign the contract as part of a sale of assets absent the employee's express consent.[9] On the other hand, when the contract is silent or expressly allows the assignment, New Jersey's courts will permit the assignment.[10]

Although the contract of employment may permit its assignment, the next question is whether the seller has, in fact, assigned the contract. The answer depends upon the terms of the contract of sale. If the contract of sale provides for the sale or assignment of all of the seller's assets, courts will treat the seller's rights in the restrictive covenant as part of the assigned assets, even though not mentioned expressly.[11] However, if the contract of sale provides for the transfer of some, but not all, of the seller's assets, then a court will probably find the restrictive covenants were not assigned unless expressly mentioned.

The case of *Woodbridge Medical Associates, P.A. v. Berkley*[12] is instructive in this regard. In *Woodbridge*, the owners of a medical group called Woodbridge Internal Medical Associates, PA created a new separate professional association called Woodbridge Medical Associates, PA (WMA). Shortly after the formation of WMA, Internal's owners transferred Internal's fixed assets to WMA at net book value without compensation to Internal. Internal, however, retained all of its accounts receivables so it could satisfy its existing liabilities. Upon the effective date of the sale, Internal ceased its operations, and its employees immediately began working at WMA. Internal, however, did not assign to WMA any of the contracts it had with its employees or shareholders; those contracts contained a variety of restrictive covenants that barred Internal's employees from setting up a competing practice.

Shortly after the transfer of assets, a disaffected group of WMA's doctors and administrative employees quit WMA and established a competing practice. WMA sought an injunction, which would enforce Internal's restrictive covenants. The trial court refused to grant the injunction. The appellate court affirmed, and held that those contracts had not been assigned to WMA notwithstanding the transfer of the fixed assets. It concluded this phase of its analysis by saying:

> And, because the record clearly demonstrates that [Internal] continued to exist following the transfer of interests and the formation of WMA, the judge correctly rejected the contention that WMA had succeeded to those assets and liabilities of [Internal] that were not actually transferred or assigned.[13]

The court also rejected the plaintiff's claim that the transfer of assets, employees and general business operations constituted a *de facto* merger.[14]

Mergers and Consolidations

In a merger, a larger corporation usually absorbs a smaller corporation. Although the smaller corporation goes out of existence, the larger corporation survives. In a consolidation, two corporations pool their operations into a new amalgamated corporate entity; in this situation, both of the original corporations go out of existence.[15]

An assignment of assets is usually part of the merger documents. Therefore, the analysis involved in determining whether the surviving corporation can enforce the restrictive covenant will be the same as the analysis involved in the sale of assets. Thus, two questions must be answered. First, does the employment contract permit its assignment? Second, was there an effective assignment of the employment contract?

The Effect of the Assignment on the Employee's Employment with the Acquired Corporation

It is important to note that a sale of assets terminates the employment relationship with the seller, even though the employee starts working for the successor employer in the same position and at the same salary without break. The Appellate Division announced this rule in *Adams v. Jersey Central Power & Light Co.*[16] In *Adams*, Jersey Central Power & Light (JCP&L) had sold its natural gas business to a company called New Jersey Gas Company. The buyer had no former connection with the seller, and neither the union nor the employees were parties to the sale. After the sale closed, JCP&L employees became employees of New Jersey Gas, but continued

in the same jobs they formerly held with JCP&L.

The question before the Appellate Division in *Adams* was whether the employees were entitled to severance pay under the collective bargaining agreement, which provided that JCP&L employees were to receive severance pay if they were "...permanently released from employment because of reasons beyond the control of the employee...." Therefore, the court had to determine if and when the employees' employment with JCP&L terminated. The court held that the employees were entitled to severance pay from JCP&L, because their employment with it had terminated when New Jersey Gas purchased JCP&L's business and its former employees started working at New Jersey Gas.

The court gave the following rationale for its decision:

> Defendant argues that what happened to plaintiffs was not a release from employment but merely a transfer of employers without a single hour's loss of pay or change of job or work location. This is factually true; it is equally true that they could no longer work for defendant with which they had the contract. It was fortuitous that New Jersey was willing to accept plaintiffs' services and that defendant was willing to make a successful effort to place them there. Plaintiffs were in no way bound to work for New Jersey. They could not continue in defendant's employ even if they wished. Their choice was to become an employee of New Jersey or seek work elsewhere.[17]

The result would be the same in the case of a merger or consolidation. In either situation, the employee is employed by a new employer. Therefore, when a merger or consolidation occurs, the employee's relationship with the original employer terminates. A comparison of the employer tax ID number on the pay stub before and after the acquisition would be the easiest way to prove this.

This principle is important because almost all non-compete clauses prevent employees from working for a competitor during the 12 months, or some other period of time, after the termination of employment. The clock would appear to start running from the time of the merger or sale of assets. Therefore, if the duration of the non-compete agreement were one year, and the employee was terminated six months after the merger, the new employer would be able to enforce the restrictive covenant for only six additional months.

In *J.H. Renarde, Inc. v. Sims*,[18] the Chancery Division was faced with a similar fact pattern. In that case, the restrictive covenant barred employees from working for a competitor for a period of nine months after the termination of their employment. The sale of the business, with an assignment of the restrictive covenants, occurred in 1993. The defendant employees resigned in 1998, and promptly opened a competing business. The buyer sued for an injunction, which the trial court granted.

In reaching its decision, the court considered only whether the restrictive covenants could be assigned. It did not discuss whether the sale of assets terminated the defendants' employment with the seller, or whether the nine-month period began to run from the date of the sale. The decision in *J.H. Renarde, Inc.* would be correct only if the sale of assets did not constitute a termination of the employment relationship between the seller and the defendants. However, as previously discussed, under *Adams v. Jersey Central Power & Light Co.*[19] the sale of assets terminated the employment relationship between the seller and the defendants even though they started working immediately for the buyer in the same position and at the same salary.

This result is not changed by the contractual provision, which states that the agreement is binding on the successors and assigns of the parties. This contractual term does not extend the duration of the employment relationship beyond the sale of assets. Rather, it merely gives the purchaser the right to enforce the restrictive covenants up to the day those covenants expire after the termination of employment. For example, in *J.H. Renarde, Inc.* the buyer could, for a period of nine months after the sale, prevent the employees from working for a competitor. But, nine months after the sale, the restrictive covenant would expire by its own terms and the buyer would be unable to prevent employees from working for a competitor. The buyer, however, could easily avoid this result by having the employees sign a new restrictive covenant.

Other Factors Affecting Enforceability After a Change in Control

After a change in control, many of the employees from the acquired company find the new 'corporate culture' uncongenial, and resign as a result. This raises

the question whether that change in corporate culture would invalidate any non-compete or non-solicitation agreements. The answer depends upon the nature and extent of the changes in working conditions.

In *Zambelli*,[20] the court said in passing that a "... change in corporate culture alone cannot invalidate a legally binding contract." That statement is true as far as it goes. However, the Supreme Court of New Jersey, in *Karlin v. Weinberg*, said that where the termination of employment:

> ...occurs because of a breach of the employment contract by the employer, or because of actions detrimental to the public interest, enforcement of the covenant may cause hardship on the employee which may be fairly characterized as undue in that the employee has not, by his conduct contributed to it.[21]

Therefore, if an employee can show that changes in the terms and conditions of employment implemented by the successor employer constituted either a breach of the employment contract or otherwise contravened public policy, then courts will not enforce the restrictive covenant.

Platinum Management, Inc. v. Dahms[22] is the only New Jersey case that discusses the nature of an employer's conduct that will absolve an employee from compliance with any restrictive covenant. In that case, the court found the first defendant, Dahms, had breached his non-compete agreement and duty of loyalty. The court also found that the second defendant, Rosenberg, had breached his duty of loyalty.

Both Dahms and Rosenberg argued that notwithstanding their own wrongful conduct, they were exonerated from liability because of the employer's wrongful conduct. In Dahms' situation, the court found that the employer failed to pay him a $21,340 override on his bonus. With respect to Rosenberg, the court held that the employer had treated him "shabbily" because Rosenberg properly believed that the employer:

> ...was not using his talents, did not appreciate his efforts for the company, and had treated him unfairly when it fired him in April 1991, (after a leg injury) and then rehired him part time at a substantially reduced salary.[23]

In considering these defenses, the court held that employees can escape liability from breaches of a non-compete agreement or other restrictive covenant only if the employer's conduct amounted to a material breach of the employment contract.[24] Using this standard, the court concluded that the employer's failure to pay the bonus override to Dahms was not a material breach of the contract. Therefore, it entered a judgment against Dahms for the damages the employer incurred. In contrast, the court entered a judgment of no cause in favor of Rosenberg. The court reasoned that the employer's unfair treatment of Rosenberg constituted a material breach of the contract and barred it from any relief against him, even though he had undoubtedly engaged in wrongful conduct.[25]

Conclusion

The enforceability of restrictive covenants after a change in control depends upon a number of factors. These include the structure of the transaction leading to the change in control. Was there a sale of stock or was there a sale of assets? And if there was a sale of assets, what assets were sold? It will also depend upon the terms of the employment contract. Did that agreement prohibit its assignment to a successor employer? Finally, the employer's treatment of the employee after the change in control will be significant. Did the employer's conduct constitute a material breach of the employment contract?

Only after these questions are answered can a decision be made concerning the enforceability of any restrictive covenants. ■

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Endnotes

1. Corporate transfers usually fall into one of three categories: a sale of stock, a sale of assets, or a merger or consolidation. *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 485 (Law Div. 1976).
2. 592 F.3d 412, 422-3 (3d Cir. 2010).
3. *Id. quoting Siemens Med. Sols. Health Serv. Corp. v. Carmilengo*, 167 F. Supp. 2d 752, 758 (E.D. Pa. 2001).
4. 175 N.J. Super. 447, 453 (Law Div. 1980).
5. N.J.S.A. 42:1A-9(a).
6. N.J.S.A. 42:1A-29(a)(2).
7. *Missett v. Hub International Pennsylvania, LLC*, 2010 WL 3704984 (Pa. Super. Ct. 2010); *American Homecare Supply Mid-Atlantic, LLC v. Gannon*, 2009 WL 6340111 (Pa. Com. Pl. 2009).
8. *See* N.J.S.A. 42:25-23, which provides that members are not individually liable for LLC's debts.
9. *See Aronsohn v. Mandara*, 98 N.J. 92, 99 (1984), where the court observed that contractual rights and obligations were freely assignable unless there was an express contractual prohibition.
10. *J.H. Renarde v. Sims,* 312 N.J. Super. 195, 199-201 (Ch. Div. 1998); *A. Fink & Sons v. Goldberg*, 101 N.J. Eq. 644, 646-47 (Ch. 1927). Other states will not allow the assignment of employment contracts. *See*, *e.g., Hess v. Gebhart & Co.*, 570 Pa. 148, 808 A.2d 912, 917-18 (2002).
11. *J.H. Renarde, Inc. v. Sims, supra*; *A. Fink & Sons v. Goldberg, supra*.
12. 2010 WL 2195760 (App. Div. 2010).
13. *Woodbridge Medical Associates, P.A. v. Berkley, supra*, 2010 WL 2195760 at *3.
14. *Id*.
15. *Applestein v. United Board & Carton Corp.*, 60 N.J. Super. 333, 342 (Ch. Div. 1960), *aff'd* 33 N.J. 72 (1960).
16. *Adams v. Jersey Central Power & Light Co.*, 36 N.J. Super. 53 (Law Div. 1955), *aff'd* 21 N.J. 8 (1956).
17. *Adams v. JCP&L, supra*, 36 N.J. Super. at 66.
18. 312 N.J. Super. 195 (Ch. Div. 1998).
19. *Supra*.
20. *Zambelli v. Wood, supra*, 592 F.3d at 423.
21. *Karlin v. Weinberg*, 77 N.J. 408, 423 (1978).
22. 285 N.J. Super. 274 (Law Div. 1995).
23. *Platinum Management, Inc. v. Dahms, supra*, 285 N.J. Super. at 287.
24. *Id*. at 303.
25. *Id*. at 313.

Commentary:
Remittitur Motions After *He v. Miller*: A Three-Judge Supreme Court Attack on Juries, Trial Lawyers, and Due Process Rights

by Christopher P. Lenzo

A motion for *remittitur* presents a judge with the opportunity to second-guess a jury's informed decision about how much harm a plaintiff has suffered. In the most fundamental sense, *remittitur* decisions radically depart from other types of judicial review. Most instances of judicial review involve legal issues, such as the adequacy of pleadings, the discoverability of information, the standards for deciding motions, the admissibility of evidence, the validity of jury charges, and statutory construction. Judges are uniquely positioned to decide these questions by virtue of their education and experience.

In contrast, *remittitur* affords judges the authority to tell jurors they got it wrong on the facts, and allows the Judiciary to substitute its own judgment for that of the jury. (Of course, the case law says that is precisely what judges are not to do on *remittitur* motions, but as a practical matter, such substitution of judgment is the very essence of a *remittitur* motion.) Judges are not any better-equipped to decide damages issues than any other class of citizens. Indeed, in the case of appellate judges deciding a *remittitur* issue on a cold paper record without seeing and hearing the witnesses, the Judiciary is at a distinct *disadvantage* compared to the jury. For all of the foregoing reasons, *remittitur* is an extreme remedy to be exercised sparingly.[1]

However, despite these concerns, a three-judge plurality of the New Jersey Supreme Court recently effected a sea change in *remittitur* jurisprudence. This departure from the tradition of deference to jury decisions disrespects jurors, makes the difficult job of being an effective trial lawyer even harder, and deprives litigants of basic due process rights.

Factual Background

In *He v. Miller*,[2] Ming Yu He sought damages for injuries she sustained in an automobile collision. The accident herniated five discs in He's spine, and caused one of those herniated discs to impinge upon her spinal cord. He treated with a chiropractor, took over-the-counter medications, consulted a physiatrist who administered an epidural injection of cortisone, underwent 30 to 40 acupuncture treatments by a pain management doctor who also administered another epidural injection of cortisone, consulted a neurosurgeon who recommended against surgery due to the potential risks, and continued to take prescription narcotics at the time of trial. According to He's testimony at trial, the injuries caused her to lose her hotel housekeeper job, drop things, be unable to do some household chores, rely upon her parents for assistance, feel useless, and give up sexual relations with her husband. The jury found the defendant negligent, and awarded He $110,000 in back pay, $500,000 in front pay, and $1,000,000 for pain and suffering. He's husband was awarded $100,000 on his *per quod* claim.

Procedural History

On a motion for *remittitur*, the trial judge reduced He's non-economic damages from $1,000,000 to $200,000 and her husband's *per quod* damages from $100,000 to $20,000. Significantly, the Law Division judge relied upon his own observations of the plaintiff in court, thereby rendering the jury's first-hand observations of the same conduct a nullity.

The Appellate Division granted the plaintiff's motion for leave to appeal, and reversed the *remittitur*. According to the appellate panel, the trial judge invaded the province of the jury by weighing the evidence himself. In addition, the Appellate Division criticized the Law Division for failing to provide specific information regarding the comparative verdicts that supposedly justified the *remittitur*.

The Supreme Court granted the defendant's motion for leave to appeal, vacated the Appellate Division's

ruling, and remanded the matter to the Law Division. The Court directed the trial judge to provide factual analysis comparing the damages award to verdicts in other similar cases.

On remand, the Law Division issued a written decision comparing the case at bar to six other lower verdicts in comparable cases, two of which the trial judge had presided over and four of which the defendant had cited to the court. In addition, the Law Division explicitly relied upon his "'own knowledge and experience as a trial attorney for approximately twenty-two years [and as] a Certified Civil Trial Attorney, [during which time the court had] focused…largely on plaintiffs' personal injury matters venued in Morris County.'"[3] Finally, the trial judge referred to his "feel of the case" based on observation of the plaintiff in the courtroom, including when the plaintiff was entering and exiting the courtroom (which, of course, the jury did not have the opportunity to observe). The Law Division reinstated its *remittitur* based on the foregoing.

On a second appeal by the plaintiffs, the Appellate Division again reversed the trial court and reinstated the jury verdict. The appellate panel specifically expressed concern about the Law Division's reliance upon a "feel of the case."

The Supreme Court then granted the defendant's petition for certification. Leave to participate *as amici curiae* was granted to the New Jersey State Bar Association, the New Jersey Association for Justice, and the Insurance Council of New Jersey.

The Supreme Court Plurality's Holding

Because Justices Virginia Long and Jaynee LaVecchia did not participate in *He*, and Justice John Wallace had not yet been replaced, the case was decided by the remaining four Supreme Court justices and Judge Dorothea Wefing of the Appellate Division. The Court split three to two, with Justice Roberto Rivera-Soto, Justice Helen E. Hoens, and Judge Wefing voting to reverse the Appellate Division's decision and uphold the Law Division's *remittitur*, and Chief Justice Stuart Rabner and Justice Barry T. Albin dissenting.

After explaining the basic principles of *remittitur* jurisprudence, the plurality noted that "[a]lthough a trial court may find support for *remittitur* by relying on other verdicts, we have cautioned that in doing so 'it must give a factual analysis of how the award is different or similar to others to which it is compared.'"[4] The Court elaborated on that point as follows:

> The careful creation of a record of the court's basis for a grant of *remittitur* is central to any evaluation of that decision because no two judges are identical and no plaintiff offered for comparative purposes will be a precise match. That is, all judges come to the bench with different backgrounds, experiences, perceptions, and views. One newly appointed to the bench and assigned to a personal injury trial after an entire career handling family law disputes inevitably will have fewer examples readily at hand with which to make a comparison than will a judge who has presided over dozens of personal injury trials or whose career was devoted to litigating such matters. Likewise, judges who have gained experience on the bench in similar trials will have a different, and perhaps better, basis on which to determine whether a particular award is beyond the acceptable to such a degree that it calls for *remittitur*.
>
> By the same token, no two plaintiffs are identical and no two cases are identical. That inevitably leads to practical constraints, because it will always be impossible to point to an identical case as a comparison.[5]

The plurality then laid down the following four principles for *remittitur* analyses:

> First, it is essential that the court considering *remittitur* create a meaningful opportunity for the litigants to be heard and to make a record. The court must give each party the chance to bring to the court's attention relevant precedents that advance that party's view of the propriety of *remittitur* and an opportunity to rebut those offered by his or her opponent. It is essential both for the purpose of letting them attempt to educate the judge as best they can about their reasons for asserting that the award is or is not so "wide of the mark" that *remittitur* is appropriate and for the purpose of creating a record that will permit appellate review.
>
> Second, identifying for the record, with as much precision as possible under the circumstances, the particular basis on which the court has made its decision is equally essential. That record must include a recitation of the reasons

that explain why some of the cases offered by the parties were persuasive and others were not, as well as the court's description of the cases over which it presided or about which it was aware that it found to be relevant comparisons. The court's own informed conscience is a fundamental part of the basis on which its decision rests, but the court must do more than gasp or express disbelief at a verdict's size. Rather, it is incumbent on a trial court to state those cases, experiences, or views that inform its conscience and that give content to its decision.

Third, the trial court may use its "feel of the case" to inform its reasoning about whether a particular verdict is so wide of the mark that *remittitur* is appropriate. We have recently observed that our deference to the trial court's "'feel of the case' is not just an empty shibboleth [because] it is the trial judge who sees and hears the witnesses and the attorneys, and who has a first-hand opportunity to assess their believability and their effect on the jury." Indeed, trial judges see much that juries do not. They see plaintiffs entering and leaving the courtroom each day, observe them when the jury's attention is on another witness or exhibit, and are privy to their interactions and behaviors when the jury is absent from the courtroom during colloquy, conferences, and breaks during proceedings. It is those observations that give content to the trial court's "feel of the case" and that may lend legitimate support to its evaluation of a *remittitur* application.…

Finally, appellate courts must be mindful of their proper role on review. Just as the trial court must give due deference to the jury's judgment and must explain in detail its reasons for concluding that an award requires *remittitur*, so too must the appellate panels recognize that their mere disagreement with that evaluation will not suffice.[6]

The Court reversed the Appellate Division and reinstated the Law Division's *remittitur*. In doing so, the plurality explicitly approved the trial judge's reliance upon his personal experience as a lawyer and his observations of the plaintiff outside the presence of the jury:

[T]he trial court relied on its personal experiences, its review of verdicts in other cases it believed were relevant comparisons, and its "feel of the case" observations.…

The court's experience was extensive, covering twenty-two years of practice as a personal injury litigator, including experience as a Certified Civil Trial Attorney, much of which was concentrated in the vicinage in which this verdict was returned. Although having served on the trial bench for only a few months, that prior experience, which informed the court's sense of where the wide range of acceptable ended, is significant. *To be sure, the court did not describe any specific jury awards from that prior experience as a trial lawyer, but its observation that it had never encountered a like amount gives content that the court's views would lack had the trial court never engaged in a personal injury practice.…*

[T]he trial court expressed its reasons for concluding that its "feel of the case" supported its decision to grant *remittitur*. In doing so, the court made a number of observations about plaintiff, including her appearance, demeanor, and behavior as she came and went during the trial. *Although the court did not specify that those observations were made entirely separate from times when the jury was in the courtroom, some of them, like the comments about plaintiff's manner of entering and exiting the courtroom, plainly were observations that the jury could not have made.*[7]

Analysis and Advice for Trial Lawyers

I view the three-judge plurality opinion in *He* as an assault on juries, trial lawyers, and due process rights. While the Court's decision gives lip service to "[t]he careful creation of a record of the court's basis for a grant of *remittitur*" and "a meaningful opportunity for the litigants to be heard and to make a record" in laying down the principles for *remittitur* analyses, the Court failed to apply those principles to the case before it, thereby reducing those guarantees of due process to empty promises.

For example, the *He* plurality approved of the trial judge's reliance upon his "personal experiences...as a personal injury litigator," even though "the [trial] court did not describe any specific jury awards from that prior

experience as a trial lawyer." Where is the due process in such circular and self-justifying reasoning? How is a trial lawyer to challenge a judge's comparison of a verdict to undescribed prior verdicts from the judge's personal experience? Due process would seem to require at a minimum that a trial judge provide the parties and their attorneys with the caption of the case, a breakdown of the amount of the verdict, the venue in which the verdict was handed down, the date on which the verdict was issued, and the key facts. Indeed, the New Jersey State Bar Association (NJSBA) argued as *amicus curiae* that only evidence in the trial record should be considered on *remittitur* motions and consideration of other verdicts or the trial judge's personal experiences should be barred. In the alternative, the NJSBA asked that the Supreme Court establish specific procedures to provide the parties with notice and an opportunity to be heard regarding any other matters to which the case at bar will be compared.[8] Unfortunately, the *He* plurality ignored what appeared to be reasonable requests to protect the due process rights of litigants and to avoid putting trial lawyers in an impossible situation. As Justice Albin and Chief Justice Rabner noted in dissent, the plurality's approval of a judge's reliance upon unspecified personal experiences in deciding *remittitur* motions means that "the grant or denial of a *remittitur* may [now] depend on the sheer happenstance of whom a litigant draws as a trial or appellate judge."[9]

On a related note, *He* allows trial judges to base *remittitur* decisions on a "feel of the case" drawn from "observations [about the plaintiff] that the jury could not have made," such as the plaintiff's "appearance, demeanor, and behavior as she came and went during the trial." I have to wonder what the point of having juries is if their verdicts can be overturned based on information that they did not have at their disposal? Again, although the plurality gives lip service to the principle that "it is not the role of the courts, either at the trial or appellate level, to sit as the decisive juror or substitute their notions of justice for those expressed by the jury,"[10] it is clear to at least this author that permitting trial judges to rely on facts not in evidence (and thus, by definition, not considered by the jury) in deciding *remittitur* motions effectively transforms the judge into "the decisive juror."

So, what is a trial lawyer to do? In my opinion, the only effective course of action left is to request in writing that the judge provide the parties with the caption, damages breakdown, venue, date, and key facts of any cases to which the court intends to compare the verdict at issue. To fulfill due process requirements, that information should be provided to the parties well in advance of oral argument. Even better, the parties should be afforded the opportunity to submit supplemental briefs distinguishing the cases upon which the trial judge is relying. And lest those on the defense side of the aisle forget, this is not just a problem for plaintiffs' attorneys. A judge could rely on unspecified verdicts in other cases to *deny* a motion for *remittitur*. If all of us routinely seek this information from trial judges deciding *remittitur* motions, these due process issues will again end up before an appellate court, and maybe the next time, the court will establish some specific procedures that actually make it easier rather than harder for trial lawyers to protect their clients' interests.

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Endnotes

1. *Tramutola v. Bortone*, 118 N.J. Super. 503, 518 (App. Div. 1972), *mod.* 63 N.J. 9 (1973)(noting that "a jury verdict [will be overturned] on the ground of excessiveness only with reluctance and never except in a clear case").
2. 207 N.J. 230 (2011).
3. *Id.* at 244.
4. *Id.* at 251 (*quoting Johnson v. Scaccetti*, 192 N.J. 256, 281 (2007)).
5. *Id.* at 253.
6. *Id.* at 254-55 (citation omitted) (*quoting Jastram v. Kruse*, 197 N.J. 216, 230 (2008)).
7. *Id.* at 256-57 (emphasis added).
8. *Id.* at 247.
9. *Id.* at 269.
10. *Id.* at 252.

What Can *Bull* Do for You? Spoliation of Evidence in the Wake of *Bull v. UPS*

by Evan M. Lison

The United States Court of Appeals for the Third Circuit recently issued an opinion clarifying litigants' obligations regarding spoliation of evidence. In *Bull v. United Parcel Service, Inc.*, the plaintiff suffered a work-related injury after which UPS's doctor restricted her lifting to 25 pounds—far less than the 70 pounds required by her position.[1] Later, an orthopedic specialist concluded that the plaintiff was only 70 percent recovered, and restricted her overhead lifting to 10 pounds, but did not mention any other types of lifting. The plaintiff returned to work and presented the specialist's note, but because she could not lift 70 pounds, UPS advised her to seek permanent disability.[2]

In response to UPS's request that she seek permanent disability, the plaintiff sought a second opinion from an orthopedic specialist, who wrote a note on June 13, 2006, stating the plaintiff "is capable of lifting 50 pounds or more."[3] When UPS received a copy of this note, it noticed it listed conflicting dates, provided contradictory answers on whether the medical condition was work-related, stated ambiguously that the plaintiff may lift "50 pounds or more," and contained illegible writing.[4] In response, the plaintiff's union representative advised her to obtain another note.[5] The plaintiff sent UPS a copy of another note dated Aug. 14, 2006, and UPS noticed it again contained inconsistent dates, illegible writing, a signature differing from that in the prior note, inconsistent answers regarding whether the medical conditions were work-related and an ambiguous statement that the "[p]atient is not able to lift over 70 pounds."[6]

Consequently, UPS wrote to the plaintiff's union representative on Sept. 27, 2006, and requested the "original notes," because "the notes received to date are blurry and in some cases illegible." The plaintiff never responded to UPS's request and, instead, filed suit alleging discrimination claims.[7]

Plaintiff's Claims Proceed to Trial; Mistrial Results Based upon Spoliation of Evidence

Immediately prior to the trial, UPS's counsel sent the plaintiff's counsel an email that purported to be a subpoena requesting production of the original doctor's notes; the originals, though, never were produced.[8] During the plaintiff's direct examination, she attempted to introduce a copy of the June 13, 2006, doctor's note. When UPS's counsel objected to production of the copy on the basis that it did not constitute best evidence, a sidebar ensued during which the plaintiff's counsel said that the original note "doesn't exist any more." In response, UPS's counsel stated they had "documented letters asking for the originals," and they "have asked for the originals, and we have never seen them." Ultimately, the judge overruled UPS's objections.[9]

When questioning proceeded, however, the judge asked the plaintiff in open court, "Well, before we do that: Where's the original of this note?" In response, the plaintiff said, "[t]he original note is in my home." Surprised by this answer, the plaintiff's counsel noted that the plaintiff had been requested to produce the original notes "since the very beginning" of the litigation. Subsequently, the judge asked the plaintiff directly whether the original note was in her home, to which the plaintiff responded, "[i]t should be." The plaintiff also stated she had not searched for the original note previously. In response to this testimony, the district court declared a mistrial and invited UPS to file a motion for sanctions. Subsequently, the plaintiff sent the original June 13, 2006, and Aug. 14, 2006, doctor's notes to the district court. The district court ruled that the plaintiff's failure to produce original doctor's notes was spoliation, and dismissed the case with prejudice.[10]

Third Circuit Reverses the District Court's Dismissal of Plaintiff's Complaint; Defines Parties' Obligations Regarding Spoliation of Evidence

Following the plaintiff's appeal, the Third Circuit considered two questions: 1) whether the production of facsimiles and copies, in lieu of originals, can be considered spoliation; and, 2) whether the plaintiff's actions constituted spoliation of evidence warranting dismissal with prejudice.[11]

The Third Circuit noted that spoliation occurs where: the evidence was in the party's control; the evidence is relevant to the claims or defenses in the case; there has been actual suppression or withholding of evidence; and, the duty to preserve the evidence was reasonably foreseeable to the party.[12] The Third Circuit ruled that "in some instances, original documents might yield relevant evidence that is simply not available from copies" such as whether the documents are authentic. In this regard, the Third Circuit agreed with the district court that "producing copies in instances where the originals have been requested may constitute spoliation if it would prevent discovering critical information."[13]

The Third Circuit, however, reversed the district court's determination that the plaintiff "intentionally withheld the original notes" from UPS, and rejected the district court's holding that UPS made "numerous requests, both formal and informal, to produce the disputed documents," to which the plaintiff never responded.[14]

First, the Third Circuit found that there were only two requests by UPS for the original notes, neither of which was made in a discovery request. The first communication was the Sept. 27, 2006, "pre-litigation letter" to the plaintiff's union representative requesting the "original notes," which, the Third Circuit opined, did not create a basis to impute the union representative's knowledge of UPS's request to the plaintiff. The Third Circuit noted further that following the plaintiff's non-production of this letter, UPS "never raised the non-production of the originals in a motion to compel, or in any other communication."[15] The second request for original notes came on March 3, 2010, only five days before trial, in an email. Although UPS classified the email as a "subpoena," discovery had closed, and "the record [did] not contain any evidence that [the plaintiff] was ever aware of this email."[16]

Second, the Third Circuit noted that although the plaintiff "put her counsel in a terrible position" at trial, the key issue was whether the discrepancy between her statements was an intentional misrepresentation or inadvertence.[17] The Third Circuit noted that the district court failed to flesh out the record, and that "there is still no evidence that [the plaintiff] knew UPS wanted the originals, since she had already produced copies." The Third Circuit concluded that because of "UPS's utter failure to produce any evidence of its own to ground the conclusion that [the plaintiff] acted in bad faith, all of this supports abiding by a presumption of inadvertence."[18]

Finally, the Third Circuit evaluated whether there was a foreseeable duty to preserve and turn over the original notes. The Third Circuit noted that the question of foreseeability is a "flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry."[19] The Third Circuit concluded that the district court was within its discretion when it determined there was a foreseeable duty because: 1) the plaintiff initiated both an Equal Employment Opportunity Commission (EEOC) proceeding and the instant litigation within a year of UPS's employment action; 2) the plaintiff was aware that she and UPS disagreed on the meaning of the notes; 3) the plaintiff's counsel says that he asked for the originals; 4) UPS's motion for summary judgment and pre-trial motion mention that UPS had never seen the originals; and 5) under Federal Rule of Evidence 1002 the employee had a duty to produce the original documents before the notes could be introduced into evidence at trial. Nevertheless, the Third Circuit cautioned that it lacked "evidence that counsel for either party made any appreciable effort to induce [the plaintiff] to search for and produce the original [notes]," and that it wondered "whether a lay-person like [the plaintiff], ignorant of the Rules of Evidence, might have concluded that copies of the notes were sufficient."[20]

The Third Circuit also held that the district court abused its discretion in determining the plaintiff intentionally withheld documents from UPS and rejected a finding of sanctionable spoliation. The Third Circuit noted the "connection between a finding of sanctionable spoliation and a ruling on bad faith":

> For the [spoliation] rule to apply...it must appear that there has been an actual suppression or withholding of the evidence. *No unfavorable inference arises when the circumstances indicate that the document or article in question*

has been lost or accidentally destroyed or where the failure to produce it is otherwise properly accounted for.[21]

The Third Circuit concluded that a finding of bad faith is "pivotal" to a spoliation determination. The Third Circuit held that because the district court abused its discretion in ruling that the plaintiff acted in bad faith, it also abused its discretion in determining that the plaintiff committed sanctionable spoliation.[22]

Third Circuit Cautions That What Constitutes "Original Document" is Not Obvious

Although the Third Circuit ruled that spoliation may apply where an original document is not produced, it also cautioned that what constitutes an "original" document is not clear, and that providing an adversary with "actual knowledge" of the need to produce original documents is necessary:

> As electronic document technology progresses, the concept of an "original" document is becoming more abstract. Moving from the more easily distinguishable photocopy or facsimile to documents created, transmitted and stored in an electronic form means that it will be increasingly difficult to ascertain where the boundary of an objectively reasonable duty to preserve such documents lies. There are-and increasingly will be—circumstances in which the foreseeability of a duty to preserve the information contained in a particular document is distinguishable—under an objective analysis—from the need to preserve that information in its "original" form or format. Indeed, arriving at a common understanding of what an "original" is in this context is challenging enough. Although it does, and always will rest with the courts to preserve the distinction between an objectively foreseeable duty and actual knowledge of such a duty, there is a concomitant obligation that counsel must assume to clearly and precisely articulate the need for parties to search for, maintain, and-where necessary—produce "original" or source documents. This case gives us one more opportunity to highlight our position that clarity in communications from counsel that establish a record of a party's actual knowledge of this duty will ensure that this technology-driven issue does not consume an unduly large portion of the court's attention in future litigation.[23]

Thus, the Third Circuit declined to define what constitutes an original document. Instead, it reminded counsel that they must articulate clearly what must be produced and which databases must be searched.

Best Practices in Pursuing "Original" Documents: A Case Note

The recent United States District Court for the Eastern District of New York decision in *Chen v. LW Restaurant, Inc.*, provides a prime example of a litigant who clearly and precisely articulated the need for original documents, and provided an adversary with "actual knowledge" of such a need.[24] There, the plaintiffs, waiters serving in the defendants' restaurant, alleged various wage and hour violations pursuant to the Fair Labor Standards Act and the New York Labor Law.[25] When discovery was in its infancy, the plaintiffs submitted a status letter to the court detailing the defendants' discovery deficiencies and requesting production of electronically stored information in the defendants' payroll records, including metadata, based on their concern that certain records may have been created for the purposes of litigation.[26]

Throughout discovery, the defendants continued to evade their discovery obligations, and the plaintiffs informed the court repeatedly that the defendants refused to produce electronically stored information, including the "original metadata" it requested.[27] The court later permitted the plaintiffs to conduct a review of the "original disk drive" containing their employment records.[28] Subsequently, however, the defendants informed the plaintiffs that these records were maintained in a "'finger sized hard disk.'"[29] Consequently, the plaintiffs requested that the court order the defendants to produce the disk, noting that the defendants' employment records were not maintained contemporaneously and were created after the litigation commenced.[30] Subsequently, the defendants provided the plaintiffs with a CD-ROM copy of the files, email versions and paper copies.

In response, the plaintiffs contacted the court and said that these materials do "not contain the original program files, which would be required for the metadata analysis."[31] The defendants had not provided the plaintiffs with the finger drive containing the original files,

and the court again ordered the defendants to produce the finger drive.[32] When the defendants failed to produce the drive in response to the court-imposed deadline, the court ordered the defendants to show cause why the disk had not been produced.[33] In response to the order to show cause, the defendants finally admitted they had lost the disk drive.[34]

The district court evaluated whether the defendants committed spoliation of evidence and whether the defendants had an obligation to preserve the finger drive even though copies of the documents had been produced.[35] In holding that the defendants had an obligation to preserve the drive, the district court made the following findings: 1) the disk drive was solely in the defendants' possession and their counsel had the responsibility to advise them to preserve the disk drive; 2) at the time the disk was lost, the litigation had been ongoing for over a year and the defendants were aware of the plaintiffs' "repeated allegation" that the payroll documents were falsified; 3) the defendants were aware of the plaintiffs' requests to have an expert examine the original disk drive; and 4) the defendants were aware of the court's orders granting these requests. Notably, in holding that the defendants had a foreseeable duty to preserve the original disk, the district court opined that defendants' counsel should have notified the defendants of a litigation hold and "repeatedly remind[ed] key players of the duty to preserve evidence."[36]

Consequently, the district court ordered the defendants be precluded from presenting any payroll or other employment records at trial.[37] The district court noted this sanction would require instructing the jury that they were permitted to presume the plaintiffs' testimony regarding their wages and hours was accurate.[38] Finally, the district court ordered that, upon the plaintiffs' request, the jury would receive an "adverse inference charge that would permit the jury to conclude, based upon the defendants' spoliation, that the employee records on the flash disk were not kept contemporaneously, but were fabricated evidence created after the initiation of this litigation."[39]

The *Chen* case stands in stark contrast to *Bull*, in which the defendant did not clearly articulate the need for the original notes in discovery requests, did not continuously demand the production of the original notes, and did not keep the court abreast of the plaintiff's failure to produce the original notes.

Conclusions

Attorneys should counsel their clients to identify those situations in which original documents may become germane to a litigation, although, as the Third Circuit stated above, it might be difficult to ascertain what constitutes an original. Indeed, in the wage and hour context, it may become necessary to preserve handwritten time sheets even though the timesheets were scanned into PDF documents, or their data was incorporated into electronic payroll records. Likewise, in the disability, workers' compensation, and Family and Medical Leave Act contexts, doctor's notes and leave of absence forms may be scanned into online human resources management systems, or may be copied and placed into personnel folders. As was the case in *Bull*, however, parties should anticipate that these original documents later could become germane to litigation.

In light of *Bull*, counsel should update their litigation-hold letters to specify original documents should also be preserved. Counsel should not assume their clients will perceive the need to retain original documents. Therefore, counsel should carefully craft their litigation-hold letters depending upon the subject matter of the particular litigation, and should resist the urge to simply issue "form" litigation-hold letters.

Bull and *Chen* should also serve as reminders that counsel must carefully craft their discovery requests to demand original documents or data. The Federal Rules of Civil Procedure place the onus on the propounding party to "describe with reasonable particularity each item or category of items to be inspected," and with respect to document requests, "specify the form or forms in which electronically stored information is to be produced."[40] In this regard, should counsel wish to examine the original of any document, they have the obligation to specify this in their request. Specific discovery requests are critical in light of the Federal Rules of Civil Procedure, which provide the responding party leeway in choosing the form of production. Indeed, "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained, or in a reasonably usable form or forms," and "[a] party need not produce the same electronically stored information in more than one form."[41]

Finally, as *Bull* and *Chen* demonstrate, counsel should keep the court informed of their need for electronically stored information or original documents,

and any roadblocks that may arise. In both cases, the courts expressly evaluated the degree to which counsel continued to demand production of original documents, and in *Chen* the court's discovery orders were a significant factor in a finding of sanctionable spoliation. Counsel should not wait until the eve of trial before pursuing the production of original documents. ■

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Endnotes

1. 665 F.3d 68, 70 (2012).
2. *Id.*
3. *Id.*
4. *Id.* at 83, n. 1.
5. *Id.* at 71.
6. *Id.* at 83, n. 2.
7. *Id.* at 71.
8. *Id.* at 75.
9. *Id.* at 71-72.
10. *Id.*
11. *Id.* at 73.
12. *Id.*
13. *Id.*
14. *Id.* at 74.
15. *Id.* at 74-75.
16. *Id.* at 75.
17. *Id.* at 76-77.
18. *Id.* at 77.
19. *Id.* at 77-78.
20. *Id.* at 78.
21. *Id.* at 79, *citing Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (emphasis in original).
22. Although the Third Circuit noted that it need not evaluate whether the district court's dismissal with prejudice was an appropriate sanction because spoliation did not occur, it nevertheless evaluated the factors set forth by *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 867 (3d Cir. 1984), and held that dismissal with prejudice was not an appropriate sanction. *Bull*, 665 F.3d at 80.
23. *Bull*, 665 F.3d at 83, n. 12.
24. No. 10-cv-200, 2011 WL 3420433, at *1 (E.D.N.Y. Aug. 3, 2011).
25. *Id.*
26. *Id.* at *2.
27. *Id.* at *2-3.
28. *Id.* at *4.
29. *Id.*
30. *Id.*
31. *Id.* at *5.
32. *Id.* at *6.
33. *Id.*
34. *Id.*
35. *Id.* at *9-10.
36. *Id.*
37. *Id.* at *20.
38. *Id.*
39. *Id.*
40. Fed. R. Civ. P. 34(b)(1)(A); 34(b)(1)(C).
41. Fed. R. Civ. P. 34(b)(2)(E)(ii); 34(b)(2)(E)(iii).

Quickie Election Rule: Not So Quick!

by Stacey A. Cutler and Kathleen L. Kirvan

In July 1935, the United States was faced with severe economic strife and unemployment rates that were reaching critical levels. In an effort to stop the downward spiral, President Franklin Delano Roosevelt signed into law the National Labor Relations Act (NLRA).[1] Also known as the Wagner Act, the intent of the NLRA was to empower workers to unionize in an effort to provide better working conditions and, in turn, help stabilize the economy. Fast forward three-quarters of a century, and in wake of the non-passage of the Employee Free Choice Act,[2] we find ourselves facing similar daunting circumstances. In an effort to energize the labor force, the NLRA is streamlining the organizing process.

While it is hard to argue against the fact that the NLRA is one of the most important pieces of legislation in the history of organized labor, some will argue that new amendments to the act go too far, and will place the ball squarely in the hands of employees and their union representatives, to the detriment of employers.[3] Although that is a legitimate concern for employers, the 'quickie election' regulations, as they have been dubbed, are more likely intended to trim the edges of how elections are run, not eliminate an employer's opportunity to speak on the topic of unionization.[4]

As it stands today, once a labor organization has established that a sufficient number of employees want to be represented it files a representation petition. Once the petition is filed with the National Labor Relations Board, established as the referee in representation elections by the NLRA, there is a healthy window of opportunity for both the union and the employer to make their presentation to the targeted workforce. Imbedded in that process are a number of checks and balances designed to make sure the election campaign is run fairly and honestly.[5] The new regulations may not change the premise, but they will reshape the path to a final result.

On June 22, 2011, the board issued a notice of proposed rulemaking (NOPR), requesting comments on 22 amendments to the current rules and regulations governing election procedures.[6] In the months following the NOPR, the board received over 65,000 public comments, a large majority of which criticized the changes surrounding the scheduling of the pre-election hearings, the requirement of a statement of position, and the content and timing of eligibility lists.[7]

Critics dubbed the rule the quickie election or ambush election rule, claiming the proposed expedited election process would limit an employer's opportunity to communicate with employees regarding union representation, and would thus lead to uninformed decisions by employees.[8] As a result of the emotional and intense response to the proposal, the board promulgated its final rule on Dec. 21, 2011, and ultimately voted to adopt only eight of the 22 original amendments, leaving the controversial ones for further consideration.[9] The board maintains that the final rule, which was adopted by a three-member divided panel, will "reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation. The final rule will also save time and resources for the parties and the agency."[10]

The eight adopted amendments present an extremely scaled-down version of the NOPR:

1. The board amended the regulations to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists.[11]
2. Along the same lines, the board amended the regulations to give hearing officers presiding over pre-election hearings the authority to limit the issues to only those that are relevant to the existence of a question concerning representation.[12] The pre-amendment rules allow evidence to be presented at pre-hearing elections on matters that are often deferred until after the election. Furthermore, these matters are frequently rendered moot after the election takes place. Thus, the board's amendments serve to avoid this unnecessary litigation and delay.[13]
3. The board's third amendment affords hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs.[14]

The pre-amendment rules allow for post-hearing briefs in all circumstances. The board's intention in the adoption of this amendment was to reduce the unnecessary filing fees and delays post-hearing briefs can cause when matters can be both addressed and solved at the pre-hearing election.[15]

4. The pre-amendment rules require parties to request review of a regional director's decision prior to an election in order to preserve their right to raise disputed issues after the election. Because the election itself renders several issues moot, this procedure creates unnecessary litigation. Judicial procedures limit interlocutory appeals for the very purpose of avoiding unnecessary litigation and delay.[16] Thus, the board's fourth amendment serves to defer the filing of requests for review until after the election has occurred.[17]
5. The pre-amendment rules provide for a 25-day waiting period prior to an election in order to give the board time to rule on any request for review.[18] These rules are in direct contrast with Congress's instruction that board review shall not stay any action of the regional director, who directs an election take place.[19] Moreover, board review during this period is extremely rare. Thus, the board's fifth amendment eliminates the recommendation that elections should be stayed for 25 days after the regional director directs that an election should occur.[20]
6. The pre-amendment rules provide limits on when parties can appeal decisions. In its continued effort to avoid piecemeal appeals, the board's sixth amendment limits the circumstances under which it can grant special permission to appeal to only extraordinary circumstances when the issues will otherwise evade review.[21]
7. The pre-amendment rules provide for different standards of review of pre-election disputes and post-election disputes (pre-election review is discretionary, while post-election review is mandatory). Furthermore, the post-election review procedures differ depending on the case.[22] The board's seventh amendment creates a uniform "discretionary" procedure for resolving pre- and post-election review, allowing the board to deny a request for post-election review when there are no compelling grounds for review.[23]
8. The board's final amendment eliminates Part 101, subpart C of its statements of procedure, which is almost entirely redundant with Part 102, subpart C of its rules and regulations.[24]

Board member Brian Hayes was the sole dissenting member to the final rule. In order to allow his opposition to be heard, the board delayed the effective date of the rule until April 30, 2012, giving Hayes sufficient time to publish a dissent before the rule would go into effect. The board authorized his dissenting opinion to be published in the *Federal Register*.[25]

With member Craig Becker's recess appointment expiring at the end of the year, the board would have lost its authority to adopt the rule had it waited until the dissent was drafted to act.[26]

Both labor and management have criticized the final rule. While labor's criticism focuses mainly on the board's decision not to adopt all of the NOPR, critics from management are questioning whether the board even has authority to issue a final ruling. Their main argument is that the board is not currently duly constituted, based both on the board's two vacant seats and the "recess appointment" of current member Becker.[27] The board addressed and rejected those arguments based on Section 3(b) of the NLRA, which provides that "at all times [three members] constitute[s] a quorum of the Board…."[28] The board also noted that there is no rule, procedure, or law that mandates board members participating in decisions must have been confirmed by the Senate. Thus, the fact that one member of the three-member panel was serving a recess appointment had no bearing on the authority of the board to issue the final rule.[29]

The new year has brought new change to the NLRB. Member Hayes had originally threatened to resign, which would have left the board without a quorum to vote on the rule. Ultimately, Hayes decided not to resign, and instead cast the dissenting vote to the adoption of the rule. Member Becker's recess appointment expired at the end of the year, leaving the board with only two active members. Subsequently, President Obama made recess appointments of three new members: Sharon Block, Terence F. Flynn, and Richard Griffin. The three members were sworn in on Jan. 9, 2012, bringing the board to a full five members for the first time since Aug. 2010.[30]

Despite the NLRB's new full-strength composition, the decision to eliminate most of the controversial amendments from the proposed rule may still be a sign of what is to come. With labor unhappy with the board's decision to eliminate several of the proposed amendments, and management unhappy with the board's decision to adopt the amendments in the final rule, it is clear that the debate on election procedures is far from over. ■

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Endnotes

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2. dpeaflcio.org/wp-content/uploads/EFCA-2011.pdf.
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13. Representation-Case Procedures, *Federal Register*, *supra*.
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16. *Id.*
17. *Amendments contained in the Final Rule on Election Procedures, supra*.
18. Representation-Case Procedures, *Federal Register*, *supra*.
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20. *Amendments contained in the Final Rule on Election Procedures, supra*.
21. *Id.*
22. Representation-Case Procedures, *Federal Register*, *supra*.
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The $20 Million Question: Are Your Attendance and Leave Policies ADA Compliant?

by Laura K. DeScioli

As Verizon Communications looks back on 2011, it will have the opportunity to revel in one successful business decision but wallow in the wake of another regrettable one. Triumph abounded last February, when Verizon pulled an apple out of its hat and announced it was ready to stock its shelves with the iPhone. The regret came just five months later, when the company's inflexible attendance policy won it a page in the record books as a party to the largest Americans with Disabilities Act (ADA) settlement in the history of the Equal Employment Opportunity Commission (EEOC), to the tune of $20 million. For the benefit of onlookers (and at the expense of Verizon), the consent decree entered into between the company and the EEOC doubles as an excellent guideline for those attempting to navigate the provisions of the ADA relating to attendance and leave of absence policies.

The consent decree was entered on July 6, 2011, and settled a nationwide class disability discrimination lawsuit filed by the EEOC in the United States District Court for the District of Maryland.[1] The decree resolved the EEOC's lawsuit, an EEOC commissioner charge, a charge filed by the Communications Workers of America, AFL-CIO, and approximately 40 individual charges filed with the EEOC. The crux of the claims was that Verizon had unlawfully denied reasonable accommodations to a number of employees with disabilities, in violation of the ADA pursuant to its rigid attendance policy.

Leave as a Reasonable Accommodation

Under the ADA, employers are required to provide reasonable accommodations to qualified individuals with disabilities unless doing so would cause the employer undue hardship. Qualified individuals are those who can perform the essential functions of the job with or without a reasonable accommodation.[3] Generally, "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[4]

Most employers are aware they are required to accommodate individuals with disabilities by making their facilities accessible, for example by building a ramp. Yet many employers, including Verizon in this case, fail to understand that reasonable accommodations may go far beyond physical changes to the work environment, and may require flexibility with respect to rules and policies. Often overlooked by employers is the fact that they may be required to grant a leave of absence as a reasonable accommodation—even in excess of that which is mandated by the federal Family and Medical Leave Act (FMLA) or a company's leave policy. As the EEOC has noted in its guidance on reasonable accommodations, employees with disabilities may be entitled to leave for a variety of reasons including, but not limited to: 1) obtaining medical treatment, 2) recuperating from an illness, 3) obtaining repairs on an assistive device, 4) avoiding temporary adverse conditions in the workplace, such as a breakdown in the air conditioning, 5) training a service animal, or 6) receiving training in the use of Braille or sign language.[5]

The EEOC has also addressed whether employers may apply 'no-fault' leave policies to individuals with disabilities. Generally, these leave policies permit employees to take a specified amount of leave for any reason during a set time period. If an employee takes additional time off after his or her leave allotment is exhausted, he or she will be subject to discipline, and perhaps termination. The guidance instructs employers to modify these policies if a qualified employee with a disability needs additional leave as a reasonable accommodation, unless: 1) the employer can provide the employee with another effective accommodation that would enable him or her to perform the essential func-

tions of the job, or 2) granting additional leave would cause an undue hardship.[6]

The Proof is in the Policy

Under Verizon's no-fault attendance policy, employees were subject to discipline, up to and including termination, if they exceeded a designated threshold of "chargeable absences." The EEOC asserted that the policy was unlawful because Verizon failed to make exceptions to its attendance policy for employees whose chargeable absences were due to their disabilities. According to the EEOC, Verizon should have engaged in an individualized interactive process with these individuals in order to evaluate whether their absences should be deemed "nonchargeable" as a reasonable accommodation.

The Settlement

While Verizon did not admit fault, it did agree to pay $20 million in monetary relief to the charging parties and class members. Furthermore, the scope of the three-year consent decree extends well beyond mere dollars and cents, mandating that Verizon do the following:

- Refrain from engaging in any discriminatory or retaliatory action based on disability;
- Modify its attendance plans and ADA policy to allow for reasonable accommodations for employees with disabilities, including treating certain absences as "nonchargeable";
- Provide periodic training on the ADA's requirements to employees who are responsible for administering the attendance policy;
- Report to the EEOC all employee complaints of disability discrimination relating to the attendance policy and those regarding Verizon's compliance with the settlement agreement;
- Post a notice about the settlement; and
- Appoint an internal monitor to ensure compliance.

As discussed below, the consent decree's provisions relating to the modification of Verizon's attendance policies provides useful guidance for similarly situated employers.

And the Answer to the $20 Million Question is…

Do what your EEOC tells you to do. The EEOC could not have dished out a clearer reference guide for determining when an employee's absence can be considered chargeable and subject to discipline. Paragraph 20.03 of the consent decree provides the following instructions to Verizon:

> In determining whether a Current Associate's absence should be "nonchargeable," Verizon is required to evaluate on an individual case-by-case basis whether each of the following is satisfied:
>
> (a) The Current Associate has a mental or physical impairment that substantially limits one or more major life activities of such individual as defined by the ADA, and for the period on and after January 1, 2009, as amended through the ADA Amendments Act of 2008;
>
> (b) the Current Associate's absence was caused by a disability;
>
> (c) the Current Associate or someone else on the Current Associate's behalf requested through the Company's designated process a period of time off from work due to a disability;
>
> (d) the Current Associate's absences have not been unreasonably unpredictable, repeated, frequent or chronic;
>
> (e) the Current Associate's absences are not expected to be unreasonably unpredictable, repeated, frequent or chronic;
>
> (f) Verizon was able to determine, from the request by or on behalf of the Current Associate or through the interactive reasonable accommodation process, a definite or reasonably certain period of time off that the Current Associate would need because of a disability; and
>
> (g) the Current Associate's need for time off from work as a reasonable accommodation does not pose a significant difficulty or expense for Verizon's business.

The decree further states that if any of these elements are not satisfied, Verizon has the discretion to deem the absence chargeable.[7]

Interestingly, this checklist reveals the EEOC's position that the ADA does not require employers to grant a leave of absence as a reasonable accommodation where the absences have been, or are expected to be, unreasonably unpredictable, repeated, frequent or chronic. Employers defending attendance-based discipline/termination can rely on this guidance in addition to arguing that absences of this nature would disrupt the employer's operations and would prohibit the employee from performing the fundamental job duties of the position at issue. To that end, employers should note

the significance of regular attendance in their employee handbooks and job descriptions. Of course, employers using no-fault attendance policies should also distribute this checklist to employees administering the policy to ensure ADA compliance.

It is important to keep in mind that a leave of absence may be required pursuant to the requirements of the FMLA or any other applicable state laws, even where the ADA does not apply. More often than not, the problem facing employers will be remembering to evaluate whether a leave must be granted pursuant to the ADA, even where an employee is not entitled to or has exhausted his or her FMLA and other state-provided leave allotments. For these reasons, employers presented with leave requests should be sure to conduct an appropriate analysis under each of these laws in order to avoid the threat of burdensome and expensive litigation faced by Verizon in this case. ■

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Endnotes

1. Consent Decree, *EEOC v. Verizon Delaware LLC, et al.* (No. 1:11-cv-01832, D. Md., July 6, 2011).
2. 42 U.S.C.A §§ 12101-12117, 12201-12213.
3. 42 U.S.C.A § 12111.
4. 29 C.F.R. § 1630 app. § 1630.2(o).
5. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, *available at* <http://www.eeoc.gov/policy/docs/accommodation.html>.
6. *Id.*
7. Consent Decree, *EEOC v. Verizon Delaware LLC, et al.* (No. 1:11-cv-01832, D. Md., July 6, 2011).

Barking Up the Wrong Tree: Would-Be Dog Handler's Discrimination and Retaliation Claims Fail Despite Rejection for Position

by James M. McDonnell

Despite seemingly having the ingredients of superficially strong age discrimination and retaliation claims, the Third Circuit affirmed the dismissal of a 24-year police veteran's complaint against the city of Vineland.[1] The 40-plus-year-old plaintiff, a sergeant with the force, applied for dog handler positions filled by younger applicants. In addition, the plaintiff allegedly suffered adverse employment actions following the filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). However, the district court disagreed with the plaintiff, and held he failed to demonstrate he was qualified for the dog handler positions or suffered adverse employment actions. The Third Circuit Court of Appeals reviewed and affirmed the lower court's grant of summary judgment in favor of Vineland.

Factual Background

Vineland hired plaintiff Harry Swain as a police officer in Sept. 1982. In Feb. 2001, the plaintiff received a promotion to sergeant in the street crimes unit. Subsequently, in Oct. 2006, in his response to an email to all supervisors, the plaintiff expressed interest in a dog handler position in the police force's K-9 unit. However, the dog handler position required officers to have a take-home vehicle. A police captain advised the plaintiff he was not eligible for the position because he lived 34 miles from the police station and was, therefore, ineligible for a take-home vehicle. Ultimately, an officer under age 40, who lived only eight miles from the station, received the position.

Approximately 14 months later, the plaintiff again expressed interest regarding another invitation to apply for available dog handler positions. This time, the plaintiff advised the police captain he intended to move to Bridgeton, only 19 miles from the police station. Notwithstanding, the captain informed the plaintiff that to receive the position, he had to live in Vineland. Moreover, the captain allegedly told the plaintiff the actual reason for his rejection was his age. In addition, the captain imposed yet another qualification: Only patrolmen, and not sergeants, could apply for dog handler positions. Ultimately, a 31-year-old officer, who lived three miles from the police station, and a 38-year-old officer, who lived seven miles from the station, received the dog handler positions.

Alleged Retaliation

The plaintiff made clear his displeasure with the decisions, and his intention to file a discrimination lawsuit. Accordingly, the captain advised the plaintiff to file a written complaint with internal affairs; the plaintiff refused. Instead, the plaintiff filed a charge of discrimination with the EEOC, and provided a copy of the charge to internal affairs. Following or around the time of these events, Vineland also selected the plaintiff for a random drug test. As a result, the plaintiff alleged he was removed from a training class and required to provide a urine sample "with the door wide open with everybody walking by[.]"

In May 2008, the plaintiff sustained injuries due to a work-related motor vehicle accident. The plaintiff's physician prescribed medical procedures to treat the injuries. However, Vineland's workers' compensation carrier requested information from the plaintiff's physician on at least two occasions, resulting in a two-month delay in the plaintiff's receipt of the prescribed treatment.

The Lawsuit

The plaintiff filed a complaint against the city of Vineland alleging, among other claims, discrimination and retaliation in violation of the federal Age Discrimination and Employment Act (ADEA)[2] and the

New Jersey Law Against Discrimination (LAD).[3] Specifically, the plaintiff claimed Vineland rejected him for the dog handler positions on the basis of age and retaliated against him for his complaint of discrimination by involving internal affairs in his complaint and delaying his surgery.

The Third Circuit's Decision

The Third Circuit ruled the plaintiff failed to establish a *prima facie* case of age discrimination because he could not demonstrate an "adverse" employment action. The court explained the plaintiff needed to show rejection from the position negatively impacted the plaintiff's "compensation, terms, conditions, or privileges of employment."[4] However, the dog handler positions at issue did not carry any promotional opportunities, change in employment status, prestige, or increased benefits. The court also found the plaintiff could only speculate with regard to overtime opportunities, and held the position sought amounted to a lateral transfer. Simply put, the court held the plaintiff's "subjective preference" for the position alone was insufficient to establish a *prima facie* case of discrimination.

Likewise, the court ruled the plaintiff failed to establish any adverse action with respect to his retaliation claim. The court explained the plaintiff was never denied medical treatment but, in fact, received the treatment prescribed by his physician, albeit a few months later. Nevertheless, the court held the plaintiff failed to demonstrate the delay was attributable to his protected activity. Moreover, the court found the city of Vineland randomly screened officers in a manner consistent with the attorney general's drug-testing policy. Therefore, the plaintiff could not establish his selection for a drug test was anything other than routine or random.

Lessons Learned

In the wake of *Swain v. City of Vineland*, practitioners should not simply assume a plaintiff meets his or her burden of establishing a *prima facie* case of discrimination or retaliation with respect to transfer or 'promotion' claims simply by demonstrating membership in a protected class and a superficially 'adverse' employment action. Instead, these cases require thorough discovery to determine whether the plaintiff suffered tangible damages beyond simple rejection from the desired position. Indeed, absent demonstration of a tangible adverse employment action, discrimination and retaliation claims may be ripe for dismissal. ■

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Endnotes

1. *Swain v. City of Vineland*, 2012 U.S. App. LEXIS 671 (3d Cir. Jan. 11, 2012).
2. 29 U.S.C. § 623.
3. N.J.S.A. § 10:5-1, *et seq.*
4. 29 U.S.C. § 623(a)(1).

Hosanna-Tabor Evangelical Lutheran Church & School: U.S. Supreme Court's Confirmation of the 'Ministerial Exception' to Employment Discrimination Laws

by Robert T. Szyba

After 40 years of development by lower courts, the 'ministerial exception' to anti-discrimination employment laws received its first treatment by the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* on Jan. 11, 2012.[1] Rooted in First Amendment protections central to this nation's most fundamental principles, the ministerial exception bars inquiry into the employment decisions of religious institutions concerning their ministers.

Background

Cheryl Perich was a 'called' teacher at the Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan. After about a year of working as a lay teacher, Perich had been called by the congregation after satisfying specific religious academic requirements and passing requisite examinations. Upon accepting her call, Perich's formal title was changed to minister of religion, commissioned.

In June 2004, Perich suddenly became ill at a church golf outing. Her illness, which could not be diagnosed for several months, necessitated that she take disability leave rather than return to Hosanna-Tabor for the start of the 2004-2005 school year. Eventually, her illness was diagnosed as narcolepsy. After concluding that her narcolepsy could be managed through medication, Perich was cleared by her doctor to return to work as of Feb. 22, 2005.

Perich notified Hosanna-Tabor of her medical clearance and intent to return to work. In response, the school advised her it had concerns over her return to teaching. Instead, the school wanted to rescind her call and effect a "peaceful release"—voluntary resignation in exchange for medical insurance benefits for the remainder of the school year. Perich refused to resign, and reported to work on the date she was medically cleared to return. She was turned away and told that she would likely be fired. Perich responded that she had spoken to an attorney and would take legal action if Hosanna-Tabor did not allow her to return to work. Soon after, Hosanna-Tabor terminated Perich's employment, citing as reasons her "regrettable" conduct of refusing to resign and reporting to work on Feb. 22, as well as the damage to the relationship caused by Perich's threat to take legal action.

Perich filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging disability discrimination and retaliation in violation of the Americans with Disabilities Act[2] (ADA). The EEOC filed suit in the Eastern District of Michigan, with Perich as an intervenor, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act.[3]

At summary judgment, Hosanna-Tabor argued that the decision to terminate Perich, its minister, was the result of Perich's disregard and violation of Lutheran doctrine dictating that Lutherans are to resolve their disputes internally, without resort to civil courts. Hosanna-Tabor cited to St. Paul's first letter to the Corinthians, stating:

> 1 When one of you has a grievance against another, does he dare go to law before the unrighteous instead of the saints? 2 Or do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? 3 Do you not know that we are to judge angels? How much more, then, matters pertaining to this life! 4 So if you have such cases, why do you lay them before those who have no standing in the church? 5 I say this to your shame. Can it

> be that there is no one among you wise enough to settle a dispute between the brothers, 6 but brother goes to law against brother, and that before unbelievers? 7 To have lawsuits at all with one another is already a defeat for you. Why not rather suffer wrong? Why not rather be defrauded? 8 But you yourselves wrong and defraud—even your own brothers![4]

The district court granted summary judgment for Hosanna-Tabor. The court found that Perich was a minister and any further litigation would necessarily result in inquiry into the validity of religious doctrine, which would be a constitutionally impermissible infringement on the religious institution's right to select its own ministers for reasons of their own choosing.[5]

The Sixth Circuit reversed, finding that Perich should not have been considered a minister, and thus did not qualify for the ministerial exception.[6] The court looked to the functions of Perich's position and her "primary duties."[7] In particular, the court focused on the fact that Perich's job was almost identical to that of any other lay teacher at Hosanna-Tabor, and that Perich spent no more than 45 minutes of her seven-hour work day on religious activities. In the court's view, Perich's title of minister of religion, commissioned, was insufficient to overshadow the day-to-day realities of her position.

History and Development of the Ministerial Exception

In 1972, the Fifth Circuit upheld the dismissal of a gender discrimination lawsuit filed by an ordained minister of the Salvation Army in *McClure v. The Salvation Army*.[8] The *McClure* court found that the statutory ministerial exception contained within Title VII of the Civil Rights Act of 1964[9] (Title VII) did not apply, as it only applied to claims of religious discrimination against religious employers.[10] Nevertheless, the court held that the "'wall of separation' between church and state" created by the First Amendment of the U.S. Constitution barred any inquiry into the employment decisions of religious institutions regarding their ministers, regardless of the protected category in question.[11] The court found that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[12] Thus, the Fifth Circuit created the present-day common law ministerial exception at issue in *Hosanna-Tabor*.

In 2006, the ministerial exception made its debut in the Third Circuit in *Petruska v. Gannon University*.[13] In *Petruska*, a female chaplain at Gannon University alleged, in sum, gender discrimination, when her position was restructured to effectively remove her from her position in favor of a male. Following *McClure* and its progeny, the Third Circuit adopted the ministerial exception to bar "any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."[14] Thus, the plaintiff's Title VII gender discrimination claims were barred, as they would have required an inquiry into the validity of the university's restructuring, and thus impacted the religious university's ability to select its chaplain.

The *Petruska* court noted, however, that certain claims, like contract claims, could proceed so long as they did not require a challenge of the validity of religious doctrine. In support, the court cited *Geary v. Visitation of the Blessed Virgin Mary Parish School*, a Third Circuit case alleging violation of the Age Discrimination in Employment Act[15] (ADEA).[16] In *Geary*, the plaintiff "did not challenge the validity of religious doctrine; she merely claims that the religious doctrine did not motivate the suit."[17] There, the court "held that 'when the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement'" under the establishment clause.[18] As a result, the court allowed the plaintiff in *Petruska* to litigate her breach of employment contract claim.

By the time *Hosanna-Tabor* reached the U.S. Supreme Court, the federal courts of appeal had uniformly recognized the existence of the ministerial exception, albeit with nuanced differences.[19] For example, in the Third Circuit the ministerial exception is treated as an affirmative defense to be brought under Federal Rule of Civil Procedure 12(b)(6), whereas in the Second Circuit it has been applied as a jurisdictional bar under Federal Rule of Civil Procedure 12(b)(1).[20]

Additionally, the courts generally agreed that the employee's title was not dispositive in determining whether the ministerial exception governed, and instead, the courts generally looked to the primary duties the employee performed.[21] As a result, many courts that

analyzed the applicability of the ministerial exception to parochial school teachers who taught primarily secular subjects found the ministerial exception did not apply. For example, the ministerial exception did not apply to a teacher at a Seventh Day Adventist elementary school where the teacher primarily taught secular subjects and her daily religious duties were limited to about one hour.[22] On the other hand, teachers who taught primarily religious subjects, or had a central role in the religious mission of the church, were considered ministers for purposes of the exception.[23]

U.S. Supreme Court Confirms and Explains the Ministerial Exception

In *Hosanna-Tabor*, a unanimous Supreme Court held that the ministerial exception is an affirmative defense to employment discrimination suits brought by ministers seeking to challenge their religious employer's decision to fire them.[24] This conclusion was based on the religious clauses of the First Amendment—the free exercise clause and the establishment clause—which were designed to prevent governmental intrusion into the affairs of religious institutions. The Court observed that a review of employment decisions necessarily would involve governmental inquiry into the internal operations of religious institutions.

Looking to the historical foundations of the First Amendment for guidance, the Court noted that by the time the religious clauses were drafted, American society had gone through several centuries of governmental intrusion into religious matters. The Puritans in New England fled Europe so they could elect their own ministers and establish their own modes of worship.[25] The Southern colonists, by contrast, brought the Church of England with them, but conflicts arose in light of English attempts to appoint religious local leaders from across the pond.[26] In this backdrop, the founding generation sought to create a separation of church and state, and thus included the religious clauses in the First Amendment.

The Court then looked to early cases centered on disputes regarding control over religious property. For instance, in *Watson v. Jones*[27] the Court was asked to resolve a dispute between antislavery and proslavery factions over who controlled a particular church building in Kentucky. Citing the separation of church and state, the *Watson* Court deferred to the decision of the governing religious body in question.[28] In 1952, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North American*, the Court "recognized that the '[f]reedom to select the clergy, where no improper methods of choice are proven,' is 'part of the free exercise of religion' protected by the First Amendment against government interference."[29] In light of the reasoning in *Kedroff*, the *Hosanna-Tabor* Court had little trouble concluding that the ministerial exception, rooted in the same religious clauses, is necessary to maintain the separation of church and state by preventing intrusion into the employment decisions made by religious institutions related to ministers.

The Court rejected the EEOC's argument that there was no need to apply the religious clauses because religious institutions could defend against employment discrimination lawsuits by invoking the constitutional right to freedom of association, which is "implicit" in the First Amendment.[30] The Court was clear that the First Amendment's special attention to religious organizations could not be ignored in this case. It also noted that the EEOC's allegedly foreseeable parade of horribles of unfettered employment law abuses by religious organizations had not actually materialized, despite the Fifth Circuit's first enunciation of the ministerial exception 40 years ago, in *McClure*.[31]

The Court clarified that the intrusion into the employment decisions of religious entities would result in the breach of the separation of church and state because it constituted government inquiry into the internal operations of religious institutions. This result was unlike the intrusion of government regulation of outward physical acts, such as the ingestion of drugs by adherents of the religious institutions.[32] Although the ADA may be a neutral law of general applicability, and society's interest in enforcement of employment discrimination laws is undoubtedly important, it cannot override the First Amendment's specific separation of church and state to allow government interference with an internal church decision affecting the faith and mission of the church itself.

Ultimately, the Court held that the ministerial exception applies to any employment discrimination suit brought by a minister to challenge a decision to terminate the minister's employment.

The Ministerial Exception Applied

The *Hosanna-Tabor* Court unanimously found that Perich was a minister, and was thus subject to the

ministerial exception, reversing the finding of the Sixth Circuit. The Court found the exception is not limited to heads of churches and religious groups, but has broader applicability.[33] Thus, the crux of the analysis is an inquiry into whether an individual is considered a minister for purposes of the ministerial exception.

The Court declined to provide a rigid formula for deciding who falls into the ministerial exception, but did highlight the factors it considered relevant to its analysis in the present case. Specifically, the Court found the following factors relevant: Perich's formal title, the substance reflected in that title, Perich's own use of that title, and the important religious functions Perich performed for the church.

As the Court explained, both Perich and Hosanna-Tabor considered her a minister. Perich had undergone about six years of religious training and satisfied rigorous religious requirements to attain her title of minister of religion, commissioned. After meeting the prerequisites, Perich was called by the congregation to her vocation, and could only be removed by a supermajority vote of the congregation. While she was a minister, Perich held herself out to the public as such, and even claimed a housing allowance on her taxes that was reserved for ministers. Perich's job duties while she worked for Hosanna-Tabor centered around transmitting the faith to the next generation—teaching the religious materials and beliefs of the Lutheran faith and "lead[ing] others toward Christian maturity."[34]

In separate concurrences, several Supreme Court justices shared further insights into the proper analysis to determine whether an individual is a minister. For instance, Justice Clarence Thomas would "defer to a religious organization's good-faith understanding of who qualifies as its minister."[35] Alternately, Justice Samuel Alito and Justice Elena Kagan sought to create flexibility in light of the diversity of religious beliefs within the population, and thus suggested the ministerial exception apply to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[36]

In unanimously finding that Perich was a minister under any of the suggested tests, the Court pointed to three errors committed by the Sixth Circuit. First, the court overlooked the relevance of Perich's official commission and formal title. Next, the Sixth Circuit placed too much weight on comparisons of job duties with lay teachers. Similarly, the court placed too much emphasis on Perich's secular duties. Instead, the court should have placed more emphasis on the quality and nature of Perich's ecclesiastical duties, as opposed to the length of time it took Perich to perform them.

Ultimately, the Court applied a flexible analysis focused on the realities of the position in context of this individual's faith. After considering the key factors here, the Court had no trouble finding that Perich was a minister, and thus covered by the ministerial exception to employment discrimination laws.

Implications of *Hosanna-Tabor*

Moving forward, *Hosanna-Tabor* makes clear that the ministerial exception is a broad affirmative defense to employment discrimination lawsuits against religious employers, under federal law and likely under state laws as well. Regardless of the statutorily protected class of which the individual may be a member, employment decisions of religious institutions are likely to fall within the ministerial exception to be largely beyond challenge. This interpretation is consistent with, and perhaps expands, the Third Circuit's treatment of the ministerial exception, as discussed in *Petruska*. The Court did not specifically address, however, whether and to what extent the ministerial exception will apply to other grounds for liability, such as tort claims and contract claims stemming from the employment relationship. Thus, religious employers may still have exposure to liability in certain circumstances, notwithstanding the ministerial exception.

The Court's reluctance to provide a clear test regarding who qualifies as a minister, however, leaves ambiguity that is likely to be the focus of future litigation. Although cases involving Lutheran ministers and lay janitors may be more predictable in light of *Hosanna-Tabor*, the panoply of individuals between the extremes is likely to require deeper analysis. Application of the ministerial exception is likely to turn on many of the factors considered by the *Hosanna-Tabor* Court, with an eye toward the 'realities' of the situation. Of course, in light of the varied religious institutions and beliefs in this melting-pot nation, the specialized circumstances applicable to each employment relationship make careful analysis imperative. ■

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Endnotes

1. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC (Hosanna-Tabor),* 565 U.S. __, 132 S. Ct. 694 (2012).
2. Americans with Disabilities Act (ADA), 42 U.S.C. § 12111 to 12117 (2000).
3. 42 U.S.C. § 12203(a); Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1602(a) (1979).
4. 1 *Corinthians* 6:1-8.
5. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 891-92 (2008).
6. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (2010).
7. *Id.* at 778 (*citing Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007)).
8. *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972).
9. 42 U.S.C. § 2000e, *et seq.* (2000).
10. *McClure*, 460 F.2d at 556 (*citing* 42 U.S.C. § 2000e-1).
11. *Id.* at 558.
12. *Id.* at 558-59.
13. *Petruska v. Gannon Univ.*, 462 F.3d 294 (2006).
14. *Id.* at 307.
15. 29 U.S.C. § 621, *et seq.* (2000).
16. *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.,* 7 F.3d 324 (3d Cir. 1993).
17. *Petruska*, 462 F.3d at 311 (*citing Geary*, 7 F.3d at 329).
18. *Id.* at 311 (*citing Geary*, 7 F.3d at 330).
19. *Hosanna-Tabor*, 565 U.S. __, 132 S. Ct. at 705 n.2 (citing to cases recognizing the ministerial exception in each circuit).
20. *Compare Petruska*, 462 F.3d at 302; *with Rweyemamu v. Cote*, 520 F.3d 198, 201 (2008).
21. *See Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985).
22. *Redhead v. Conference of Seventh Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006).
23. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (finding that a nun who taught canon law at Catholic University was a ministerial employee).
24. *Hosanna-Tabor*, 565 U.S. ___, 132 S. Ct. at 710.
25. *Id.* at 702 (*citing* T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 3 (1986); McConnell, The Origins and Historical Understanding of Free Exercise of Religious, 103 *Harv. L. Rev.* 1409, 1422 (1990)).
26. *Id.* at 703 (*citing* H. Eckenrode, Separation of Church and State in Virginia 13-19 (1910)).
27. 13 Wall. 679 (1872).
28. *Hosanna-Tabor*, 565 U.S. ___, 132 S. Ct. at 704 (*citing Watson*, 13 Wall. at 727).
29. *Id.* at 704 (*citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).
30. *Id.* at 706.
31. *Id.* at 710.
32. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (upholding denial of unemployment benefits of two members of the Native Am. Church on account of sacramental ingestion of peyote, a crime under Oregon law).
33. *See Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985).
34. *Hosanna-Tabor*, 565 U.S. ___, 132 S. Ct. at 708.
35. *Id.* at 710 (Thomas, J. concurring).
36. *Id.* at 711 (Alito, J. concurring).

Point:
White v. Starbucks: Doing One's Job is Not Whistle-Blowing

by Curtis G. Fox and Jay S. Becker

The New Jersey Appellate Division recently affirmed the dismissal of a claim of retaliation under the Conscientious Employee Protection Act[1] (CEPA), finding that the plaintiff did not engage in any protected activity when she reported violations of law to her supervisor and managers as part of her job responsibilities. The decision reaffirms the manifest and logical principle that doing one's job does not amount to whistle-blowing pursuant to CEPA.

In *White v. Starbucks*,[2] plaintiff Kari White was a district manager for defendant Starbucks Corporation.[3] The plaintiff's job description provided that she was:

> required to regularly and customarily exercise discretion in managing the overall operation of the stores within [her] district[,]... [including] overseeing the district's store management workforce, making management staffing decisions, ensuring district-wide customer satisfaction and product quality, ... and managing safety and security within the district. She was also responsible for ensur[ing]...[that employees] adhere to legal and operational compliance requirements.[4]

During the first six weeks of her employment with Starbucks, the plaintiff participated in a training program covering customer care, communication, managing food and financial performance, store development, and delegation.[5] The plaintiff was also trained in retail management and compliance with public health laws.[6]

The plaintiff's district consisted of Linden, Newark, Union, Westfield, Woodbridge, and Route 1 North Iselin.[7] She testified that she raised and discussed alleged violations of law with her supervisors as part of her job responsibilities.[8] With respect to the stores under her supervision, the plaintiff informed her supervisors during routine meetings and in general conversations about the following: missing merchandise and theft at the Hoboken store;[9] missing thermometers in the Woodbridge store;[10] missing thermometers and unsanitary conditions in the Newark store;[11] alleged drinking on the job by employees in the Newark store;[12] alleged after-hours sex parties in the Iselin store;[13] a customer attack in the Newark store;[14] the transmittal of pornographic emails in the Iselin store;[15] and tables and chairs in the Westfield store needing reconfiguration to comply with handicap accessibility laws.[16] Additionally, the plaintiff memorialized the reports of violations in a memorandum to the employee resources director at Starbucks.[17]

After receiving numerous complaints from store managers in the plaintiff's district about her, Jeffrey Peters, regional director of operations for the central and northern sections of New Jersey, and Glenn Shuster, partner resources manager for the Upper Mid–Atlantic Region, informed the plaintiff that her employment was terminated.[18] Specifically, Peters and Shuster advised the plaintiff that they were concerned because she had inquired about a store manager's health condition in the context of criticizing his work performance, "even after being asked on three separate occasions to not broach the subject with him."[19] Peters told the plaintiff she posed a liability risk to Starbucks, and that her services were no longer wanted.[20]

The plaintiff waited until the months subsequent to the termination of her employment to file a police report in Hoboken regard the missing inventory she allegedly discovered, and a report to the Woodbridge police department about the sex parties and the pornography in the Iselin store.[21]

CEPA prohibits an employer from taking "retaliatory action" against an employee because the employee engages in any one of the following "whistle-blowing" activities:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer...that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law...; or

....

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law...;

(2) is fraudulent or criminal...; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[22]

In affirming the dismissal of the plaintiff's complaint, the Appellate Division agreed with the trial court's conclusion that the plaintiff did not engage in any protected whistle-blowing activity because, "the issues on which she base[d] her claim [fell] within the sphere of her job-related duties."[23] Her job was to ensure that the alleged violations at the stores in her district were addressed and corrected;[24] thus, it would be illogical and disingenuous to claim that she disclosed, objected to, or refused to participate in an activity, policy or practice of Starbucks that she reasonably believed was in violation of a law, rule or regulation promulgated pursuant to law. Rather, the plaintiff brought the store issues to the attention of her supervisors during routine meetings and in general conversations, "to keep them abreast of the situation and the action she was taking as district manager."[25] CEPA was designed to protect employees who report illegal or unethical workplace activities,[26] and not to protect employees engaged in their routine and daily job functions.

In *White*, the Appellate Division relied heavily on its prior holding in *Massarano v. New Jersey Transit*,[27] which dismissed the plaintiff's CEPA retaliation claim on the basis that the plaintiff's alleged whistle-blowing activity (reporting the improper disposal of New Jersey Transit (NJT) blueprints, diagrams, schematics for bridges, tunnels, and utility facilities) did not amount to whistle-blowing because it fell under the plaintiff's job duties as security operations manager for NJT.[28] The Appellate Division's holding in *White* reaffirms the principle first articulated in *Massarano*, that performing one's job does not constitute whistle-blowing pursuant to CEPA.

In *Massarano*, the plaintiff was responsible for supervising security personnel in Newark, Maplewood, Kearny and the NJT concourse in New York's Penn Station.[29] As with the decision in *White*, the Appellate Division in *Massarano* examined the plaintiff's job duties as security operations manager to determine if her conduct constituted whistle-blowing under CEPA.[30] Specifically, the plaintiff's job responsibilities included instituting training, raising standards, enhancing and updating guidelines and manuals, establishing a tiered pay scale to attract and retain better employees, terminating workers who did not improve their performance, upgrading equipment and preparing a business plan for the security office.[31] Most important, the plaintiff testified that she "discussed everything" with Frank Fittopaldi, the director of organization services for NJT.[32]

Fittopaldi was not at work when the plaintiff was advised by the Newark building supervisor of the discarded documents.[33] Consequently, the plaintiff notified the acting executive director of the situation.[34] Thus, the Appellate Division agreed with the trial court's analysis that the plaintiff did not engage in any protected whistle-blowing activity, but was "merely doing her job" as security operations manager by reporting her findings and her opinion to the acting executive director in Fittopaldi's absence.[35]

The Appellate Division's decision in *White* was not the first time the court applied the holding in *Massarano.* In *Aviles v. Big M, Inc.*,[36] the Appellate Division relied on *Massarano*, concluding that a dressing room attendant, who was terminated for not following store protocol in her method of confronting a suspected shoplifter, was not a whistle-blower under CEPA. The Appellate Division, in *Aviles*, rejected the plaintiff's argument that her confrontation of a suspected shoplifter constituted a whistle-blowing activity pursuant to CEPA, reasoning that "a plaintiff's job duties cannot be considered whistle-blowing conduct."[37]

Likewise, this same reasoning underpinned the decision in *Ortiz v. Union County*,[38] where the Appellate Division held that disciplining a subordinate did not constitute whistle-blowing as a matter of law. The plaintiff in *Ortiz*, the acting commander of the Union County Sheriff's Office Administrative Services Unit, confronted and issued a reprimand to a subordinate detective concerning misrepresenting the hours he worked, and his tardiness.[39] The plaintiff also reported the detective's actions to his own supervisor.[40]

The Appellate Division, in *Ortiz*, held the plaintiff's actions in both reporting his subordinate and issuing

him a reprimand did not qualify as whistle-blowing under CEPA.[41] "Rendering discipline is a responsibility of a supervisor and a part of a supervisor's job function. Otherwise, all supervisors who reprimand or discipline subordinates would qualify as CEPA claimants."[42] The Appellate Division's holding in *Ortiz* is again consistent with the axiom that doing one's job does not constitute whistle-blowing as a matter of law.

Similarly, the Appellate Division held, in *Richardson v. Deborah Heart & Lung Center*,[43] that the plaintiff's "express job duties" did not constitute protected whistle-blowing conduct under CEPA. In *Richardson*, the plaintiff was a former assistant manager whose duties included assisting with payroll and conducting quality assurance functions.[44] The plaintiff alleged that she engaged in CEPA-protected conduct by enforcing the defendant's "policy or practice of correcting potential billing mistakes."[45] The plaintiff further argued that "by refusing to overlook staff mistakes, she refused to participate in conduct that she reasonably believed to be in violation of the law."[46] The Appellate Division dismissed the plaintiff's claim, reasoning that "when the employer has assigned plaintiff the express task of correcting and reporting the mistakes of co-employees, the employer cannot reasonably be viewed as having condoned the alleged errors of co-employees."[47] The Appellate Division further stated that the "glaring deficiency" in the plaintiff's claim was that her employer, like Starbucks in *White*, did not ask her to overlook staff mistakes, but rather, she was charged with the task of finding and correcting staff mistakes.[48]

White does not signify the "obliteration" of CEPA, but instead stands for the well-established law in New Jersey that if a plaintiff is performing his or her job duties, even if those duties include reporting violations of law or policy to supervisors, he or she cannot be a whistle-blower as a matter of law. Stated simply, a plaintiff who reports conduct, as part of his or her job, is not a whistle-blower whose activity is protected under CEPA.[49] To hold otherwise would transform every employee tasked with a role in compliance into a whistle-blower.

The take-away for employers is that it is paramount to provide clear and detailed job descriptions to all employees, especially those who are tasked with reporting violations of law or policy to their supervisors. Furthermore, as was the case with the plaintiff in *White*, employers should train managerial employees to identify and report violations of law and policy to their supervisors. These two measures will help ensure that an employee who reports violations of law or policy to his or her supervisor as part of his or her job responsibilities cannot later contrive the claim he or she is a whistle-blower protected by CEPA.[50]

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Endnotes

1. N.J.S.A. 34:19-1, *et seq.*
2. No. A-3153-09T2, 2011 WL 6111882 (App. Div. Dec. 9, 2011).
3. *Id.* at *1.
4. *Id.* (internal quotations omitted).
5. *Id.*
6. *Id.*
7. *Id.* at *2, n.1.
8. *Id.* at *10.
9. *Id.* at *2.
10. *Id.*
11. *Id.* at *3.
12. *Id.* at *4.
13. *Id.* at *5.
14. *Id.*
15. *Id.* at *6.
16. *Id.* at *7.
17. *Id.* at *6.
18. *Id.*
19. *Id.*
20. *Id.* at *8.
21. *Id.*
22. N.J.S.A. 34:19-3. *See also Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003).
23. *White* at *9.
24. *Id.* at *10.
25. *Id.*
26. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 431 (1994).

27. 400 N.J. Super. 474, 491 (App. Div. 2008).
28. *Id*.
29. *Id*. at 477-78.
30. *Id*. at 478.
31. *Id*.
32. *Id*.
33. *Id*. at 480.
34. *Id*.
35. *Id*.
36. No. A-4980-09T4, 2011 WL 780889 (App. Div. March 8, 2011).
37. *Id*. at *5 (*citing Massarano* at 491).
38. No. A-0644-08T1, 2010 WL 1329052 (App. Div. April 7, 2010).
39. *Id*. at *2.
40. *Id*.
41. *Id*. at *7.
42. *Id*.
43. No. A-4611-08T2, 2010 WL 4067179, at * 6 (App. Div. July 28, 2010).
44. *Id*. at * 1.
45. *Id*. at * 5.
46. *Id*. at * 6 (internal quotations omitted).
47. *Id*. at * 7.
48. *Id*.
49. *White* at *9.
50. The Supreme Court of New Jersey denied the plaintiff's petition for certification.

Counterpoint:
The Game Changer

by Claudia A. Reis

On Dec. 9, 2011, the Appellate Division so narrowly construed the Conscientious Employee Protection Act (CEPA)[1] that it created a judicial exception thereto with the potential to undermine the protections of the act.[2] The case at issue, *White v. Starbucks Corporation*, which stands for the proposition that employees who blow the whistle on illegal conduct within the scope of their job duties are not entitled to the protections of CEPA, has been described by employers as a "game changing decision" and "the decade's biggest whistleblower case."[3] Indeed, in reaching this conclusion, the Appellate Division created an exception that is likely to swallow the rule and leave New Jersey employees bereft of any legal protections for blowing the whistle on illegal workplace conduct.

In *White*, Starbucks Corporation employed the plaintiff as a district manager for Starbucks and she reported directly to defendant Jeffrey Peters, the regional director of operations. In her capacity as a district manager, the plaintiff's responsibilities included managing the overall operation of the stores, overseeing management, ensuring product quality, managing safety and security, and "ensuring that employees adhere[d] to legal and operational compliance requirements."[4]

Shortly after commencing employment with Starbucks, the plaintiff reported theft in the Hoboken store.[5] Approximately two months later, in or around Oct. or Nov. 2007, the plaintiff also raised food safety concerns about the Woodbridge store,[6] and complained about unsanitary conditions at the Newark store to each of the respective store managers.[7] The plaintiff reported each of the above-referenced complaints to her supervisor, defendant Peters.[8] By Dec. 2007, the store managers for the Newark and Iselin stores had raised concerns about the plaintiff's management style, and an anonymous employee complaint alleged that the plaintiff was distrustful, rude, dismissive, and disrespectful.[9] In late December, defendant Peters held a roundtable discussion with the store managers in the plaintiff's district—the individuals responsible for the stores cited by the plaintiff—who generally complained about the plaintiff's management style. Soon after this meeting, the plaintiff learned from the Union store manager that the complaints about her were being lodged in response to the concerns she raised about certain stores.[10]

The plaintiff continued to complain about conditions at various Starbucks stores in her district throughout early 2008. For example, by February, she had attempted to address concerns about after-hours sex parties in the Iselin store, as well as alcohol consumption during work hours and a physical attack on a customer in the Newark store.[11] By late February, the plaintiff complained to an employee resources director that she was being punished for reporting violations of company policy, and provided him with a timeline of events outlining her numerous complaints to defendant Peters.[12] In March, the plaintiff was addressing an issue involving an Iselin store employee who had sent a pornographic email to at least one other employee. In Feb. or March 2008, the plaintiff complained that the configuration of the tables and chairs in the Westfield store violated the Americans with Disabilities Act.[13] Like her prior complaints, all of these complaints and concerns were reported to defendant Peters.[14]

The store managers in the plaintiff's district continued to lodge complaints against her throughout early 2008. At some point in February, defendant Peters suggested that the plaintiff start looking for other employment; however, the plaintiff refused to do so.[15] During a meeting with defendant Peters and a partners resource manager for the Mid-Atlantic Region on or around March 20, 2007, the plaintiff was told that they were concerned about her career with Starbucks. At the conclusion of that meeting, the plaintiff reiterated the various violations of law she had observed during her employment.[16] The following day, the plaintiff chose to resign after being given the choice of resigning or having her employment terminated.[17] She subsequently filed a CEPA claim against defendants Starbucks and Peters relating to the retaliation she was subjected to for complaining about and reporting various violations of law.[18]

The trial court granted the defendants' motion for summary judgment and dismissed the plaintiff's claim as a matter of law. Specifically, the trial court found the plaintiff had not engaged in whistle-blowing activities

because the issues she complained about fell within the scope of her job duties.[19] The Appellate Division, relying upon *Massarano v. New Jersey Transit*,[20] affirmed the trial court's holding.[21]

At best, the Appellate Division's decision in *White* is woefully deficient in several respects. At worst, the decision is a blatant disregard for the public policy of this state, a usurpation of the authority of the Legislature, and an attempt to obliterate the protections afforded by CEPA.

The Appellate Division purported to rely upon the holding in *Massarano* for the proposition that employees who blow the whistle on illegal conduct within the scope of their job duties are not entitled to the protections of CEPA. However, *Massarano* does not stand for that proposition, and is, in fact, much more limited in its application. *Massarano* involved a security manager for New Jersey Transit who was "outraged" after discovering four recycling bins full of discarded blueprints or schematics for, in part, bridges, tunnels, a rail operations center, underground gas lines, and building specifications.[22] Because her immediate supervisor was not available that day, plaintiff Massarano contacted one of her supervisor's superiors to determine what to do about the situation.[23] The plaintiff in *Massarno* subsequently had various disagreements and run-ins with her supervisor, and her employment was ultimately terminated approximately 18 months after her discovery of the discarded materials.

The Appellate Division held that the plaintiff was not entitled to the protections of CEPA because New Jersey Transit's "disposal of the documents in a bin on the gated loading dock did not constitute a clear violation of a statute, regulation or public policy."[24] Moreover, the court found that "[n]othing in the record lead[] to the conclusion that the defendants "retaliated against the plaintiff for reporting the disposal of documents...." Thus, the Appellate Division denied the plaintiff relief because there was no legal or evidentiary basis for illegal retaliation, and not because the alleged protected activity was within the scope of her duties. In a passing observation, the court mentioned that even if it found that disposing of the materials at issue "violated public policy, plaintiff's reporting the disposal...did not make her a whistle-blower under the statute [because] plaintiff was merely doing her job...by reporting her findings and...opinion...."[25] Thus, the holding of *Massarano* is extremely limited. More importantly, however, the *dicta* in *Massarano* adopted and re-characterized by the Appellate Division as a "holding" flies in the face of CEPA's statutory language and the unequivocal protections afforded by CEPA.

CEPA was enacted "'to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'"[26] In that way, CEPA is "a reaffirmation of this State's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a preexisting common-law tort cause of action for such retaliatory discharge."Because "CEPA must be considered 'remedial' legislation," it "should be construed liberally to effectuate its important social goal."[27] In an act of judicial defiance and bravado, the Appellate Division ignored the unequivocal public policy of this state and legislated from the bench by narrowly construing CEPA in such a way as to create a judicial exception.

CEPA makes it unlawful for an employer "to take any retaliatory action against an employee because the employee" 1) "discloses, or threatens to disclose...an activity, policy or practice...that the employee reasonably believes" violates a law, rule or regulation,[28] or 2) "objects to, or refuses to participate in any activity, policy or practice...which the employee reasonably believes is in violation of law, or a rule or regulation" or "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment."[29] Importantly, "employee" is defined as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."[30]

Simply put, CEPA protects all employees who disclose, threaten to disclose, object to, or refuse to participate in unlawful activities or activities that violate public policy—not just those employees who do so when the activity they are blowing the whistle on does not fall within the scope of their duties. In fact, no case of precedential value has ever found the existence of such an exception.[31] In contrast, countless precedential decisions have afforded protection to employees who blow the whistle on activities within the scope of their job duties.[32]

Moreover, the exception created by the Appellate Division may swallow CEPA's general rule that employees who blow the whistle are entitled to protection from retaliation. For example, if such an exception is created, employers will simply avoid liability for violations of

CEPA by making it the responsibility of each and every employee to report violations of law. This outcome is not as absurd a proposition as it may sound, or simply overreaching on the part of a plaintiff's attorney. After all, part of the plaintiff's job duties in *White* required her to ensure that employees adhered to legal requirements.[33]

Moreover, employees often discover or learn of unlawful workplace conduct by virtue of being exposed to it in the normal scope of their duties. For example, there is certainly no reason why employers should be permitted to retaliate against any of the following with impunity:

- a police officer who compiles information about illegal arrests and the manipulation of crime statistics;
- a corporation's pollution control technician who complains that his employer's dumping of toxic chemicals in a river violates Environmental Protection Agency regulations;
- a human resources employee who concludes that a high-level employee is engaging in widespread gender discrimination;
- an auditor for a publicly traded company who insists that it is not appropriate to use accounting loopholes and poor financial reporting to hide considerable debt from shareholders;
- a Securities and Exchange Commission enforcement officer who complains that he is being directed to ignore what is likely a Ponzi scheme by an investment securities firm claiming to achieve results that are mathematically and legally impossible;
- a cigarette company executive who discloses that his employer knew for decades about the addictive and lethal nature of cigarettes; or
- a pharmaceutical marketing director who raises concerns about representatives engaging in off-label marketing of a particular drug.

Don't we, as a society, want each of those individuals to be entitled to the protections of CEPA in order to encourage them to report illegal or unethical workplace activities? In fact, don't we, as a society, want to encourage all employees to report illegal or unethical workplace activities, regardless of the manner in which they obtained knowledge of these violations? After all, isn't this the very purpose underlying CEPA?

The Appellate Division went out of its way to legislate from the bench to limit drastically the class of employees entitled to the protections of CEPA. Instead of creating new and unworkable rules of law that fly in the face of the public policy of this state, what the Appellate Division should have done was to determine whether: 1) the plaintiff, in *White*, possessed a reasonable belief that her employer violated a law, rule, regulation or a clear mandate of public policy; 2) she performed a whistle-blowing activity described in Section a(1), (c)(1), or (c)(3); 3) she suffered an adverse employment action; and 4) the whistle-blowing activity and the adverse action were causally related.[34] That's all the Appellate Division should have done...nothing less...and certainly nothing more.

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Endnotes

1. N.J.S.A. 34:19-1, *et seq.*
2. *White v. Starbucks*, 2011 WL 6111882 (App. Div. Dec. 9, 2011).
3. www.eanj.org/content/webinar-archive-understanding-white-v-starbucks-biggest-whistleblower-case-year.
4. *White*, 2011 WL 6111882 at *1.
5. *Id.* at *2.
6. *Id.* at *6.
7. *Id.* at *2.
8. *Id.* at *1, 2.
9. *Id.* at *3, 4.
10. *Id.* at *4.
11. *Id.* at *4, 5.
12. *Id.* at *6.
13. *Id.* at *7.
14. *Id.* at **4-7.
15. *Id.* at *5.
16. *Id.* at *7.
17. *Id.* at *8.
18. Br. of Pl-Appellant Kari White, dated May 17, 2010, at *3.
19. *White*, 2011 WL 6111882 at * 1.
20. 400 N.J. Super. 474 (App. Div. 2008).
21. *White*, 2011 WL 6111882 at * 10.

22. *Massarano*, 400 N.J. Super. at 479-80.
23. *Id*. at 480, 487
24. *Id*. at 490. It is also worth noting that the Appellate Division's analysis in *Massarano* was flawed and legally incorrectly to the extent that it required the plaintiff to prove that New Jersey Transit's actions actually violated a law, rule or public policy. *Hernandez v. Montville Township Bd. of Educ*., 354 N.J. Super. 467, 473 (App. Div. 2002), *aff'd* 179 N.J. 81 (2004)(holding that a plaintiff who brings a claim under Section 3(a) of the CEPA need only show that she possessed a reasonable belief the employer's conduct violated a law, rule, regulation or public policy rather than prove the conduct actually constituted such a violation). The reason a plaintiff does not have to prove an actual violation is that the CEPA's goal was "not to make lawyers out of conscientious employees who object to employer [and employee] conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." *Mehlman v. Mobil Oil Corp*., 153 N.J. 163, 193-94 (1998).
25. *Massarano*, 400 N.J. Super. at 491
26. *Yurick v. State*, 184 N.J. 70, 77 (2005) (*quoting Abbamont v. Piscataway Twp. Bd. of Educ*., 138 N.J. 405, 431 (1995)).
27. *Abbamont*, 138 N.J. at 431.
28. N.J.S.A. 34:19-3(a)(1).
29. N.J.S.A. 34:19-3(c)(1), (3).
30. N.J.S.A. 34:19-2(b).
31. There are no reported cases that stand for the proposition that employees are not entitled to the protections of CEPA if they blow the whistle on conduct within the scope of their job duties. There are, however, some unreported decisions that could be read to stand for that proposition. *Aviles v. Big M, Inc*., 2011 WL 780889 (App. Div., March 8, 2011); see also *Ortiz v. Union County*, 2010 WL 1329052 (App. Div., April 7, 2010); *Richardson v. Deborah Heart & Lung Center*, 2010 WL 4067179 (App. Div., July 28, 2010).
32. Both the New Jersey Supreme Court and Appellate Division have afforded the protections of CEPA to various employees who blew the whistle on conduct that was within the scope of their job duties. *Donnelson v. DuPont Chambers Works*, 206 N.J. 243, 256-57 (2011)(holding that "[o]ne could hardly dispute that" the complaint of an engineer responsible for the safe operation of chemical reactors to his supervisor "about the catastrophic consequences that he reasonably believes might occur from the unsafe operation of a reactor containing extremely dangerous chemicals falls within the activity protected" under CEPA); *Maimone v. Atlantic City*, 188 N.J. 221 (2006)(affording protection to police officer who complained about the department's policy decision to cease investigation and enforcement of code provisions prohibiting the promotion of prostitution and restricting the location of sexually oriented businesses); *Mehlman*, 153 N.J. 163 (holding that the director of toxicology, whose responsibilities included providing toxicologic and regulatory advice to Mobil Oil, was entitled to the protections of CEPA when he complained about excessive levels of benzene); *Abbamont*, 138 N.J. 405 (finding that an industrial arts teacher who complained about air quality in the shop as a result of inadequate ventilation was entitled to protections of CEPA); *Turner v. Associated Humane Societies*, Inc., 396 N.J. Super. 582 (App. Div. 2007)(providing protections of CEPA to an animal shelter employee whose job duties included processing adoption forms and who objected to and participated in an investigation concerning the adoption of a dog that should have been euthanized for biting a previous owner); *Parker v. M&T Chemicals, Inc*., 236 N.J. Super. 451 (App. Div. 1989)(affording protections of CEPA to attorney who objected to his client's use of a competitor's trade secrets that were inappropriately obtained).
33. *White*, 2011 WL 6111882 at *1.
34. *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003); *Turner*, 396 N.J. Super. at 592.

Update:
Contingency Fee Enhancements Under New Jersey Attorney Fee-Shifting Statutes are Alive and Well

by Jon Green

In the March 2011 edition of this publication, this writer discussed two Appellate Division decisions that cast doubt on the vitality of contingency attorney fee enhancements, which the New Jersey Supreme Court had held in 1995 were applicable to cases brought under the New Jersey Law Against Discrimination (LAD) and other fee-shifting statutes. The article predicted that the New Jersey Supreme Court would reverse the recent Appellate Division decisions and reaffirm contingency fee enhancements based upon a risk of loss analysis. This writer is happy to report, in one of life's rare moments, "I told you so," as the New Jersey Supreme Court, in *Walker v. Giuffre*, reversed the two Appellate Division decisions and reaffirmed use of contingency enhancements.[1]

In 1995, the New Jersey Supreme Court held, in *Rendine v. Pantzer*,[2] that an attorney representing a prevailing plaintiff in an employment discrimination case brought under the LAD could seek an enhancement of his or her lodestar fees (*i.e.*, the hours reasonably expended times the market hourly rate of the attorney) if the fee was contingent on the lawsuit's outcome. That enhancement was based on a risk of loss analysis, and not the quality of plaintiff's counsel's representation.

Discussion

Walker[3] involved a Consumer Fraud Act claim where the plaintiff's counsel had represented a purchaser of a new automobile from a dealership that included an illegal overcharge for registration fees and a questionable "documentation fee" of $199. The Law Division awarded a 45 percent contingency enhancement to plaintiff's counsel, but the Appellate Division reversed, holding that the trial judge's ruling that the case was not "typical" as defined by *Rendine*, was devoid of analytical support, and was inconsistent with the 2010 U.S. Supreme Court decision of *Perdue v. Kenny A.*[4] Perdue held that certain factors had to be analyzed before plaintiff's counsel could receive an enhancement of an attorney's fee award under 42 U.S.C. 1988 in a contingency fee setting for exemplary performance.[5] The Appellate Division directed that the trial court, on remand, address those six factors, as well as *Rendine*, when determining the appropriate enhancement to the lodestar.[6]

Thereafter, another Appellate Division panel, in an unpublished decision, and relying upon the decisions in *Walker* and *Perdue*, vacated a 50 percent contingency fee enhancement awarded to plaintiff's counsel whose Americans with Disabilities Act (ADA) and LAD lawsuit prompted the defendant shopping center to modify its parking lot to make it accessible for customers with disabilities. In that case, the Appellate Division, in *Humphries v. Powder Mill Shopping Center*,[7] reasoned that the trial court did not give proper consideration to the Appellate Division's decisions in *Walker* and *Perdue* regarding fee enhancements because the plaintiff was required to prove "rare and exceptional circumstances to justify an enhancement."[8] In its remand instructions, the Appellate Division in *Humphries* made no mention of *Rendine*, even though the plaintiff had filed suit under the LAD as well as the ADA, and plaintiff's counsel had not sought enhancement on the basis of extraordinary performance, but rather a contingency enhancement based on the risk of loss and strength of the case.[9]

Plaintiffs in both cases sought and were granted certification, and both cases were then consolidated for decision on the "overarching question concerning the continuing validity of the *Rendine* approach...."[10] The Supreme Court unanimously[11] re-affirmed *Rendine's* approach, authorizing contingency enhancements for New Jersey statutes that permit fee-shifting. The Court traced the federal judicial history of contingency enhancements up to when *Rendine* was decided in 1995, and concluded that the United States Supreme Court "had directly confronted the propriety of a contingency enhancement [for all federal fee-shifting statutes] and, over a strong dissent, had rejected it."[12]

Recognizing that *Rendine* "identified the competing strands in the United States Supreme Court's approach to contingency enhancements," the Court "found the arguments for outright rejection for contingency enhancements unpersuasive and opted instead to address the concerns

through adoption of the standards that we fixed to guide courts in awarding contingency enhancements."[13] The Court relied heavily upon *Rendine's* substantive justification for contingency enhancement (*i.e.*, courts, "after having carefully established the amount of the lodestar fee, should consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome").[14]

The Court explained the qualitative difference between *Rendine* and the 2010 *Perdue* decision in the following manner:

> The precise inquiry in *Perdue* was the application of these six important rules in the context of an enhancement based on either the quality of an attorney's performance or the results achieved, an issue not directly relevant to the question raised here. Although in applying those rules to the particular award then being reviewed the Court reiterated that a contingency enhancement is not permitted, the opinion made it abundantly clear that, for federal fee-shifting purposes, this issue had been settled in *Dague*. Simply put, the Court's decision in *Perdue* reiterates the framework that applies to fee awards in federal courts arising from federal statutes and does not represent any new approach on the subject.[15]

The Court, in *Walker*, noted that there were no decisions relied upon by the Court in *Perdue* that were even considered and then rejected by the Court in *Rendine*.[16] In sum, the Court held that the Appellate Division erroneously considered *Perdue's* analysis in both decisions and reaffirmed *Rendine's* rationale and standards for awarding contingency enhancements.[17]

Conclusion

The New Jersey Supreme Court correctly rejected the application of *Perdue's* almost categorical reluctance to enhance fee awards under federal fee-shifting statutes based upon plaintiff's counsel's performance. That rationale was not the basis for contingency enhancements under *Rendine*, as the New Jersey Supreme Court correctly recognized in *Walker*. In sum, contingency enhancements based on plaintiff's risk of loss are alive and well under New Jersey fee-shifting statutes. ■

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Endnotes

1. The March 2011 article addressed two different rationales for eliminating contingency fee enhancements. One consideration was that the performance of plaintiff's counsel should rarely, if at all, serve as a basis to award contingency fee enhancements as decided by the United States Supreme Court in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010). This consideration was the basis for two Appellate Division decisions vacating contingency enhancement awards that the New Jersey Supreme Court addressed in *Walker v. Giuffre*, 209 N.J. 124 (2012). The other consideration was the *New Jersey Law Journal*'s editorial board's opinion that contingency enhancements were no longer needed to attract competent counsel. The Court did not address or raise this issue in *Walker.*
2. 141 N.J. 292 (1995).
3. The New Jersey Supreme Court consolidated the two appeals, *i.e.*, *Walker v. Giuffre* and *Humphries v. Powder Mill Shopping Plaza.*
4. *Perdue v. Kenny A.,* 130 S. Ct. 1662 (2010).
5. *Id.* at 1672-73.
6. *Walker v. Giuffre*, 415 N.J. Super. 597, 610 (App. Div. 2010).
7. 2011 WL 6127 (App. Div. 2010).
8. *See id.* at *9; *Walker*, 209 N.J at 154 .
9. *Id.*
10. *Walker*, 209 N.J. at 128.
11. The Court ruled 5-0 with Justice Anne Patterson and t/a Justice Dorothea Wefing not participating.
12. *Walker*, 209 N.J. at 136 (internal citations omitted).
13. *Id.* at 138.
14. *Id.*
15. *Id.* at 140 (internal citations omitted).
16. *Id.*
17. In *Walker*, the Consumer Fraud Act lawsuit, the case was remanded to the Law Division for further consideration because the trial court did not articulate the necessary basis under *Rendine* for enhancement. *Id.* at 157. In *Humphries*, the reasonable accommodation lawsuit under the LAD, the Court affirmed the Law Division's award of 50 percent contingency enhancement of plaintiff's counsel's lodestar fees. *Id.* at 156.