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Message From the Chair

by Paul L. Kleinbaum

As I write this column,[1] spring has finally emerged from the bitterly cold and snow storm-filled winter. I hope you weathered this past winter without any major problems. We have another excellent edition of the *Quarterly* to help usher in this season. As the *Quarterly* has done in past years, Rob Szyba and Claudia Reis and the editors have put together an edition in which Rutgers School of Law–Camden law students have been paired with section members to co-author a number of the articles. Congratulations and thank you to Rutgers co-authors Iveliz Crespo, Tim McCarthy, Hope Deutsch and Jang Lee for their contributions.

Congratulations also to my colleague Paulette Brown, first vice-chair of the section, on her unanimous nomination to be the president-elect of the American Bar Association (ABA). If, as expected, Paulette is elected in August, she will become president in Aug. 2015. Paulette will be the first African-American woman to lead the ABA and the first New Jersey lawyer to do so in over 50 years!

Across the country, public-sector unions and employees have been through a tempestuous last few years, to say the least. Perhaps the most extreme example is the successful legislative effort in Wisconsin to severely curtail the role of unions.[2] In New Jersey, public-sector unions have not faced the same legislative onslaught. However, they have faced a hostile governor and Legislature that have placed limitations on the scope of negotiations, including the elimination of the right to negotiate over health insurance contributions[3] and, for police and fire, limitations on the ability to negotiate and arbitrate economic issues.[4]

There are other legal and administrative efforts being made to curtail the role of public-sector unions. Two pending cases, one on the federal level and one on the state level, are illustrative of these assaults. In *Harris v. Quinn*,[5] the United States Supreme Court is being asked to overrule its 1977 decision in *Abood v. Detroit Bd. of Educ.*[6] In *Atlantic County*,[7] the New Jersey Public Employment Relations Commission (PERC) rejected over 35 years of precedent when it held that a public employer's undisputed past practice of paying automatic

salary increments upon the expiration of a contract is no longer enforceable. The decisions in these cases, if adverse to the unions, will have a significant impact on public-sector unions.

Harris v. Quinn, which was argued in the Supreme Court on Jan. 21, 2014, squarely places the issue of *Abood*'s continued viability at center stage. The Court is reviewing a decision by the Seventh Circuit, which upheld the collection of agency fees from the employees at issue in that case. Surprisingly, the Seventh Circuit's decision focused more on whether the employees at issue, home healthcare aides, were state employees than on whether it should reverse *Abood*.

By way of refresher, the Supreme Court in *Abood* rejected a constitutional challenge to a Michigan statute permitting government employers and unions to agree to agency shop arrangements that would permit unions to collect agency fees (the fees paid by nonmembers in lieu of dues) as long as the fees were used by the union for expenditures for collective bargaining, contract administration and grievance adjustment. The obligation of a nonmember to pay agency fees is grounded in labor polices endorsing the principle of exclusive union representation. To that end, a nonmember should pay his or her fair share for receiving the benefits of a majority representative's collective bargaining efforts and should not get a free ride. Nonmembers also benefit because a majority representative owes a duty of fair representation to all employees in the unit, including those who choose not to become members.

Harris was brought, not surprisingly, by the National Right to Work Legal Defense Foundation and is a direct constitutional attack on the ability to collect agency fees at all, whether for collective bargaining purposes or any other purpose. Since *Abood*, agency fee statutes have survived attacks by the National Right to Work Legal Defense Foundation and others for over 35 years. In 1979, New Jersey adopted its own agency fee statute in the wake of the *Abood* decision.[8] It also survived a challenge to its constitutionality by the National Right to Work Legal Defense Foundation.[9]

In my opinion, *Abood* will survive this challenge as well. However, the case is just another example of the attacks public-sector unions have been under in recent years.

In *Atlantic County*, the Public Employment Relations Commission (PERC) overturned over 35 years of precedent when it found the dynamic *status quo* doctrine no longer requires public employers to pay negotiated salary increments set forth in the parties' collective negotiations agreement after an agreement has expired and before a new agreement has been reached. The decision, in my view, appears to be result-oriented and an unwarranted departure from well-established labor relations principles.

The dynamic *status quo* doctrine finds its source in *Galloway Twp. Bd. of Educ.*[10] There our Supreme Court, in affirming PERC's 1975 decision, applied well-settled private-sector principles and held that a board of education's failure to pay salary increments after the expiration of the agreement was a change in the *status quo* and an unlawful unilateral change in terms and conditions of employment. The Court noted that the Legislature recognized the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees.[11] Since *Galloway Twp. Bd. of Educ.*, parties have continued to apply this principle.

However, in *Atlantic County*, PERC announced its radical departure from this well-settled precedent of over 35 years. It justified its decision by relying, in significant part, on what it characterized as changes in the "labor relations climate," including the enactment of the reduction in the tax levy cap law[12] and the enactment of the interest arbitration cap law,[13] both in 2010. A major flaw in PERC's decision is that neither the Supreme Court nor PERC in *Galloway Twp. Bd. of Educ.* relied on this rather vague notion of the labor relations climate to support their decisions. Rather, both the Supreme Court and PERC relied upon well-established principles of private- and public-sector labor law. PERC claimed, disingenuously in my view, that its reversal of the dynamic *status quo* principle will somehow promote the prompt resolution of labor disputes. It never addressed how its abrupt about face will impact the hundreds, if not thousands, of collective bargaining relationships that have relied on this principle since 1978. PERC'S decision, if not reversed, will have a detrimental effect on these relationships and will not result in the prompt resolution of labor disputes.

The issues in *Harris* and *Atlantic County* will no doubt be discussed and debated in the months ahead. The section has a number of exciting programs coming up at which these and many other new decisions and issues will be discussed. The Public Sector Law Conference just took place on April 25. The Hot Tips in Labor & Employment Law Program will be held on June 13. It

is also time to plan to attend the section's program and luncheon at the NJSBA Annual Meeting on May 16. In addition to an excellent panel on the *Montone v. City of Jersey City*[14] decision, we will present the section's first annual award, named in memory of Sid Lehmann, to a deserving member of the section. Finally, the section's two-day Labor and Employment Law Summer Institute will be held on July 15 and 16. All of these programs provide a great way to earn your continuing legal education credits and keep up-to-date with the latest developments.

I hope you will join us for one or all of these programs. ■

Endnotes

1. I would like to thank Marissa A. McAleer, Esq., an associate in Zazzali, Fagella, Nowak, Kleinbaum & Friedman, for her assistance with the preparation of this column.
2. Steven Greenhouse, The Wisconsin Legacy, *N.Y. Times*, Feb. 23, 2014, at B1.
3. P.L. 2010, c.2; P.L. 2011, c.78.
4. P.L. 2010, c.105.
5. *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (2013).
6. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).
7. *County of Atlantic*, PERC No. 2014-40, 40 NJPER 285 (¶109 2013), *appeal pending*.
8. N.J.S.A. 34:13A-5.5 *et seq.*
9. *Robinson v. State*, 806 F.2d 442 (3d Cir. 1986), *cert. denied* 107 S. Ct. 2463 (1987).
10. *Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n*, 78 N.J. 25 (1978).
11. *Id.* at 78.
12. P.L. 2010, c.44.
13. P.L. 2010, c.105.
14. *Montone v. City of Jersey City*, Dkt. No. A-4158-11T4, 2013 WL 6764525 (App. Div. Dec. 24, 2013).

Inside this issue

Message From the Chair 1
by Paul L. Kleinbaum

Message From the Editor 5
by Robert T. Szyba

In the Name of Justice: The *Groark* Effect on the Scope of Discovery 6
by Paulette Brown and Jennifer A. Watson

***Sandifer v. United States Steel*: The United States Supreme Court 'Changes Clothes'** 9
by Lisa Barré-Quick and Hope Marie Deutsch

'But for' is the Straw That Broke the Camel's Back 13
by Claudia Reis and Iveliz Crespo

Sue Your Employer for Retaliation and Prove It—Go Directly to Jail—Do Not Pass Go—Do Not Collect $200 15
by James E. Burden

Should Employers Adopt OWBPA Waiver and Release Requirements for All Severance Agreements? An Analysis of *Carey v. NMC Global* 23
by Elizabeth Y. Moon

***Raymours Furniture Co. v. Rossi*—Is Mandatory Mandatory?** 27
by Gian M. Fanelli, Jang J. Lee, and Jason T. Brown

Is There an Unexpected Pay Day In Your 'Unpaid' Intern's Future? 31
by Timothy McCarthy and M. Trevor Lyons

Jersey City and Newark Require Private-Sector Employers to Pay Employees Earned Sick Leave 34
by Alexander L. D'Jamoos

What to Expect When Your Employee is Expecting: How the LAD's Pregnancy Amendment Impacts the Employer-Employee Relationship 38
by Kathryn K. McClure

Closing the Gender Gap? New Jersey's Pay Secrecy Ban 43
by Janet O. Lee

Weight in the Workplace: Where Size Shouldn't Matter 46
by La Toya L. Barrett

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Message From the Editor

by Robert T. Szyba

This year, the *Labor and Employment Law Quarterly* welcomes four law students from Rutgers School of Law-Camden for the third annual issue partnering attorneys with student-authors. Thus, included in this issue are several articles where attorneys and student-authors offer insightful analysis of recent developments that are relevant to practitioners on various sides of labor and employment law issues.

We begin with a discussion from Paulette Brown and Jennifer A. Watson regarding a recent decision of the U.S. District Court for the District of New Jersey on the discoverability of law enforcement officers' internal affairs files in civil litigation. The applicability of the *Groark v. Timek* decision to cases brought under the Law Against Discrimination is a very interesting topic. Then, explaining what it means to 'change clothes' for purposes of the Fair Labor Standards Act, Lisa Barré-Quick and Hope Marie Deutsch analyze the U.S. Supreme Court's decision in *Sandifer v. United States Steel*. Claudia Reis and Iveliz Crespo follow by analyzing the U.S. Supreme Court's discussion of the 'but-for' standard in *Burrage v. United States*.

Addressing the issue of post-*Quinlan* developments pertaining to employees who wind up in possession of their employer's documents that turn up in discovery in cases brought under the Conscientious Employee Protection Act or Law Against Discrimination, James E. Burden discusses the Appellate Division's decision in *State v. Saavedra*. Elizabeth Y. Moon discusses waiver and release requirements under the Older Workers Benefit Protection Act as applicable to severance agreements in the context of the Appellate Division's *Carey v. NMC Global* decision.

Gian M. Fanelli, Jang J. Lee, and Jason T. Brown explain the U.S. District Court's recent decision in *Raymours Furniture Co. v. Rossi* where the court declined to compel arbitration, finding that the arbitration clause at issue was illusory based on the employer's ability to change the arbitration agreement at any time without notice.

Looking at recent trends and developments with litigation pertaining to unpaid interns, Timothy McCarthy and M. Trevor Lyons walk us through the legal nuances and considerations that employers have been recently forced to consider.

We then turn to Alexander L. D'Jamoos for an explanation of the new requirements in Newark and Jersey City following the recent enactment of municipal ordinances requiring paid sick leave for employees. Kathryn K. McClure follows with an analysis of the new protection under the Law Against Discrimination for employees who are pregnant, have recently given birth, or who experience medical conditions related to pregnancy or childbirth. Addressing another amendment to the Law Against Discrimination, Janet O. Lee discusses the pay secrecy ban prohibiting employers in New Jersey from taking action against any employee who discloses or asks another employee to disclose information relating to his or her pay or compensation. Discussing discrimination against employees based on their weight, La Toya L. Barrett explores developments under the Law Against Discrimination.

The editors would like to thank Pam Jenoff, clinical associate professor, for her continued support of the collaboration between the Rutgers School of Law-Camden and the *Labor and Employment Law Quarterly*. ■

In the Name of Justice: The *Groark* Effect on the Scope of Discovery

by Paulette Brown and Jennifer A. Watson

Employer beware: An expansion of *Groark v. Timek*,[1] a recent decision of the U.S. District Court for the District of New Jersey, would push the boundaries of discovery where there is an allegation of pervasive indifference by an employer toward the unlawful conduct of its employee.

In *Groark*, on the night of Aug. 7, 2010, Matthew Groark was patronizing the Dusk Nightclub in the Caesar's Casino in Atlantic City, when suddenly, and without provocation, he was brutally kicked, thrown down stairs, and beaten by police officers Frank Timek and Sterling Wheaten, who were working as security for the club.[2] The officers charged Groark with resisting arrest and aggravated assault, among other charges. The aggravated assault charge was eventually reduced to simple assault, and ultimately, all charges against Groark were dismissed.[3]

As a result, Groark filed a lawsuit against the two police officers and Atlantic City, alleging the city failed to property train its police officers, and that its "customs, policies, practices, ordinances, regulations and directives...caused [his] false arrest..."[4] Further, Groark asserted that Atlantic City was deliberately indifferent to the "violent propensities" of officers Timek and Wheaten.[5] Groark also included Fourth Amendment claims of excessive force, false arrest and malicious prosecution.[6] The complaint included common law claims of assault and battery, as well as false imprisonment, false arrest, and malicious prosecution.[7]

Groark's complaint also alleged that Atlantic City's internal affairs investigations had no teeth—specifically that its customs, policies and practices were deliberately indifferent and caused the violation of his constitutional rights.[8]

During discovery, Groark demanded any and all internal affairs (IA) investigation files for officers Timek and Wheaten. Atlantic City objected to the demand, and instead produced IA index cards for the two officers. The index cards for Timek listed 52 complaints from May 30, 2001, to March 20, 2012, and contained complaints ranging from "simple assault," "excessive force," and "racial profiling" to "racial slurs," "demeanor," and "improper search and false arrest," among others. Forty-nine of the charges were resolved as either "exonerated," "unfounded," or "not sustained."[9] The index cards for Wheaten reflected approximately 26 complaints from Sept. 2008, to April 2012. Those allegations ranged from "excessive force," "harassment," and "improper search and demeanor," to "simple assault and standard of conduct," "assault and neglect of duty," and "improper arrest."[10] All of the complaints were closed as either "exonerated" or "not sustained," except one that was closed administratively.[11]

In discovery, Groark demanded that Atlantic City produce the entire set of IA files for the police officers, instead of simply producing the index cards. Atlantic City refused, and Groark moved before the court for production of the IA files.[12]

In response to Groark's motion to compel, Atlantic City advanced several objections, including the law enforcement privilege and relevancy. The court emphasized that the purpose of internal affairs investigations is to provide the public with the confidence that objective, meaningful, and real investigations into the conduct of accused police officers are conducted.[13] In *Groark*, the plaintiff had no way of knowing whether the investigations of the two officers were objective, meaningful, or real by simply reviewing the statistics provided on the index cards supplied by Atlantic City. The court noted that Timek and Wheaten had been before the court, on multiple occasions, defending similar allegations but receiving no consequences from the Atlantic City Police Department. In rejecting the law enforcement privilege argument, the court weighed the privilege analysis with an "eye towards disclosure" and found the investigation records to be relevant to the claims asserted in Groark's complaint in so far as they were needed to establish his claim of Atlantic City's deliberate indifference.[14] Further, the court determined that even if privileged, the public's need to know that the investigation process was real outweighed the law enforcement privilege.[15]

The court also rejected the alternative argument that post-incident IA files are irrelevant and that pre-incident files should be limited.[16] With respect to the post-incident IA files, the court relied upon well-established federal law that recognizes that federal rules allow "broad and liberal discovery."[17] While it is fundamental that the party seeking discovery must establish the discovery is reasonably calculated to lead to discovery of admissible evidence, the court determined that subsequent incidents may show a "continuous pattern that supports a finding of an accepted custom or policy," and were relevant.[18]

Further, the court rejected the argument that Atlantic City should not have to produce all of the police officers' pre-incident IA files, holding that the files were relevant to determining the extent to which Atlantic City's allegedly unconstitutional customs were entrenched and established.[19] The court opined that Groark was entitled to know whether his encounter with the officers was an isolated occurrence or was consistent with long-standing practices.

Although issuing a sweeping decision granting voluminous discovery, the court was careful to note that this opinion does not grant a free pass to all pre- and post-incident IA files, but states that future cases must be judged within the context of their own facts.[20] The court made clear that it was not ruling on the merits of Groark's claims, nor on the admissibility of the IA files at trial. The court merely determined that the files were not privileged, and were highly relevant to the plaintiff's claims. Accordingly, the motion to compel was granted, and Atlantic City was ordered to produce all records concerning IA's investigations into Timek and Wheaten.

In reaching its conclusion, the district court employed sweeping reasoning that severely erodes defense arguments against producing underlying investigation materials. For example, the court wrote:

> Atlantic City argues, 'Unlimited disclosure will interfere with future internal affairs investigations....' To the extent Atlantic City is referring to the citizen population, it underestimates their motivation, will and intelligence....Faced with a choice of keeping their identities secret and the possibility that their complaints could be 'swept under the rug,' or disclosure of their complaints that could motivate a police force to protect rather than violate citizens' rights, it is likely complainants would favor disclosure. The Court also believes that most citizens agree with the Court that '[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman....' To the extent Atlantic City posits that its police officers and IA investigations will be 'chilled' by the disclosure of its IA files, the Court completely discounts the argument.... Shame on any municipality if it 'chills' its investigation of potential police misconduct because it is concerned about what a thorough, unbiased and objective investigation would reveal.[21]

Moreover, the district court painstakingly set forth the manner in which the sweeping discovery ordered in *Groark* was necessitated by defense victories in earlier Section 1983 lawsuits. The opinion analyzed in great detail prior summary judgment decisions in which plaintiffs who had only statistical or aggregate data about unconstitutional conduct had lost their claims without a trial due to the inability to prove error in investigations of even dozens of earlier allegations.[22] Significant to the court, plaintiffs stand vulnerable to summary judgment if the only evidence of *Monell* custom or policy is the "mere" numerosity of prior complaints of similar conduct. To survive summary judgment, a plaintiff would most likely have to demonstrate inadequacies in the investigation of a sampling of those prior complaints.[23] The decision also, therefore, rejects the tilted playing field on which a municipal employer withholds the underlying data about *Monell* patterns and then obtains summary judgment based on the plaintiff's lack of underlying data.

It remains to be seen whether *Groark* will impact discovery in cases under the New Jersey Law Against Discrimination. In expanding the principles of *Groark* to a harassment case, for example, employers should beware of a plaintiff who brings an allegation of a superficial investigation against an employer, where the employer failed to thoroughly investigate and reprimand an alleged repeat harasser. *Groark* demonstrates that such allegations against the employer may lead to disclosure of a broad scope of employer records in an effort to establish liability via a pattern of indifference by the employer. ■

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Endnotes

1. *Groark v. Timek*, No. 12-1984, 2013 U.S. Dist. LEXIS 168716 (D.N.J. Nov. 27, 2013).
2. *Id.* at *3.
3. *Id.*
4. *Id.* at *3-4.
5. *Id.* at *4.
6. *Id.*
7. *Id.* at *4 n.3.
8. *Id.* at *7-8.
9. *Id.* at *4-5.
10. *Id.*
11. *Id.*
12. *Id.* at *7-8.
13. *Id.* at *8-14.
14. *Id.* at *23-35.
15. *Id.*
16. *Id.* at *47-55.
17. *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999).
18. *Groark v. Timek*, No. 12-1984, 2013 U.S. Dist. LEXIS 168716, at *47-52 (D.N.J. Nov. 27, 2013).
19. *Id.* at *52-54.
20. *Id.* at *54-55.
21. *Id.* at *31-33.
22. *Id.* at *16-20, *41-47.
23. *Id.*

Sandifer v. United States Steel: The United States Supreme Court 'Changes Clothes'

by Lisa Barré-Quick and Hope Marie Deutsch

In its unanimous Jan. 27, 2014 decision in *Sandifer v. United States Steel*, the United States Supreme Court ruled that the time steelworkers spent "donning and doffing" protective clothing and equipment prior to the beginning and following the end of their shifts constituted "changing clothes" for purposes of the exclusion from the "hours worked" definition in Section 203(o) of the Fair Labor Standards Act (FLSA).[1] Therefore, consistent with the applicable collective bargaining agreement, the Supreme Court determined that such time was not compensable.[2]

The *Sandifer* decision resolved a circuit split and clarified the scope of Section 203(o). It also provides guidance to employers and unions as they negotiate and interpret contract provisions relating to compensability of time expended putting on and taking off personal protective gear and equipment.

Statutory Background

Originally enacted in 1938, the FLSA "establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments."[3] It requires "compensation for all work or employment engaged in by employees covered by the Act."[4] In 1949, the FLSA was amended to add Section 203(o), which defines hours worked, and provides that in determining hours of work for which an employee is entitled to be compensated under the FLSA,

> there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.[5]

"Simply put, the statute provides that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining."[6] The FLSA does not, however, define changing clothes, and prior to the Court's decision in *Sandifer*, a circuit split existed regarding the issue of whether donning and doffing protective gear constitutes "changing clothes" for purposes of Section 203(o).[7]

Case Background

In *Sandifer,* unionized steelworkers at United States Steel's plant in Gary, Indiana, filed a putative collective action asserting that the company had violated the FLSA by failing to compensate workers for time spent donning and doffing protective gear.[8] The protective gear at issue included "a flame-retardant jacket, pair of pants, and hood; a hardhat; a 'snood'; 'wristlets'; work gloves; leggings; 'metatarsal' boots; safety glasses; earplugs; and a respirator."[9] The workers argued that putting on and taking off these items of protective gear did not qualify as changing clothes within the meaning of Section 203(o), and hence, the time was compensable irrespective of the terms of the collective bargaining agreement.[10]

In contrast, United States Steel contended, in pertinent part, that time spent donning and doffing protective clothing and equipment prior to and after the end of the workers' shifts fell within the exclusionary changing clothes language in Section 203(o), and hence was rendered non-compensable by the pertinent provision of the applicable collective bargaining agreement.[11]

The Decisions Below

The district court granted United States Steel's motion for summary judgment in pertinent part, finding that donning and doffing the protective gear at issue did, in fact, constitute changing clothes within the meaning of Section 203(o), and was, therefore, not compensable under the terms of the collective bargaining agreement at issue.[12] The district court further

determined that even if certain items—the hardhat, glasses, and earplugs—were not 'clothes' for purposes of Section 203(o), that time spent putting on and taking off such items was *de minimis*, and hence, not compensable under the FLSA.[13] The Seventh Circuit Court of Appeals affirmed regarding this issue.[14]

The Supreme Court Decision

Justice Antonin Scalia, writing for a unanimous Court,[15] held that the "'donning and doffing' of the protective gear at issue qualifie[d] 'changing clothes' within the meaning of § 203(o)" and the Supreme Court therefore affirmed.[16]

Defining "Clothes" for Purposes of Section 203(o)

The Court in *Sandifer* first considered the meaning of the word 'clothes' as it was used in Section 203(o). Since clothes are not defined by the statute, the Court looked to "[d]ictionaries from the era of Section 203(o)'s enactment," and accordingly, concluded that consistent with the colloquial definition of the time, clothes are "items that are both designed and used to cover the body and are commonly regarded as articles of dress."[17] In so finding, the Court rejected the petitioners' argument that the definition of clothes necessarily excludes protective gear, finding "no basis for the proposition that the unmodified term 'clothes' somehow omits protective clothing."[18] Moreover, the Court expressed concern that such an interpretation would "run[] the risk of reducing § 203(o) to near nothingness" and "would largely limit the application of § 203(o) to what might be called workers' costumes, worn by such employees as waiters, doormen, and train conductors."[19] Instead, the Court found that "[t]he statutory context makes clear that the 'clothes' referred to are items integral to job performance" because "the donning and doffing of other items would create no claim to compensation under the Act, and hence no need for the § 203(o) exception."[20]

The Court also rejected United States Steel's construction of the word clothes, which would have "encompass[ed] the entire outfit that one puts on to be ready for work."[21] In rejecting this position, the Court noted that had Congress intended such a definition, it "could have declared bargainable under § 203(o) 'time spent in changing *outfits*,' or 'time spent in putting on and off *all the items needed for work*.'"[22]

In adopting a middle ground position, the Court noted that its definition "leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices."[23]

Defining "Changing" for Purposes of Section 203(o)

Having defined clothes for purposes of Section 203(o), the Court next turned to interpretation of the word "changing." The Court again looked to dictionaries contemporaneous with the passage of Section 203(o) and found that the word "changing" had "two common meanings at the time"—specifically—to "substitute" or to "alter."[24] Accordingly, the Court adopted this dual definition.[25]

In so ruling, the Court rejected the petitioners' position that changing meant only "substituting"—as in changing a tire or diaper.[26] Instead, the Court found that "despite the usual meaning of 'changing clothes,' the broader statutory context makes it plain that 'time spent in changes clothes' includes time spent in altering dress."[27] Thus, the Court rejected the petitioners' position that "changing" connotes only "substitution," and so, would not include placing protective gear *over* an employee's street clothes.[28]

Applying the Court's Definitions

Applying its newly clarified definitions of the pertinent statutory terms, the Court held that the "donning and doffing of the protective gear at issue qualifies as 'changing clothes' within the meaning of § 203(o)."[29]

With respect to the specific items at issue, the Court found that all of the items except the glasses, earplugs, and respirator constituted clothes for purposes of Section 203(o).[30] Regarding the non-clothing items, the Court rejected application of the *de minimis* doctrine utilized by the courts below.[31] Instead, the Court found that the more appropriate approach was to consider the time at issue "on the whole" and determine whether the preliminary and postliminary activities may overall "be fairly characterized as 'time spent in changing clothes or washing.'"[32] To this end, the Court found:

> If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver's suit and tank) the entire period should not qualify as 'time spent in changing clothes'

under § 203(o), even if some clothes items were donned and doffed as well. But if the vast majority of time is spent in donning and doffing 'clothes' as we have defined the term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.[33]

Applying this newly articulated standard to the case before it, the Court affirmed, finding that the time at issue spent putting on and taking off protective gear was, "on the whole," time spent "changing clothes" under Section 203(o), and so, was not compensable pursuant to the applicable terms of the controlling collective bargaining agreement.[34]

Implications for the Future

The Court's decision in *Sandifer* provides clarity to employers and their unionized work forces regarding the definitions applicable to the clothes-changing provisions of Section 203(o) and informs on the concomitant scope of the statutory provision. Accordingly, it provides guidance to both sides of the table on the implications of existing and future negotiated contract language and perhaps provides some of the predictability intended by the statute. ■

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Endnotes

1. *Sandifer v. United States Steel Corp.*, __ U.S. __, 134 S. Ct. 870, 873-74, 879-81 (2014); 29 U.S.C. § 203(o).
2. *See Sandifer*, 134 S. Ct. at 873-74, 881.
3. United States Department of Labor, Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act (available at http://www.dol.gov/whd/regs/compliance/hrg.htm).
4. *Sandifer v. United States Steel Corp.*, 2009 W.L. 3430222, *3 (N.D. Ind. 2009) (*citing Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944)), *aff'd in pertinent part, Sandifer v. United States Steel Corp.*, 678 F.3d 590 (7th Cir. 2012), *aff'd, Sandifer*, 134 S. Ct. 840 (2014).
5. 29 U.S.C. § 203(o).
6. *Sandifer*, 134 S. Ct. at 876.
7. The Fourth, Fifth, Sixth, Seventh, 10th, and 11th circuits broadly interpreted the term "changing clothes" to include putting on and taking off personal protective clothing and equipment for purposes of Section 203(o). *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138-39, 1140-41 (10th Cir. 2011); *Spoerle v. Kraft Foods, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010), *cert. denied*, __ U.S. __, 131 S. Ct. 933 (2011); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614-15 (6th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 212, 215-16 (4th Cir. 2009), *cert. denied*, __ U.S. __, 131 S. Ct. 187 (2010); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 949, 956 (11th Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008); *Bejil v. Ethicon*, 269 F.3d 477, 480, n.3 (5th Cir. 2001). Conversely, only the Ninth Circuit narrowly interpreted the "changing clothes" provision of Section 203(o) to exclude donning and doffing personal protective equipment. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).
8. *Sandifer*, 134 S. Ct. at 874; *see also Sandifer*, 2009 WL 3430222, *aff'd in pertinent part*, *Sandifer*, 678 F.3d at 592.
9. *Id.* (noting that the district and circuit court opinions provide fuller descriptions of the items at issue).
10. *Sandifer*, 134 S. Ct. at 876. The collective bargaining agreement provided in pertinent part that employees would not be paid for "time spent in preparatory or closing activities on the employer's premises...for which compensation is not paid under present practices." *Sandifer*, 2009 WL 3430222 at *8.
11. *See Sandifer*, 2009 WL 3430222 at *4-5.
12. *Sandifer*, 134 S. Ct. at 874 (*citing Sandifer*, 2009 WL 3430222 at *4-10).
13. *Id.* at 874, 881 (*citing Sandifer*, 2009 WL 3430222 at *6).
14. *Id.* (*citing Sandifer*, 678 F.3d at 593-95).

15. Justice Sotomayor joined the opinion except as to footnote 7.
16. *Sandifer*, 134 S. Ct. at 879.
17. *Id.* at 876-77 (emphasis in original) (*citing Webster's New International Dictionary of the English Language* 507 (2d ed. 1950) (defining clothes as "[c]overing for the human body; dress; vestments; vesture") and 2 *Oxford English Dictionary* 524 (1933) (defining clothes as "[c]overing for the person; wearing apparel; dress, raiment, vesture")).
18. *Id.* at 877.
19. *Id.*
20. *Id.* at 878.
21. *Id.*
22. *Id.* (emphasis in original).
23. *Id.*
24. *Id.* at 879 (*citing* 2 *Oxford English Dictionary* 268 (defining change as "to substitute another (or others) for, replace by another (or others)" and "[t]o make (a thing) other than it was; to render different, alter, modify, transmute")).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The Court reasoned that "[t]he object of § 203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation." *Id.* The Court expressed concern that there can be "little meaningful negotiation, if 'changing' means only 'substituting'" because "[w]hether one actually exchanges street clothes for work clothes or simply layers garments atop one another after arriving on the job site is often a matter of purely personal choice....influenced by such happenstances and vagaries as what month it is, what styles are in vogue, what time the employee wakes up, what mode of transportation he uses, and so on." *Id.* Citing the reasoning of the Fourth Circuit, the Court noted that "if the statute imposed a substitution requirement, 'compensation for putting on a company-issued shirt might turn on something as trivial as whether the employee did or did not take off the t-shirt he wore into work that day.'" *Id.* (*citing Sepulveda*, 591 F.3d at 216). In essence, the Court found that limiting the definition of "changing" to "substituting" would essentially result in a reading of the FLSA which would "allow workers to opt into or out of its coverage at random or at will" and that "[w]here another reading is textually permissible" such result should not be "allowed." *Id.*
29. *Id.*
30. *Id.* The Court noted that the district court had found that respirators "'are kept and put on as needed at job locations,' which would render the time spent donning and doffing them part of an employee's normal workday, and thus, beyond the scope of Section 203(o)." *Id.* at 881 (*citing Sandifer*, 2009 WL 3430222 at *2). The Court opted not to disturb the district court's factual conclusion which had not been addressed by the Seventh Circuit decision. *Id.* Likewise, the Court relied upon the district court's finding that time spent "donning and doffing" safety glasses and ear plugs was "minimal." *Id.*
31. *Id.* at 880-81. In rejecting application of the *de minimus* doctrine, the Court noted that "[a] *de minimus* doctrine does not fit comfortably within the statute at issue here, which, it can fairly be said, is *all about* trifles" and noting that "there is no more reason to *disregard* the minute or so necessary to put on glasses, earplugs, and respirators, than there is to *regard* the minute or so necessary to put on a snood." *Id.* at 880 (emphasis in original). Moreover, the Court noted "it is most unlikely that Congress meant § 203(o) to convert federal judges into time-study professionals. That is especially so since the consequence of dispensing with the intricate exercise of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities is not to prevent compensation for the uncovered segments, but merely to leave the issue of compensation to the process of collective bargaining." *Id.* at 880-81. The Court sought to give the text of Section 203(o) "a meaning that avoids such relatively inconsequential judicial involvement in 'a morass of difficult, fact-specific determinations'" *Id.* at 881 (*citing Sepulveda*, 591 F.3d at 218).
32. *Id.*
33. *Id.*
34. *Id.*

'But for' is the Straw That Broke the Camel's Back

by Claudia Reis and Iveliz Crespo

Much ink and web chatter has been dedicated to resolving the seemingly existential debate concerning the meaning of the "but for" standard in claims brought under the Age Discrimination in Employment Act (ADEA) since the issuance of the *Gross v. FBL Financial Services, Inc.*[1] decision. The United States Supreme Court finally clarified what many practitioners have always believed—namely, that "but for" means a "motivating factor" rather than the sole reason. Interestingly, that clarification came in the form of a criminal case that has largely flown under the radar of most employment practitioners.[2]

In *Gross*, the Supreme Court noted that "even when a plaintiff has produced some evidence that age was one motivating factor in that decision," the employer would not be liable for a violation of ADEA unless the plaintiff carried the burden of proving that age was "*the* 'but-for cause' of the challenged adverse employment action."[3] In reaching this conclusion, the Court relied heavily upon the statutory language of ADEA, which provides, in relevant part, that "it shall be unlawful for an employer... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[4] That holding has been interpreted by some to mean that showing that age was "a motivating factor" (as opposed to *the* motivating factor) is insufficient to establish liability under ADEA because of the presence of the word "the" immediately before the term "but for cause."

That interpretation was advanced by members of the defense bar who pushed for acceptance of the proposition that the but for standard articulated in *Gross* is an onerous burden for plaintiffs to overcome because it requires plaintiffs to prove that age was the sole reason for the adverse action. Such an interpretation, had it been accurate or accepted by the Court, would have certainly made it quite difficult for plaintiffs to successfully bring age discrimination claims under ADEA. Thankfully, *Burrage* makes clear that *Gross* was nothing more than a tempest in a teapot.

The defendant, Burrage, who was charged with and convicted of distributing heroin in violation of the Controlled Substances Act, was subject to statutorily prescribed enhanced penalties because the user-purchaser died after ingesting, in addition to various other drugs, the heroin Burrage sold him.[5] Thus, instead of spending not more than 20 years in prison, which would have been the penalty under normal circumstances, Burrage faced a mandatory minimum 20-year sentence because "'death or serious bodily injury result[ed] from the use of [the distributed] substance.'"[6] Burrage, who was convicted of the charge involving the enhanced penalty, appealed his sentence, citing the inability of two medical experts, at trial, to conclude that the user "would have lived had he not taken the heroin."[7] As a result, Burrage moved for a judgment of acquittal, contending the victim's death did not "result from" heroin use because there was no evidence that heroin was the but for cause of death.[8] The district court denied his motion, and the Eight Circuit Court of Appeals affirmed the conviction.[9]

A unanimous Supreme Court (with Justices Ruth Bader Ginsburg and Sonia Sotomayor concurring in the judgment) reversed Burrage's conviction and held that while but for causation "imposes...a requirement of actual causality," it does not require that the act giving rise to the offense be the sole cause.[10] In reaching this conclusion, the Court analogized the Controlled Substance Act's "results from" language to ADEA's "because of" language.[11] Specifically, the Court explained but for causation in the following manner:

> where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died. The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so-if, *so to speak, it was the straw that broke the camel's back*. Thus, if poison is

administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.[12]

In short, the Court concluded that a factor need not be the "sole factor" to be a but for factor for purposes of establishing liability. That point was further clarified by the Supreme Court's interpretation of the relevant criminal statute's results from language in the same manner as its interpretation of employment law's 'because of' language.[13] Specifically, in that regard, the Court found instructive its "interpretation of statutes that prohibit adverse employment action 'because of' an employee's age or complaints about unlawful workplace discrimination...." With regard to ADEA claims, the Court explained that "[t]o establish a disparate treatment claim under the plain language of [ADEA,] a plaintiff must prove that age was [*a*] 'but for' cause of the employer's adverse decision."[14] What led to great debate about whether *Gross* established a new and unprecedented standard in ADEA cases was the inclusion of the word "the" before the words "but for," thus, giving rise to the suggestion that "a motivating factor" really meant "the sole motivating factor." The Court in *Burrage*, perhaps cognizant of the overly constrained interpretation of *Gross*, substituted a bracketed "[a]" for the original word "the" immediately preceding "but for cause." By doing so in conjunction with its description of but for as the "straw that broke the camel's back," the Court made clear that but for causation does not require a showing that an impermissible motive was the *sole* cause of the challenged action.

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Endnotes

1. 557 U.S. 167 (2009).
2. *Burrage v. United States*, 134 S. Ct. 881 (2014).
3. 557 U.S. at 180 (emphasis added).
4. *Id.* at 176 (*quoting* 29 U.S.C. § 623).
5. *Burrage*, 134 S. Ct. at 885-87.
6. *Id.* at 887-88 (*quoting* 21 U.S.C. § 841(b)(1)(A)-(C)).
7. *Id.* at 885-86.
8. *Id.* at 886.
9. *Id.*
10. *Id.* at 887-88, 892.
11. *Id.* at 889.
12. *Id.* at 888 (emphasis added) (internal citations omitted).
13. *Id.*
14. *Id.* at 889 (*quoting Gross*, 557 U.S. at 176).

Sue Your Employer for Retaliation and Prove It—Go Directly to Jail—Do Not Pass Go—Do Not Collect $200

by James E. Burden

"Ladies and gentlemen of the jury, have you reached a verdict?"

"Yes, Your Honor. We find that the plaintiff, Ms. Jones, has proven that the defendant, ABC Company, discriminated and retaliated against her in violation of the New Jersey Conscientious Employee Protection Act...."

"Thank you. Bailiff, please remand the prisoner, I mean plaintiff, to the holding facility while we take a break before the punitive damage phase of the trial."

Sound preposterous? Sound far-fetched? It is not. It is happening right now in New Jersey to Ivonne Saavedra. Saavedra is a former clerk who was employed by the North Bergen Board of Education. Saavedra blew the whistle on what she believed to be illegal behavior by her employer (*i.e.*, the failure to properly discard documents that contained confidential information about students and parents). She was directed to simply throw the documents in the trash rather than shred them. Saavedra kept some of the documents, which she had been directed to throw away, and copied others. She turned those documents over to her counsel in connection with her Conscientious Employee Protection Act (CEPA) and Law Against Discrimination (LAD) case against her employer. Once the documents were produced in the civil case, her employer contacted the prosecutor, claimed that she "stole" the documents and subsequently a grand jury indicted her for committing the crimes of official misconduct and theft.

The History Leading Up to *Saavedra*—*Quinlan v. Curtiss-Wright*

How did we get from the days where New Jersey's courts once proudly stated that CEPA, its whistleblower statute, was "the most far reaching 'whistleblower statute' in the nation,"[1] to today, where whistleblowers are labeled as criminals and thieves? In *Mehlman v. Mobil Oil Corporation*, the Supreme Court stated "the purpose of CEPA is '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.'"[2]

When did our courts shift from applying the LAD to eradicate the "cancer of discrimination,"[3] to criminalizing actions taken in furtherance of maintaining such cases?

Recently, CEPA and LAD plaintiffs, like Saavedra, have faced harsh criticism from their employers for engaging in 'self-help' with respect to gathering documentary proof to support their claims. The situation faced by the plaintiff in *Saavedra* is one that can be traced directly to the Supreme Court's holding in *Quinlan v. Curtiss-Wright Corp.*[4] In *Quinlan*, the plaintiff, Joyce Quinlan, a high-level human resources (HR) executive at Curtiss-Wright, alleged she had hit a glass ceiling after years of faithful service to the company. Quinlan was passed over for promotion and the position was given to a man who had objectively fewer qualifications and less experience than she did. Disappointed that she had been passed over for promotion, Quinlan consulted with counsel.[5]

Quinlan was in a unique position as an HR executive to have access to the very documentary proof that clearly established she had been the victim of illegal gender discrimination. She compiled that proof, copying documents that proved her claims. Quinlan never removed original documents from the workplace and gave the copies she made only to her counsel.

Quinlan filed suit against Curtiss-Wright, asserting that she was the victim of illegal gender discrimination based on her employer's failure to promote her; her employer engaged in a pattern and practice of gender discrimination; and her employer discriminated against her in wages and salary. During discovery, in response to Curtiss-Wright's request for production, Quinlan's counsel turned over the documents she had compiled.[6]

Curtiss-Wright claimed Quinlan had "stolen" corporate documents and fired her. Quinlan then asserted

an additional claim for LAD retaliation. Curtiss-Wright claimed it did not discriminate against Quinlan and did not retaliate against her, but fired her because she had stolen company property.[7]

The jury found otherwise and concluded that Curtiss-Wright had discriminated against Quinlan in violation of the LAD, and further that Curtiss-Wright had retaliated against Quinlan by firing her. The jury awarded Quinlan $475,892 in back pay, $3,650,318 in front pay (based on the retaliation claim), and awarded punitive damages in the amount of $4,565,479.[8]

Appeals followed. The Appellate Division reversed the verdict on the LAD retaliation claim, vacated the punitive damage award, and remanded for a new trial.[9] Quinlan appealed to the Supreme Court, which reversed the decision of the Appellate Division, and reinstated the retaliation and punitive damage awards.

In so doing, the Supreme Court established a seven-part test to determine whether an employee may take and use an employer's documents:

1. How did the employee come into possession of the document? For example, was it in the ordinary course of his or her job duties or did the employee rummage through the workplace to find the document?
2. What did the employee do with the document? Did he or she simply give a copy to their attorney to evaluate or prosecute a claim, or did the employee distribute the document within and without the workplace?
3. What is the nature and content of the document? Does it contain trade secrets or confidential information like Social Security numbers?
4. Does the company have a clearly identified policy on privacy or confidentiality that the employee's disclosure has violated? Does the company routinely enforce the policy?
5. How relevant is the document to the claimed discrimination, and is the use of the document unduly disruptive to the employer's ordinary business?
6. How strong was the employee's reason for copying the document? Is there likelihood that, if the employee had not copied the document, the employer would have discarded or destroyed the document? Is it the 'smoking gun?'

Finally, the court should evaluate how its decision in the particular case bears upon two fundamental considerations that are often in conflict in the LAD: 1) the broad remedial purposes the Legislature has advanced through the LAD; and 2) the effect, if any, that either protecting the document by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees.[10]

Justice Barry T. Albin wrote a vigorous dissent in *Quinlan*, stating, "Today's ruling sends a disturbing signal to both the business community and the bar that employee *theft* may actually pay."[11] That sentence rang loud and clear throughout New Jersey's legal community. Articles were published labeling Quinlan as a "thief" despite the fact that she had proven to a jury the entity labeling her a thief, the Curtiss-Wright Corporation, had engaged in illegal discrimination and retaliation with actual malice or evil-mindedness and that the Supreme Court reinstated the punitive damages verdict that had been vacated by the appellate court.

State v. Saavedra — The *Quinlan* Dissent Gains Ground

Fast forward three years. In the time since the *Quinlan* decision, the courts have been flooded with claims by employers who have been sued for illegal retaliation in violation of CEPA and for discrimination and retaliation in violation of the LAD, that the employee advancing the suit had 'stolen' documents from their employer. Most, if not all, plaintiffs' employment attorneys are now cautious to even review documents presented by their clients and potential clients for fear that they too will be accused of some criminal act, such as possession of stolen property. This fear is not without merit. In *Quinlan*, the dissent was highly critical of Quinlan's counsel for having accepted what it characterized as "stolen" and "pilfered" documents.[12]

The *Quinlan* dissent has armed employers accused of illegal retaliation and/or discrimination with a new weapon—the imposition of criminal charges against employees and their counsel who, in the course of discovery in a civil case, provide to the employer copies of its own documents, which prove the employer has, or is currently, engaging in illegal retaliation and/or discrimination. We are entering an era where the protection of whistleblowers and the eradication of discrimination is being replaced with the criminalization of the discovery process in these civil suits.

Saavedra faces criminal prosecution for producing, in her CEPA case, documents that support her reasonable objective belief that the board of education was engaging in illegal activity. In its Dec. 24, 2013, decision, the

Appellate Division rejected her argument that photocopying and retaining the documents was protected by the Supreme Court's holding in *Quinlan*.[13]

Saavedra was employed by the North Bergen Board of Education for several years as a clerk, she was transferred to the board's payroll department and remained there for 10 years. She was thereafter assigned to the board's special services department and became a clerk for a child study team. Ms. Saavedra's son was also employed as a part-time employee by the board.[14]

In Nov. 2009, one year before the Supreme Court decided *Quinlan*, Saavedra and her son filed a civil complaint against the board, her supervisor, an office manager, and a North Bergen Township commissioner, asserting gender, ethnic, and sex discrimination in violation of the LAD and illegal retaliation in violation of CEPA. Saavedra's CEPA claim was premised on alleged pay irregularities, reimbursing employees improperly for "unused" vacation time they had actually used, wrongful denial of employee unpaid family leave, violations of child study team regulations, and "unsafe conditions."[15]

Saavedra, much like Quinlan before her, gave her counsel in the civil case documents related to her claims. Saavedra's counsel in the civil matter produced those documents to the board's attorney in discovery in the employment case. The board's attorney notified the board's general counsel, who brought the matter to the attention of the Hudson County prosecutor, who determined the matter should be presented to a grand jury.[16]

A grand jury was convened and the state called the board's general counsel to testify as its only witness before the grand jury. He testified that Saavedra had sued the board and that "there [was] a [civil] lawsuit outstanding." The general counsel testified that Saavedra had taken from the board 367 documents, including at least 69 original documents. He informed the board's defense counsel that "the information [contained] in those documents was highly confidential, very sensitive, and [that the board] needed to act on [Saavedra's decision to resort to self-help] immediately."[17] He then described five of the documents, focusing on the confidential nature of each one. The five documents were the following:

- a bank statement that a parent provided to the board;
- an appointment schedule with a psychiatrist who treated special needs students;
- a "Consent for Release of Information to Access Medicaid Reimbursement for Health-Related Support Services";
- a signed letter from a parent whose child received confidential services for the child's special needs; and
- an alleged original letter from a different parent to the director of special services regarding an emotional problem involving that parent's child. In the letter, the parent indicated her son "came off the bus soaked in urine, very nervous, and his eyes were twitching." The document revealed the identity of the student.[18]

All of the documents contained confidential information.

The board's general counsel testified that the documents in Saavedra's possession belonged to the board. He explained that board "employees are trained and informed[,] via internal policies[,] guidelines[,] and regulations[,] that these documents are highly confidential and are not to be disclosed or tampered with in any way." He stated that these documents are not to be "disclosed [or] taken" by board employees.[19]

In May 2012, the grand jury returned an indictment against Saavedra charging her with second-degree official misconduct, and third-degree theft of movable property (public documents).[20]

Saavedra moved to dismiss the indictment. During oral argument on that motion, the trial judge focused on whether the state presented sufficient evidence to establish a *prima facie* case that Saavedra committed these offenses.[21]

Saavedra's counsel contended she took the documents for a lawful use (*i.e.*, the prosecution of her LAD and CEPA claims), that the state failed to present exculpatory evidence to the grand jury, and that the state was punishing Saavedra for exercising improper judgment on the job. Saavedra's counsel argued that "*Quinlan* says it's legal to take confidential documents," and that preventing defendant from taking the confidential documents would have a chilling effect on future LAD cases.[22]

The state maintained it presented to the grand jury sufficient evidence to show that Saavedra committed these crimes. The assistant prosecutor argued that Saavedra's reliance on *Quinlan* was misplaced. He stated that *Quinlan*, which he emphasized was decided in the context of a civil case rather than on a motion to dismiss an indictment, did not create a bright-line rule permitting a public servant such as Saavedra to take highly confidential documents that did not belong to her. The state asserted the indictment was not manifestly deficient or palpably defective and there existed no exculpatory evidence that squarely refuted an element of the offenses.[23]

In Oct. 2012, the trial judge issued a written decision agreeing with the state's arguments, and denied the motion. The judge recognized that on a motion to dismiss the indictment, the state need not produce evidence adequate to sustain a conviction, but rather, the state's evidence must be sufficient to establish a *prima facie* showing that a crime has been committed. The trial judge acknowledged that Saavedra bears a "'heavy burden' of demonstrating that the 'evidence is clearly lacking to support the charge[s].'" The trial judge then concluded that Saavedra did not meet her burden.[24]

In denying the motion to dismiss the indictment, the trial court rejected the applicability of *Quinlan* but still performed a *Quinlan* analysis. It found in favor of the board, holding "that 'an employee's removal of documents from his or her employer for use in a [ ]LAD suit, is not per se lawful.'"[25]

Saavedra appealed that denial to the Appellate Division and it affirmed the trial court's decision. In so doing, the Appellate Division stated:

> We hold, under the facts of this case, that a criminal court judge is not required to perform a *Quinlan* analysis to decide a motion to dismiss an indictment charging a defendant with official misconduct predicated on an employment-related theft of public documents. Instead, the judge should apply well-settled standards regarding whether to grant such motions. That is, to survive a motion to dismiss an indictment, the State need not produce evidence adequate to sustain a conviction; but rather, the State must introduce sufficient evidence before the grand jury to establish a prima facie case that defendant has committed a crime. Because the State produced such evidence here, the judge properly concluded that the indictment was not manifestly deficient or palpably defective.[26]

The Appellate Division began its analysis noting that it could not disturb the trial court's ruling unless it found that the trial judge had abused her discretion. The Appellate Division applied the following standard in determining whether the trial court had properly denied Saavedra's motion to dismiss the indictment:

> A judge should not dismiss an indictment except on the clearest and plainest ground, where it is "manifestly deficient or palpably defective." When reviewing such motions, the court must construe the facts in the light most favorable to the State. "As long as an indictment alleges all of the essential facts of the crime, the charge is deemed sufficiently stated." We have stated that "the quantum of this evidence...need not be great."[27]

The Appellate Division then reviewed the record, and found the state had presented sufficient evidence to support the charges sustained in the indictment. It found the state produced sufficient evidence to support the charge of theft, defined as: "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."[28]

The Appellate Division also found the state produced sufficient evidence to support the charge of official misconduct. Pursuant to N.J.S.A. 2C:30-2:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner.

Thus, pursuant to this section of the statute, official misconduct has three elements: 1) a defendant must be a "public servant," 2) "who committed 'an act relating to his office,' which constituted 'an un-authorized exercise of his official functions,' knowing that it was unauthorized or committed in an unauthorized manner," and 3) had a purpose "to obtain a benefit for himself or another" or "to injure or deprive another of a benefit."[29]

In so doing, the Appellate Division stated:

> We also emphasize that the grand jury is an accusatorial rather than an adjudicative body; grand jurors do not determine guilt or innocence. A grand jury is simply "asked to determine whether 'a basis exists for subjecting the accused to a trial.'" Here, the record demonstrates that the grand jury correctly performed its limited role.[30]

This decision demonstrates the real danger faced by CEPA and LAD plaintiffs—armed with the Appellate Division's decision in *Saavedra*, what can stop an employer from bringing criminal complaints against employees who produce evidence to support their claims in civil cases? In *Saavedra* the employer presented, through its general counsel, testimony that Saavedra had "stolen" documents from the board. While the grand jury was told there was a pending lawsuit, it was not told what the claims were and what relevance the alleged stolen documents had to the claims, nor was it given any reason why Saavedra copied and/or kept the documents.[31]

Hearing only one side of the story, it is not surprising Saavedra was indicted. As New York State Chief Judge Sol Wachtler once famously stated, "a grand jury would 'indict a ham sandwich,' if that's what you wanted."[32] The Appellate Division rejected Saavedra's reliance on *Quinlan* to provide a basis for her collection of the documents and as a defense to the criminal charges. First, it distinguished *Quinlan* on the basis that Quinlan was a private individual employed by a private company, not a public employee, as was Saavedra.[33]

Next, the Appellate Division noted that the *Quinlan* test is applied by "civil judges," and, taking a page out of the *Quinlan* dissent, stated:

> We reject defendant's argument that the holding in *Quinlan* essentially prevents the State from introducing evidence before the grand jury that demonstrates a prima facie showing that defendant "unlawfully t[ook], or exercise[d] unlawful control over" the documents. *Quinlan* did not establish a bright-line rule that automatically entitled defendant to take the Board's highly confidential original documents. In fact, the Court in *Quinlan* made clear that even with the availability of its multifaceted analysis, employees run the significant risk that the conduct in which they engage will not be found by a court to fall within the protection [the *Quinlan* analysis] creates. The risk of self-help is high and the risk that a [petit civil] jury will reject a plaintiff's argument that he or she was fired for using the document, rather than for finding it and taking it in the first place, will serve as an important limitation upon any realization of the fears that the employers have expressed to the Court.[34]

The Appellate Division in *Saavedra* went even further in distinguishing *Quinlan*, stating:

> We are satisfied, however, that *Quinlan* does not apply directly to the facts presented here because the Supreme Court did not intend its holding in that civil case to act as a means of mounting a facial challenge to the indictment in this criminal case. As we have discussed at length *infra*, the standards for assessing the sufficiency of an indictment are well-settled. There is nothing in *Quinlan* that signals any deviation from *Hogan*.[35]

The Appellate Division also rejected Saavedra's claim that she made an "honest error" in taking the documents, stating:

> Defendant stood in "a fiduciary relationship" to the public and therefore was expected to serve with the "highest fidelity." Thus, we reject defendant's contention that the Legislature did not intend to include within the official misconduct statute the activity of taking highly confidential documents while performing a governmental function as a public servant.[36]

The Appellate Division found that Saavedra's 'honest error' argument amounted to essentially a claim of right defense under N.J.S.A. 2C:20-2c. Under this statute, the state is required to prove "beyond a reasonable doubt... that the defendant did not honestly believe...she had a right to the property or was authorized to receive, take, acquire, or dispose of the property." However, this ruling does not spare Saavedra from criminal prosecution—it merely provides her with a potential defense at the time of trial.

The Appellate Division rejected Saavedra's argument that the indictment should be dismissed because the state failed to present exculpatory evidence to the grand jury (*i.e.*, evidence relating to her LAD lawsuit against the board and her reliance on the *Quinlan* decision as a basis for collecting the documents). Instead, the Appellate Division concluded that such evidence was not "clearly exculpatory evidence," stating:

> presenting evidence to the grand jury that defendant took the documents to pursue her civil lawsuit against the Board is not "clearly

> exculpatory." Even if *Quinlan* were directly on point, which it is not, "what the employee did with the document" is only one factor to consider pursuant to the *Quinlan* analysis. Undertaking the *Quinlan* analysis is "a difficult...task,"...and defendant's purported reason for taking the documents does not in and of itself constitute "clearly exculpatory" evidence.[37]

The Appellate Division also rejected Saavedra's argument that allowing the state to criminalize her conduct will have a chilling effect on "potential plaintiffs in LAD claims." Instead, the Appellate Division followed the rationale from the *Quinlan* dissent, claiming there are a wide variety of discovery methods to obtain the evidence Saavedra collected, such as:

> (1) seeking, under certain circumstances, to preserve evidence through taking depositions and obtaining documents before filing a lawsuit (R. 4:11-1); (2) requesting documents pursuant to a protective order (R. 4:10-3); (3) taking depositions after the commencement of the action (R. 4:14-1); (4) subpoenaing non-party witnesses for depositions (R. 4:14-7); (5) propounding interrogatories (R. 4:17); (6) serving document demands (R. 4:18); (7) propounding requests for admissions (R. 4:22-1); (8) obtaining orders to make discovery (R. 4:23); (9) seeking sanctions for failure to comply with court orders (R. 4:23-2); and (10) obtaining further sanctions for failure to make discovery (R. 4:23-5).[38]

The Appellate Division also noted other safeguards exist for employees who believe their employers will hide or destroy evidence, such as an adverse inference charge, sanctions against the employer or its counsel, and a party may bring a new cause of action based on the tort of fraudulent concealment.[39]

Finally, the Appellate Division in *Saavedra* noted that there are other safeguards in place to deter employers from pursuing criminal prosecution unfairly against employees. For instance, an aggrieved party may bring a claim for malicious prosecution if he or she can show that "(1) a criminal action was instituted by [the] defendant against [her]; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." And, importantly, pursuant to Rule 3.4(g) of the Rules of Professional Conduct, a lawyer runs the risk of ethics charges if that lawyer "present[s], participate[s] in presenting, or threaten[s] to present criminal charges to obtain an improper advantage in a civil matter."[40]

State v. Saavedra — The Dissent

One member of the panel in *Saavedra* dissented, and wrote a well-reasoned opinion detailing why the criminal indictment should have been dismissed. Judge Marie P. Simonelli, J.A.D., began her dissent with a recitation of the history and broad remedial purposes of the LAD and CEPA, as well as their very strong protections against retaliation for engaging in protected conduct.

Judge Simonelli then reviewed the criminal statutes, noting that:

> an essential element of...official misconduct is defendant's knowledge that the act he commits is "unauthorized." In order for a public servant to be aware that he or she is committing an unauthorized act and thereby "fairly expose" himself or herself to prosecution for official misconduct, "there must be an available body of knowledge by which the [public servant] had the chance to regulate his conduct. *The law must give a person of ordinary intelligence fair warning what conduct is proscribed*, so that he may act accordingly." Thus, where an area of law or regulation is so amorphous and uncertain that persons of ordinary intelligence have no fair warning their conduct was illegal, such conduct cannot be punished with criminal prosecution. We have emphatically and in no uncertain terms held that where the law gives a person of ordinary intelligence no fair warning what conduct is proscribed, "[i]n those circumstances, it is fundamentally unfair to subject a defendant to a criminal prosecution."[41]

Judge Simonelli then concluded that because the theft statute, the public official statute, the LAD and CEPA do not give fair warning to employees that the taking or copying of confidential employer documents while engaged in CEPA and/or LAD-protected activity is "unlawful" or criminally "unauthorized," the indictment should have been dismissed under the "fundamental fairness doctrine."[42]

Further, Judge Simonelli noted that the *Quinlan* decision "permits employees to take or copy confidential employer documents under certain circumstances,"

which the *Quinlan* majority "declined to characterize as a 'theft.'"[43]

Judge Simonelli also reasoned that the Supreme Court in *Quinlan* only warned employees of the "significant risk" of adverse employment action, such as termination, for their self-help activities, not criminal prosecution and imprisonment.[44]

Judge Simonelli also pointed out that:

> Even Justice Albin recognized that employees may be justified in taking or copying confidential employer documents where the documents "clearly indicate [ ] that the employer was engaged in illegal conduct." And there are cases where whistleblowing employees prevailed while relying on confidential employer documents.[45]

Judge Simonelli concluded:

> Under these circumstances, the law is so amorphous and uncertain that lay persons of ordinary intelligence acting in good faith pursuant to CEPA and/or the LAD have no fair warning it is a crime to take or copy confidential employer documents they may reasonably believe are relevant to their claims and transmit those documents to their private attorneys. Accordingly, it is fundamentally unfair to subject these individuals to criminal prosecution for theft and official misconduct.[46]

Judge Simonelli offered a solution to the problems presented in this case—apply the doctrine of fundamental fairness in order to ensure justice for all employees who act in good faith pursuant to the LAD and/or CEPA until the Legislature has resolved the conflict between the LAD and CEPA and the criminal statutes.[47]

Where Do We Go From Here?

For Saavedra, the battle continues. On March 14, 2014, the New Jersey Supreme Court granted certification in this matter. For attorneys who represent employees in LAD and CEPA cases, the future is uncertain regarding how to proceed in the face of *State v. Saavedra*. Are there any documents an employee can produce in discovery without risking indictment? Can employees copy any documents to show to their counsel to evaluate and prosecute their claims of discrimination and retaliation? Can employees take pictures of relevant documents or will that violate the majority's holding in *State v. Saavedra*?

Until this issue is decided, perhaps the safest course is to have employees describe, by date, time, author, and recipient, all of the documents they believe are relevant to their claims. When putting an employer on notice of the claims, even before litigation is filed, counsel for the employees can demand the employer put a litigation hold on all documents and electronic data that relate to the employee and his or her claims. Employees' counsel can demand the defendant employer produce those documents the employee has identified and, if the employer claims they do not exist or they cannot be located, seek a court order permitting the employee to copy the documents. Perhaps with court approval, the employee may be protected from criminal prosecution for copying and producing documents that are relevant to and support their claims.

Contrary to the majority in *State v. Saavedra*, is it really likely an employee, who has been fired or is the victim of retaliation and discrimination and has taken employer documents in an effort to prove his or her claims, will have the ability to fight both the employer and the state at the same time? Will that employee be able to participate in discovery in the civil matter when he or she knows that everything he or she said and all of the evidence he or she produced can (and most likely will) be used against him or her in a criminal proceedings? It is difficult to argue against the proposition that this employee's ability to pursue his or her LAD and/or CEPA claim will be severely restricted.

One thing is clear, if *State v. Saavedra* becomes the prevailing law in this state, the LAD and CEPA will be substantially weakened as employees who have in any way attempted to document their claims with employer documents and information will be strongly discouraged from bringing claims for fear of being subjected to the imposition of criminal charges and possible incarceration. Such a result is diametric to the stated purpose of both statutes. ■

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Endnotes

1. *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 179 (1998).
2. *Id.* (*citing Abbamont v. Piscataway Bd. of Educ.*, 138 N.J. 405, 431, 650 A.2d 958 (1994); *accord Barratt v. Cushman & Wakefield*, 144 N.J. 120, 127, 675 A.2d 1094 (1996)).
3. *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 258 (2010) (*quoting Fuchilla v. Layman*, 109 N.J. 319, 334, *cert. denied*, 488 U.S. 826 (1988)).
4. *Id.*
5. *Id.* at 246-47.
6. *Id.* at 247-48.
7. *Id.* at 248-49.
8. *Id.* at 251-52.
9. *Id.*at 253.
10. *Id.* at 269-71.
11. *Id.* at 277 (emphasis added).
12. *Id.* at 278, 281-82.
13. *State v. Saavedra*, 433 N.J. Super. 501, 501, 81 A.3d 693 (App. Div. 2013).
14. *Id.* at 508.
15. *Id.* at 508-09.
16. *Id.* at 509-10.
17. *Id.* at 510.
18. *Id.*
19. *Id.*
20. *Id.* at 512. *See* N.J.S.A. 2C:30-2a; N.J.S.A. 2C:20-3; N.J.S.A. 2C:20-2b(2)(g).
21. *Saavedra*, 433 N.J. Super. at 512.
22. *Id.*
23. *Id.*
24. *Id.* at 513.
25. *Id.*
26. *Id.* at 507 (citations omitted).
27. *Id.* at 514. (citations omitted).
28. *Id.*; N.J.S.A. 2C:20-3(a).
29. *Saavedra*, 433 N.J. Super. at 518 (*citing State v. Quezada*, 402 N.J. Super. 277, 283, 953 A.2d 1206 (App. Div. 2008)).
30. *Id.* at 515 (citations omitted).
31. *Id.* at 519.
32. *See People v. Carter*, 77 N.Y.2d 95, 107, 564 N.Y.S.2d 992, 566 N.E.2d 119 (1990) (Titone, J., dissenting) (*citing* Tom Wolfe, The Bonfire of the Vanities, at 603 (*quoting* S. Wachtler, Ch. J)).
33. *Saavedra*, 433 N.J. Super. at 515.
34. *Id.* at 516-17.
35. *Id.* at 521-22 (*citing State v. Hogan*, 144 N.J. at 228-29, 676 A.2d 533 (1996).
36. *Id.* at 520.
37. *Id.* at 522-23 (citations omitted).
38. *Id.* at 527.
39. *Id.*
40. *Id.* at 528 (citations omitted).
41. *Id.* at 534 (citations omitted) (emphasis in original).
42. *Id.* at 536.
43. *Id.* at 535 (*citing Quinlan*, 204 N.J. at 268-72).
44. *Id.* (*citing Quinlan*, 204 N.J. at 272).
45. *Id.* (*citing Quinlan*, 204 N.J. at 282 (Albin, J., dissenting)).
46. *Id.* at 536.
47. *Id.* (*citing Zehl v. City of Elizabeth Bd. of Educ.*, 426 N.J. Super. 129, 137 (App. Div. 2012)).

Should Employers Adopt OWBPA Waiver and Release Requirements for All Severance Agreements? An Analysis of *Carey v. NMC Global*

by Elizabeth Y. Moon

On Aug. 26, 2013, the Appellate Division of the New Jersey Superior Court, in *Carey v. NMC Global Corp.*,[1] reversed a trial court's grant of summary judgment in favor of an employer in a disability discrimination and retaliation case brought under the New Jersey Law Against Discrimination (LAD). In doing so, the Appellate Division reiterated the requirements that an employer must satisfy in order to enforce a severance agreement that contains a waiver and release of claims.

The plaintiff in the case, M. David Carey, had been employed by NMC Global Corporation as a dispatcher for over two and a half years when he was terminated. His termination meeting occurred on the first day that he returned from a disability leave and was told that he had been replaced during his leave. During his termination meeting, he was presented with a separation agreement that he "recognized as a 'legal document,'" but he did not read it fully before he immediately signed it. Prior to signing, Carey had been told he would receive two weeks' worth of additional pay if he signed the agreement and if not, he would receive nothing.[2]

The agreement contained a waiver and release of claims along with an acknowledgment stating, among other things, that the agreement was being signed "of his own free-will, knowingly and voluntarily...[and] that he fully understands it to be a final and binding separation and release agreement." After consulting with an attorney a few days later, Carey sent a letter attempting to revoke the agreement to the NMC vice president, who had been present during his termination meeting. Carey also sent another letter to NMC requesting that the direct deposit of his severance payment be stopped. Since NMC deposited the payment into his bank account anyway, Carey subsequently sent a check to NMC returning the entire amount of the payment.[3]

Carey later filed suit alleging claims for disability discrimination and retaliation for taking medical leave, and NMC moved for summary judgment. The trial court dismissed Carey's complaint based on the waiver and release of claims contained in the separation agreement that he had executed, finding that the agreement had been executed knowingly and voluntarily. Carey then appealed.[4]

To determine whether the severance agreement with release was entered into knowingly and voluntarily by Carey, the Appellate Division set forth the following eight factors from *Swarts v. Sherwin-Williams Company*:[5]

> 1) the plaintiff's education and business experience, 2) the amount of [] time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law"... [7)] whether an employer encourages or discourages an employee to consult an attorney and [8)] whether the employee had a fair opportunity to do so.[6]

Applying these factors, the court first described Carey as a high school graduate who was "not as educated as some of the plaintiffs found to have executed a valid release." Carey alleged he signed the agreement in approximately five minutes because he felt pressure to sign by NMC's vice president, who was "glaring at him," and he received two weeks' salary in consideration for the execution of the agreement and release.

He was given no opportunity to negotiate the terms of the agreement and testified he did not understand the language contained in the release. It was undisputed that Carey was not represented by and did not consult with an attorney prior to signing the agreement. While he was not encouraged to seek counsel, he also was not discouraged from doing so. The court noted that Carey had not even considered consulting with an attorney because of the pressure he felt to immediately sign the agreement. Based on these factors, the Appellate Division concluded that genuine issues of material facts existed regarding whether Carey had knowingly and voluntarily waived his LAD discrimination claims.[7]

Since he had not alleged age discrimination, the *Carey* decision does not address, or even mention, the requirements for a valid waiver under the Older Workers Benefit Protection Act (OWBPA), which amended the Age Discrimination in Employment Act (ADEA).[8] However, because of the Appellate Division's decision, employers should consider implementing some or all of the OWBPA's waiver requirements in its severance agreements regardless of the age of the employee. Under the OWBPA, a waiver will not be enforced as entered into knowingly and voluntarily unless at a minimum:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under [the ADEA];
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement;...[and]
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired[.][9]

While neither *Carey* nor any of the cases cited therein state that an employer must provide the revocation period set forth in the OWBPA, an employer's compliance with the six other requirements would improve the likelihood that a release will be found to have been executed knowingly and voluntarily under the eight factors identified in *Swarts* and cited in *Carey*.

For example, *Carey* notes that an employee's waiver of claims must be supported by adequate consideration in order to be enforceable, and that such consideration must be greater than that which the employee would have normally received.[10] The OWBPA provision is identical, requiring that a waiver of rights can only be enforced if made "in exchange for consideration in addition to anything of value to which the individual already is entitled."[11] Accordingly, when an employer complies with the OWBPA's requirement that a release provide consideration above and beyond that to which the employee is already entitled, it would also satisfy the sixth factor under *Swarts* when assessing whether a waiver of rights was knowing and voluntary.

Similarly, an employer drafting an agreement "that is written in a manner calculated to be understood by [an employee]"[12] would presumably take into consideration the employee's education and business experience in order to make it understandable to that employee or would simplify the language enough so that the "clarity of the agreement" cannot be questioned.[13]

In *Carey*, the employee possessed a high school diploma but also had 15 years of work experience prior to becoming employed at NMC. The court did not address whether his extensive experience compensated for his lack of college education, but noted that the education and experience of an employee "are not necessarily dispositive" of whether a release is knowing and voluntary. While the court determined that Carey's lack of post-secondary education neither supported nor undermined NMC's argument that the waiver was knowing and voluntary, the court plainly stated that there was no indication that Carey understood the rights he was giving up at the time he signed the agreement with release.[14] Employers can avoid a similar finding by ensuring that their severance agreement with release "is written in a manner calculated to be understood by

[the] individual" to whom it is provided and by specifically referring to the rights and claims being waived, as required by the OWBPA.[15]

With regard to the 21 days to be provided under the OWBPA,[16] such a minimum consideration period would likely be held sufficient to allow an employee to consider and waive his or her litigation rights. In *Carey*, the Appellate Division briefly surveyed other cases that had addressed whether a release was executed knowingly and voluntarily. The court noted that eight days was found to be sufficient to consider a release in *Swarts*,[17] and that one month had been a sufficient amount of time in *Cirillo v. Arco Chemical Co.*[18] However, it also noted that 10 days had not been enough time for a terminated employee to consider a release in *Cook v. Buxton, Inc*.[19] While the Appellate Division did not state exactly how much time an employee should receive to deliberate, the approximately five minutes that Carey had before signing the agreement was clearly not enough, and the court suggested that employees receive "significantly more time to sign the release."[20]

Providing an employee with 21 days to consider a release and waiver of claims and advising the individual in writing to consult with an attorney would also increase the likelihood of being able to enforce the release pursuant to the fifth, seventh, and eighth factors identified in *Swarts*. While an employer cannot obviously force its employee to consult with or be represented by counsel, advising the individual in writing that he or she should seek counsel would satisfy the requirement that an employer encourage the employee to seek legal counsel and provide a fair opportunity for the employee to do so.[21]

The one factor that remains unaddressed by the OWBPA is the employee's role in negotiating the terms of the agreement. In *Carey*, the Appellate Division noted that the plaintiff had not asked for an increase of his severance payment, did not attempt to negotiate, and was given no opportunity to negotiate any aspect of the agreement. The court, therefore, concluded that these circumstances raised a question of fact regarding whether Carey's execution of the agreement had been knowing and voluntary. In reaching this conclusion, the Court stated that an "ability to negotiate suggests that the atmosphere surrounding the signing of the release was not oppressive."[22] Then, citing the Third Circuit Court of Appeal's decision in *Cirillo*, the court further stated that, "[t]he existence of an opportunity to negotiate with respect to a release is a substantial indicia that its execution was knowing and voluntary."[23] However, *Cirillo* also noted that "the absence of such an opportunity [to negotiate] is not as strong an indicia that a release is unknowing or involuntary."[24]

Furthermore, in *Ponzoni v. Kraft General Foods, Inc.*,[25] a case also cited by *Carey*, the Third Circuit found that even though the employee "did not seek out an opportunity to discuss or negotiate the release of specific claims before signing the Release," he was unable to otherwise establish that "there was an oppressive atmosphere" surrounding the execution of the release. Accordingly, by demonstrating that the circumstances under which a release was executed were not otherwise oppressive, an employer does not necessarily have to permit negotiation of a severance agreement in order for it to be enforced as voluntary and knowing.

The Appellate Division's decision in *Carey* serves as an important lesson to employers who offer severance packages to employees being terminated in exchange for a waiver and release of claims. An employee's execution of a severance agreement with release may be unenforceable, even if the agreement itself states it is being executed knowingly and voluntarily. A court examining an agreement containing a release of claims will look at the totality of the circumstances to determine whether the release was knowing and voluntary.[26] An agreement that conforms to the OWBPA's waiver and release requirements will more likely be enforceable as a valid agreement. However, whether an employer decides to comply with the OWBPA's waiver requirements or not, *Carey* is a reminder that employers must be adequately trained in the process of offering severance agreements in order to avoid a determination that its release was involuntarily and unknowingly executed. Employers should provide sufficient time for consideration of the agreement, ensure that the release is understandable to the employee, and most importantly, encourage and provide time for the employee to seek legal counsel. ■

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Endnotes

1. 2013 WL 4504274 (App. Div. Aug. 26, 2013).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Id.* at *3.
5. *Swarts v. Sherwin-Williams Co.*, 244 N.J. Super. 170 (App. Div. 1990).
6. *Id.* at 177 (*quoting Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988)).
7. *Carey*, 2013 WL 4504274 at *4-8.
8. 29 U.S.C. § 621, *et seq.*
9. 29 U.S.C. § 626(f)(2). It should be noted that these provisions apply to waivers that are individually executed and not to waivers executed in connection with an exit incentive plan or reduction in force for a group of employees, which require additional information to be provided to the affected employees under the OWBPA.
10. *Carey*, 2013 WL 4504274, at *7.
11. 29 U.S.C. § 626(f)(2)(D).
12. 29 U.S.C. § 626(f)(2)(A).
13. *Swarts*, 244 N.J. Super. at 177 (*quoting Coventry*, 856 F.2d at 523).
14. *Carey*, 2013 WL 4504274, at *1, *4-7.
15. 29 U.S.C. § 626(f)(2)(A)-(B).
16. 29 U.S.C. § 626(f)(2)(F)(i).
17. *Swarts*, 244 N.J. Super. at 178-79.
18. *Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 453 (3d Cir. 1988).
19. *Cook v. Buxton, Inc.*, 793 F. Supp. 622, 625 (W.D. Pa. 1992).
20. *Carey*, 2013 WL 4504274, at *5.
21. *Swarts*, 244 N.J. Super. at 177 (*quoting Coventry*, 856 F.2d at 523).
22. *Carey*, 2013 WL 4504274, at *5 (*quoting Riddell v. Medical Inter-Insurance Exchange*, 18 F. Supp. 2d 468, 473-74 (1998)).
23. *Id.* (*citing Cirillo*, 862 F.2d at 455 n.4).
24. *Cirillo*, 862 F.2d at 455 n.4.
25. *Ponzoni v. Kraft General Foods, Inc.*, 774 F. Supp. 299, 313 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).
26. *Carey*, 2013 WL 4504274, at *3.

Raymours Furniture Co. v. Rossi—Is Mandatory Mandatory?

by Gian M. Fanelli, Jang J. Lee, and Jason T. Brown

Mandatory arbitration agreements are under assail in the courts as judges have been looking for reasons to retain jurisdiction rather than relinquish control to an arbitrator. The United States Supreme Court, in *AT&T Mobility, LLC v. Concepcion,*[1] decreed the enforceability of arbitration clauses and then reaffirmed, in *American Express Co. v. Italian Colors Restaurant*,[2] yet courts across the country have chosen not to enforce all arbitration agreements blindly and have instead distinguished those opinions to comply with other laws. One of the latest exceptions to the mandatory arbitration trend is *Raymours Furniture Co. v. Rossi,*[3] where the court invalidated the arbitration clause as illusory.

Background on Mandatory Arbitrations

Mandatory arbitration is a form of alternative dispute resolution that forces the parties to litigate disputes outside the courts, generally for a fee, with an allegedly neutral third party. Employers may compel a mandatory arbitration agreement as a condition of employment, which may waive the employee's right to bring any potential claims before a court, unless an exception can be found. The employer often has the luxury of counsel in crafting these one-sided agreements, but the employee rarely does. With the challenging economy, prospective employees may sign pretty much anything to obtain work and current employees, especially at-will employees, may sign anything to keep their jobs. By accepting arbitration and waiving litigation, the employee will now be at the mercy of a self-serving arbitration system by submitting to arbitrators who may be biased because they depend on continued business from the employer.[4]

Class Action Lawsuits in an Arbitration Context

In 2011, the Supreme Court ruled in a groundbreaking decision, *AT&T Mobility, LLC v. Concepcion*, that arbitration clauses must be enforced and class action waivers in arbitration agreements must be followed because of the mandatory provision of the Federal Arbitration Act (FAA).[5] This dealt a major blow to the ability to collectively vindicate rights in any venue. The Court's decision in *Concepcion* overruled the California Supreme Court's decision in *Discover Bank v. Superior Court*.[6] In *Discover Bank*, the California court found a consumer arbitration agreement that prohibited class arbitrations unconscionable because individual bilateral arbitration was not an adequate substitute for a class action where the amount of damages may be small and it may be cost-prohibitive to litigate individually.

The Supreme Court has also applied the same principles from the consumer context in the employment context. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court enforced an agreement that required the arbitration of Age Discrimination in Employment Act (ADEA) claims, rejecting an argument that arbitration procedures could not adequately further the process of that statute, because the arbitration procedures did not provide for class actions.[7] The Court explained that as long as the employee agreed to the arbitration requirement, the burden was on the employee to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims.

Gilmer was followed by two other cases in which the Supreme Court found arbitration under the FAA applicable to employment discrimination suits—*Circuit City Stores v. Adams*[8] and *Rent-a-Center, West, Inc. v. Jackson*.[9]

Raymours Furniture Co. v. Rossi

In *Raymours Furniture Co. v. Rossi*, in a reversal of the typical roles, the plaintiff was the corporate employer and the defendant was the employee. Rossi alleged discrimination, retaliation, and constructive discharge.[10] In *Raymours*, the defendant employee attempted to resolve her case by contacting the plaintiff-employer with a demand letter pre-litigation.

After failed settlement discussions, the employer filed a demand for arbitration with the American Arbitration Association (AAA) and, when the employee refused to participate in the AAA arbitration, Raymours Furniture,

the employer, filed a petition to compel arbitration with the U.S. District Court for the District of New Jersey. The employee filed a motion to dismiss the petition to compel arbitration and asked the court for an emergency stay of arbitration, which was granted.

The issue was whether an enforceable arbitration agreement existed between the parties. The district court stated there was no enforceable arbitration agreement between the parties because: 1) an unqualified disclaimer on the employee handbook does not allow the court to conclude that the employee clearly and unambiguously agreed to mandatory arbitration; and 2) the employer's ability to change the contents of the handbook/arbitration agreement at any time without notice rendered the agreement to arbitrate illusory and unenforceable.[11]

Raymours Procedural Background

The employee signed a receipt and acknowledgment of an employment handbook, which contained a provision granting the employer the unilateral right to change its "employment policies at any time." The acknowledgement further dictated that in consideration for continued employment the employee agreed to be bound by all future revisions of the handbook. While the initial handbook did not contain an arbitration clause, in Jan. 2012, subsequent to the signing of the acknowledgment, the employer adopted an employment arbitration program, which it incorporated into its handbook. The arbitration program dictated that the defendant must arbitrate any employment-related or compensation-related claims between the defendant and plaintiff. The employee acknowledged receipt of the updated handbook two times, when the employer updated its handbook in Jan. 2012 and in April 2013.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the U.S. Supreme Court stated as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract and the courts have jurisdiction to hear argument regarding the enforceability of the arbitration clause itself.[12] In contrast, if the issue of the contract's validity in its entirety is challenged the arbitrator has jurisdiction.[13] This may seem like a subtle distinction, but this permits an orderly litigation of the forum before hearing other merit-based challenges.

In *Raymours,* like *Cardegna*, the challenge at issue for the court was not the entire agreement, but the arbitration provision. The employer filed a petition to compel arbitration and a motion to compel arbitration and stay proceedings. The court held that it had subject matter jurisdiction to adjudicate the employer's petition to compel, and furthermore, to adjudicate whether or not there was an enforceable arbitration agreement between the parties.[14]

Raymours Legal Analysis

The *Raymours* court ruled that the federal court had subject matter jurisdiction because the employee's raised controversy was based on a hypothetical federal cause of action. The complaint, in theory, could have been brought under the Americans with Disabilities Act (ADA), a federal statute. The employee could have potentially asserted a claim on the basis of disability or failure to accommodate, because Rossi alleged that the employer discriminated against her on the basis of disability when it transferred her, retaliated against her for complaining about discrimination, and then constructively discharged her.

Although the topical arbitration issues overshadow other issues, it is critical to note for all sides that the sending of a demand letter asserting federal causes of action may enable the court to invoke jurisdiction. As in the instant case, a demand letter sent by a potential plaintiff has the capacity to invert the litigation and cast the complainant in the role of defendant, and although the letter may be sent with the thought of amicable direct resolution, the individual may be hauled into court or arbitration to litigate the raised issues.

Employee Did Not Agree Clearly and Unambiguously to Arbitration

The *Raymours* court looked to Section 2 of the FAA, which states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[15]

Under New Jersey law, an arbitration agreement "must reflect that an employee has agreed clearly and unambiguously to arbitrate the dispute claim."[16] In *Woolley v. Hoffman La-Roche, Inc.*, the Supreme Court of New Jersey stated that employment handbooks may create an enforceable agreement of employment terms unless the employer expressly states that the handbook is not a contract.[17] Here, Raymours created a disclaimer specifically stating that the handbook was not a contract. The handbook stated, "[n]othing in this Handbook, or any other Company practice or communication or document, including benefit plan descriptions, creates a promise

of continued employment, employment contract, term or obligation of any kind on the part of the Company." The court held that since the handbook itself disclaimed it was a contract, under *Woolley*, the arbitration clause within was an unenforceable illusory term.

In *Leodori v. CIGNA Corp.*, the Supreme Court of New Jersey rejected the employer's argument that an employee's receipt of a handbook and continued employment constituted an implied agreement to abide by the arbitration policy.[18] The employer in *Leodori* relied on *Woolley,* which argued that the employee's receipt of the handbook and his continued employment at the company constituted an implied but enforceable agreement to abide by the arbitration policy.[19] However, this court disagreed with the employer by stating that *Woolley*'s implied-contract doctrine focuses on an employer's obligation to its employees, not vice versa. This court held that *Woolley* and *Leodori* remain good law and control in this case.[20]

The court distinguished *Raymours* from *Forsyth v. First Trenton Indem. Co.,*[21] where the Appellate Division of the New Jersey Superior Court found the "'record as a whole' reflects a knowing and voluntary waiver of plaintiff's rights." In *Forsyth*, however, unlike *Raymours*, there was no provision in the handbooks that disclaimed the binding effect or enforceability as it did in *Raymours*. Raymours's handbook provision that specifically disclaimed binding effect or enforceability rendered it unenforceable.

An Arbitration Agreement Granting the Employer the Ability to Unilaterally Alter the Agreement at Will is Illusory and Unenforceable

The handbook that Raymours drafted did not require the changes be put in writing and distributed to employees.[22] While Rossi acknowledged on two separate occasions that she read and understood the handbook and arbitration provisions, the employer retained the exclusive right to unilaterally alter the agreement at will. Therefore, the language in the employee handbook "makes performance entirely optional" for the employer.[23] The court ruled that these types of agreements, where there is a lack of mutual obligation, are illusory and thus unenforceable.

Other courts have also found that arbitration clauses subject to change at the sole discretion of the employer are illusory.[24] In *Caire v. Conifer Value Based Care, LLC.*, like *Raymours*, the court stated that where a party reserves the right to "alter, amend, modify or revoke" an arbitration agreement, the promise to arbitrate is illusory and the arbitration agreement is unenforceable for lack of consideration.[25]

Conclusion

Raymours marks an important ruling for employees who often enjoy inherently unequal footing when imposing arbitration agreements as a requisite for employment. Arbitration agreements that grant the employer the ability to unilaterally alter the terms of the agreement are illusory and thus unenforceable. The employer can't have it both ways, and if the handbook is not an enforceable contract, then it's not enforceable for either party. If the employer chooses to make it enforceable then certain contractual rights and causes of actions may be bestowed upon the employee. The sleeper issue of note is that pre-litigation notices may actually enable the employer to commence an action against the employee, inverting the procedural posture of the case. ■

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Endnotes

1. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).
2. *Am. Express Co., v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).
3. *Raymours Furniture Co., v. Rossi*, 2014 U.S. Dist. LEXIS 1006, 2014 WL 36609 (D.N.J. Jan. 2, 2014).
4. Michael Pye et al., The Right to Refuse Unsafe Work in New Zealand, N.Z. J. Ind. Rel. 199216 (June 1, 2001), 2001 WL 22252902 (citing U.S. study finding that in the majority of cases reviewed, arbitrators demonstrated a deference and bias towards the prerogative of management to manage).
5. *Concepcion*, 131 S. Ct. at 1742.
6. *Discover Bank v. Superior Court*, 134 Cal. App. 4th 886 (Cal. App. 2d Dist. 2005).

7. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).
8. *Circuit City Stores v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).
9. *Rent-A-Center West Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).
10. *Raymours*, 2014 U.S. Dist. LEXIS 1006 at *2.
11. *Id.* at *28-29.
12. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).
13. *Id.*
14. *Raymours,* 2014 U.S. Dist. LEXIS 1006 at *11.
15. *Id.* at *18.
16. *Id.* (*citing Leodori v. CIGNA Corp.*, 175 N.J. 293, 814 A.2d 1098, 1104 (2003)).
17. *Raymours,* 2014 U.S. Dist. LEXIS 1006 at 18 (*citing Woolley v. Hoffman La-Roche, Inc.*, 99 N.J. 284, 491 A.2d. 1257 (N.J. 1985)).
18. *Leodori*, 814 A.2d at 1105.
19. *Id.*
20. *See Molloy v. Am. Gen. Life Companies*, Civ. No. 05-4547 (MLC), 2006 U.S. Dist. LEXIS 49850, 2006 WL 2056848, at *4 (D.N.J. July 21, 2006) (rejecting argument that *Leodori* is preempted by the FAA).
21. *Forsyth v. First Trenton Indem. Co.*, L-9185-08, 2010 N.J. Super. Unpub. LEXIS 1183, 2010 WL 2195996, at *8 (App. Div. May 28, 2010).
22. *Raymours*, 2014 U.S. Dist. LEXIS 1006 at *28-29 (*citing Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 760 (7th Cir. 2001)).
23. *Id.*
24. *Caire v. Conifer Value Based Care, LLC*, CIV.A. RDB-13-1216, 2013 WL 5973151 (D. Md. Nov. 8, 2013).
25. *Id.* at 9.

Is There an Unexpected Pay Day In Your 'Unpaid' Intern's Future?

by Timothy McCarthy and M. Trevor Lyons

The days of the coffee-fetching, cubicle-dwelling unpaid intern appear to be numbered due to a recent explosion in wage and hour litigation: collective actions filed by unpaid interns alleging violations of the federal Fair Labor Standards Act (FLSA) and its state analogs. Companies like Conde Nast, the publishing corporation that owns a number of high-profile magazines including *Vanity Fair* and *The New Yorker*, have gone so far as to discontinue their internship programs altogether in response to these wage and hour lawsuits.[1] While commentators disagree on the benefit of these unpaid jobs for the interns, one thing is certain: Employers face a threat of liability that could cost them millions.

The central issue in cases involving unpaid interns is whether the intern is an 'employee' under the FLSA. This basic question dates back to 1947, when the United States Supreme Court created a trainee exception to FLSA coverage in *Walling v. Portland Terminal Co.*[2] There, the Court determined that because the trainee, rather than the employer, was the primary beneficiary of the one-week training program at issue, the trainee was not an employee under the FLSA.

Adopting the factors analyzed in *Walling*, in April 2010, the Department of Labor issued Fact Sheet #71 to act as guidance in determining whether an unpaid intern is an employee. Fact Sheet #71 explains that an intern is not an employee, and an internship may be unpaid, only when six criteria are met: 1) the internship must be similar to training that would be given in an educational environment; 2) the internship must be for the benefit of the intern; 3) the intern cannot displace regular employees; 4) the employer cannot derive an immediate advantage from the activities of the intern, and on occasion its operations might actually be impeded; 5) the intern is not necessarily entitled to a job at the conclusion of the internship; and 6) the employer and the intern must understand that the intern is not entitled to wages for the time spent in the internship.

Under these factors, a surge of unpaid intern lawsuits cropped up in 2013, two of which were filed in the Southern District of New York (SDNY). In *Wang v. The Hearst Corporation*,[3] Hearst was sued by unpaid interns who had worked for its various magazines, including *Cosmopolitan* and *Seventeen*. The SDNY denied the interns' motion for summary judgment on the issue of whether they were employees, finding that disputes of fact existed regarding the level of educational training offered to the interns and the benefit of the program for the interns. U.S. District Judge Harold Baer also denied the interns' motion for class certification under Rule 23 for the New York Labor Law (NYLL) claims and collective action under FLSA § 216(b) for the federal wage claims, but shortly thereafter permitted an interlocutory appeal to the Second Circuit Court of Appeals to decide the class certification issue on an interim basis, before the case proceeds to final judgment.

Shortly thereafter, in *Glatt v. Fox Searchlight Pictures Inc.*,[4] former production interns, including two who had worked on the set of the 2010 film *Black Swan*, sought certification of an FLSA collective action and summary judgment on the question of whether they were employees. Regarding whether the internship provided training similar to that found in an educational setting, the SDNY determined that the interns derived no educational benefits aside from on-the-job learning that any employee would receive. Similarly, the court determined that the production internships were designed more for the benefit of the company than the interns. The interns were performing "chores," which were essential functions that would have alternatively been performed by paid employees. Therefore, the court also found the internships displaced regular employees.

The court, however, also acknowledged the wave of unpaid intern wage-and-hour actions in the SDNY and stated, "Several intern cases have been filed in the Southern District of New York since [the court's previous] order, and this issue affects all of them." Finding

a substantial basis for a difference of opinion regarding the standard that should be applied based upon the intra-district split and by the disparate approaches taken by other jurisdictions, U.S. District Judge William H. Pauley III concluded that immediate appeal to the Second Circuit was appropriate. The Second Circuit accepted the appeal.

In a third case, *Bickerton v. Rose*,[5] a New York court approved a class action settlement in a case brought by a group of former interns who had worked on the set of *The Charlie Rose Show*. In approving a settlement that entitled claimants to $110 for each week of work performed, up to a maximum of 10 weeks, the lawsuit cost *The Charlie Rose Show* an estimated $110,000 between these payments and attorneys' fees.[6]

An even costlier settlement was reached in *Davenport v. Elite Model Management*,[7] in which a New York federal judge recently approved a settlement of $450,000 to former interns.[8] This settlement is set to pay between $700 and $1,750 to more than 100 former interns. Nearly one-third of the $450,000 settlement fund will be going to the attorneys representing the interns.

These cases demonstrate that employers who utilize unpaid interns must beware of minimum wage and overtime restrictions under the FLSA and similar state laws, such as the NYLL and the New Jersey Wage and Hour Law. If it is determined that an unpaid intern is, in fact, an employee, then the employer's failure to comply with minimum wage requirements potentially exposes the employer to a number of penalties, including criminal prosecution, liability for back wages, liquidated damages, and injunctions. Employers also face the potential of collective action under the FLSA, which is similar to a class action brought pursuant to Rule 23 in federal courts but with a less burdensome showing required to certify a collective action.[9] Employers should be aware of these risks and cautiously evaluate their unpaid internship programs utilizing the factors enumerated by the Department of Labor.

Emerging Trend to Expressly Protect Unpaid Interns from Employment Discrimination

On Nov. 18, 2013, the New Jersey Senate introduced a bill (S-3064), which would permit unpaid interns to seek relief from purported harassment, discrimination, and retaliation under the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and the Worker Freedom From Employer Intimidation Act. The proposed bill expressly defines an unpaid intern as an individual who performs work for an employer, for the purpose of training, where:

- the employer is not committed to hiring the individual as an employee or in any other compensated capacity at the conclusion of the training period;
- the employer and the individual agree in writing that the individual is not entitled to any compensation for the work performed; and
- any work performed by the individual:
  - supplements employer training given in an educational environment intended to enhance the employability of the individual;
  - provides experience for the benefit of the individual; and does not displace employees of the employer.

The legislation appears to be an attempt by the Senate to respond to a recent SDNY opinion, *Wang v. Phoenix Satellite Television US*,[10] in which the court held that an unpaid college intern could not bring a sexual harassment lawsuit against her employer because, as an intern, she was not an employee, as recognized under New York State and New York City's analogous anti-discrimination laws. In that case, the plaintiff alleged she was unlawfully subjected to sexual harassment by her former supervisor's sexual advances. The court dismissed the plaintiff's sexual harassment claim brought under the New York City Human Rights Law (NYCHRL), holding that, as an unpaid intern, the plaintiff was not an employee within the meaning of the NYCHRL. In so holding, the court based its determination on analogous interpretations of the New York State Human Rights Law and Title VII of the Civil Rights Act of 1964, which have both been interpreted to exclude unpaid interns from their protections.

Presently, only one state—Oregon—provides such protections to unpaid interns. However, at least one other state—New York—is currently considering similar protections. If passed, S-3064 will afford unpaid interns the same protections against discrimination, harassment, and retaliation as paid employees. Employers, therefore, should consider reminding all employees that all individuals in the workplace are entitled to work in an environment free from unlawful discrimination and retaliation, and should consider including express examples involving interns in their periodic training sessions. Additionally, employers should evaluate their

current policies and practices to make certain they protect unpaid interns from discrimination, harassment, and retaliation. ■

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Endnotes

1. *See* Cara Buckley, Sued Over Pay, Conde Nast Ends Internship Program, *N.Y. Times* (Oct. 23, 2013), *available at* http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?_r=0.
2. 330 U.S. 148 (1947).
3. 293 F.R.D. 489 (S.D.N.Y. 2013).
4. 293 F.R.D. 516 (S.D.N.Y. 2013).
5. No. 650780/2012, 2013 WL 3335076 (N.Y. Sup. Ct. June 28, 2013).
6. *See* Amanda Becker, *PBS' Charlie Rose settles with unpaid interns as lawsuits spread*, Reuters (July 1, 2013), *available at* http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701.
7. 1:13-cv-01061-AJN.
8. *See* Michael Lipman, Elite Modeling Reaches Largest-Ever Unpaid Intern Settlement, Law360.com (Jan. 13, 2014), *available at* http://www.law360.com/articles/500826/elite-modeling-reaches-largest-ever-unpaid-intern-settlement. Additionally, the plaintiffs' memorandum of law in support of their motion for settlement is available at 2013 WL 6919169.
9. *See* 29 U.S.C. § 216(b). For a comparison of the requirements for Rule 23 class actions and Section 216 collective actions, see Sam J. Smith and Christine M. Jalbert, *Certification – 216(b) Collective Actions v. Rule 23 Class Actions and Enterprise Liability under the FLSA*, American Bar Association (2011), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flabor_law%2Fmeetings%2F2011%2Fac2011%2F084.pdf&ei=3Mn_Uq_ZKbHeyQHD8oGoAg&usg=AFQjCNGnxxqXqwyG5d4q4QJh0jLQ0ytL0w&sig2=up3-05Af3KMsR5TuTBp8mA.
10. No. 13 Civ. 218(PKC), 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013).

Jersey City and Newark Require Private-Sector Employers to Pay Employees Earned Sick Leave

by Alexander L. D'Jamoos

The cities of Jersey City[1] and Newark[2] each recently passed an ordinance to guarantee most private-sector employees paid sick leave. Generally, both ordinances provide all private-sector employees the opportunity to earn up to 40 hours of sick leave annually, and force certain businesses to pay for their workers' use of accrued sick time.

In passing the paid sick leave ordinances, Jersey City and Newark became the sixth and seventh cities in the country, respectively, to adopt such a law. In this area they join San Francisco, CA; Seattle, WA; Portland, OR; New York City, NY; and the District of Columbia. Though similar statewide legislation has been proposed in New Jersey and other states, Connecticut is the only state to have passed a mandatory sick leave law, which has been in effect since 2011.[3] Evidently, the state's two largest cities did not wait for Trenton legislators to vote on the New Jersey Paid Sick Leave Bill.[4]

Who is Covered by the Sick Leave Ordinances?

In defining the terms "employee" and "employer," the Jersey City and Newark ordinances incorporate the broad definitions used by the New Jersey Wage and Hour Law. An "employee" is defined by the state wage and hour law as any individual employed by an employer.[5] Under these ordinances, an employee (as defined above) is eligible for sick leave so long as they work in the city for at least 80 hours in a year. The employee need not be based in the city to be eligible for its protection. The ordinances only exclude: 1) all public-sector employees and 2) private-sector employees covered by collective-bargaining agreements that expressly waive paid sick time.

Under the state wage and hour law, an "employer" includes any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.[6] Based on this definition, all private-sector employers who operate a business or have employees who work in Jersey City and Newark are subject to the new ordinances.[7]

Both ordinances mandate that employers in Jersey City and Newark with 10 or more employees must provide their employees the opportunity to earn up to 40 hours of paid sick leave annually. In determining whether an employer meets the 10 employee threshold, the ordinances count all employees, whether full time, part time, or temporary. The ordinances are silent on whether the 10 employees must be working in the city, suggesting that all employees are counted, regardless of their location.

Moreover, the ordinances create distinctions (not exemptions) for small employers with less than 10 employees. These small employers are subject to different requirements by the Jersey City and Newark ordinances, as noted below.

Jersey City's Paid Sick Leave Benefits

The Jersey City sick time ordinance was passed by the city council on Sept. 25, 2013, with considerable public support. The ordinance's proponent, Jersey City Mayor Steve Fulop, signed the Jersey City Earned Sick Time Ordinance (JCESTO) into law on Oct. 21, 2013. The law took effect on Jan. 24, 2014. The JCESTO will cover an estimated 30,000 employees who work for an employer in Jersey City.

The Jersey City ordinance provides that employees will earn one hour of sick time for every 30 hours worked. Overtime hours worked must be included in the accrual calculation. Employers with 10 or more employees must provide up to 40 hours (five days) of *paid* sick leave. The ordinance requires that employers with less than 10 employees provide up to 40 hours of *unpaid* sick time. Their use of sick time is protected but not paid. Workers at these small businesses are eligible to earn and use unpaid sick time on the same basis that paid sick time is earned and used by employees of larger Jersey City businesses.

Employees begin to accrue sick leave credit immediately upon being hired. Beginning on the employee's 90th day of employment, the employee may use

accrued sick time for his or her own illness or injury, for preventative care, or to care for a sick or injured family member. An employee may also use paid sick time: 1) if the employee's place of business is closed due to a public health emergency; 2) to care for a child whose school has been closed; or 3) to care for a family member who has been exposed to a communicable disease. The ordinance broadly defines "family member" to include the employee's child, parent, spouse, civil union partner, domestic partner, sibling, grandparent, or grandchild, and includes adoption, foster, and step-relationships.

To use sick time, the employee need only make an oral request to his or her employer. The employer may not require that an employee requesting leave search or find his or her replacement worker. Nor may the employer require a doctor's note or other written notice verifying the employee's need for sick time, unless the employee is absent for more than three consecutive days. The employer must exercise care not to request disclosure of the employee's or family member's medical condition, and it must maintain confidentiality over any information provided by the employee to support the sick leave.

Newark's Paid Sick Leave Benefits

On Jan. 28, 2014, the Newark's City Council passed a paid sick time law that is substantially similar to the JCESTO. On Jan. 29, 2014, Mayor Luis A. Quintana signed the ordinance into law. The law will take effect 120 days after enactment, on May 29, 2014. The Newark ordinance will provide an estimated 38,000 workers paid sick leave in the city.

While most of the pertinent terms are consistent with JCESTO, the Newark ordinance extends benefits to a larger group of employees than Jersey City's sick time ordinance. Where Jersey City employers with fewer than 10 employees need only protect (not pay for) earned sick time, the Newark ordinance requires employers with less than 10 workers to provide a minimum of 24 hours (three days) of paid sick time to their employees.

The Newark ordinance also extends full protection to workers in certain industries where the spread of illnesses is at a higher risk. All child care workers, home healthcare workers, and food service workers in Newark shall receive 40 hours (five days) of paid sick time, regardless of the number of employees maintained by their employer (even if less than 10).

Comparable to the JCESTO, the paid sick time benefits in Newark may be used by employees for their own care or for the care of a family member beginning on the 91st calendar day of employment.

Retaliation Prohibited

Retaliation against employees who request and use paid sick time is strictly prohibited. This means that, in enforcing its absenteeism policy, an employer may not count the employee's sick time as an absence that may result in discipline, demotion, termination, or other adverse action. Threats, suspensions, or reduction of hours may also constitute adverse actions, which violate the ordinances.

Employers are also prohibited from retaliating against an employee who informs any person—including an attorney—about an alleged violation of the ordinance or cooperates with an investigation of any alleged violation. Employees are similarly protected from retaliation should they file a complaint regarding an alleged violation.

Notice to Employees

Employers in both cities must provide written notice to each employee describing the employee's right to paid sick time, how the sick time accrues, how the employee may use sick time, and the employee's right to be free from retaliation. Employers must also prominently display a poster in the workplace containing notice of the ordinance. Employers will be able to obtain these notices and posters from the Jersey City Department of Health and Human Services (department) and the Newark Department of Child and Family Well-Being (agency). Failure to provide the notice or display the poster may result in civil fines. Failure to provide the prescribed notice under the JCESTO can result in a fine up to $100 for each employee who was not given notice and $500 for each establishment where a poster was not displayed.

Enforcement

The department/agency has been authorized to enforce the ordinance, which will require it to establish a system to receive, investigate, and resolve complaints. Once the ordinances go into effect, the department/agency will be able to audit businesses and conduct on-site investigations to ensure employers are in compliance with the law's mandates. Employers are required to create and retain records for three years, document-

ing employees' hours worked and paid sick time taken. The department/agency may inspect these records to monitor compliance with the law's requirements. If the employer cannot produce records verifying its employees' hours and use of sick time, the department/agency may presume the employer has violated the ordinance, which may result in a civil fine.

Nothing in the ordinance requires an aggrieved employee to make a complaint to the department/agency. Rather, the employee may file a private action in the city's municipal court.[8] Any employer who violates the ordinance is subject to payment of restitution in the amount of paid sick time unlawfully withheld in addition to municipal fines assessed. A violation in Jersey City would be punishable by a fine of up to $1,250 and/or a period of community service for each individual infraction of the ordinance. In Newark, a violation of the sick time ordinance would impose a $1,000 fine and possible imprisonment or community service not exceeding 90 days.

New Jersey Paid Sick Leave Bill

The New Jersey Paid Sick Leave Bill was introduced to the New Jersey Senate (S-785) on Jan. 14, 2014, and the Assembly (A-2354) on Feb. 6, 2014. The bills were referred to each house's respective labor committee where they await further consideration.

Currently, the proposed statewide law would require private-sector employees to accrue one hour of sick time for every 30 hours worked. The state bill would provide more generous annual sick time requirements than the Jersey City and Newark ordinances. Companies with fewer than 10 people, defined as "small employers," would be required to pay for a maximum of 40 hours (five days) of earned sick leave per year. Whereas employees working for all other companies (those with more than 10 employees) would be permitted to accrue up to 72 hours (nine days) of earned sick leave annually.

Employers Must Prepare and Implement the New Laws

Since there is no statewide law in New Jersey requiring private-sector employers to provide employees with paid or unpaid sick leave, the Jersey City and Newark ordinances will set the standards for employers within their reach. Therefore, employers with business operations in Newark and/or Jersey City (or with employees working 80 or more hours annually in these cities) must review and revise their policies and practices to ensure compliance with the new ordinances' notice, accrual, documentation, enforcement, and use requirements.

At the outset, the ordinances require employers to issue notices, display posters, and maintain an attendance system that accurately accrues employees' earned sick time and absences. These requirements are already in effect in Jersey City and will be imposed on Newark employers in late May. While many private-sector employers provide paid sick time, companies should confirm that their existing policy offers the same or more protections than these city ordinances to avoid liability. At this time, the prudent employer may also consider defining its policy on the discretionary terms related to paid sick time. For example, whether the employer would loan sick time in advance of accrual, reimburse employees for unused sick time at the end of each year, or allow the use of accrued sick time in increments of less than one day.

Additionally, employers must train managers on practices concerning employee sick time requests and enforcement of the company's attendance policies to remain within the parameters of the ordinances. ■

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Endnotes

1. Ordinance amending and supplementing Chapter 3 (Administration of Government) Article VI (Department of Administration) of the Jersey City Municipal Code to Implement Paid Sick Time, Ordinance #13-097 (City of Jersey City, NJ, 2013), *available at* http://www.cityofjerseycity.com/uploadedFiles/Public_Notices/Agenda/City_Council_Agenda/2013/2013_Ordinance_2nd_Reading/Agenda%20Document(14).pdf.

2. Ordinance of the city to promote the overall health and safety of the residents and workers in the City of Newark by reducing the risk of and spread of communicable disease and contagion by requiring a policy of paid sick leave for workers, Ordinance #13-2010 (City of Newark, NJ, 2014), *available at* https://newark.legistar.com/LegislationDetail.aspx?ID=1518218&GUID=22C72D79-0A2C-4DF9-A597-9FF29C980CF6&Options=ID%7CText%7C&Search=sick+leave.
3. Similar bills are pending legislative action in California, Massachusetts, Nebraska, Oregon, and Vermont. Whereas, preemptive bills attempting to block municipalities from passing paid sick time legislation have been introduced in ten states including Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, North Carolina, Tennessee, and Wisconsin.
4. *See* S785/A2354, 216th Legis. (2014).
5. N.J.S.A. 34:11-56a1(h).
6. N.J.S.A. 34:11-56a1(g).
7. Update on Newark Paid Sick Leave, Mondaq (Day Pitney LLP, New York, NY), March 3, 2014, *available at* http://www.mondaq.com/unitedstates/x/296740/employee+rights+labour+relations/Update+On+Newark+Paid+Sick+Leave.
8. Though the JCESTO states that, "any person claiming to be aggrieved by the violation of this Ordinance may bring a cause of action in any court of competent jurisdiction," the venue for enforcing this municipal ordinance would likely be limited to the Jersey City Municipal Court since only the state Legislature may confer a private right of action in the superior court. *R.J. Gaydos Ins. Agency v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271-72 (2001).

What to Expect When Your Employee is Expecting: How the LAD's Pregnancy Amendment Impacts the Employer-Employee Relationship

by Kathryn K. McClure

Female employees who are pregnant, have recently given birth, or who experience medical conditions related to pregnancy or childbirth, gained expanded protection under the New Jersey Law Against Discrimination (LAD) on Jan. 21, 2014, when Governor Chris Christie signed into law Senate Bill S-2995,[1] amending the LAD to explicitly prohibit discrimination on the basis of pregnancy.[2] In a departure from similar provisions under the LAD and the Americans with Disabilities Act (ADA), requiring accommodations for disabled employees to enable them to perform essential job functions,[3] the new law also requires employers to accommodate employees who experience normal pregnancies, when they would benefit from job accommodations or modifications in order to maintain healthy pregnancies.[4] With passage of the new law, New Jersey joins a growing number of jurisdictions extending greater employment protections to employees affected by pregnancy.[5]

The amended LAD, which applies to all New Jersey employers, specifically prohibits employers from treating female employees the employer knows, or should know, are affected by pregnancy, less favorably than non-pregnant employees with similar abilities to work.[6] The new law includes in its definition of "pregnancy," "childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth."[7] Like other protected statuses under the LAD, the new law prohibits employers from refusing to hire, discriminating in the terms and conditions of employment, or terminating the employment of a woman on the basis of her pregnancy.[8] In addition to enhanced protection in employment, the new law likewise bans discrimination on the basis of pregnancy within the contexts of housing, public accommodations and finance.[9]

Notably, the amended LAD also requires employers to accommodate the needs of an employee affected by pregnancy when the employee requests an accommodation on the advice of her physician.[10] Such accommodations include bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work. The plain language of the law makes clear that the enumerated accommodations are not exclusive.[11] An employer may not penalize an employee for requesting or utilizing an accommodation.[12] Similar to reasonable accommodation standards for disabled individuals under the LAD and ADA, the new law does not require an employer to provide the requested accommodation if it can show it would cause an undue hardship on the employer's business operations.[13]

In determining whether an accommodation would cause an undue hardship, the amended LAD enumerates the following factors for employers to consider:

- the overall size of the employer's business with respect to the number of employees
- the number and type of facilities
- the size of the employer's budget
- the types of operations, including the composition and structure of the employer's workforce
- the nature and cost of the accommodation needed while taking into consideration the availability of tax credits, tax deductions and outside funding
- the extent to which the requested accommodation would involve a waiver of an essential job requirement, as opposed to a tangential or non-business necessity requirement.[14]

Employers may not provide workplace accommodations and paid/unpaid leave to an employee affected by pregnancy in a manner less favorable than the same accommodations provided to non-pregnant employees

with similar work abilities. The law specifically notes that it does not increase or decrease an employee's legal right to paid or unpaid leave in connection with pregnancy.[15] Unlike reasonable accommodations for disabled individuals under the LAD, a leave of absence is not an enumerated accommodation for pregnancy.[16] The new law amended the Legislature's findings and declarations to specifically proclaim that the LAD amendment was necessary to combat pregnancy discrimination because:

> pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired....[17]

The Practical Implications

While not previously identifying pregnancy as a specific protected class, as early as 1978, New Jersey courts construed the LAD to prohibit discrimination on account of pregnancy as gender-based discrimination or because of pregnancy-related disabilities.[18] In this regard, the newly supplemented LAD mirrors the protection of the federal Pregnancy Discrimination Act (PDA), enacted in 1978 to amend Title VII of the Civil Rights Act of 1964, prohibiting discrimination on the basis of pregnancy in hiring, firing, and other terms and conditions of employment.[19] Notably, the PDA applies only to employers with 15 or more employees, while the LAD applies to all employers.[20]

Prior to the amended LAD, however, neither federal nor state law required that employers reasonably accommodate the needs of employees affected by pregnancy. Therefore, the most significant practical implication for employers and employees is the new law's reasonable accommodation requirement. The amendment requires employers to accommodate employees affected by pregnancy regardless of whether they have an LAD disability or whether the requested accommodations are necessary to enable the employees to perform the essential functions of their jobs. Thus, the LAD amendment extends protections to pregnant employees significantly farther than the PDA and the ADA.[21]

The newly amended LAD may require employers to treat pregnant employees differently, as recommended by their physicians, rather than merely the same as all other employees. The passage of the new law decidedly supplants "[t]he theme of equal, not preferential, treatment under the PDA," as followed by the Supreme Court nearly a decade ago in *Gerety v. Atl. City Hilton Casino Resort*.[22]

In *Gerety*, a divided Supreme Court held that a casino's termination of a pregnant employee did not violate the LAD, when, on her physician's instruction, the employee took time off beyond the 26 weeks allowed by casino policy.[23]

Christina Gerety became pregnant with twins in 1997. A perinatologist discovered a serious health issue with one of the twins she was carrying. Although Gerety had planned to work through her pregnancy, she was unable to do so because of medical reasons, which required, among other things, hospitalization.[24] The Supreme Court noted, there was "no dispute that bona fide medical concerns required Christina to request that her leave be extended for the duration of her pregnancy."[25]

On her doctor's instruction, Gerety requested medical leave with extensions that exceeded the casino's 26-week maximum policy. The casino maintained a "strict, no-exceptions standard" that any employee who exceeded the 26-week maximum would be terminated, but eligible for rehire with a loss of seniority.[26] The Supreme Court noted that the employer did not have to treat female employees differently than other employees when applying its policies and, as such, the casino's policy applied to women and men equally. The *Gerety* Court held that "[i]f an employer treats its pregnant employees no differently than comparable non-pregnant employees in need of extended medical leave, then the LAD is not transgressed."[27]

Writing for the dissent in *Gerety*, Chief Justice Deborah Portiz rejected the majority's view and found, to the contrary, that an employer's facially neutral leave policy, which resulted in a disparate impact on women, required a finding of gender discrimination.[28] The dissent in *Gerety* held "that an employer must reasonably accommodate the women in its workforce by extending leave for pregnancy when such leave is necessary for health reasons, unless the employer can demonstrate that business necessity prevents that accommoda-

tion."[29] Chief Justice Poritz noted, because men cannot become pregnant, employers could "'penalize workers on account of their pregnancies with impunity.'"[30]

In 2006, the year following the Supreme Court's *Gerety* decision, the New Jersey Division on Civil Rights (DCR) amended the LAD's enabling regulations to expressly provide for "leaves of absence" as an example of a reasonable accommodation for persons with disabilities.[31] The amendment was the DCR's response to *Conoshenti v. Public Service Electric & Gas Co.*, a 2004 Third Circuit decision holding that a leave of absence was not a reasonable accommodation, because the regulations specifically required that an employee be able to "presently" perform the essential functions of her job.[32] At the same time, the DCR amended the regulations to remove the statement that the LAD protects only an employee who can "presently" perform the essential functions of her job with or without a reasonable accommodation.[33] As a result of the 2006 amended regulations, under the LAD, attendance or being physically present at work was no longer necessarily a criteria of an employee's ability to perform the essential duties of her job.[34] Furthermore, pursuant to the regulations, "[a]n employer must make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business."[35]

Thus, although the recent LAD amendment requiring reasonable accommodations for women affected by pregnancy specifically states it shall not increase or decrease a woman's right to paid or unpaid leaves, the LAD regulations with regard to leaves of absence for disabled employees dictate a different outcome for women like Gerety, who are experiencing high-risk pregnancies or medical conditions related to pregnancy. In those cases, the LAD's enabling regulations require a leave of absence as a reasonable accommodation where the employee's pregnancy-related medical condition qualifies for disability protection, unless the employer can show an undue hardship. Additionally, although the record in *Gerety* does not make clear whether accommodations such as those suggested in the new amendment would have enabled Gerety to remain employed during her pregnancy, the new law certainly makes working through pregnancy a more realistic possibility for women with high-risk pregnancies and medical conditions related to pregnancy.

The new law will likely have the greatest impact for female employees experiencing normal pregnancies who cannot perform essential job functions because of the physical demands or hazards of the work, such as with respect to the duties of police officers. Following *Gerety*, New Jersey courts held that "a normal pregnancy, absent complications" did not constitute a disability under the LAD.[36] Thus, pregnant female employees were eligible for enhanced protection under the LAD only if they suffered pregnancy-related medical conditions that qualified for disability protection, and possible accommodation under the LAD or ADA. If they experienced a normal pregnancy without complication, but the pregnancy alone precluded performance of their essential job functions, and the employer had no light-duty policy, the employee could find herself on an unpaid leave of absence.

For example, in *Larsen v. Twp. of Branchburg*, the Appellate Division held that a pregnant female patrol officer who was experiencing a normal pregnancy without complications, did not have a disability within the meaning of the LAD.[37] Beginning in 1995, the Township of Branchburg Police Department employed Larsen as a patrol officer. In June 2001, the police department eliminated its light-duty policy.[38] Notwithstanding, upon confirming her pregnancy in 2002, Larson's doctor gave her a note "restricting her to light duty."[39]

When the police department did not place Larsen on light duty, she applied for disability.[40] In support of her disability application, her doctor stated that, although Larson was having a normal pregnancy, she "should not perform strenuous activities associated with being a police officer, breaking up fights, et cetera…[and] should avoid situations that will put her baby at risk, trauma, et cetera."[41] After the disability insurer denied her application because she was having a normal pregnancy, her employers denied her request to return to work because of her doctor's statements that she avoid strenuous activities.[42] Consequently, the township and police department offered her positions in the tax assessor's office, which she declined. Larsen subsequently provided a certification from her doctor stating she was not to perform normal patrol functions, including apprehending and subduing suspects on foot or by car, guarding prisoners or making arrests, or maintaining a high level of physical exertion for a period of time.[43] Because of the inconsistencies in her doctors' statements, the township refused to allow her to return to work until after she had given birth.[44]

During her pregnancy, Larsen sued her employers alleging disability and perceived disability discrimination, as well as gender discrimination in violation of the LAD.[45] The Appellate Division affirmed the trial court's grant of partial summary judgment of Larsen's disability and perceived disability claims.[46] Following the Supreme Court's reasoning in *Gerety*, the Appellate Division then affirmed a jury decision finding that the township did not discriminate against Larsen on the basis of her gender, because the police department's no light-duty policy was applied equally across the board.[47] In light of the reasonable accommodation requirements for pregnancy in the newly amended LAD, pregnant employees who require modified work schedules or job duties, or temporary transfers to less strenuous work, can avoid Larsen's dilemma.

The Take Away

At a minimum, New Jersey employers will need to update policies and handbooks and provide training to managers and human resources personnel on the effects of the new law. Although the new law does not explicitly require a back-and-forth dialogue between the employer and the employee, New Jersey employers can also anticipate undertaking an interactive process similar to that required in disability accommodation cases, in response to pregnant employees' requests for accommodations. As part of that interactive process, New Jersey employers and employees will also have to determine whether a pregnant employee requires an accommodation for a normal pregnancy under the new amendment, in addition to women experiencing high-risk pregnancies or medical conditions associated with pregnancies, which must also be accommodated in accordance with disability accommodation requirements under the LAD and ADA. Attorneys counseling or representing female employees who are, or have recently been, pregnant will also need to be diligent in assessing whether an employer has abided by the new amendment's enhanced protections. ■

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Endnotes

1. P.L. 2013, Ch. 220; 2012 New Jersey Senate Bill No. S-2995.
2. N.J.S.A. 10:5-12(a), (s).
3. N.J.A.C. 13:13-2.5(b); 42 U.S.C. § 12112(b)(5).
4. N.J.S.A. 10:5-12(s); 10:5-3.1(a).
5. Alaska, Alaska Stat. §§ 18.80.220(a), 39.20.520; California, Cal. Gov't Code § 12945; Connecticut, Conn. Gen. Stat. § 46a-60(a)(7); Hawaii, Haw. Rev. Stat. §§ 368, 378; Illinois, Ill. Comp. Stat. § 775 5/2-102; Louisiana, La. Rev. Stat. §§ 23.341-42; Maryland, Md. Code Ann., State Gov't § 20-609; Texas, Tex. Labor Code Ann. § 21.106, Tex. Loc. Gov't Code §180.004; and New York City, N.Y.C. Admin. Code § 8-107(22).
6. N.J.S.A. 10:5-12(s).
7. *Id.*
8. *Id.* at (a).
9. *Id.* at (f), (g), (h), & (i).
10. *Id.* at (s).
11. *Id.*
12. *Id.*
13. N.J.A.C. 13:13-2.5(b); 42 U.S.C. § 12112(b)(5); N.J.S.A. 10:5-12(s).
14. N.J.S.A. 10:5-12(s).
15. *Id.*
16. *Compare* N.J.A.C. 13:13-2.5(b)(1)(ii), *with* N.J.S.A. 10:5-12(s).
17. N.J.S.A. 10:5-3.1(a)-(b).

18. *Castellano v. Linden Bd. of Educ.*, 79 N.J. 407, 409-12 (1979) (affirming judgment of the Appellate Division finding that a mandatory one-year maternity policy and refusal to allow pregnant teacher use of accumulated sick leave for absence due to childbirth discriminated against teachers because of their sex); *Rendine v. Pantzer*, 141 N.J. 292, 298-307 (1995) (affirming jury verdict in favor of former employees discharged when their employer discovered they were pregnant in violation of LAD and modifying counsel fee award); *Farley v. Ocean Twp. Bd. of Educ.*, 174 N.J. Super. 449, 451-52 (App. Div. 1990) (finding that school board policy singling out disability due to pregnancy and childbirth constituted disparate treatment on account of sex and, thus, violated LAD); *Gilchrest v. Haddonfield Bd. of Educ.*, 155 N.J. Super. 358, 367-68 (App. Div. 1978) (finding that if pregnancy was the only temporary disability which led to a non-tenured teacher's contract nonrenewal it would constitute gender-based discrimination in violation of the LAD, but reversing determination and order of the Director of the Division on Civil Rights in teacher's favor and dismissing complaint on basis there was insufficient evidence to support that conclusion and, therefore, no proof of discrimination).
19. 42 U.S.C. § 2000e(k).
20. 42 U.S.C. § 2000e; N.J.S.A. 10:5-5(a) and (e).
21. *Compare* N.J.S.A. 10:5-12(s); 42 U.S.C. § 2000e(k), *with* 42 U.S.C. § 12112(b)(5).
22. *Gerety v. Atl. City Hilton Casino Resort*, 184 N.J. 391, 405 (2005).
23. *Id.* at 393-94.
24. *Id.* at 393-95.
25. *Id.* at 395.
26. *Id.* 393-95.
27. *Id.* at 406.
28. *Id.* at 408.
29. *Id.*
30. *Id.* at 414 (*citing* Judith G. Greenberg, *et al.*, *Women in the Law* 99 (2d ed. 1998)).
31. N.J.A.C. 13:13-2.5(b)(1)(ii).
32. *Conoshenti v. P.S.E. & G. Co.*, 364 F.3d 135 (3d Cir. 2004); N.J.A.C. 13:13-2.8.
33. 38 N.J.R. 335(a).
34. *See* N.J.A.C. 13:13-2.5.
35. N.J.A.C. 13:13-2.5; *see also Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 397 (App. Div. 2002) (*quoting* N.J.A.C. 13:13-2.5(b)(2) ("[t]he regulations also require employers to 'consider the possibility of reasonable accommodation before firing...a person with a disability on the grounds that his or her disability precludes job performance'")).
36. *Larsen v. Twp. of Branchburg*, 2007 N.J. Super. Unpub. LEXIS 2808 (App. Div. Jan. 22, 2007).
37. *Id.* at *10.
38. *Id.* at *2.
39. *Id.*
40. *Id.* at *3.
41. *Id.*
42. *Id.* at *3-4.
43. *Id.* at *5.
44. *Id.*
45. *Id.* at *5-6.
46. *Id.* at *9-12.
47. *Id.* at *17-19.

Closing the Gender Gap? New Jersey's Pay Secrecy Ban

by Janet O. Lee

In 1963, President John F. Kennedy passed the Equal Pay Act as an amendment to the Fair Labor Standards Act.[1] This law prohibits discrimination on the basis of sex in the payment of wages by employers and was aimed at abolishing wage disparity based on sex. Despite the passage of this law five decades ago, a 2012 United States Bureau of Labor Statistics report stated that working women earned only 81 cents for every dollar earned by their male counterparts.[2] While this represents an improvement over the 62 cents women earned per dollar earned by men in 1979 (the first year for which earnings data are available),[3] it would appear that complete pay parity between men and women has not yet been achieved, despite the fact that today, more women than men obtain bachelors and master's degrees and are employed in management and professional occupations.[4] At the same time, women remain outnumbered by men in the upper echelons of corporate America. As of Jan. 15, 2014, only 4.6 percent of Fortune 500 and Fortune 1000 companies had a woman as CEO.[5] And when it comes to law firms, a recent survey found that barely 15 percent of equity partners are women.[6]

Not surprisingly, surveys show that Americans have a general perception that men have an advantage when it comes to wages and hiring.[7] However, most workers do not believe their own workplace is gender biased.[8] This perception may be attributed in part to the existence of pay secrecy policies, which prohibit employees from discussing and comparing their salaries, which in turn prevents the detection of potential wage disparities. In one survey conducted by the Institute of Women's Policy Research of The George Washington University, 51 percent of women and 47 percent of men reported that discussing wages or salary is prohibited or discouraged at their workplace and could lead to the loss of their job.[9] As a result, in recent years some state legislatures, including New Jersey, have passed laws that are ostensibly designed to eradicate gender gaps in pay, including bans on pay secrecy policies.

New Jersey's Legislative Efforts

In March 2012, the New Jersey Legislature introduced three bills intended to combat the gender gap in pay. The first bill, A-2647, would require every employer in New Jersey to post notification of worker rights under every applicable state and federal law providing for gender pay equity or prohibiting wage discrimination based on gender. The second bill, A-2650, was designed to mirror the continuing violations requirements in the federal Lily Ledbetter Fair Pay Act of 2009 by providing that a discriminatory compensation decision or other unlawful employment practice under the Law Against Discrimination (LAD) occurred each time compensation was paid in furtherance of that discriminatory decision or practice. The third bill, A-2648, would have amended the Conscientious Employee Protection Act (CEPA) to protect employees who disclose information regarding the compensation, terms of employment, and certain characteristics of any employee or former employee from retaliatory action by employers, if such disclosures were made with the reasonable belief that the purpose of the disclosure was to assist in the investigation of or legal action regarding potential discriminatory treatment.

These bills were passed by the Legislature in June 2012, and sent to Governor Chris Christie for consideration. Governor Christie noted that "[t]oo often in our past, women have seen their incalculable contributions to the workplace insufficiently compensated" and lauded the Legislature's efforts to "aid gaps in gender pay," stating that the progress made by women in the workplace should not "succumb to ignorance."[10]

The posting requirement in A-2647 was signed into law on Sept. 19, 2012, as a "sensible Statewide notice requirement" that would "serve to educate our workforce by providing a clear and daily reminder of the protections set forth in our law."[11] The continuing violations amendment in A-2650 was returned to the Legislature, however, because it did not conform fully with the federal Lily Ledbetter Act and the New Jersey Supreme Court opinion in *Alexander v. Seton Hall University,*[12] in

that it did not limit the back period for which a plaintiff may seek recovery for discriminatory paychecks to two years.[13] The pay secrecy prohibition in A-2648 was also returned to the Legislature with the recommendation that the proposed amendment to CEPA be incorporated into the LAD instead, as it was more consistent with the LAD's purpose of preventing workplace discrimination than with CEPA's purpose of prohibiting employer retaliation against whistleblowers.[14]

The New Jersey version of the Lily Ledbetter Act has not yet been passed, but Governor Christie's recommendation with regard to A-2648 was adopted and the LAD was amended by the Legislature to make it an unlawful employment practice "[f]or any employer to take reprisals against any employee for requesting from any other employee or former employee of the employer information regarding the job title, occupational category, and rate of compensation, including benefits, of any employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of any employee or former employee of the employer, regardless of whether the request was responded to, if the purpose of the request for the information was to assist in investigating the possibility of the occurrence of, or in taking of legal action regarding, potential discriminatory treatment concerning pay, compensation, bonuses, other compensation, or benefits."[15] The amendment also provides that no employee is required to make such disclosures.

This amendment to the LAD was approved by Governor Christie and became law on Aug. 28, 2013. Under the so-called 'pay secrecy ban,' it is now unlawful for a New Jersey employer to take action against any employee who discloses or asks another employee to disclose information relating to his or her pay or compensation, if the disclosure or request was made for the purpose of investigating potential discrimination. New Jersey thus joined Vermont, New Mexico, Illinois, Colorado, California, and Michigan in banning employers from penalizing employees who are seeking to gather information to challenge potentially discriminatory pay.

The Pay Secrecy Ban's Effect on New Jersey Employers

While an employee's disclosure of or request for compensation and other information is not protected if it was made for some purpose other than investigating potential discrimination, employers should be cautious when it comes to addressing discussions of pay among their employees. The National Labor Relations Act (NLRA) specifically protects the right of employees to engage in protected concerted activities, including the right to discuss wages and other matters pertaining to their terms and conditions of employment.[16] Courts have found that even informal rules prohibiting employees from communicating with one another regarding wages, such as instructions by managers not to discuss wages with other employees, "undoubtedly tends to interfere with the employees' right to engage in protected concerted activity" under the NLRA.[17]

Moreover, the LAD's pay secrecy ban may go beyond the protection provided by the NLRA. For example, whereas the NLRA protects employees—but not supervisors or other members of management[18]—who engage in concerted activities, under the LAD's pay secrecy ban, even supervisors or managers may be protected if they seek or disclose salary information in connection with a discrimination investigation. Similarly, public-sector workers are protected under the LAD, whereas the NLRA excludes employees of federal, state and local governments, as well as employers who employ only agricultural laborers, and employers subject to the Railway Labor Act from its protection.[19]

Without the benefit of regulations or case law delineating the limits of the LAD's pay secrecy amendment, as it now stands New Jersey's pay secrecy ban is far broader in scope than the protections provided under the NLRA. New Jersey employers would therefore be well advised to act with caution before taking action against any individual who has disclosed or requested information regarding another's wages, bonuses, benefits, or other compensation. Moreover, employers should educate their managers and supervisors with regard to the new law to ensure that they, and their employees, are properly instructed with regard to their obligations and rights—including the right *not* to disclose such information. Finally, this may be a good time for employers to turn an examining eye to their pay practices to ensure a discriminatory pay gap between men and women does not exist within their workforce. As the adage goes, an ounce of prevention is worth a pound of cure. ■

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Endnotes

1. 29 U.S.C. § 206.
2. *See* United States BLS Reports, Highlights of Women's Earnings in 2012, Report 1045, Oct. 2013, *available at* http://www.bls.gov/cps/earnings.htm#demographics.
3. *Id.*
4. *See* United States Bureau of Labor Force Statistics, Current Population Survey Table 11, Employed persons by detailed occupation, sex, race and Hispanic or Latino ethnicity, *available at* http://www.bls.gov/cps/tables.htm#charemp.
5. *See* statistics provided by Catalyst, a nonprofit organization whose mission is to expand opportunities for women in business, *available at* http://www.catalyst.org/knowledge/women-ceos-fortune-1000.
6. *See* National Association of Women Lawyers and The NAWL Foundation, Report of the Sixth Annual National Survey on Retention and Promotion of Women in Law Firms (Oct. 2011), *available at* http://www.nawlfoundation.org/pav/docs/surveys/NAWL-Survey2011.pdf.
7. *See* On Pay Gap, Millenial Women Near Parity—For Now, Pew Research Center, Dec. 11, 2013, *available at* http://www.pewsocialtrends.org/files/2013/12/gender-and-work_final.pdf.
8. *Id.*
9. *See* Pay Secrecy and Wage Discrimination, IWPR #Q016, Jan. 2014, *available at* http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications.
10. *See* Assembly Bill No. 2648 Conditional Veto, Sept. 24, 2012, *available at* http://www.njleg.state.nj.us/2012/Bills/A3000/2648_V1.HTM.
11. *Id.*
12. 204 N.J. 219 (2010).
13. *See* Assembly Bill No. 2650 Conditional Veto, Sept. 24, 2012, *available at* http://www.njleg.state.nj.us/bills/BillView.asp.
14. *See* Assembly Bill No. 2648, *supra* note 10.
15. N.J.S.A. 10:5-12(r).
16. *See Fredericksburg Glass and Mirror, Inc.*, 323 N.J.R.B. 165 (1997).
17. *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) (*citing Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (8th Cir. 1993) and *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)).
18. 29 U.S.C. § 152(11).
19. 29 U.S.C. § 152(2) & (3).

Weight in the Workplace: Where Size Shouldn't Matter

by La Toya L. Barrett

For five years, Joseph Gimello worked for his employer as an office manager. Gimello repeatedly received praise for his high sales numbers and overall job performance. He also received several performance-based bonuses, pay increases, and awards. Gimello believed his qualifications, performance, and the successful management of two store locations would secure his promotion to district manager. But, there was one problem: Gimello was fat. At five feet, eight inches tall, Joseph Gimello weighed over 250 pounds. At one point, Gimello weighed as much as 324 pounds. Instead of being promoted, Joseph Gimello was fired. Gimello's termination was based solely on his weight.[1]

A Growing Issue

According to the Centers for Disease Control and Prevention, there has been a dramatic increase in obesity in the United States during the past 20 years, and the rates remain high. More than one-third of adult Americans and approximately 12.5 million children are obese.[2]

We have waged a 'war on obesity': posted calorie counts—everywhere, attempted soda bans, employer wellness programs, infomercials, healthier food choices, and encouraging more exercise for children. There has been an overwhelming push for public awareness on the issue of obesity and its link to various health issues.

Unfortunately, the same war does not exist to tackle weight discrimination.

Although more than 60 percent of Americans are considered overweight and more than one-quarter are considered obese, instances of weight discrimination have steadily increased. [3] According to the National Association to Advance Fat Acceptance (NAAFA), fat Americans face discrimination daily. NAAFA faults a thin-obsessed society and negative stereotypes.

Many people harbor significant biases against overweight people, which include thoughts that the overweight are ugly, sloppy, lazy, unintelligent, and unhealthy.[4] Many view obesity as a personal defect—a character flaw.[5]

These weight-based stereotypes do not disappear in the workplace.

In fact, the workplace is becoming an unforgiving environment for overweight and obese employees. According to a 2008 Yale University study published in the International Journal of Obesity, lifetime experiences of discrimination occurred primarily in employment settings. Almost 60 percent of the participants who reported weight discrimination experienced employment discrimination on average of four times during their lifetime. This is similar to experiences of people reporting race discrimination (53 percent), and higher compared to individuals reporting gender discrimination (40 percent).[6]

While weight discrimination is prevalent in employment settings, there are very few laws that specifically outlaw weight discrimination.[7]

New Jersey Courts Weigh In

In 1991, when the Appellate Division decided *Gimello v. Agency Rent-A-Car Systems*,[8] the issue of weight discrimination was novel in New Jersey. *Gimello* was the first time the court considered whether obesity falls within the broad remedial sweep of the Law Against Discrimination (LAD).

In deciding this issue, the court relied heavily on the findings of the administrative law judge, who determined that Gimello's termination was a direct result of unlawful discrimination on the basis of obesity.

The court also relied on the LAD's then definition of "handicapped," which stated in pertinent part:

> "Handicapped" means suffering…from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions…which is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.[9]

The court then reviewed earlier cases in New Jersey where the broad statutory definition of handicapped was applied. For example, in *Clowes v. Terminix Int'l Inc.*,[10] the plaintiff's alcoholism was considered a disability under the LAD, and in *Andersen v. Exxon,*[11] the plaintiff's back injury years prior was considered a disability under the LAD. The ultimate holding extended these same protections to the obese:

> The important point is that the record supports the Director's finding that the employer terminated Gimello because of a condition covered by the broad language of N.J.S.A. 10:5-5q which condition did not prevent him from doing his job. This is employment discrimination under the LAD and is actionable. This type of prejudice "is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be non-existent." …. "The essence of discrimination…is the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics." We affirm the Director's decision finding unlawful employment discrimination [against] Gimello because of his obesity.[12]

In 2002, approximately 10 years later, in *Viscik v. Fowler Equipment Co.*,[13] the New Jersey Supreme Court came to the same conclusion: Obesity can be considered a disability within the meaning of the LAD.

The *Viscik* plaintiff had been overweight her entire life. As a result of her obesity, she suffered from other medical problems, including arthritis and asthmatic bronchitis, as well as hip and knee joint problems. Viscik's weight and other medical illnesses associated with her weight caused her to use a cane at times and move around the office slowly. Her supervisor claimed she was unproductive, and fired her after only four days of work.

At trial, Viscik had a medical expert testify about her obesity and its complications. The plaintiff's expert stated that her obesity was genetic and that her weight consistently ranged from approximately 340 to 450 pounds even though the ideal weight for her height and age was 180 to 185 pounds. The plaintiff's expert also stated that Viscik had several obesity-related illnesses, which caused her to be diagnosed with morbid obesity.

Viscik's expert explained that the term morbid obesity referred to "the disease" that occurs when a person has "a medical illness as a result of…obesity."[14] Finally, Viscik's expert found that her obesity constituted a handicap because she could not perform the tasks that normal people could.

As the Court noted in *Viscik*, there are two specific categories of handicap under the LAD: physical and non-physical. To meet the physical standard, a plaintiff must prove that he or she is: 1) suffering from physical disability, infirmity, malformation or disfigurement, 2) which is caused by bodily injury, birth defect or illness.[15]

The New Jersey Supreme Court found that Viscik's morbid obesity did fit the statutory definition of handicapped, holding:

> Viscik's testimony, medical history, and her expert's opinion fully support the finding that she established a physical handicap within the meaning of the LAD. According to her expert, she is morbidly obese, that is, suffering from disease or pathology as a result of her obesity, and that her obesity-based arthritis, heart condition and obstructive lung disease are clearly "physical infirmities" under the first prong of the physical handicap test. The second prong of that test requires the infirmity to be "caused by bodily injury, birth defect or illness." On that point, Dr. Shen testified that Viscik's metabolic condition is genetic, that she suffered from it since birth, and that it is a direct cause of the obesity-based infirmities. Additionally, Viscik testified about the limits that her morbid obesity imposes in relation to her knee. She verified her inability to move around quickly and need for a cane. She also explained the effects of her asthma and shortness of breath. Dr. Shen, moreover, attested to each of those limitations. We are satisfied, therefore, as was the Appellate Division, that the evidence supported the jury's finding with regard to Viscik's handicap.[16]

Not many obesity cases have been before the New Jersey appellate courts since *Gimello* and *Viscik* were decided. While New Jersey is among the few jurisdictions that addressed weight discrimination, this area of the law is still not fully developed.

How Fat is Too Fat? Weight Discrimination and the Non-Obese Plaintiff

Although the LAD appears to provide protection for victims of weight discrimination, the cases where plaintiffs have been successful have focused on obesity as a medical condition. Both *Gimello* and *Viscik* presented expert medical evidence to support the claim that they were handicapped within the meaning of the LAD.[17]

According to the law in New Jersey, once it is demonstrated by unrefuted medical evidence that a plaintiff is obese and was terminated due to his or her obesity, then that is employment discrimination and actionable under the LAD.[18] The N.J. Supreme Court, however, has also stated that expert medical evidence is required where the existence of a disability is not readily apparent.[19]

Which begs the question: Is obesity only considered a disability when accompanied by medical evidence?

Where courts have accepted a disability and/or perceived disability argument, plaintiffs generally have been 'morbidly obese' or 'obese' rather than merely 'overweight.' This means using a disability and/or perceived disability framework would likely protect only the fattest individuals and permit discrimination against people who are overweight but not medically obese.

So what happens to the New Jersey employee who is overweight, but not medically obese, and perceived by his or her employer as being 'too fat'?

If an employer refuses to hire someone who is overweight, because the employer believes the person will have a hard time going from place to place, or going up and down stairs, or is likely to be absent from work more than other employees, that means the employer perceives the overweight person as disabled, and that overweight individual may have a claim under the LAD.

Discrimination based on a perception of a disability is within the protection of the LAD.[20] For example, in *Poff v. Caro*, a landlord refused to rent an apartment to three gay men because he believed they would likely get AIDS and endanger his family residing on the premises. Although the plaintiffs did not have AIDS, and therefore did not have a 'handicap' under the LAD, the court stated:

> Distinguishing between actual handicaps and perceived handicaps makes no sense. For example, in the case of racial and religious discrimination, the Law Against Discrimination cannot reasonably be read to prohibit a landlord from refusing to rent to a member of a racial or religious minority, but to allow a landlord to refuse to rent to a person who is only *perceived* by the landlord to be such a member. Reasonably interpreted, the Law Against Discrimination protects persons who are discriminated against because they have AIDS and persons who are discriminated against because they are perceived to have AIDS or to be potential victims of AIDS.[21]

In deciding this case, the *Poff* court relied heavily on the New Jersey Supreme Court's discussion of perceived disabilities in *Andersen v. Exxon Co.*[22] The Court noted:

> The implications of the [perceived disability] doctrine are present in the context of this case, where the employer has determined that complainant's condition was serious enough to deny him employment. We agree that "[p]rejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent."[23]

Andersen was also followed in *Rogers v. Campbell Foundry Co.*[24] In *Rogers*, the Appellate Division affirmed the director of the Division on Civil Rights' determination that the employer had committed unlawful employment discrimination when it refused to hire the plaintiff based on a chest x-ray and the employer's mistaken belief that the plaintiff was predisposed to serious illnesses. The Court held:

> We understand the import of footnote 2 in *Andersen* to be that where, as here, the physical condition perceived by the prospective employer as constituting a handicap is actually normal and nondisabling, the provisions of the Law Against Discrimination…are nevertheless applicable.[25]

These cases clearly stand for the rule that those perceived as suffering from a particular disability are as much within the protected class as those who are actually disabled.

In the case of Joseph Gimello, his employers believed he could not perform the duties of a district manager, which included traveling from office to office, because

of his size and weight.[26] Although Gimello was able to demonstrate his obesity with unrefuted medical evidence, the Court also determined Gimello's employer discriminated against him due to a perceived disability. Relying on *Andersen*, *Rogers*, and *Poff*, the Court noted the employer's perceptions provided an independent basis for finding in favor of Gimello.[27]

Therefore, in New Jersey, if an overweight plaintiff can demonstrate that the discrimination he or she claims to have experienced would not have occurred but for the perception that he or she is somehow limited in ability because he or she is overweight and/or obese, his claim may be covered by the LAD, even if the plaintiff is not morbidly obese.

Conclusion

Employment discrimination is not just a matter between employer and employee; there is a public interest in discrimination-free work places.[28] Currently, overweight and obese individuals suffer employment discrimination in hiring and firing, in their working conditions, and in promotions, salary and compensation—simply because of their size.[29]

The essence of discrimination is the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics.[30] To judge individuals on their weight, size, and appearance rather than their individual merits is discrimination, and should be recognized by the courts as unlawful discrimination.

Every person, regardless of size, has the right to a life of dignity and respect.[31]

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Endnotes

1. *Gimello v. Agency Rent-A-Car Systems*, 250 N.J. Super. 338, 365 (App. Div. 1991).
2. Centers for Disease Control and Prevention, http://www.cdc.gov/obesity/adult/index.html.
3. Minn. Dep't of Human Rights, Weight Bias: The Next Civil Rights Issue, *Rights Stuff Newsletter*, Summer ed., 2010 at 2.
4. Diane Cadrain, Boss Says, 'You're Too Fat', *AARP Bulletin* (Nov. 16, 2011). *See also* Elizabeth Kristen, Addressing the Problem of Weight Discrimination in Employment, 90 *Cal. L. Rev.* 57, 66 (2002).
5. Minn. Dep't of Human Rights, *supra* note 2, at 3.
6. RM Puhl, et al., Perceptions of weight discrimination, *International Journal of Obesity*, 5 (2008).
7. Michigan is the only state that specifically outlaws weight discrimination. The following cities have also passed laws prohibiting weight discrimination: Washington D.C.; San Francisco, CA; Santa Cruz, CA; Binghamton, NY; Urbana, IL; and Madison, WI.
8. 250 N.J. Super. 338 (App. Div. 1991).
9. *Gimello*, 250 N.J. Super. at 357-58 (*quoting* N.J.S.A. 10:5-5q). *See also infra* note 16.
10. 109 N.J. 575 (1988).
11. 89 N.J. 483 (1982).
12. *Gimello*, 250 N.J. Super. 338, 365 (App. Div. 1991) (citations omitted).
13. 173 N.J. 1 (2002).
14. *Id*. at 10.
15. *Id*. at 15.
16. *Id*. at 17-18.
17. Since *Gimello* and *Viscik* were decided, the term "handicap" was changed to "disability." *See* N.J.S.A. 10:5-5q.
18. *Gimello*, 250 N.J. Super. at 365.
19. *Viscik*, 173 N.J. 1, 16 (2002).
20. *Poff v. Caro*, 228 N.J. Super. 370, 377 (Law Div. 1987).
21. *Id*. at 377-78.
22. 89 N.J. 483 (1982).

23. *Id*. at 495-96 n.2 (citations omitted).
24. 185 N.J. Super. 109 (App. Div. 1982).
25. *Rogers*, 185 N.J. Super. at 113.
26. *Gimello*, 250 N.J. Super. at 345.
27. *Id*. at 362.
28. *Fuchilla v. Layman*, 109 N.J. 319, 335 (1988) (citations omitted).
29. Kristen, *supra* note 3, at 62-66. *See also* Cadrain, *supra* note 3.
30. *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 378 (1988).
31. William C. Taussig, Weighing In Against Obesity Discrimination, 35 *B.C.L. Rev.* 927, 962 (1994) (*quoting* National Association To Advance Fat Acceptance, unpublished pamphlet (describing the ultimate message of the organization)).