



# New Jersey Labor and Employment Law Quarterly

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## Chair's Column

by Paul L. Kleinbaum

Welcome to another excellent edition of the *Labor and Employment Law Quarterly*. As I write this column, the National Labor Relations Board is at full strength, the first time since 2003. In addition, on Oct. 29, 2013, the Senate confirmed Richard Griffin's nomination as general counsel. You may recall that Griffin's appointment as board member by President Barack Obama was invalidated by the D.C. Circuit in *Noel Canning v. NLRB*,<sup>1</sup> a case that was just heard by the Supreme Court this term (see below). General Counsel Griffin was the keynote speaker at the NLRB conference on Nov. 22, 2013. He was introduced by Ret. Chief Justice James R. Zazzali. Griffin's remarks were interesting and informative, and included new initiatives he is planning. All the panels were excellent and well received by an overflow crowd.

This United States Supreme Court term promises to be an interesting one. There are a number of significant labor and employment law cases on the Court's 2013-14 docket. Here is a sampling of those cases.

*Noel Canning v. NLRB*, *supra*, is the labor case of this term. It was argued on Jan. 13, 2014. The Court will review the decision of the D.C. Circuit, which invalidated President Obama's Jan. 4, 2012, recess appointments of three members of the NLRB. The case raises the issue of whether the president's recess appointments were within his power under the appointments clause of the Constitution. The D.C. Circuit held that the president's constitutional authority to make recess appointments extended only to those made during the intercession recess of the Senate to fill vacancies that first arise during that recess. Two other federal appellate courts, including the Third Circuit, also invalidated NLRB decisions for similar reasons following *Noel Canning*.<sup>2</sup>

In *Mulhall v. Unite Here Local 355*,<sup>3</sup> the Court heard oral argument on Nov. 13, 2013. It reviewed an 11th Circuit decision that held a "neutrality agreement" between a union local and Florida Greyhound Track and Casino violated Section 302 of the Labor Management Relations Act (LMRA).<sup>4</sup> The issue is whether the neutrality agreement constituted a "thing of value" that



is prohibited under Section 302. The Court noted that both the Fourth and the Third circuits reached opposite conclusions.<sup>5</sup> On Dec. 10, 2013, the Court issued an order dismissing the *writ of certiorari* as improvidently granted over a dissent by Justice Stephen Breyer.<sup>6</sup>

In *Harris v. Quinn*,<sup>7</sup> the Court will review a Seventh Circuit decision that upheld Illinois legislation that extended the state's public sector collective bargaining law, including its agency fee provisions to home health-care aides who provide home-based care to Medicaid recipients. The case was brought by the National Right to Work Legal Defense Foundation, which argued the aides were not state employees and the agency fee provisions of the law violate the First and 14th amendments. The Court upheld the agency fee provisions on the narrow grounds that the aides are state employees for the purposes of applying the Supreme Court's decision in *Abood*.<sup>8</sup> Oral argument was scheduled on Jan. 21, 2014.

*Levin v. Madigan*<sup>9</sup> was argued on Oct. 7, 2013. The Court considered whether state and local government employees can bypass procedures in the Age Discrimination in Employment Act (ADEA)<sup>10</sup> and go straight to court to pursue claims for age discrimination under Section 1983.<sup>11</sup> The Seventh Circuit held that the employee, a 61-year-old former assistant attorney general who alleged he was unlawfully terminated and replaced with a younger female employee, was not limited solely to a claim under the ADEA. It was reported that a great deal of time was spent on procedural issues during oral argument. On Oct. 15, 2013, the Court issued an order dismissing the *writ of certiorari* as improvidently granted.<sup>12</sup>

In *Sandifer v. U.S. Steel Corp.*,<sup>13</sup> the Court is reviewing a Seventh Circuit decision that involved the question of whether Section 3(o) of the Fair Labor Standards Act (FLSA)<sup>14</sup> excluded from work hours time spent by employees changing into and out of safety equipment. Under the collective bargaining agreement, U.S. Steel and United Steel Workers agreed employees' time spent in preparatory or closing activities, including changing clothes, would not be compensated. The employees' lawsuit asserted they should be paid for time they spent changing into and out of safety clothing they are required to wear and walking to and from their work stations from the locker room. The union was not a party in the case. The Seventh Circuit dismissed the complaint and held that some personal protective gear was "clothing" and, therefore, fell within the clothing exemption the FLSA and contract provision. It further held that donning and doffing non-clothes items like

safety glasses, earplugs and hardhats was "*de minimus*," and therefore not compensable. The Seventh Circuit also held that employee time spent travelling between locker rooms and work stations need not be compensated. The Court heard argument on Nov. 4, 2013.

In *Lawson v. FMR LLC*,<sup>15</sup> the Court will consider whether Section 806 of the Sarbanes-Oxley Act<sup>16</sup> (SOX), its whistleblower provision, extends beyond employees of a public company to encompass employees of a private company that is a private contractor or subcontractor to that public company. The plaintiffs sued their former employers, which were private companies that provided advice or management services to Fidelity mutual funds. The Court will review a First Circuit decision, which held that Section 806 only protected employees of public companies and did not protect employees of separate investment advisor firms that managed the funds. The case was argued on Nov. 12, 2013.

On a local level, the section has held and will be sponsoring a number of excellent Institute for Continuing Legal Education (ICLE) programs, a number of which are annual seminars covering a wide range of topics. To name just a few, the Employment Law Roundtable, moderated by Paulette Brown, was held on Dec. 17, 2013. Once again, as last year, there was an excellent turnout to hear several interesting and informative programs. The Labor Law Forum, moderated by Wayne Positan, is scheduled for March 26, 2014; the New Jersey Public Employment Conference is scheduled for April 25, 2014; and, Hot Tips in Labor & Employment Law, moderated by Arnold Shep Cohen, will take place on June 13, 2014. These programs are always informative, well attended, and well received. Please mark your calendars.

On a more festive note, the holidays have just passed and the new year is here. The section celebrated the holidays on Dec. 4, 2013, at the Maplewood Country Club. The section's party is always a great way to share the holiday spirit with colleagues and to usher in the new year. And, once again, Nancy Smith organized the toy and book drive to benefit Wynona's House. Nancy reported that the section's response was our most generous and successful to date, and we made many kids very happy. Thanks to Nancy, and all who participated! Also, I would be remiss if I did not note that Hanukkah overlapped with Thanksgiving this year, an event that some say will not happen again for more than 75,000 years. So Happy Thanksgiving to those who celebrated both!

Because this is my first column of 2014, on behalf of section officers Paulette Brown, Lisa Manshel, Ian

Meklinsky, and Keith Waldman, I would like to wish you and your families a very happy, successful, and safe new year! ■

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## Endnotes

1. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 103 S. Ct. 2861 (2013).
2. *NLRB v. New Vista Nursing & Rehabilitation*, 719 F. 3d 203 (3d Cir. 2013); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013).
3. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 2849 (2013).
4. 29 U.S.C. § 186.
5. *Id.* at 1214.
6. *Unite Here Local 355 v. Mulhall*, 571 U.S. \_\_ (2013).
7. *Harris v. Quinn*, 656 F. 3d 692 (7th Cir. 2011), *cert. granted*, 2013 WL 5430482 (U.S. Oct. 1, 2013).
8. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).
9. *Levin v. Madigan*, 692 F. 3d 607 (7th Cir. 2012), *cert. granted*, 133 S. Ct. \_ (2013), *cert. dismissed as improvidently granted*, 2013 WL 5610423 (U.S. Oct. 15, 2013).
10. 29 U.S.C. § 621, *et. seq.*
11. 42 U.S.C. § 1983.
12. *Madigan v. Levin*, 571 U.S. \_\_ (2013).
13. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 1240 (2013).
14. 18 U.S.C. § 201, *et seq.*
15. *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), *cert. granted*, 133 S. Ct. 2387 (2013).
16. 18 U.S.C. § 1514A(a).

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*The opinions of the various authors contained within this issue should not be viewed as those of the Labor and Employment Law Quarterly or the New Jersey State Bar Association.*

### Editorial Board

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## Message From the Editor

by Robert T. Szyba

It is both an honor and a privilege to take the helm of the *Labor and Employment Law Quarterly*. I thank my predecessor, Anne Ciesla Bancroft, for an amazing job during her tenure as editor-in-chief, as I look forward to continuing in the tradition of excellence of the *Quarterly*.

Since the last issue of the *Labor and Employment Law Quarterly*, we have seen some significant events relevant to the labor and employment law practice. To help explain the legal landscape of same-sex marriage as it pertains to employers in this state, Joseph J. Lazzarotti, Douglas L. Klein, and Peter Seltzer explore the implications of the U.S. Supreme Court's decision in *United States v. Windsor*, and the Supreme Court of New Jersey's decision in *Garden State Equality v. Dow*. The *Battaglia v. United Parcel Service, Inc.* decision touches on multiple aspects of employment litigation. Omar A. López discusses the view from the plaintiffs' bar, while Howard M. Wexler and Ephraim J. Pierre give some insights from the defense bar. Another New Jersey Supreme Court decision, *Longo v. Pleasure Productions, Inc.*, impacts the standard applicable to awards of punitive damages, which Mark J. Blunda discusses in detail. Kathryn K. McClure dives deep into the Appellate Division's *Lippman v. Ethicon, Inc.* decision to analyze the "job duties" exception to the Conscientious Employee Protection Act (CEPA), which has been used to bar the whistleblower claims of employees who report illegal conduct within the scope of their job duties.

With the enactment of the New Jersey Security and Financial Empowerment Act (NJ SAFE Act), the state has created new employment protections for the victims of domestic violence. Marion Cooper explains both the policy considerations as well as the mechanics of the new law, which went into effect on Oct. 1, 2013. Next, Neha Patel discusses the legal implications of a request by an employee with a disability to transfer into a vacant position despite the fact that a more qualified candidate is also in the running. Then, following the recent release of the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), Christina Stoneburner explores how the changes to the prior edition will impact employment litigation for both employees and employers.

Exploring the idea of weight discrimination, Amanda E. Jackson discusses the Appellate Division's analysis of the 'Borgata Babes' program in *Schiavo v. Marina District Development Company, LLC*. Michael O'Connor and Justin Burns discuss recent trends in workplace investigations originating from the National Labor Relations Board and legislative action.

Finally, Michael R. DiChiara looks across the Hudson to see what can be learned from a recent Second Circuit decision affirming personal liability for the owner of a supermarket chain that was found to have violated the Fair Labor Standards Act. ■

# A Survey of the Same-sex Marriage Landscape for New Jersey Employers Following *United States v. Windsor* and *Garden State Equality v. Dow*

by Joseph J. Lazzarotti, Douglas J. Klein, and Peter Seltzer

Following a rather unconventional path, New Jersey recently became the 14th state to legalize same-sex marriage. Having authorized civil unions in 2007, the New Jersey Legislature passed a bill legalizing same-sex marriage in Feb. 2012. However, Governor Chris Christie vetoed the legislation. Litigants then mounted challenges against New Jersey's same-sex marriage prohibition in state court. Prior to Sept. 2013 these efforts were unsuccessful.

The landscape changed dramatically on June 26, 2013, when the U.S. Supreme Court issued a monumental decision in *United States v. Windsor*, striking down as unconstitutional the provision of the Defense of Marriage Act (DOMA) defining marriage under federal law as between one man and one woman.<sup>1</sup> In response to *Windsor* and at the direction of President Barack Obama, federal agencies began churning out new regulatory guidance on rights and benefits for same-sex couples.<sup>2</sup> *Windsor* and federal agency responses provided fresh ammunition for those challenging New Jersey's same-sex marriage ban in court.

*Windsor* triggered a Sept. 27, 2013, decision by Superior Court Judge Mary C. Jacobson, Law Division, Mercer County, in *Garden State Equality v. Dow*.<sup>3</sup> In light of *Windsor*, the court found New Jersey's denial of marriage to same-sex couples violated equal protection rights under the New Jersey Constitution, despite the right to enter into civil unions. The court directed New Jersey to permit same-sex couples to marry by Oct. 21, 2013.

Significant, rapid developments followed. First, New Jersey initiated an appeal of the decision ordering the state to recognize gay marriage by Oct. 21, 2013. New Jersey also sought a temporary stay of the Oct. 21 deadline pending the appeal. However, on Oct. 18, 2013, the New Jersey Supreme Court unanimously denied the state's motion to stay the lower court's decision pending appeal. In response, Governor Christie decided to drop the state's appeal altogether on Oct. 21, leaving the same-sex marriage decision unopposed in New Jersey courts.

*Windsor* and the ensuing developments have meaningful implications for New Jersey workplaces. In order for employers to understand the developing post-*Windsor* landscape, it is useful to analyze the history of same-sex couples' legal status in New Jersey, including the DOMA, *Windsor*, and *Garden State Equality*.

## Background

### The DOMA

President Bill Clinton signed the DOMA into law in Sept. 1996. Section 2 of the DOMA provides that no state is required to give effect to any same-sex marriage recognized in another state.<sup>4</sup> Under Section 3 of the DOMA, "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."<sup>5</sup>

### *United States v. Windsor*

Edith Windsor legally married her same-sex spouse, Thea Spyer, in Canada in 2007.<sup>6</sup> The couple resided in New York, which recognized their marriage as valid.<sup>7</sup> When Spyer died in 2009, Windsor sought to claim the federal estate tax exemption for a surviving spouse.<sup>8</sup> However, pursuant to Section 3 of the DOMA, the federal government did not recognize Windsor and Spyer as legally married, and therefore Windsor did not qualify for the estate tax exemption.<sup>9</sup> As a result, Windsor had to pay more than \$363,000 in federal estate taxes on her inheritance of Spyer's estate.<sup>10</sup> Under federal law this tax would not have been levied against Windsor if Spyer were a man.

Windsor brought suit in federal court to challenge the DOMA. She claimed she was unconstitutionally discriminated against on the basis of her sexual orientation. The U.S. District Court for the Southern District

of New York granted summary judgment in Windsor's favor, holding that Section 3 of the DOMA violated the equal protection clause of the U.S. Constitution.<sup>11</sup> The Court of Appeals for the Second Circuit upheld the district court's decision on Oct. 18, 2012.<sup>12</sup> On Dec. 7, 2012, the U.S. Supreme Court granted *certiorari*.<sup>13</sup>

In a 5-4 decision issued on June 26, 2013, the U.S. Supreme Court affirmed the Second Circuit's finding in favor of Windsor, holding that Section 3 of the DOMA violated the guarantee of equal protection under the Fifth Amendment (Section 2 of the DOMA was not challenged in the case before the Supreme Court).<sup>14</sup> The Court ruled the equal protection guarantee of the 14th Amendment (incorporated into the due process clause of the Fifth Amendment) prohibits the federal government from refusing to recognize same-sex marriages entered into under the law of a state.<sup>15</sup> The Court relied primarily on the fact that states have historically defined marriage for themselves, and found that because New York chose to protect same-sex relationships by allowing same-sex couples to marry, it was an equal protection violation for the federal government to make unequal a subset of state-sanctioned marriages.<sup>16</sup> Accordingly, the Court struck down Section 3 of the DOMA. As a result, there is no longer any federal law, regulation, or other administrative guidance defining marriage as between a man and a woman.

### Federal Response to *Windsor*

Immediately after the Supreme Court decided *Windsor*, President Obama directed the United States attorney general to work with other Cabinet members to "review all relevant federal statutes to ensure [the *Windsor*] decision, including its implications for Federal benefits and obligations, [wa]s implemented swiftly and smoothly."<sup>17</sup>

Federal agencies overseeing statutes and regulations covering employees and the workplace began issuing post-*Windsor* guidance in the weeks that followed. While New Jersey employers continue to await additional post-*Windsor* federal agency guidance, to date agencies that have issued rulings generally have limited the extension of benefits to same-sex couples in legally recognized marriages, and not to same-sex couples in civil unions and domestic partnerships.

For example, in a July 3, 2013, ruling, the Office of Personnel Management stated it did not intend to extend coverage for health benefits to civil union or domestic partners of civilian federal employees.<sup>18</sup> Similarly, the United States Department of Labor, Wage and

Hour Division, charged with administering several fair employment laws such as the Family and Medical Leave Act (FMLA), the federal act which affords job-protected leave for certain family and medical reasons, updated Fact Sheet 28f, which details qualifying reasons for leave under the FMLA.<sup>19</sup> In light of *Windsor*, the division announced that for purposes of determining entitlement to FMLA benefits, a "spouse" is "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."<sup>20</sup>

On Aug. 29, 2013, the Internal Revenue Service (IRS) ruled that same-sex couples who are legally married in jurisdictions that recognize their marriages will be treated as married for all federal tax purposes, regardless of whether the couple currently lives in a jurisdiction that recognizes same-sex marriage or not.<sup>21</sup> The ruling applies to all federal tax provisions where marriage is a factor, such as filing status, personal and dependency exemption claims, standard deductions, employee benefits provisions, IRA contributions, and earned income tax credit claims.<sup>22</sup> The ruling does not apply to registered domestic partnerships, civil unions, or similar formal relationships recognized under state law.<sup>23</sup>

Then, on Sept. 18, 2013, the U.S. Department of Labor (DOL) issued a technical release.<sup>24</sup> The release provides that for purposes of the DOL's regulatory authority to interpret the Employee Retirement Income Security Act (ERISA), the federal law governing employee benefit plans, where the term "spouse" is used, "spouse" will be read to mean individuals who are lawfully married under any state law, including same-sex spouses, and without regard to whether their state of domicile recognizes same-sex marriage.<sup>25</sup> Therefore, for example, an employee benefit plan participant who marries a person of the same sex in a jurisdiction and under a plan that recognizes same-sex marriage will continue to be treated as married with respect to federal employee benefits laws such as COBRA, even if the couple moves to a state that does not recognize same-sex marriage. The DOL also stated that the terms "spouse" and "marriage" do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals in these relationships have the same rights and responsibilities as those individuals who are married under state law.<sup>26</sup>

## History of Legal Rights for Same-sex Couples in New Jersey

To understand the developing landscape of same-sex marriage in New Jersey post-*Windsor*, it is helpful to look back at the legal status of same-sex couples in the state and challenges to the prohibition against same-sex marriage under New Jersey law.

### Domestic Partnership Act of 2004

In 2004, New Jersey enacted the Domestic Partnership Act, which provides a limited number of spousal rights and benefits to committed same-sex couples.<sup>27</sup> Among the rights first granted to same-sex couples upon enactment of the Domestic Partnership Act who meet the domestic partnership requirements were: 1) statutory protection against various forms of discrimination (including under the New Jersey Law Against Discrimination);<sup>28</sup> 2) visitation and decision making rights in healthcare;<sup>29</sup> and 3) limited health and pension benefits provided in the same manner as spouses.<sup>30</sup> However, the Domestic Partnership Act did not grant same-sex couples a full equivalency of rights, benefits and statuses afforded to heterosexual couples in civil marriages. For instance, under the Domestic Partnership Act, same-sex couples were not granted: 1) joint property ownership rights;<sup>31</sup> 2) survivor benefits such as under the New Jersey Workers' Compensation Act;<sup>32</sup> 3) tax deductions for spousal medical expenses;<sup>33</sup> and 4) the testimonial privilege.<sup>34</sup>

Based on subsequent legislation, presently New Jersey law only permits couples, either same-sex or mixed-gender, 62 years and older to enter domestic partnerships.

### *Lewis v. Harris*

In 2006, in *Lewis v. Harris*, a group of same-sex plaintiffs sued New Jersey officials seeking a declaration that New Jersey's ban on same-sex marriage violated their equal protection rights under the New Jersey Constitution, as the Domestic Partnership Act still did not provide them equivalent rights to opposite-sex couples, including numerous important familial rights.<sup>35</sup> As a result, the plaintiffs also sought injunctive relief compelling state officials to grant them marriage licenses.<sup>36</sup> The New Jersey Supreme Court ultimately heard the case and held that under the New Jersey Constitution, same-sex couples should be entitled to the same rights and benefits under state law as lawfully married heterosexual couples. However, the Court refused to carve out a right for same-sex couples to enter into civil marriages under New Jersey law, instead deferring to the Legislature to

either amend state law to include same-sex couples in the definition of "marriage," or to draft parallel legislation that would grant same-sex couples the exact same rights as those of married heterosexual couples.<sup>37</sup>

### Civil Union Act of 2007

The Legislature did not legalize same-sex marriage in response to *Lewis*. Instead, the *Lewis* decision spurred New Jersey to pass the Civil Union Act.<sup>38</sup> Effective Feb. 19, 2007, the Civil Union Act entitled qualifying same-sex couples to identical legal rights and financial benefits under New Jersey law as those available to married heterosexual couples. These include, but are not limited to: 1) entitlement to benefits under the New Jersey Family Leave Act; 2) spousal coverage under insurance policies; and 3) the right to claim a partner as a dependent for New Jersey state tax filing.<sup>39</sup>

In conjunction with the enactment of the Civil Union Act, the New Jersey attorney general (Stuart Rabner, now chief justice of the New Jersey Supreme Court) issued a formal opinion letter explaining how same-sex relationships formed under the laws of other jurisdictions would be treated in New Jersey after implantation of the Civil Union Act.<sup>40</sup> The guidance set forth in the formal opinion letter continues to be standard operating procedure in New Jersey for civil unions.

Pursuant to the Civil Union Act, the nature of rights conferred to a same-sex couple under the laws of the jurisdiction in which they were married, and not the name the other jurisdiction labeled the relationship, determines how New Jersey law treats the couple once they reside in New Jersey.<sup>41</sup> Pre-existing New Jersey domestic partnerships remained in effect. However, domestic partners could convert to a civil union, although, as discussed earlier, no couples under 62 years of age could enter into a new domestic partnership once the 2007 Civil Union Act took effect.

Same-sex relationships from other jurisdictions that closely approximate New Jersey domestic partnerships, in which same-sex couples are afforded some but not all rights and obligations of marriage, are treated as domestic partnerships under New Jersey law.<sup>42</sup> Similarly, same-sex relationships from other jurisdictions that provide substantially all the rights and benefits of marriage are treated as civil unions under New Jersey law.<sup>43</sup> However, after the decision in *Garden State Equality* and the U.S. Supreme Court's decision in *Windsor*, same-sex marriages established in other jurisdictions are almost certainly recognized as legal marriages



in New Jersey, but same-sex civil union couples are still only recognized as civil unions.

### *Garden State Equality v. Dow*

In 2011, a lesbian, gay, bisexual and transgender rights organization called Garden State Equality, along with six same-sex couples and their children, filed a new state court action, *Garden State Equality v. Dow*, arguing New Jersey civil unions do not afford the same rights as marriage as required by the New Jersey Supreme Court in *Lewis v. Harris*.<sup>44</sup>

While the parties were in the midst of pre-trial discovery, the U.S. Supreme Court issued its decision in *Windsor*. In response, the *Garden State Equality* plaintiffs made a motion for summary judgment. The plaintiffs asked the court, in light of *Windsor*, to find as a matter of constitutional law, and not on the basis of a factual record, that the equal protection guarantees under the New Jersey Constitution require civil marriage to be extended to New Jersey same-sex couples.<sup>45</sup> They argued that because the federal government now confers spousal benefits to same-sex couples in states that allow them to marry, New Jersey civil union couples have an inferior status to heterosexual married couples because they are denied federal spousal benefits.<sup>46</sup> The state opposed the motion, arguing, among other things, that any deprivation caused to New Jersey civil union couples derives from the actions of the federal government and not state action because New Jersey provides equal marital rights and benefits to same-sex couples through its Civil Union Act consistent with the New Jersey Supreme Court's directive in *Lewis*.<sup>47</sup>

On Sept. 27, 2013, the Law Division granted the plaintiffs' summary judgment motion, finding an equal protection violation under the New Jersey Constitution.<sup>48</sup> Based on the reasoning described below, the court directed New Jersey to permit same-sex couples to marry starting Oct. 21, 2013.<sup>49</sup>

### *Preliminary Considerations*

The Law Division began by considering the viability of the plaintiffs' application, namely whether the case was 'ripe' for a summary judgment decision, whether the plaintiffs had standing to move for summary judgment, and whether there was sufficient state action to raise valid equal protection claims under the New Jersey Constitution.

Ripeness is a judicial doctrine designed to avoid premature adjudication, and considers multiple factors,

including the hardship to parties caused by withholding court consideration.<sup>50</sup> The state argued the plaintiffs' motion was premature because many federal administrative agencies had not announced how they would interpret *Windsor*, and the plaintiffs could not demonstrate the requisite hardship to merit review.<sup>51</sup> However, the court disposed of this argument, finding, among other things, that by the express terms of the Civil Union Act, same-sex partners in New Jersey are not "spouses," and several federal agencies had already determined that benefits will be offered only to legally married couples, and not to civil union couples.<sup>52</sup> As a result, the plaintiffs are currently ineligible for benefits, which the court deemed an "immediate and significant" hardship affecting their constitutional rights.<sup>53</sup>

The Law Division also found the plaintiffs had standing to make a summary judgment motion. Standing refers to a party's entitlement to maintain an action—in order to sue, a plaintiff must demonstrate a sufficient 'stake' in the outcome of the litigation.<sup>54</sup> The state questioned whether the plaintiffs satisfied the standing requirement because none of them had been denied federal benefits directly. The court did not agree. The court was persuaded by certifications Garden State Equality submitted on behalf of four members of the organization. In two of the certifications, signed by federal employees with civil union partners, members stated they were harmed by the decision of the Office of Personnel Management to exclude civil union partners from employee benefits.<sup>55</sup> In the other two certifications, signed by civil union partners in same-sex relationships with non-citizens, the members claimed they were harmed by the recent decision of the United States Department of State not to allow them to sponsor their civil union partners for immigration purposes.<sup>56</sup> In light of this evidence, the court was convinced the plaintiffs demonstrated a sufficient stake in the outcome of the matter as individual plaintiffs and members of Garden State Equality demonstrated "clear and present harm."<sup>57</sup>

Finally, the Law Division found sufficient state action to warrant an equal protection constitutional challenge. Any equal protection claim under the New Jersey Constitution necessarily requires state action.<sup>58</sup> The state made a variety of arguments in opposition to the contention there was sufficient state action. Among others, the state argued that because providing federal benefits is solely the responsibility of the federal government, any alleged deprivation of federal benefits necessarily could not be viewed as state action.<sup>59</sup> The plaintiffs

countered by arguing that the state's action was in establishing the post-*Lewis* two-tiered structure with different labels for same-sex and opposite-sex couples, which, although valid under New Jersey law at the time it was created, now precludes same-sex couples from realizing federal benefits.<sup>60</sup> In essence, the Supreme Court's *Windsor* decision, which extended federal benefits to same-sex married couples, transformed a lawful structure under *Lewis* into impermissible state action.

The Law Division agreed and wrote:

Plaintiffs do not allege here that the State must force the federal government to provide benefits to couples in civil unions. Rather, they allege that the violation of their constitutional rights derives from a state action, that of creating separate systems of marriage and civil unions, dependent upon sexual orientation.<sup>61</sup>

Accordingly, the court proceeded to address the underlying equal protection violation allegations.

#### *Equal Protection Violation Finding*

The Law Division began by recognizing under *Lewis* "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution."<sup>62</sup> The state made several arguments in the face of the plaintiffs' contention that post-*Windsor*, same-sex couples in New Jersey are denied equal rights to federal benefits because of New Jersey's prohibition against same-sex marriage. For example, the state argued that federal agencies that have issued post-*Windsor* guidance stating same-sex benefits would be extended only to same-sex married couples misread *Windsor*, and civil union couples actually are entitled to federal spousal benefits under *Windsor*.<sup>63</sup> The state also argued that since domestic relations is an area the federal government historically has regarded as the "exclusive province of the States" and because the Civil Union Act requires civil union couples to receive the same rights and benefits as married couples, the federal government must recognize a civil union as a marriage and partners of that union as spouses for purposes of federal benefits.<sup>64</sup> The court was not persuaded.

The court found that even if the harm to New Jersey same-sex couples could be cured by the federal government recognizing New Jersey civil unions as equivalent to marriage for purposes of federal marital

rights, privileges and benefits, it had no jurisdiction to order such a remedy.<sup>65</sup> In light of *Windsor* and *Lewis*, the court found the plaintiffs showed civil union partners in New Jersey were denied equal access to federal benefits. This, in turn, the court ruled, meant the right to marry should be extended to same-sex couples under the equal protection guarantee of the New Jersey Constitution.

Accordingly, the Law Division entered final judgment in favor of the plaintiffs on the New Jersey constitutional claims. The court gave the state until Oct. 21, 2013, to recognize same-sex marriage.

#### **The Aftermath of *Garden State Equality v. Dow***

The state sought a stay of the Law Division's order directing New Jersey to recognize same-sex marriage pending appeal.<sup>66</sup> On Oct. 10, 2013, the Law Division denied the state's motion for a stay. The court found, among other things, that a stay was inappropriate where the state could not establish a likelihood of success of its appeal of the court's summary judgment decision, and because the plaintiffs would suffer many hardships if the stay were issued.<sup>67</sup> On Oct. 11, the state made an emergent motion to the New Jersey Supreme Court for a stay of the lower court's order directing the state to begin recognizing same-sex marriages on Oct. 21, 2013.<sup>68</sup> The state also moved for direct certification to the New Jersey Supreme Court of the equal protection violation finding, skipping Appellate Division review.<sup>69</sup> The state argued that "[t]o overhaul such an ancient social institution prematurely, precipitously, or in a manner ultimately deemed unnecessary would injure not only the public interest, but the State that represents this interest."<sup>70</sup>

On Oct. 18, 2013, the Supreme Court denied the state's motion for a stay of the Law Division's order to recognize same-sex marriage by Oct. 21.<sup>71</sup> It found the state was not entitled to a stay for several reasons, including because the state did not demonstrate a reasonable probability of success on the merits of the underlying appeal.<sup>72</sup> In reaching its decision, the Court adopted much of the Law Division's reasoning with respect to New Jersey civil union couples being denied access to federal benefits post-*Windsor*.<sup>73</sup> The Court agreed to hear the appeal, but not until Jan. 2014. Therefore, pursuant to the Law Division's Sept. 27, 2013, order, effective Oct. 21, 2013, New Jersey was required to begin recognizing same-sex marriage, pending outcome of the *Garden State Equality* appeal in 2014.

However, on Oct. 21, 2013, the state withdrew its appeal.<sup>74</sup> No formal explanation was provided to the Court. Accordingly, same-sex marriage is legal in New Jersey, and is not subject to any challenge.

### **New Jersey Employers and the Impact of *Windsor* and *Garden State Equality***

As a result of the *Windsor* and the *Garden State Equality* decisions, same-sex marriage is legal in New Jersey. After *Windsor* and *Garden State Equality*, most of the limitations on the extension of benefits to employees in committed same-sex relationships have been lifted.

Pursuant to President Obama's directive, federal agencies have begun issuing post-*Windsor* guidance. Some of the changes already impacting the workplace are described below. New Jersey employers should heed this guidance unless and until it is successfully challenged. Additional guidance is expected.

It remains to be seen whether challenges are mounted against federal agencies such as the DOL, whose post-*Windsor* guidance to date defines the terms "spouse" and "marriage" as not including individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. Where a federal agency has not issued post-*Windsor* guidance or where guidance has been limited, New Jersey employers should proceed with caution if denying benefits to employees in civil unions or domestic partnerships.

### **What is the Effect on Group Health Plans?**

Currently, there is no federal law mandating group health plan coverage based on marital status. ERISA generally preempts state law.<sup>75</sup> Therefore, a state law definition of spousal status generally will not be relevant in the context of group health plan coverage, unless that definition is part of the state law that regulates insurance.<sup>76</sup> That is, if a state law that regulates insurance requires health insurance policies issued in the state to cover same-sex spouses if the policy also covers opposite-sex spouses, that law generally will not be preempted by ERISA. Employers sponsoring fully insured group health plans are subject to the state regulation of insurance governing their plans. On the other hand, employers with plans that are self-funded,

and not subject to state insurance laws, still appear to be able to exclude same-sex spouses from eligibility under their health plans regardless of state law if they choose to do so, and provided they are careful in drafting plan eligibility language.

As addressed above, the DOL's Sept. 18, 2013, technical release provided that for purposes of its regulatory authority in interpreting ERISA, where the term "spouse" is used, "spouse" will be read to refer to any individuals who are lawfully married under any state law, including same-sex spouses, and without regard to whether their state of domicile recognizes same-sex marriage.<sup>77</sup> Accordingly, for ERISA purposes, an employee benefit plan participant who marries a person of the same gender in a jurisdiction that recognizes same-sex marriage will continue to be treated as married even if the couple moves to a state that does not recognize same-sex marriage. The DOL did not address the question of whether this guidance will be applied retroactively.

The DOL also stated that the terms "spouse" and "marriage" do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights as those individuals who are married under state law.<sup>78</sup> However, New Jersey requires that insurance policies provide equal coverage or benefits to same-sex couples that have been married in another state or entered into a New Jersey civil union, and therefore a New Jersey employer that purchases an insurance policy offering group coverage to spouses is bound to provide spousal benefits to same-sex couples.<sup>79</sup>

### **What is the Effect on FMLA Leave?**

As outlined above, the FMLA generally requires employers with 50 or more employees to provide unpaid leave to employees for qualified medical and family reasons.<sup>80</sup> The FMLA defines a "spouse" as a "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides."<sup>81</sup> Therefore, the law from the employee's home state dictates whether the employee is a spouse for purposes of qualifying for FMLA leave, even though FMLA benefits are federal ones.

Accordingly, same-sex couples residing in states that recognize same-sex marriage are entitled to benefits

under the FMLA, while same-sex couples residing in states that do not recognize same-sex marriage are not entitled to these benefits (before Oct. 21, 2013, this was the case in New Jersey). Although New Jersey now recognizes same-sex marriage, New Jersey employers should take care in evaluating FMLA benefits for employees who live in another state that does not recognize same-sex marriage. For example, a New Jersey employer may have some employees working in the same location who reside in New Jersey who are eligible for FMLA leave, and other employees who reside in Pennsylvania who would be ineligible for FMLA benefits, since same-sex marriage is not currently recognized in Pennsylvania. For New Jersey same-sex couples still in civil unions, they would not be entitled to FMLA benefits; however, New Jersey employers also must bear in mind that at a minimum, they are still obligated to provide benefits under the New Jersey Family Leave Act.<sup>82</sup> New Jersey employers should make sure they remain aware of employees' marital status, as many same-sex couples in civil unions may not immediately enter into marriages for a variety of reasons, including qualification for income-based subsidies, such as food stamps, Medicaid, or even federal student loans.

### What are the Federal Tax Implications?

As addressed above, on Aug. 29, 2013, the IRS ruled that same-sex couples who are legally married in jurisdictions that recognize their marriages will be treated as married for all federal tax purposes, regardless of whether the couple currently lives in a jurisdiction that recognizes same-sex marriage or not.<sup>83</sup> Of particular import for New Jersey employers, the IRS ruling provided that as of Sept. 16, 2013, employers must recognize same-sex spouses for federal payroll tax purposes, including with respect to the taxation of employer-provided group health coverage and other fringe benefits, and implement the ruling with respect to qualified retirement plan spousal protections and benefits, including treating a same-sex spouse as a spouse for payment of death benefits and qualified joint and survivor annuity requirements. Therefore, based on the outcome of *Garden State Equality*, employers must be in compliance with the IRS ruling now.

The IRS has also issued additional guidance outlining administrative procedures to correct overpayments of employment taxes paid in 2013 and any prior periods open under the statute of limitations for employer-

provided spousal benefits that are excludable due to marital status.

New Jersey employers should also note that the IRS stated it will be issuing further guidance on the retroactive application of *Windsor* to benefit and retirement plans, and on plan amendment requirements (including timing of required amendments).<sup>84</sup> The ruling did not address whether employers will be required to take any retroactive actions for tax and benefit treatment of same-sex marriages prior to Sept. 16, 2013.<sup>85</sup>

### Takeaway

The rights of same-sex couples in the workplace in New Jersey depend on what type of legally recognized relationship they choose. After *Windsor* and *Garden State Equality*, a same-sex couple's marriage is recognized and permitted in New Jersey. Married same-sex couples are entitled to the same federal and state benefits as heterosexual married couples. If a same-sex couple enters into a civil union, despite *Windsor*, at least based on federal administrative agency guidance to date, the couple still may not be afforded equal benefits under federal law—although the couple is entitled to equal benefits as heterosexual married couples pursuant to the New Jersey Civil Union Act. New Jersey same-sex domestic partnership couples are still not entitled to federal spousal benefits and benefits under New Jersey law remain limited.

As the post-*Windsor* landscape unfolds, New Jersey employers should consider the extent to which they presently extend benefits to employees in committed same-sex relationships and the impact of *Windsor* and *Garden State Equality*. Employers continue to await additional guidance from federal agencies on how laws and regulations impacting workplace benefits will be administered post-*Windsor*. Employers are well advised to confer with legal counsel and qualified benefits advisors to ensure legal compliance and address any nuances between federal and state law where applicable. ■

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## Endnotes

1. 570 U.S. \_\_\_\_, 133 S. Ct. 2675 (2013).
2. See Press Release, Office of the White House Press Secretary, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013) [hereinafter Statement of the President], available at <http://www.whitehouse.gov/doma-statement> (last visited Oct. 17, 2013).
3. *Garden State Equality v. Dow*, Docket No. MER-L-1729-11, slip op (Law Div. Sept. 27, 2013). The plaintiffs named then New Jersey Attorney General Paula Dow as a defendant in her official capacity along with the commissioner of the New Jersey Department of Human Services, Jennifer Velez, and the commissioner of the New Jersey Department of Health and Senior Services, Mary E. O'Dowd, also in their official capacities.
4. 29 U.S.C. § 1738C (1996).
5. 1 U.S.C. § 7 (1996).
6. 133 S. Ct. at 2682.
7. *Id.* at 2683.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).
12. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).
13. *United States v. Windsor*, 2012 U.S. LEXIS 9413 (2012).
14. 570 U.S. \_\_\_\_, 133 S. Ct. 2675 (2013).
15. *Id.* at 2705-06.
16. See *Id.* at 2709-10.
17. Statement of the President, *supra* note 2.
18. Federal Employee Health Benefit Program Carrier Letter No. 2013-20, from John O'Brien, Director of Healthcare and Insurance, OPM to All Carriers (July 3, 2013), available at <http://www.opm.gov/healthcare-insurance/healthcare/carriers/2013/2013-20.pdf> (last visited Oct. 17, 2013).
19. United States Department of Labor, Wage and Hour Division, *Fact Sheet 28F: Qualifying Reasons for Leave under the Family and Medical Leave Act* (2013), available at <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (last visited Oct. 17, 2013).
20. *Id.*
21. Rev. Rul. 2013-17 (2013) at 10.
22. *Id.* at 13.
23. *Id.*
24. United States Department of Labor, Technical Release No. 2013-04 (Sept. 18, 2013) [hereinafter DOL Technical Release 2013-04], available at <http://www.dol.gov/ebsa/newsroom/tr13-04.html> (last visited Oct. 18, 2013).
25. *Id.*
26. *Id.*
27. N.J.S.A. 26:8A-1, *et seq.*
28. N.J.S.A. 26:8A-2(d).
29. N.J.S.A. 26:2H-12.22.
30. N.J.S.A. 26:8A-2(e).
31. N.J.S.A. 46:3-17.2.
32. N.J.S.A. 34:15-13.
33. N.J.S.A. 54A:3-3(a).
34. N.J.S.A. 2A:84A-17(2).
35. 188 N.J. 415 (2006).
36. *Id.*
37. *Id.* at 463.
38. N.J.S.A. 37:1-28, *et seq.*
39. *Id.*
40. Office of Attorney General, Formal Opinion No. 3-2007 (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.
41. *Id.* at 2.
42. *Id.*
43. *Id.*
44. Complaint, *Garden State Equality v. Dow*, Docket No. MER-L-1729-11 (Law Div. June 29, 2011).
45. Pltf. Br. In Supp. of Mot. for Summ. J., *Garden State Equality v. Dow*, Docket No. MER-L-1729-11 (Law Div. July 3, 2013), available at <http://www.judiciary.state.nj.us/samesex/gardenstate.pdf> (last visited Oct. 17, 2013).
46. *Id.* at 20-21.
47. *Id.*
48. *Garden State Equality v. Dow*, Docket No. MER-L-1729-11, slip op (Law Div. Sept. 27, 2013). The equal protection guarantees the New Jersey Constitution provides are set forth at Article I., Paragraph I, and provide that, “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. Const., Art. I, Para. I.

49. *Id.*
50. *Id.* at 21.
51. *Id.* at 23-24.
52. *Id.* at 24-30.
53. *Id.* at 28.
54. *Id.* at 30.
55. *Id.* at 12.
56. *Id.*
57. *Id.* at 31.
58. *Id.* at 36.
59. *Id.* at 35.
60. *Id.*
61. *Id.* at 40.
62. *Id.* at 43 (citing *Lewis v. Harris*, 188 N.J. 415, 423 (2006)).
63. *Id.* at 46.
64. *Id.* at 47.
65. *Id.* at 48.
66. Motion for a Stay, *Garden State Equality v. Dow*, Docket No. MER-L-1729-11 (Law Div. Oct. 1, 2013) available at [http://www.judiciary.state.nj.us/samesex/Motion\\_to\\_Stay.pdf](http://www.judiciary.state.nj.us/samesex/Motion_to_Stay.pdf) (last visited Oct. 27, 2013).
67. Statement of Reasons Supporting the Denial of the State's Application for a Stay, *Garden State Equality v. Dow*, Docket No. MER-L-1729-11 (Law Div. Oct. 10, 2013), available at [http://www.judiciary.state.nj.us/samesex/Decision\\_Stay.pdf](http://www.judiciary.state.nj.us/samesex/Decision_Stay.pdf) (last visited Oct. 17, 2013).
68. Motion, *Garden State Equality v. Dow*, Docket No. A-0521-13 (App. Div. Oct. 11, 2013), available at <https://www.judiciary.state.nj.us/samesex/GSEappellatBriefEmergentStay.pdf> (last visited Oct. 18, 2013). The emergent motion was made to the Superior Court of New Jersey, Appellate Division. However, because the New Jersey Supreme Court accepted jurisdiction of the case on appeal on Oct. 11, 2013, the Supreme Court would ultimately decide the emergent application for a stay of Judge Jacobson's order and not the Appellate Division.
69. Motion, *Garden State Equality v. Dow*, Docket No. 073328 (N.J. Oct. 8, 2013) available at <https://www.judiciary.state.nj.us/samesex/AG%20motion%20for%20direct%20cert%2010-07-13.pdf> (last visited Oct. 17, 2013).
70. *Id.* at 7.
71. Decision and Order, *Garden State Equality v. Dow*, Docket No. 073328 (N.J. Oct. 18, 2013), available at <https://www.judiciary.state.nj.us/samesex/Supreme%20Court%20Opinion%20on%20Stay%20Motion.pdf>.
72. *Id.* at 15.
73. See, e.g., *Id.* at 14-16.
74. Dismissal of Appeal *Garden State Equality v. Dow*, Docket No. 073328 (N.J. Oct. 21, 2013), available at <https://www.judiciary.state.nj.us/samesex/AG%20Withdrawal%20of%20Appeal%20102113.pdf> (last visited Oct. 27, 2013).
75. 29 U.S.C. § 1144(a) *et seq.*
76. *Id.* at (b)(2).
77. DOL Technical Release 2013-04, *supra* note 24.
78. *Id.*
79. N.J.S.A. 37:1-28, *et seq.*
80. 29 C.F.R. § 825.104(a).
81. 29 C.F.R. § 825.122(a).
82. N.J.S.A. 34:11B-1, *et seq.*
83. Rev. Rul. 2013-17 (2013) at 10.
84. *Id.* at 14-15.
85. *Id.* at 13.

# ***Battaglia v. UPS:*** **A Lesson on Proving Protected Activity and Damages Under the LAD and CEPA**

by Omar A. López

The New Jersey Supreme Court, in *Battaglia v. United Postal Service*,<sup>1</sup> continued its expansive interpretation of the New Jersey Law Against Discrimination<sup>2</sup> (LAD), while more strictly applying the language of the Conscientious Employee Protection Act<sup>3</sup> (CEPA). Plaintiffs will likely benefit from the Court's unanimous holding under the LAD, and should take heed of the Court's warnings regarding jury charges under both acts. But perhaps the most important aspect of the decision deals with proving emotional distress damages under the LAD. The facts of this case are intricate and warrant examination.

## **The Facts**

In 2001, the plaintiff, Michael Battaglia, worked as a center manager at a United Postal Service (UPS) facility, where he supervised Wayne DeCraine, a supervisor.<sup>4</sup> In his position, Battaglia overheard DeCraine making vulgar and derogatory comments about women, prompting Battaglia to require DeCraine to write himself up in accordance with UPS policy. During this time, Battaglia also verbally admonished DeCraine for remarks he made regarding another female worker.<sup>5</sup> In 2003, Battaglia was offered and accepted a promotion to division manager, although he later turned down the position due to illness.<sup>6</sup> After UPS filled his original position during his absence, Battaglia accepted a demotion and transfer. In 2004, DeCraine became Battaglia's supervisor.<sup>7</sup>

Battaglia witnessed DeCraine, a previous subordinate who was now Battaglia's division manager, making inappropriate sexual comments, including vulgar references about women, their anatomy, and his desire to engage in sexual relations with women. Battaglia even overheard DeCraine having a discussion regarding his preferred pornographic websites.<sup>8</sup> Battaglia complained to DeCraine about the behavior, saying DeCraine would "[get] himself in trouble" and that his actions were a disservice to the employees he was supposed to be lead-

ing.<sup>9</sup> Notably, DeCraine's comments did not occur in the presence of any female employees, nor did Battaglia allege that female employees overheard the remarks.<sup>10</sup> Battaglia also confronted DeCraine about the propriety of an alleged relationship DeCraine had with a female employee. Despite Battaglia's complaints, DeCraine persisted in his conduct.<sup>11</sup> In addition, on one occasion in 2004, Battaglia told DeCraine that other employees were imbibing alcohol during lunch, failing to return to work after such lunches, and abusing corporate credit cards.<sup>12</sup> Although his original complaints did not reference fraud, Battaglia contended at trial that this conduct amounted to fraud.<sup>13</sup>

Battaglia then sent an anonymous letter to human resources, containing admittedly vague allegations of inappropriate language, sexual relationships among employees, reports of employees drinking at lunch, as well as complaints about management leadership styles.<sup>14</sup> At trial, Battaglia asserted that UPS never took action regarding the letter, even though DeCraine and others made clear they were aware of the letter.<sup>15</sup> Battaglia denied being the author. However, UPS's investigator later determined Battaglia was the author and shared this information with management. In Jan. 2005, Battaglia was demoted again. According to UPS, performance problems, a history of belligerence and obsessive behavior, and a breach of confidentiality were the cause of Battaglia's demotion.<sup>16</sup>

## **Procedural History**

Battaglia filed a superior court complaint that included LAD and CEPA causes of action, asserting the true cause of the demotion was retaliation for Battaglia's complaints under either act.<sup>17</sup> In 2009, the jury returned a verdict on both the CEPA and LAD causes of action, awarding \$500,000 in economic damages and \$500,000 for emotional distress, although the emotional distress award was remitted to \$205,000 upon UPS's motion.

Following cross-appeals to the Appellate Division, the appellate court affirmed the CEPA award, but reversed the award regarding the LAD and the entry of emotional distress damages.<sup>18</sup> After motions to reconsider were denied, both parties petitioned for *certiorari* to the New Jersey Supreme Court, which was granted.

### The LAD Claim

Justice Helen Hoens, writing for a unanimous Court, first reversed the Appellate Division's decision regarding the LAD verdict. The Court began by reaffirming that the LAD should be interpreted to effectuate its broad remedial purposes of "eradicating the cancer of discrimination."<sup>19</sup> In addition, the LAD's anti-retaliation provision makes it illegal "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act[.]"<sup>20</sup> In LAD retaliation claims, the employee must prove the employee engaged in a protected activity known to the employer; the employee was subjected to an adverse employment decision; and, there is a causal link between the protected activity and the adverse employment action.<sup>21</sup> Further, the protected activity—a complaint about discriminatory behavior or hostile work environment—must have been made reasonably and in good faith.<sup>22</sup> Conversely, an "unreasonable, frivolous, bad-faith or unfounded" complaint is insufficient to establish liability for retaliation under the LAD.<sup>23</sup>

According to the Court, the Appellate Division erred when it decided that, because Battaglia's complaints could not make out a cognizable claim of discrimination against female UPS employees, Battaglia could not claim protection under the LAD's anti-retaliation provisions after his complaints.<sup>24</sup> In overturning the appellate court, the Court held that, in order to engage in protected activity, the LAD does not require a showing of the existence of a separate, identifiable victim of actual discrimination, noting that such a narrow holding would not advance the broad purposes of the LAD. Rather, the Court held that a plaintiff need only prove he held a good faith belief the conduct complained of violates the LAD.<sup>25</sup> Plaintiffs need not understand the intricacies of the LAD in order to be successful in a claim for retaliation under the statute.<sup>26</sup> Rather, a plaintiff holding a reasonable and good faith belief that the complained-of conduct violates discrimination laws, even if the belief is technically inaccurate, is still protected by the LAD.

Notably, the opinion highlights a flawed investigation by UPS—one that consisted of an investigator's limited efforts and reliance on the investigator's preexisting beliefs rather than an investigation into the substance of Battaglia's complaints. With respect to the investigation, the Court noted that "as the jury concluded, the corporate response [consisted of] action against the individual who complained."<sup>27</sup> The Court's rebuke should dissuade employers from conducting sham investigations into complaints under the LAD. Concluding that the LAD claim had improperly been reversed, the Court reinstated the LAD verdict.

### Emotional Distress Damages Under the LAD

Next, the Court considered whether a LAD plaintiff could recover damages for future emotional distress without an expert opinion. In addressing this issue, the Court reaffirmed that the proofs required to prove emotional distress under either statute are far less than that required under tort-based claims, such as intentional infliction of emotional distress, as "the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments."<sup>28</sup> However, the Court, agreeing with the Appellate Division, found that the lay evidence presented by Battaglia on the issue of permanent emotional distress was insufficient to allow damages for future emotional distress. Although the emotional injury suffered by "the LAD plaintiff...is obvious, once remedied through a verdict, any claim that those effects will endure so as to support a future award must be proven by credible, competent evidence lest that verdict be the product of speculation."<sup>29</sup>

As a separate basis for upholding the reversal of the emotional distress award, the Court found that the charge instructing the jury to consider the plaintiff's age and life expectancy in determining damages improperly encouraged the jury to award future emotional distress damages.<sup>30</sup> Notably, the Court made no mention of whether the plaintiff actually sought prospective emotional distress damages. Thus, the holding could amount to a sweeping prohibition against a jury considering a plaintiff's age and life expectancy without an expert opinion, whether or not future emotional distress damages are sought or awarded. Nevertheless, the Court left undisturbed prior precedent that a plaintiff may recover statutorily recognized emotional distress damages under both the LAD and CEPA without expert testimony.<sup>31</sup>



## The CEPA Claim

The Court next addressed the fraud-based CEPA claim. CEPA is designed to protect employees who blow the whistle on illegal or unethical activity committed by their employers or co-employees, even in the absence of employer complicity.<sup>32</sup> As UPS demoted but did not discharge Battaglia, the Court recognized that such action still qualifies as a retaliatory action under CEPA.<sup>33</sup> The first element of proving a fraud-based CEPA claim requires that “[a] plaintiff must demonstrate that... he or she reasonably believed that his or her employer’s conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy[.]”<sup>34</sup> However, a plaintiff need not prove an actual violation of the law, rule, regulation or clear mandate of public policy in order to succeed on such a claim.<sup>35</sup>

First, the Court found that Battaglia did not hold a reasonable belief the actions complained of were fraudulent. Battaglia’s complaints about extended lunches, consuming alcohol at lunch, and minor credit card misuse did not rise to the level protected by CEPA.<sup>36</sup> The Court held that CEPA plaintiffs must meet the statutory requirements of protected activity—even if not required to prove actual fraud—as the act does not protect complaints of minor or trivial infractions of internal company policy.<sup>37</sup>

Next, the Court turned to the portion of the jury charge that described the factual conduct the jury must find in order to return a CEPA verdict. The relevant portion of the charge described the conduct as “[deal- ing] with credit cards, [dealing] with meal practices[,] and other things.”<sup>38</sup> The Court held the charge erred for two reasons. First, the Court held that such a descrip- tion did not sufficiently articulate the plaintiff’s conduct that constituted protected activity. Second, by including the term “and other things,” the Court held that charge allowed for the jury to take into account facts of which

the plaintiff was not aware. By including the offending language, the charge was based on facts “untethered to any belief, reasonable or not, of plaintiff’s.”<sup>39</sup> Thus, because of the lack of “complete and accurate guidance” in the jury charge, the Court held the CEPA verdict could not stand.<sup>40</sup>

## Beyond Battaglia

*Battaglia v. United Postal Service*<sup>41</sup> provides several lessons for employment practitioners, employees, and employers. First, employers would be well-advised to conduct good-faith investigations into complaints of LAD and CEPA violations, and steer away from preconceived plans to terminate. Further, the Court’s decision may be seen as a move toward a zero-tolerance policy against adverse employment action resulting from complaints that refer to discriminatory conduct under the LAD—whether or not individuals of a protected class actually heard the discriminatory comments. Next, when drafting jury charges, attorneys should take care to avoid the inclusion of the plaintiff’s age and life expectancy in the absence of an expert opinion, whether or not future emotional distress damages are actually sought. Further, a jury charge on a fraud-based CEPA claim must accurately specify the plaintiff’s protected activity or risk reversal on appeal. Finally, even if a fraud-based CEPA claim may be properly founded on coworker conduct,<sup>42</sup> such a claim requires more than complaints of drinking alcohol at lunch, taking long lunches, or minor misuse of the company credit card. After all, although CEPA protects whistleblowers, it is not enough to “blow any whistle.”<sup>43</sup> ■

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## Endnotes

1. 214 N.J. 518 (2013).
2. N.J.S.A. 10:5-1 *et seq.*
3. N.J.S.A. 34:19-1 *et seq.*
4. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 527.
5. *Id.* at 527-28.
6. *Id.*
7. *Id.* at 528-29.
8. *Id.* at 529.
9. *Id.*
10. *Id.* at 548.
11. *Id.* at 529.
12. *Id.* at 530.
13. *Id.*
14. *Battaglia v. United Postal Service, Inc.*, No. A-0226-09A2 (App. Div. Aug. 12, 2011) (slip op. at 9-11).

15. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 532.
16. *Id.* at 532-536.
17. In the interest of brevity, the author has omitted a discussion of the breach of contract claim.
18. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 540-41.
19. *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988); *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 604 (1993).
20. N.J.S.A. 10:5-12(d).
21. *See Craig v. Suburban Cablevision Inc.*, 140 N.J. 623, 630-31 (1995).
22. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. 354, 373 (2007).
23. *Id.*
24. *Battaglia v. United Postal Service*, 214 N.J. at 547.
25. *Id.* at 547-48.
26. *Id.* at 549-50.
27. *Id.* at 551.
28. *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).
29. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 554; *but see Lockley v. Turner*, 779 A.2d 1092, 1099 (App. Div. 2001) (“[e]motional turmoil, however, cannot be so neatly categorized; it is not turned on and off like a spigot”), *aff'd in part, rev'd in part on other grounds sub nom. Lockley v. State, Dep't of Corr.*, 177 N.J. 413 (2003).
30. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 554-55.
31. *Id.* at 552.
32. *Estate of Roach v. TRW*, 164 N.J. 568 (2000); *Higgins v. Pascack Valley Hospital*, 158 N.J. 404 (1999).
33. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 556.
34. *Dwonzar v. McDevitt*, 177 N.J. 451, 462 (2003).
35. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 557-58.
36. *Id.* at 560.
37. *Id.* at 560-61.
38. *Id.* at 561.
39. *Id.* at 562.
40. *Id.*
41. 214 N.J. 518.
42. *Estate of Roach v. TRW, Inc.*, 164 N.J. at 612-13.
43. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. at 371.

# New Jersey Supreme Court Issues Long-awaited *Battaglia* Decision and Delivers Good and Bad News for Employers

by Howard M. Wexler and Ephraim J. Pierre

**B**attaglia v. United Parcel Service Inc.<sup>1</sup> presents encouraging news for both plaintiffs and New Jersey employers. Notably, and most encouraging for plaintiffs, the New Jersey Supreme Court effectively lowered the retaliation standard under the New Jersey Law Against Discrimination (LAD), holding that actual discrimination against an identifiable victim is not necessary to establish a retaliation claim. Rather, an employee need only demonstrate a good-faith belief that the complained of conduct violated LAD, in addition to meeting the other prongs of a *prima facie* case of retaliation.

Nevertheless, *Battaglia* addresses many interesting issues for New Jersey employers. First and foremost, the Supreme Court made it clear that “vague and conclusory complaints about trivial or minor matters, or generalized workplace unhappiness”<sup>2</sup> are not protected under New Jersey’s plaintiff-friendly Conscientious Employee Protection Act (CEPA). In addition, the Supreme Court held that expert proof of permanency is required for employees to recover for future emotional distress damages. Lastly, the Supreme Court briefly discussed CEPA waiver provisions, urging trial courts to be careful to prevent plaintiffs from bringing parallel claims under two or more statutes such as LAD and CEPA. As discussed below, collectively, these are welcome rulings for New Jersey employers.

## Factual Background

In *Battaglia*, the plaintiff, a male employee, alleged that on several occasions his supervisor made crude and inappropriate sexual comments about female employees. These remarks were made only in the presence of the plaintiff and other male managerial employees. No gender-based comments were made to or in the presence of any female employees. The plaintiff also alleged that he heard a rumor and observed behavior, which confirmed that his supervisor was engaged in a

sexual affair with a female subordinate. The plaintiff also alleged that he told his supervisor that one or more managers were taking “liquid lunches” or drinking alcohol during lunch and dividing the charges among each manager’s company credit card to avoid spending limits, thus abusing the company credit cards.<sup>3</sup>

The plaintiff wrote an anonymous and somewhat ambiguous letter to human resources complaining about his supervisor. The letter stated, in part, that the “leaders of the district used langu[age] you wouldn’t use with your wors[t] nightmare[.]”<sup>4</sup> which the plaintiff claimed referred to his supervisor’s gender-based comments. The letter also included a general statement about “so many examples [of] poor and unacceptable, unethical behavior[.]”<sup>5</sup> The plaintiff contended the previous statement was a reference to the improper use of company credit cards among company managers.

Human resources found it difficult to investigate the letter’s complaints in detail because the allegations were generalized and vague. After completing the investigation, which resulted in no disciplinary action, a human resources manager happened upon an unrelated document the plaintiff authored. By comparing the two documents, the human resources manager determined the plaintiff wrote the anonymous letter. The human resources manager later shared her belief with a company manager in the plaintiff’s district.

Before and after the plaintiff’s anonymous letter, the plaintiff was also involved in a series of incidents. First, the plaintiff’s supervisor reprimanded him for walking out of a managers’ meeting and behavior seen as undermining his supervision by pointing out the division’s alleged poor performance. Second, a female driver accused the plaintiff of creating a hostile work environment when he yelled at her in an abusive manner after confronting her about an unreported accident. The female driver and the plaintiff’s supervisor also stated that during a grievance meeting, the plaintiff was belligerent.

erent, reducing the driver to tears. Lastly, the plaintiff leaked information relating to an internal manager's meeting, which was viewed as a serious internal security matter. These incidents led company management to conclude the plaintiff was engaging in a pattern of poor behavior. As a result, the plaintiff was later demoted.

The plaintiff filed suit, alleging, among other things, that his demotion was in retaliation for his complaints about his supervisor's gender-based comments. In addition, the plaintiff brought a claim under CEPA, alleging that his demotion was also due to his complaints regarding the misuse of company credit cards. A jury found for the plaintiff on his LAD and CEPA retaliation claims and awarded him \$500,000 in economic damages and \$500,000 in emotional distress damages, which included future damages despite the plaintiff not supporting such damages with any expert testimony during the trial.

An appellate panel<sup>6</sup> reversed the LAD jury verdict and entered judgment for the employer because there was no evidence that female employees heard any gender-based comments, nor any evidence of disparate treatment or a hostile work environment. Regarding the plaintiff's CEPA claim, the appellate panel found there was sufficient evidence for the jury to decide whether the plaintiff believed the alleged credit card use was fraudulent.

### The New Jersey Supreme Court Ruling

The New Jersey Supreme Court disagreed with the appellate panel's understanding that LAD only protects complaints of discrimination against identifiable victims, holding that such a narrow application would disserve the broad and over-arching remedial purpose of LAD. An employee need not prove there is an identifiable victim of actual discrimination when he or she complains about behavior he or she believes is discriminatory. Rather, the Supreme Court stated, "as long as the complaint is made in a good faith belief that the conduct complained of violates the LAD, it suffices for purposes of pursuing a cause of action."<sup>7</sup>

Regarding the plaintiff's CEPA claim, the Supreme Court agreed with the appellate panel's decision to reverse the jury verdict, explaining that under a fraud-based CEPA retaliation claim, an employee must be specific about the complained-of activity. The Supreme Court emphasized that, "CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee

complaints."<sup>8</sup> Vague or generalized complaints, or complaints about minor matters, are insufficient to sustain a retaliation claim, the Supreme Court held. Ultimately, to succeed on a fraud-based CEPA claim, an employee must have reasonably believed the activity complained of was occurring and was fraudulent. Under this reasoning, the Supreme Court found that neither the plaintiff's anonymous letter nor his alleged comment to his supervisor were sufficient.

The Supreme Court went on to discuss the availability of emotional distress damages under LAD. While noting that emotional distress damages are easier to recover under LAD than under general tort law, the Supreme Court held that to recover damages for future emotional distress (those expected to continue after trial), expert proof of the permanency, or those damages, is required. Here, because there was no such expert proof, the Supreme Court held that the trial court inappropriately allowed the jury to speculate regarding the plaintiff's future emotional damages by allowing it to consider the plaintiff's age and life expectancy in awarding future emotional distress damages.

Last, while the parties did not brief the issue, the Supreme Court addressed CEPA's election of remedies provision. Under the provision, a plaintiff waives any alternative remedy that would otherwise be available for the same alleged retaliatory conduct, although not at the expense of pursuing other claims that are substantially independent from a CEPA claim.<sup>9</sup> The Supreme Court noted it is possible to pursue claims under CEPA and LAD. Nonetheless, the Supreme Court noted that the plaintiff's claims could have been brought solely under CEPA. In light of this, the Supreme Court urged trial courts to be careful to prevent plaintiffs from bringing parallel claims under two or more statutes.

### What *Battaglia* Means for New Jersey Employers

While *Battaglia*'s ruling regarding the retaliation standard under LAD is worrisome, New Jersey employers should take heart from the remaining rulings and guidance. Notably, the Supreme Court's pronouncement that an employee must reasonably believe both that the complained-of activity occurred and was fraudulent to sustain a fraud-based CEPA claim is a welcome holding for New Jersey employers who are increasingly having to defend themselves against "vague and conclusory"<sup>10</sup> CEPA claims.

Additionally, the Supreme Court's holding that expert proof of permanency of damages is required in order for an employee to recover for future emotional distress damages is also welcome news for employers. Although emotional distress damages under LAD are easier to recover than under general tort law, the Supreme Court erected an additional hurdle for plaintiffs seeking emotional distress damages for LAD claims. Employers should anticipate that this ruling may result in plaintiffs obtaining experts in all cases to preserve their ability to recover future emotional distress damages at trial.

Last, increased vigilance regarding parallel retaliation claims brought under two or more statutes, namely, CEPA and LAD, will likely affect the way plaintiffs plead and pursue litigation with multiple causes of action tethered to retaliation allegations. Trial courts, heeding

the Supreme Courts urging, may request that plaintiffs sharpen their retaliation claims and select the proper substantive recovery route earlier in the litigation process. The wavier provision suggests that wavier takes place when a CEPA claim is filed (i.e., the "institution of the action").<sup>11</sup> Courts have held, however, that waiver does not occur until the close of discovery.<sup>12</sup> In the present case, the Supreme Court appeared troubled that the case proceeded to trial without an election of recovery under CEPA or LAD. *Battaglia* will likely have a dramatic impact as lower courts implement its holding and guidance. ■

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## Endnotes

1. *Battaglia v. United Parcel Serv., Inc.*, No. A-86/87-11 (N.J. July 17, 2013).
2. *Id.* at 52.
3. *Id.* at 8.
4. *Id.* at 10.
5. *Id.*
6. *Battaglia v. United Parcel Serv., Inc.*, No. A-0226-09T2 (App. Div. Aug. 12, 2011).
7. *Battaglia*, No. A-86/87-11, Slip Op. at 36.
8. *Id.* at 50 (quoting *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 613-14 (N.J. 2000)). N.J.S.A. 34:19-8 ("[T]he institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.").
9. *Battaglia*, No. A-86/87-11, Slip Op. at 52.
10. N.J.S.A. 34:19-8; see also *Falco v. Cmty. Med. Ctr.*, 296 N.J. Super. 298, 318 (App. Div. 1997) *abrogated on other grounds by Dzwonar v. McDevitt*, 177 N.J. 451 (2003); *Flaherty v. Enclave*, 255 N.J. Super. 407, 414 (Law Div. 1992).
11. See *Young v. Schering Corp.*, 141 N.J. 16, 32 (1995) ("The meaning of 'institution of an action' [as used in N.J.S.A. 34:19-8] could conceivably contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by Rule 4:25-1."); see also *Maw v. Advanced Clinical Commc'ns, Inc.*, 359 N.J. Super. 420, 441, (App. Div. 2003) *abrogated on other grounds by Dzwonar v. McDevitt*, 177 N.J. 451 (2003) and *rev'd on other grounds by*, 179 N.J. 439, 846 A.2d 604 (2004); *Brangan v. Ball Plastic Container Corp.*, CIV. 11-5470 RBK/KMW, 2012 WL 1332663, at \*6 (D.N.J. April 17, 2012).

# **Longo v. Pleasure Productions, Inc.:** **Emphasizing Upper Management’s Role** **in Punitive Damages Under CEPA**

by Mark J. Blunda

On July 24, 2013, the New Jersey Supreme Court reversed a jury’s award of \$500,000 in punitive damages against an employer in a Conscientious Employee Protection Act (CEPA) case, ruling that a new punitive damages trial was needed due to the trial court’s failure to properly instruct the jury on the standard for upper-management liability for punitive damages. While the Supreme Court’s decision in *Longo v. Pleasure Productions, Inc.*<sup>1</sup> does not break new ground, it reinforces the strict standard required to award punitive damages against an employer under CEPA and the New Jersey Law Against Discrimination (LAD), and the necessity of explicitly instructing a jury on those requirements.

The plaintiff, Doreen Longo, was employed in the sales department of East Coast News Corp., a company involved in the adult entertainment industry. On several occasions, Longo verbally reported to her direct supervisor, Bo Pezzullo, that she was “terrified” of a male coworker in her department, Marc Kercheval. According to Longo, Kercheval had violent outbursts in the office and threatened to sexually assault her. Despite the verbal reports to her direct supervisor, nothing was done. When Kercheval’s aggression continued, Longo sent an e-mail to Pezzullo, describing the violent behavior and requesting the supervisor “[p]lease help us.”<sup>2</sup> The supervisor did not respond.

On Feb. 1, 2006, Longo wrote a second e-mail to Pezzullo, reiterating that her coworker’s behavior was continuing and that the situation was getting dangerous. Longo sent a copy of the e-mail to the general manager, Michael Savage, explaining that she and Pezzullo had spoken to Kercheval, but that the problems continued. There was no response to the second e-mail. Longo then went to see Savage to make sure he had received the e-mail. He acknowledged receipt, but said he was too busy at the moment.

One week later, Longo was called into a meeting with Kercheval; the head of human resources; and Frank Koretsky, co-owner of East Coast, as well as of the defendant, Pleasure Productions, Inc. At the meeting, Koretsky screamed expletives at both Longo and Kercheval and called them various derogatory terms. On Feb. 8, 2006, Longo and Kercheval received identical warning notices for poor sales and inappropriate remarks about the company. Longo wrote a rebuttal stating she was hurt to receive a warning notice for reporting the situation of sexual harassment and hostile work environment.

A short time later, Kercheval was fired. Longo was called into a meeting with Savage and an in-house attorney for East Coast. The Supreme Court decision recites the following statements at that meeting:

Savage said, “Doreen, we really like you. You’re a great sales rep, and I hate to do this, but I got to let you go.” Savage then said, “Your complaints about [Kercheval] caused a commotion and we like a nice, laidback environment around here.”<sup>3</sup>

The plaintiff brought an action under both CEPA and the LAD against East Coast, related companies and individual defendants, Koretsky, Savage, Pezzullo, Kercheval and the in-house attorney. Prior to trial, Longo withdrew her LAD claim. At the close of the plaintiff’s case at trial, the trial judge dismissed her complaint against the related companies, Kercheval and the in-house attorney. The jury returned a no-cause verdict in favor of Savage and Pezzullo, but found East Coast and Koretsky, in his individual capacity, liable to Longo in the amount of \$120,000 in economic damages and \$30,000 in emotional distress.

A punitive damages trial followed against only the employer, East Coast.

During the punitive damages phase, Longo's attorney argued to the jury that East Coast operated not just through its owner, Frank Koretsky, but "through all of its employees and it is responsible for the behavior of all its employees..."<sup>4</sup> He specifically argued that the employer was responsible for the behavior of the plaintiff's direct supervisor, as well as that of the general manager.

The trial judge charged the jury that it could only award punitive damages to punish the defendants who acted in an "especially egregious or outrageous manner," and that the plaintiff must prove she is entitled to punitive damages by clear and convincing evidence.<sup>5</sup> However, during the charge conference, the plaintiff's counsel urged the judge to remove an instruction that, to award punitive damages, the jury was required to find "at least one of [ECN's] 'upper management' employees was involved with the [retaliatory acts],"<sup>6</sup> as well as the definition of upper management. The judge agreed to do so over the objection of defense counsel.<sup>7</sup>

The defendants' counsel challenged the jury charge on the grounds that: 1) it did not contain a definition of upper management; 2) it was silent on the issue of finding that upper management participated in or had been willfully indifferent to the retaliatory conduct against the plaintiff; and 3) although Koretsky was found individually liable for compensatory damages under a preponderance of the evidence standard, the jury was not instructed that in determining punitive damages against the employer, it had to weigh the owner's involvement against the clear and convincing evidence standard.

The trial judge did not adopt the employer's request to amend the charge. The jury awarded Longo \$500,000 in punitive damages, to be paid by the employer, East Coast.

On appeal, the Appellate Division affirmed the compensatory damages award. A majority of the panel also affirmed the punitive damages award. While the majority opinion cited the *Cavuoti*<sup>8</sup> and *Lehmann*<sup>9</sup> requirements for involvement of upper management, it determined that Koretsky, as president and a co-owner of East Coast, held an upper-management position and his participation in the unlawful acts committed against the plaintiff was determined by the jury in the compensatory damage phase of the trial. As a consequence, according to the majority, it was unquestionable that "some" involvement by upper management sufficient to impute liability to East Coast existed. It also pointed out

the general manager, Savage, was a member of upper management, a co-founder of the company, reported directly to Koretsky, and had broad supervisory powers over both the plaintiff and Kercheval, including the power to fire. Therefore, citing to *Baker v. National State Bank*, the majority held that the trial court's determination not to instruct the jury on that issue was not error.<sup>10</sup>

Judge Dorothea O'C. Wefing dissented, concluding that the punitive damages award should be reversed since the trial court's charge failed to instruct the jury that a "necessary pre-condition to an award of punitive damages was a finding that upper management had either actively participated in or been willfully indifferent to the violation of Plaintiff's rights." She opined that her colleagues had disregarded the repeated statements of the Supreme Court in *Cavuoti*, *Lockley*,<sup>11</sup> and *Quinlan*,<sup>12</sup> and that the trial judge's failure to include a proper "upper management" instruction was exacerbated by the comments of the plaintiff's counsel to the jury.

A unanimous Supreme Court agreed with the dissent. It reversed the punitive damages award and remanded it to the Law Division for a new trial on punitive damages only. The Court determined that the failure to provide an upper-management charge to the jury was a fatal flaw. It was necessary for the jury to determine which of the actors was a member of upper management before it could determine whether their conduct could be attributed to the employer. The high court agreed with the dissenting appellate judge that this lack of guidance was exacerbated by the plaintiff's counsel's argument to the jury that the conduct of any East Coast employees could be the basis for the award of punitive damages. The Supreme Court also found fatal the trial court's failure to charge that the conduct of the owner, Koretsky, had to be evaluated under the "clear and convincing evidence" standard, rather than the "preponderance of evidence standard."

Removing any uncertainty regarding the requirements for assessing punitive damages against an employer in a CEPA or LAD case, the Supreme Court cited its prior holdings and directed that the following principles govern jury instructions on punitive damages:

In CEPA cases, similar to LAD claims, failure to charge the jury with an upper-management instruction is a "fundamental flaw."<sup>13</sup>

Based on the doctrine of *respondeat superior*, punitive damages can only be awarded against an employer for the actions of its upper-management employees.<sup>14</sup>

The jury must determine whether the “wrongful conduct was committed by employees who were clearly members of upper management.”<sup>15</sup>

Punitive damages are to be awarded only when the upper-management employee’s conduct is “especially egregious.”<sup>16</sup>

The conduct by upper-management employees must constitute actual participation or willful indifference to the plaintiff’s rights.<sup>17</sup>

Any uncertainty about the roles and responsibilities of the upper-management employees who committed the wrongful conduct must be decided as a matter of fact by the jury.<sup>18</sup>

An upper-management charge is especially important when the wrongful conduct was allegedly committed by different employees, since the jury must determine which employees are part of upper management.<sup>19</sup>

Whether one views *Longo* as a blow to plaintiffs, a boon to employers, or a neutral restatement of existing law, the indisputable fact is that the New Jersey Supreme Court has now made clear the requirements for assessing punitive damages against employers in CEPA and LAD claims. ■

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## Endnotes

1. *Longo v. Pleasure Prod., Inc.*, \_\_\_ N.J. \_\_\_, 2013 WL 3811800 (July 24, 2013).
2. *Id.* slip op. at 4.
3. *Id.* slip op. at 5.
4. *Id.* slip op. at 6.
5. *Id.*
6. Model Jury Charge (Civil), Punitive Damages—Law Against Discrimination (LAD) Claims, § 8.61 (2010).
7. *Longo v. Pleasure Prod., Inc.*, Docket No. A-3872-09T2, slip op. at 18 (App. Div. Aug. 15, 2011).
8. *Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107 (1999).
9. *Lehmann v. Toys ‘R’ Us, Inc.*, 132 N.J. 587, 625 (1993).
10. *Longo v. Pleasure Prod., Inc.*, No. A-3872-09T2, slip op. at \_\_\_23\_\_.
11. *Lockley v. Dept. of Corr.*, 177 N.J. 413, 425 (2003).
12. *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010).
13. *Baker v. National State Bank*, 161 N.J.220, 226 (1999).
14. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 415-18 (1994).
15. *Baker*, 161 N.J. at 223.
16. *Id.*; *Abbamont*, 138 N.J. at 419.
17. *Id.*; *Lehmann*, 132 N.J. at 625.
18. *Id.*; *Lockley*, 177 N.J. at 413; *Mogull v. CB, Commercial Real Estate Group, Inc.*, 162 N.J. 449, 474-75 (2000); *Maiorino v. Schering-Plough Corp.*, 302 N.J. Super. 323, 355 (App. Div.), *certif. denied*, 152 N.J. 189 (1997).
19. *Mogull*, 162 N.J. at 449.



Commentary:

## Stemming the Tide: The Appellate Division Shores Up CEPA Protection for Whistleblowers Doing Their Job

by Kathryn K. McClure

On Sept. 4, 2013, the Appellate Division<sup>1</sup> issued a precedential decision, *Lippman v. Ethicon, Inc.*,<sup>2</sup> stemming a rising tide of employer-friendly decisions that have disqualified employees who blew the whistle on illegal conduct in the ordinary course of performing their job duties from protections of the Conscientious Employee Protection Act<sup>3</sup> (CEPA). *Lippman* is the first published decision to finally take a stand against the “job duties” exception, which emanated from poorly phrased *dicta* in *Massarano v. New Jersey Transit*,<sup>4</sup> a decision by a prior Appellate Division panel. Subsequently and repeatedly mischaracterized as a “holding” in its unpublished progeny,<sup>5</sup> *Massarano*’s job duties exception threatened to put decades of CEPA precedent at risk and, indeed, had “the potential to swallow the protections of the Act.”<sup>6</sup> Employers heralded the job duties exception as a bar to whistleblowers from protections otherwise afforded them by the CEPA.<sup>7</sup> *Lippman*, a consequential decision, is evidence that the Appellate Division is still capable of protecting the civil rights of New Jersey employees to be free from illegal retaliation for blowing the whistle on workplace conduct.

However, *Lippman* was a compromise victory for whistleblowers. Although the *Lippman* panel tracked CEPA’s plain language in squarely declining to adopt the job duties exception, it affirmatively created a class of ‘watchdog’ compliance employees upon which it foisted an additional burden of proof that is inconsistent with CEPA’s plain language.<sup>8</sup> For employees, *Lippman* may be viewed as one-step-forward-two-steps-back progress in charting CEPA jurisprudence on a right course consistent with its legislative purpose, but it is widely anticipated that the Supreme Court will likely and firmly decide the issue, which is an outcome both sides—at least for now—embrace.

### Background

Plaintiff Joel S. Lippman, M.D., held a medical degree and a master’s degree in public health when he commenced employment in 1990 as the director of medical services for Johnson & Johnson (J&J) subsidiary Ortho-McNeil Pharmaceutical (OMP), a pharmaceuticals manufacturer. During Lippman’s 10-year tenure with OMP, he received several promotions, ultimately to vice-president of clinical trials, a position that gave him direct responsibility for product quality and safety.<sup>9</sup>

Lippman’s whistleblowing began between 1998 and 1999, when he objected to the launch of a hormone replacement product based upon clinical trials data revealing the product caused a higher rate of endometrial hyperplasia, a condition that can lead to endometrial cancer. Lippman believed marketing the drug would violate the Food, Drug and Cosmetic Act and state products liability laws, and was “‘incompatible with a clear mandate of public policy against marketing defective products that present a reasonably foreseeable risk of injury’ to the public.”<sup>10</sup> Lippman voiced his concerns to his supervisor, as well as the vice-president and chairperson of Pharmacological Research Institute (PRI), an entity responsible for development of pharmaceutical products for J&J-affiliated companies.<sup>11</sup> OMP eventually stopped marketing the product.<sup>12</sup>

In late 1999, while still in the position of vice-president of clinical trials at OMP, Lippman objected to launching and marketing a contraceptive skin patch because data showed users were experiencing an increase in deep venous thrombosis, a condition that can cause “emboli, strokes, heart attacks[,] or blindness.”<sup>13</sup> Lippman suggested OMP stop launching and marketing the contraceptive patch in order to conduct additional research on known and other potential risk factors.

Although OMP heeded Lippman's advice, Lippman claims it was raising these concerns that led to his transfer to J&J subsidiary Ethicon, Inc. in July 2000.<sup>14</sup>

Lippman joined Ethicon as vice-president of medical affairs in July 2000. In that role, he was "responsible for safety, ensuring that safe medical practices occurred in clinical trials of [Ethicon's] products; ... medical reviews, information from a medical standpoint; [and] medical writing."<sup>15</sup> In 2002, Ethicon promoted him to the position of worldwide vice-president of medical affairs and chief medical officer, where he was responsible for clinical affairs, health economics and reimbursement, and medical affairs.<sup>16</sup>

By virtue of his positions with Ethicon, Lippman was required to serve on several internal review boards, including the company's global management board, where senior management could evaluate various important matters, including an increase in customer complaints or concerns about a product Ethicon was manufacturing or selling. Lippman was also a member of Ethicon's products board, which was headed by the company's president and comprised of high-level decision makers, including the chief financial officer and marketing executives. Lippman testified that his role on the products board was "as an advisor in his field of expertise, [t]o provide the medical/clinical/health economics input into the Ethicon products strategic activities."<sup>17</sup>

Last, in addition to Lippman, Ethicon's vice-president of quality and regulatory affairs, Catherine Beath, head of research and development, chief executive officer and head of operations, served on the company's quality board. The purpose of the quality board was to "assess the health risks posed by Ethicon's products and to provide 'medical input' in determining whether the company needed to take corrective measures with respect to their products in the field."<sup>18</sup>

Lippman engaged in his whistleblowing activities at Ethicon largely through his participation in these internal boards, particularly the quality board.

Beginning in 2001, Lippman began to raise safety and efficacy concerns about several Ethicon products, including, Corlink™, a device for use in cardiac bypass surgery in lieu of sutures. Lippman objected to Ethicon's marketing of Corlink™ because he believed it had not been adequately tested.<sup>19</sup> His concerns arose, in part, from the fact that Corlink™ was developed by Bypass Ltd., for which Lewis Pell was one of the company's "major investors[.]" Pell was also, at that time, "J&J's 'single largest' individual shareholder."<sup>20</sup> Several senior

decision makers at Ethicon, including the company's then-group chairperson, Dennis Longstreet, disagreed with Lippman's opinion. Longstreet left Lippman a threatening voicemail stating, "if you don't cooperate [sic] with bringing this to market, it will affect your bonus and possibly your standing in the company."<sup>21</sup>

Despite Longstreet's threat and continuing pressure from Ethicon's senior management, from 2002 through 2003, Lippman persisted in his objections regarding Corlink™. In the end, Ethicon did not bring Corlink™ to market because of Lippman's efforts.<sup>22</sup>

In terms of gross sales, surgical sutures are the biggest product line Ethicon markets. In 2001, Ethicon began receiving reports of "adverse events" associated with an absorbable suture. According to Lippman, the adverse events included inflammatory reactions that would sometimes require surgery to remove the suture, inflamed tissue, and wound infections. At a quality board meeting in 2002, the members decided that rather than recall the product, they would continue an investigation and update the product warning in the package insert for surgeons. Ethicon subsequently decided to stop selling the suture, at which time Lippman advised Beath the company should recall the product remaining on the market.<sup>23</sup>

In 2002 and 2003, Ethicon began receiving adverse event reports regarding a surgical gel used to relieve post-operative pain. Upon review by the quality board, Lippman agreed with the board's decision not to recall the product. However, he objected to and refused to sign physician alert letters (which he would typically sign) because of his concern the advice Ethicon intended to communicate in those letters would jeopardize patient safety and welfare. Additionally, in a memorandum dated March 14, 2003, Lippman memorialized his "increasing concerns throughout 2002 and 2003 and called for a [q]uality [b]oard meeting and a recall."<sup>24</sup> Shortly thereafter, in April 2003, after a second patient died as a result of the gel product, Ethicon recalled the product.<sup>25</sup>

A similar series of events occurred in 2004 and 2005 regarding a mesh product used to close wounds after hernia-repair surgery. In 2004, Ethicon began receiving reports that the mesh was delaminating or coming apart. Beath testified that one possible health hazard from the delaminating mesh was the creation of an opening of the bowel into the abdomen. According to Lippman, he was instrumental in getting the quality board to meet and discuss the problems with the mesh

device. During one quality board meeting, he suggested Ethicon “proactively” give the mesh device data to the FDA, anticipating it would require or strongly urge a recall of the product. Lippman’s position was vindicated and the FDA advised Ethicon to treat the situation like a recall.<sup>26</sup> Sherilyn S. McCoy, who replaced Dennis Longstreet as Ethicon’s group chairperson in July 2005, testified at her deposition that the cost to Ethicon to recall the mesh product was between \$10 and \$100 million.<sup>27</sup>

In Jan. 2006, McCoy reorganized senior management, including the creation of a position of vice-president of clinical operations and health economics and reimbursement, one of the three specific areas for which Lippman was responsible.<sup>28</sup> Lippman argued this was retaliation for his advocating for the recall of the mesh product the prior month.<sup>29</sup> Specifically, he argued that “McCoy’s alleged reorganization plan was merely a subterfuge to strip [his] authority and responsibility in retaliation for his unyielding positions, as a physician and as an employee charged with monitoring product safety, to adhere to his professional ethics and to follow relevant FDA guidelines.”<sup>30</sup>

Lippman’s final acts of whistleblowing occurred three months later, in April 2006, when he advised Beath that Ethicon should implement an immediate recall of a defective “life sustaining” medical device used during cardiac bypass surgery after the company received a report that the device “fell apart” during surgery.<sup>31</sup> DFK-24 was an arterial cannula device that returned “external oxygenated blood to the patient’s circulatory system through the aorta[.]” during cardiac bypass surgery.<sup>32</sup> Beath disagreed with Lippman and, in her capacity as head of the quality board, decided on a different course of action. In the same month, Ethicon received three additional complaints of DFK-24 falling apart. Beath was steadfast that a quality board review was premature until Ethicon could examine the initial device to determine whether surgeon misuse caused it to fall apart. At Lippman’s insistence, the quality board convened on April 14, 2006. Lippman’s position prevailed, and Ethicon issued a global hold on the sale and use of DFK-24.

In the final two weeks of April 2006, Lippman persistently contacted senior management about Ethicon’s failure to implement the quality board’s recall decision.<sup>33</sup> He claimed Ethicon chairperson McCoy and vice-president Beath usurped the quality board’s authority by overruling its decision to recall the device, and

Ethicon’s upper management improperly interfered with the quality board’s decisions.<sup>34</sup>

On May 16, 2006, within approximately two weeks of his last whistleblowing activity regarding the DFK-24 recall, Ethicon terminated Lippman’s employment. Ethicon’s alleged basis for terminating Lippman’s employment was, according to chairperson McCoy, her discovery that he had an “an inappropriate relationship, with someone who worked directly for him.”<sup>35</sup>

Lippman subsequently filed a claim against J&J and Ethicon because of the retaliation to which he was subjected in violation of CEPA for repeatedly voicing concerns about, objecting to, and refusing to participate in conduct that violated the law and compromised patient safety and welfare. The trial court granted the defendants’ summary judgment motion and dismissed Lippman’s cause of action as a matter of law. Specifically, relying in part upon the Appellate Division’s decision in *Massarano*, the trial court found Lippman did not present a *prima facie* claim under CEPA because “[a]ll evidence indicates that [p]laintiff performed his job by notifying his supervisors of issues and Ethicon responded appropriately.”<sup>36</sup>

### The Parties’ Positions

On appeal, Lippman argued that the motion judge took an overly narrow interpretation of CEPA, which must be broadly construed in order to effectuate its important social goal of protecting employees who report workplace wrongdoing from retaliation. “According to [Lippman], the trial court misread our dictum in *Massarano* to create a class of employees who, as a matter of law, fall outside CEPA’s protection merely because they were hired to monitor and express an opinion about the employer’s compliance with relevant laws and regulations.”<sup>37</sup> Lippman also contended he was terminated not because he allegedly violated a non-existent Ethicon policy, but because “key decision makers at Ethicon perceived the way he performed his duties and the positions that he advocated as either needlessly conservative or naively insensitive to Ethicon’s business and corporate interests,” and because Lippman’s “penchant for recalling dangerously defective products was economically unfeasible.”<sup>38</sup>

The defendants, relying largely on the prior Appellate Division decision in *Massarano*, argued that Lippman’s acts did “constitute whistle-blowing activities because they [fell] within the sphere of his job-related duties.”<sup>39</sup>

The defendants emphasized that Ethicon gave Lippman multiple opportunities to “express his opinion, freely and openly, in a variety of deliberative forums,” and Lippman’s “views were almost universally accepted.”<sup>40</sup>

### The Appellate Division’s Analysis

As an initial matter, with regard to Ethicon’s pretextual basis for terminating Lippman’s employment, the Appellate Division determined the evidence demonstrated, among other things, that the consenting subordinate never reported directly to Lippman; the defendants did not have a policy prohibiting the type of consensual relationship that allegedly occurred; and chairperson McCoy, who was responsible for terminating Lippman, could not cite any other instance in which one of the defendants’ employees “was terminated (or even disciplined) for having a consensual romantic relationship with an alleged subordinate[.]”<sup>41</sup> The *Lippman* panel concluded a jury could find the defendants retaliated against Lippman “by seizing upon a specious claim of impropriety” in order to rid “the company of [a] meddling ... uncooperative and fiscally irresponsible employee.”<sup>42</sup>

In reversing entry of summary judgment in the defendants’ favor, the *Lippman* court observed “the parties’ polarized positions are primarily predicated on the motion court’s incorrect legal assumption that an employee’s job title or employment responsibilities should be considered outcome determinative in deciding whether the employee has presented a cognizable cause of action under CEPA.”<sup>43</sup> The *Lippman* panel explicitly declined to endorse the job duties exception, even if “such a notion was approvingly expressed or implicitly adopted by the panel in *Massarano*,” on the basis that it is inconsistent with Supreme Court precedent construing whistleblower protection under CEPA.<sup>44</sup> Rejecting the reasoning urged by the defendants that “a plaintiff who reports conduct as part of his or her job is not entitled to the whistle-blowing protections afforded under CEPA[.]” the *Lippman* court held:

We respectfully disagree that this outcome is consistent with CEPA’s broad remedial purposes and, most importantly, correctly applies our Supreme Court’s construction of the protections afforded under CEPA. We thus decline to endorse it. Indeed, the facts of this case illustrate the gaping holes this line of reasoning creates in the wall erected by the Legislature

to protect whistleblowers from retaliation. ‘Watchdog’ employees, like plaintiff, are the most vulnerable to retaliation because they are uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety.<sup>45</sup>

Thus, the Appellate Division disagreed with the trial court that CEPA will exempt from its protections a class of employees because their whistleblowing activities may coincide with the performance of their job duties. In making its determination, the Appellate Division noted the statutory definition of “employee” as “any individual who performs services for and under the control and direction of an employer for wages or other remuneration.”<sup>46</sup> Clearly, the Appellate Division stated, CEPA’s definition in no way relies upon an employee’s job title or “core functions” of the job in determining whether the employee is entitled to CEPA protection.<sup>47</sup>

The *Lippman* court, guided by the *prima facie* CEPA elements established by the Supreme Court in *Dzwonar v. McDevitt*,<sup>48</sup> and specifically setting forth verbatim CEPA’s “objects to, or refuses to participate in” whistleblowing activity definition,<sup>49</sup> found sufficient evidence from which a reasonable fact finder could determine that Lippman engaged in whistleblowing when he objected to the defendants’ delay in recalling “dangerous defective medical products” and insistence upon “a patient-centered approach” when deciding whether to implement a recall.<sup>50</sup>

The Appellate Division focused particularly on Lippman’s whistleblowing activity with regard to DFK-24, the defective ‘life-sustaining’ cardiac bypass surgical device. Among other condemning findings, the Appellate Division noted the record before it permitted a jury to find the defendants’ senior management attempted to undermine the vital roles of their internal corporate boards “as a business strategy to maximize corporate profits by avoiding or delaying the high cost and commercial stigma involved in recalling a medical product.”<sup>51</sup> In sum, the Appellate Division firmly concluded the evidence presented by Lippman squarely addressed the elements identified in *Dzwonar* and, thus, his claims could proceed to a jury.<sup>52</sup>

It is important to note that the Appellate Division included one important *caveat* in the *Lippman* decision. Although the Appellate Division expressly declined to adopt the job duties exception mentioned in *Massarano*,

the court also rejected Lippman's argument that the trial court was free to disregard that language in *Massarano* as mere *dictum*.<sup>53</sup> The *Lippman* panel, relying upon the Supreme Court decision in *State v. Dabas*, stated that "lower courts should consider themselves bound by a higher court's *dicta*."<sup>54</sup> However, a review of the case law upon which *Dabas* relies is unequivocal that such *dicta* must be carefully considered or include a strong statement of underlying social policy.<sup>55</sup> Moreover, the Supreme Court in *Dabas* specifically ruled that "[a]ppellate and trial courts consider themselves bound by *this* Court's pronouncements, whether classified as *dicta* or not."<sup>56</sup>

Notably, *Massarano* is repeatedly cited as holding that employees who blow the whistle on illegal conduct within the scope of their responsibilities are not entitled to CEPA protection.<sup>57</sup> *Massarano*, however, does not stand for that proposition. The Appellate Division held that the plaintiff in *Massarano* was not entitled to CEPA's protections because the subject of her allegedly protected activity was not a clear violation of a statute, regulation, or public policy.<sup>58</sup> Moreover, unlike the plaintiff in *Lippman*, the court found the record void of evidence that the plaintiff in *Massarano* suffered retaliation.<sup>59</sup> Thus, the Appellate Division ruled the plaintiff in *Massarano* was not entitled to relief because the record failed to demonstrate a legal or evidentiary basis for a CEPA claim, not because the alleged protected activity fell within the scope of her job duties.<sup>60</sup>

In what can be called, at best, poorly phrased *dicta* and, at worst, nothing more than a passing factual observation, the Appellate Division in *Massarano* mentioned that even if it had found her employer violated public policy, *Massarano*'s reporting "did not make her a whistle-blower under the statute[] [because] plaintiff was merely doing her job as the security operations manager by reporting her findings and opinion...."<sup>61</sup> That subsequent courts have adopted and re-characterized the *dicta* in *Massarano* as a 'holding' in order to deprive whistleblowers of their civil right to be free from unlawful retaliation is simply intellectually dishonest and an assault on the CEPA. Moreover, in view of the authority cited by the Supreme Court in *Dabas*, it would appear the *Massarano dicta* does not pass muster as either carefully considered or a strong statement of underlying social policy requiring lower courts necessarily be bound by it.

## Exhaustion Requirement for "Watchdog" Employees

In *Lippman*, the Appellate Division also articulated a new class of "watchdog" employees who, according to the court, are the most susceptible to retaliation because of their unique positions and knowledge of employers' misconduct.<sup>62</sup> After quoting the statutory definition of "employee" and "whistle-blowing," the Appellate Division abandoned its otherwise strict interpretation of the statute when it announced a newly minted "watchdog" employee classification upon which the court foisted a heightened burden of proof that has no support in CEPA's statutory language.

First, the *Lippman* court defined a "watchdog" employee as one "who, by virtue of his or her duties and responsibilities, is in the best position to: (1) know the relevant standard of care; and (2) know when an employer's proposed plan or course of action would violate or materially deviate from that standard of care."<sup>63</sup> Second, the *Lippman* panel articulated a four-part test for establishing a CEPA claim for watchdog employees. The test tracks the *Dzwonar* test with additional burden of an exhaustion requirement on the second prong. Specifically, the watchdog employee must demonstrate:

- (1) he or she reasonably believed that the employer's conduct was violating either a law, government regulation, or a clear mandate of public policy;
- (2) he or she refused to participate or objected to this unlawful conduct, *and advocated compliance with the relevant legal standards to the employer or to those designated by the employer with the authority and responsibility to comply*;
- (3) he or she suffered an adverse employment action; and
- (4) a causal connection between these activities and the adverse employment action.<sup>64</sup>

The Appellate Division stated, "[t]o be clear, this second element requires a plaintiff to show he or she either (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct."<sup>65</sup> Although the *Lippman* court claimed it was satisfied that its watchdog employee test was in accord with *Dzwonar*, without doubt it heightens the burden enumerable types of whistleblowers (e.g., auditors, accountants, CFOs, ombudsmen, regulatory compliance and human resources personnel) will

have to shoulder unless and until the Supreme Court dispenses with this additional exhaustion requirement. This pronouncement of a class of watchdog employee and the additional burden such employees must carry to prove their CEPA claims runs counter to the legislative language and undermines the public policy underlying the act. As the Supreme Court recently noted in rejecting an overly narrow construction of CEPA's remedies provision, "[t]he clear language of CEPA is our surest guide. We will not 'rewrite a plainly-written enactment' or engraft 'an additional qualification which the legislature pointedly omitted.'"<sup>66</sup> Contrary to this pronouncement by the Supreme Court, the *Lippman* court has improperly imposed upon 'watchdog' employees an additional burden that has absolutely no basis in the statutory language.

### **The *Lippman* Decision is Consistent with More than Two Decades of CEPA Precedent**

Overall, however, *Lippman* is an overdue correction of the trend toward the job duties exception and consistent with more than two decades of CEPA precedent. Enacted by the Legislature in 1986,<sup>67</sup> and described as "one of the most far reaching whistleblower statutes in the nation[,]"<sup>68</sup> CEPA's "purpose 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."<sup>69</sup> In *Abbamont v. Piscataway Twp. Bd. of Educ.*, the Supreme Court stated, "[w]e view [CEPA] as a reaffirmation of this State's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections...."<sup>70</sup> The *Abbamont* Court continued, "[i]n New Jersey, we are deeply committed to the principle that an employer's right to discharge an employee carries a correlative duty to protect his freedom to decline to perform an act that would constitute a violation of a clear mandate of public policy."<sup>71</sup> The Legislature intended that CEPA "encourage, not thwart, legitimate employee complaints."<sup>72</sup> Therefore, consistent with its significant public purpose, "CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal."<sup>73</sup>

More than two decades of binding CEPA decisions make abundantly clear that employees who blow the whistle in the course of performing their job duties are entitled to statutory protection. Numerous and, indeed, seminal CEPA decisions provide ample examples of

employees who were found to have proven, or successfully pled, CEPA claims when the retaliation they suffered arose from or coincided with the performance of their job duties. Indeed, to underscore CEPA's importance, its protection has been extended to employees who, by virtue of their job responsibilities, discover and report concerns regarding threats to public health and welfare ranging from those of a catastrophic magnitude such as dangerous phosgene reactors<sup>74</sup> and unsafe benzene levels in gasoline<sup>75</sup> to more ordinary concerns, including poorly ventilated shop classrooms<sup>76</sup> and overflowing toilets in unsanitary elementary school bathrooms.<sup>77</sup> CEPA also protects the whistleblower whose concern might appear ordinary on its surface—such as a refusal to process the adoption of a dangerous dog—but if that whistleblower's employer heeded his objection, the death of an elderly woman could have been prevented.<sup>78</sup>

### **Conclusion**

While it is clear *Lippman* has slowed the gaining momentum of *Massarano* and its progeny, it remains to be seen if watchdog employees will be entitled to the same degree of protection provided to every other employee pursuant to CEPA. For now, however, *Lippman* is the first and only precedential decision stemming the tide of 'merely doing his job' decisions. In the meantime, unless and until the Supreme Court grants a petition for certification in *Lippman*, employees who fall within the class of watchdog employees are secure in knowing they will not be left out in the cold entirely by CEPA, but thanks to *Lippman* must endeavor to satisfy the heightened standard to demonstrate whistleblowing activity.

In the meantime, *Lippman* is likely to spawn additional litigation as employers and employees grapple with new questions. Who is a watchdog employee? What about employees whose duties are broader and include only a minor watchdog component? How does a watchdog employee satisfy the exhaustion requirement? In *Lippman*, the Appellate Division has given our most vulnerable whistleblowers a significant burden to shoulder when they are most in need of CEPA's protection. ■

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## Endnotes

1. The panel was comprised of judges Hon. Jose L. Fuentes, P.J.A.D., Hon. Jonathan N. Harris and Hon. Ellen Koblitz. Judge Fuentes delivered the opinion.
2. *Lippman v. Ethicon, Inc. and Johnson & Johnson, Inc.*, \_\_\_\_ N.J. Super. \_\_\_\_, 2013 WL 4726834 (App. Div. Sept. 4, 2013).
3. N.J.S.A. 34:19-1, *et seq.* CEPA prohibits employers from retaliating against an employee who “[d]iscloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer...that the employee reasonably believes...is in violation of a law, or a rule or regulation promulgated pursuant to law... or is fraudulent or criminal[,]” N.J.S.A. 34:19-3(a) or who “[o]bjects to, or refuses to participate in” the same wrongful conduct or that which the employee reasonably believes “is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.” N.J.S.A. 34:19-3(c). Employees are similarly protected from retaliation if they provide information to or testify before any public body conducting an investigation or inquiry into the foregoing types of wrongdoing. N.J.S.A. 34:19-3(b). However, employees who provide information to and/or testify before public bodies are not entitled to CEPA protection unless they first bring the wrongdoing to the attention of their supervisor in writing and give the employer a reasonable opportunity to cure the wrongdoing. N.J.S.A. 34:19-4. This disclosure requirement is excused where the employee is reasonably certain that the wrongdoing is known to one or more supervisors or the employee fears physical harm will result from the disclosure. *Id.*
4. *Massarano v. New Jersey Transit*, 400 N.J. Super. 474 (App. Div. 2008).
5. *See, e.g., Gianfrancesco v. Laborers Int’l. Union of N. Am. Local 594*, 2013 WL 244905 (D.N.J. Jan. 22, 2013); *Tayoun v. Mooney*, 2012 WL 5273855 (App. Div. Oct. 26, 2012); and *White v. Starbucks Corp.*, 2011 WL 6111882 (App. Div. Dec. 9, 2011).
6. *See* Claudia A. Reis, *The Game Changer*, *New Jersey Labor and Employment Law Quarterly*, Vol. 53, No. 4, at 52 (May 2012).
7. *See, e.g., Wendy Johnson Lario & Micala Campbell Robinson*, *Chinks in the Armor: CEPA Plaintiffs are Not So Invincible These Days*, *New Jersey Labor and Employment Law Quarterly*, Vol. 34, No. 4, at 12-15 (July 2013); *Carla N. Dorsi & Michel J. Riccobono*, *If It’s Your Duty, It’s Not Whistleblowing, One year later, and Starbucks still serves up a “tall” defense for employers*, *New Jersey Law Journal*, Vol. 210, No. 13 (Dec. 31, 2012).
8. *Lippman*, 2013 WL 4726834, at \*\*19-20.
9. *Id.* at \*2.
10. *Id.* at \*3.
11. *Id.*
12. *Id.* at \*4.
13. *Id.*
14. *Id.* at \*1, 4. In the interest of balance, the Appellate Division noted that Lippman received a \$14,000 salary increase within six months of his transfer to Ethicon and testified at his deposition that, “at the time, he viewed his new position at Ethicon as ‘better for [his] career.’” *Id.* at \*5.
15. *Id.* at \*5.
16. *Id.* at \*7.
17. *Id.* at \*6.
18. *Id.* at \*\*5-7.
19. *Id.* at \*\*7-8. Ethicon had acquired the license to market Corlink™ in the United States.
20. *Id.* at \*8.
21. *Id.*
22. *Id.*
23. *Id.* at \*\*9-10. The Appellate Division made a point to note that in 2006 Lippman learned that Ethicon never sent the updated package warning as directed by the quality board in 2002. *Id.* at \*10.
24. *Id.* at \*10.

25. *Id.* at \*\*10-11.
26. *Id.* at \*\*11-13.
27. *Id.* at \*6,13.
28. *Id.* at \*7, 15.
29. *Id.* at \*15.
30. *Id.*
31. *Id.* at \*7, 13.
32. *Id.* at \*13.
33. *Id.* at \*\*13-15.
34. *Id.* at \*7, 15.
35. *Id.* at \*16.
36. *Id.* at \*1.
37. *Id.*
38. *Id.* at \*17.
39. *Id.*
40. *Id.*
41. *Id.* at \*16.
42. *Id.* at \*19.
43. *Id.* at \*2
44. *Ib.*
45. *Id.* at \*17.
46. *Id.* quoting N.J.S.A. 34:19-2(b).
47. *Id.* at \*17.
48. *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003) setting forth a *prima facie* case under CEPA as requiring a employee to demonstrate that: (1) he or she reasonably believed that his or her employer's conduct was violating a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) her or she performed a 'whistle-blowing activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
49. N.J.S.A. 34:19-3(c).
50. *Lippman*, 2013 WL 4726834, at \*\*18-19.
51. *Id.* at \*19.
52. *Id.* at \*20.
53. *Id.* at \*17, n.11.
54. *Id.* (citing *State v. Dabas*, \_\_\_ N.J. \_\_\_, \_\_\_ (2013) (slip op. at 29)).
55. In *Dabas*, the Supreme Court was confronted with the circumstance of a prosecutor's office that had decided it was free to destroy an investigator's contemporaneous notes of his interview with the defendant because the office decided that the Supreme Court's declarations on the topic were merely *dicta*. *Id.* The Supreme Court held that the prosecutor's office was not at liberty to disregard a pronouncement of the Supreme Court even if it could be properly characterized as *dictum*. *Id.* (citing *State v. Breitwesier*, 373 N.J. Super. 271, 282-83 (App. Div. 2004) (holding that, as the state's intermediate appellate court, the Appellate Division considers itself "bound by carefully considered *dictum* from the Supreme Court."), *certif. denied*, 182 N.J. 628 (2005); *Barreiro v. Morais*, 318 N.J. Super. 461, 468 (App. Div. 1999) (acknowledging that even though rulings were *dictum* the Appellate Division was bound by them); *Kenny v. Scientific, Inc.*, 204 N.J. Super. 228, 247 (Law Div. 1985) ("Whether *dictum* or not, it is such a strong statement of underlying social policy by the State's highest court that a trial judge should not arrogate unto himself the right to disregard it."))
56. *Id.* at 29.



57. *Massarano*, 400 N.J. Super. at 474. Following are the pertinent facts in *Massarano*. In Aug. 2001, *Massarano* began working as a security operations manager for New Jersey Transit (NJT). *Id.* at 477. Subsequent to starting the job, *Massarano* learned that she was employed by NJT via an outside contractor who did not provide the same benefits as NJT. *Id.* at 478. For the next 12 months, *Massarano* persistently pressured her supervisor to create an in-house NJT position for her. *Id.* at 478-79. On Aug. 15, 2002, shortly after learning her position would not be transferred to NJT, *Massarano* was “outraged” after discovering that NJT had disposed of “blueprints or schematics for bridges, tunnels, a new rail operations center, underground gas lines, and building specifications” in four recycling bins on a loading dock of a NJT building in Newark. *Id.* at 479. *Massarano*’s immediate supervisor was not available that day. Consequently, *Massarano* reported the discarded documents to her supervisor’s superior and then to her direct supervisor the following day. *Id.* at 480. After persistent disagreements and arguments with her supervisor, largely over NJT’s failure to create an internal position for her, *Massarano*’s employment was terminated 18 months after her report regarding the documents. *Id.* at 482-85.
58. *Id.* at 490.
59. *Id.* at 491.
60. *Id.* at 491-92.
61. *Id.* at 491.
62. *Lippman*, 2013 WL 4726834, at \*17.
63. *Id.* at \*19.
64. *Id.* at \*20. (Emphasis added.)
65. *Id.*
66. *Donelson v. DuPont Chambers Works*, 206 N.J. 243, 261 (2011).
67. N.J.S.A. 34:19-1 to -8.
68. *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 179 (1998).
69. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 431 (1995).
70. *Id.* (quoting *Lepore v. National Tool & Mfg. Co.*, 115 N.J. 226, 228 (quoting *Lepore*, 224 N.J. Super. 463, 470 (App. Div. 1988)), cert. denied, 493 U.S. 954, 110 S. Ct. 366, 107 L. Ed. 2d 353 (1989)).
71. *Id.* at 431-32 (quoting *D’Agostino v. Johnson & Johnson, Inc.*, 225 N.J. Super. 250, 265 (App. Div. 1988), aff’d o.b., 115 N.J. 491 (1989)).
72. *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 610 (2000) (quoting *Barratt v. Cushman & Wakefield, Inc.*, 144 N.J. 120, 127 (1996)).
73. *Abbamont*, 138 N.J. at 431 (citing Judiciary, Law and Public Safety Committee, Statement on Assembly Bills No. 2872, 2118, 2228 (1990) (indicating that “the remedies available under the ‘whistleblower’ act are to be liberally construed”)).
74. *Donelson*, 206 N.J. at 243. *Donelson*’s co-plaintiff, Jack Seddon, was an operator technician working in a “highly toxic” phosgene building. The Supreme Court observed that his job duties included ensuring “the safe operation of equipment and the safe handling of dangerous chemicals in the building.” *Id.* at 248. “He was also responsible for the safety of those who worked there and those who lived in the surrounding area.” *Id.* Among his whistleblowing activities, Seddon reported unsafe conditions in DuPont’s operation of the phosgene reactor. Specifically, Seddon warned that DuPont’s unsafe operation of the phosgene reactor “could cause an explosion and the release of deadly gasses into the atmosphere, killing and seriously injuring nearby residents[]” in a potential catastrophe Seddon likened to the Union Carbide chemical leak in Bhopal, India which killed 3,000 people. *Id.* at 249.

75. *Mehlman*, 53 N.J. at 163. Mobil Oil Corp. employed renowned toxicologist Dr. Myron A. Mehlman, as its director toxicology. *Id.* at 167-68. Mobil's job description characterized Mehlman's primary function as "represent[ing] Mobil on toxicology matters, and provid[ing] toxicologic and regulatory advice for prudent business decisions." *Id.* at 168. Mehlman's major responsibilities included advising Mobil of pending developments in toxicology regulations that could affect its worldwide business. The Supreme Court noted that "[t]he record clearly demonstrated that Mehlman's responsibilities ...were broad and of international scope." *Id.* In Sept. 1989, Mehlman was representing Mobil at an international symposium in Japan where he addressed a group of managers at Mobil's Japanese subsidiary on toxicology and environmental health issues, namely health hazards of human exposure to gasoline. *Id.* at 168-69. During his presentation, Mehlman showed slides reflecting the range of benzene, a dangerous and toxic chemical additive, in gasoline sold in Japan. *Id.* at 169. During the presentation, the subsidiary's technical manager advised Mehlman that the slide was incorrect because the level of benzene in gasoline sold in Japan was actually higher than that reflected on Mehlman's slide. *Id.*

As recounted by the Supreme Court:

Mehlman responded that 'we, in [the] United States and at Mobil[,] consider benzene as a very poisonous chemical — dangerous and toxic. And [these] concentrations are too high. [T]hey have to be reduced.' ...[The manager] stated that [the Japanese subsidiary] was not required to inform Japanese regulatory officials of their gasoline's benzene content. When Mehlman insisted that the benzene level 'is much too dangerous and you must reduce it,' [the manager's] response...was that '[w]e have old equipment and we cannot do that because it will cost us several hundred million dollars to change that single refinery to produce a product with low levels of benzene.' Mehlman replied: "You reduce it or do not sell it," and he described the reaction of the other [subsidiary] managers as 'stunned, shocked and surprised.' *Id.*

76. *Abbamont*, 138 N.J. at 405. Piscataway's Board of Education employed Joseph P. Abbamont to teach industrial arts. From the outset of his employment, Abbamont voiced concern about "poor health and safety conditions of the metal shop, including broken machines, lack of air ventilation, inadequate lighting, and slippery floors." *Id.* at 410. When Abbamont agreed to teach plastics instead of metals, he continued to press the district for repairs to the ventilation systems in the shop classroom because, "like metal-shop machinery, plastics machinery creates fumes...." *Id.* at 411.

77. *Hernandez v. Montville Twp. Bd. of Educ.*, 179 N.J. 81 (2004) affirming on the opinion below 354 N.J. Super. 467 (App. Div. 2002). Montville's Board of Education employed Victor Hernandez as a full-time night janitor for two elementary schools. *Id.* at 470. The board required Hernandez to attend health and safety meetings including one at which a safety representative advised that OSHA regulated the cleanliness of the bathrooms, thus, mandating a sanitary environment. Hernandez was also given "a staff handbook which emphasized the importance of safety at the schools and directed a custodian to assume responsibility for the general safety of the building." *Id.* He subsequently reported safety and sanitary concerns. Specifically, Hernandez objected to "broken toilets that were clogged and overflowing for prolonged periods of time, causing feces and urine to spill out on the floor," and an exit sign that was improperly unlit for a week. *Id.* at 471.

78. *Turner v. Associated Humane Societies, Inc.*, 396 N.J. Super. 582 (App. Div. 2007). Talib Turner was employed by an Associated Humane Societies (AHS) animal shelter to perform clerical work including data input, processing paperwork for the surrender and adoption of animals, answering telephones and client contact. Prior to Turner's employment, the owner of a Doberman pinscher who had been bitten by the dog paid the shelter \$205 to euthanize the animal; this information was noted on the shelter's paperwork. *Id.* at 587. Contrary to its agreement with the dog's owner, the shelter put the Doberman up for adoption. In processing the dog's paperwork for adoption to an elderly woman, Turner discovered it attacked its prior owner who paid to have it euthanized. *Id.* at 587-88. Turner objected to his supervisor to the adoption of the dangerous Doberman, but his objection was overruled by the shelter's executive director who said "[h]e has to do it. I approved it. That's his job." *Id.* at 588. Turner completed the adoption on the executive director's order. *Id.* at 589. Nine days later the Doberman attacked and killed the elderly woman who bled to death on her bedroom floor. *Id.*

# New Jersey's New "Safe Act" Addresses the Impact of Domestic Violence on the Workplace

by Marion Cooper

Domestic violence doesn't stay at home when victims go to work. It follows them, sometimes resulting in violence in the workplace. Or it spills over into other aspects of their lives, jeopardizing their ability to keep a job, whether because of the need for time off for medical attention, for court appearances, or because of the abusers' active interference by preventing victims from getting to work, harassing them at work, limiting their access to cash and transportation, and sabotaging child-care arrangements.

Domestic violence, dating violence, sexual violence, and stalking are epidemic in the U.S. and affect individuals of virtually every racial, ethnic, gender, age, and socioeconomic group.<sup>1</sup> The overwhelming majority of victims are women (78 percent), and the majority of offenders (87 percent) are men.<sup>2</sup> The legal system has taken notice of the impact of these crimes on all aspects of the victims' lives. Local, state, and federal legislation has been proposed and enacted to address the effect not only on employees' personal lives, but their workplaces as well.

## What is Domestic Violence?

Domestic violence is "a pattern of behavior in which one economic partner uses physical violence and/or sexual or economic abuse to control the other partner in a relationship. It is not defined by physical acts alone; it includes conduct and patterns of behavior such as threats, intimidation, isolation, and other coercive and controlling acts."<sup>3</sup> In whatever form it appears, domestic violence impacts families, communities, and workplaces.

## How Does Domestic Violence Affect the Workplace?

The Centers for Disease Control and Prevention estimates that the annual cost of lost productivity in the workplace due to domestic violence equals \$727.8 million.<sup>4</sup> Sixty-one percent of recently surveyed senior executives reported that domestic violence has a harmful effect on their company's productivity and 70 percent said that domestic violence negatively affects

employee attendance.<sup>5</sup> Costs of direct medical and mental healthcare services related to domestic violence total nearly \$4.1 billion a year.<sup>6</sup> These statistics are not surprising in light of the fact that victims of domestic violence lose 8 million days of work annually, the equivalent of 32,000 full-time jobs and over 5.5 million days of household productivity.<sup>7</sup>

The occurrence of domestic violence in the workplace itself is staggering. Between 1993 and 1999, an average of 1.7 million violent victimizations per year were committed against individuals age 12 or older who were *at work or on duty*.<sup>8</sup> In 2000, homicide was the leading cause of death on the job for women.<sup>9</sup>

The consequences of domestic violence on victims' abilities to obtain and maintain employment are well documented. The American Bar Association Commission on Domestic Violence reported in 2009<sup>10</sup> that up to half of employed victims claim they lost their jobs due, at least in part, to domestic violence.<sup>11</sup> Almost 50 percent of sexual assault survivors lose their jobs or are forced to quit their jobs in the aftermath of the crime.<sup>12</sup> Up to two-thirds of employed victims surveyed have reported their abusers harassed them at work.<sup>13</sup> Over half of employed victims of domestic violence reported missing work because of the abuse, and 47 percent were specifically prevented from working by the abuser.<sup>14</sup>

Employees who are the abusers also impact the company's bottom line. They lose work time, are less productive, experience high turnover, have increased accidents, and misuse company resources. The Maine Department of Labor and Family Crisis Service reported that 78 percent of abusers (all male) used workplace resources at least once to express remorse, anger, check up on, or threaten their victim; 74 percent reported having easy access to the intimate partner's workplace; and 21 percent reported they contacted their partner at the workplace in violation of a no-contact order.<sup>15</sup>

The Vermont Council on Domestic Violence found that half of an abuser's workday was spent keeping track of their partner and what he or she was doing and 80

percent said their job was negatively affected.<sup>16</sup> Of the abusers, 29 percent contacted their partner while at work to say something that might have scared or intimidated him or her; 20 percent left or were late to work to be abusive to their partner; 75 percent had a hard time concentrating while at work because of their abuse of intimate partners; 55 percent telephoned their partner while at work to threaten, control, or abuse him or her; and 13 percent stopped by his or her expected location while they were on-the-clock to check up on their partner or to do something threatening, controlling, or abusive.<sup>17</sup>

Many employers remain reluctant to implement policies to confront domestic violence, because they are uncomfortable with the subject, uncertain about their role in prevention, have concerns about confidentiality and intrusion, have a desire to respect the employee's privacy and have a need for guidance.<sup>18</sup>

The severity of the problems resulting from domestic violence led a number of states to pass domestic violence leave laws to afford victims the opportunity to take time off to go to court to seek safety for themselves or their family, to obtain medical care and/or counseling, to heal from the emotional and physical pain, and to plan for their future and ongoing safety.

A number of states have enacted laws that provide victims with time off from work to address issues related to domestic violence and/or that protect victims from any employment discrimination related to the domestic violence.<sup>19</sup> In addition to the rights under these laws, victims of domestic violence may have the right to leave under the federal Family and Medical Leave Act, the Americans with Disabilities Act, and any comparable state or local laws.

### **New Jersey's Response**

On July 13, 2013, Governor Chris Christie signed the New Jersey Security and Financial Empowerment Act (NJ SAFE Act) into law.<sup>20</sup> Effective on Oct. 1, 2013, the NJ SAFE Act, covering public and private employers with 25 or more employees, provides up to 20 days of unpaid leave in one 12-month period when an employee<sup>21</sup> or their child, parent, spouse, domestic or civil union partner has been the victim of a domestic violence incident or a sexually violent offense. To be eligible, the employee must have worked 1,000 base hours during the 12-month period immediately preceding the leave.

Under the NJ SAFE Act, each incident of domestic violence or any sexually violent offense constitutes a

separate offense for which the eligible employee may take leave, as long as the employee has not already exhausted the allotted 20 days for the 12-month period. The unpaid leave may be taken intermittently in intervals of no less than one day, as needed for the employee or the employee's family or household member to handle issues arising from the incident, such as:

- seeking medical attention for, or recovering from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee's child, parent, spouse, domestic partner, or civil union partner;
- obtaining services from a victim services organization for the employee or the employee's child, parent, spouse, domestic partner, or civil union partner;
- obtaining psychological or other counseling for the employee or the employee's child, parent, spouse, domestic partner, or civil union partner;
- participating in safety planning, temporarily or permanently relocating, or taking other actions to increase the safety from future domestic violence or sexual violence or to ensure the economic security of the employee or the employee's child, parent, spouse, domestic partner, or civil union partner;
- seeking legal assistance or remedies to ensure the health and safety of the employee or the employee's child, parent, spouse, domestic partner, or civil union partner, including preparing for or participating in any civil or criminal legal proceeding related to or derived from domestic violence or sexual violence; or
- attending, participating in or preparing for a criminal or civil court proceeding relating to an incident of domestic or sexual violence of which the employee or the employee's child, parent, spouse, domestic partner, or civil union partner, was a victim.

The unpaid leave runs concurrently with any paid vacation leave, personal leave, or medical or sick leave the employee elects to use, or which the employer requires the employee to use during any part of the 20-day period of unpaid leave. If the employee's request for leave under the NJ SAFE Act is also covered by the New Jersey Family Leave Act (NJ FLA) or the federal Family and Medical Leave Act (FMLA), the leave must count simultaneously against the employee's entitlement under each law.

Before taking leave under the NJ SAFE Act, the employee must give the employer written notice. If the necessity for the leave is foreseeable, notice must be given as far in advance as reasonable and practical under

the circumstances. An employer may also require the employee to substantiate the domestic violence or sexually violent offense that is the basis for the leave. If the employee provides one or more of the types of documentation listed in the act, such as a restraining order; a letter from the prosecutor; documentation of a conviction for the offense; medical documentation of the offense; certification from a certified domestic violence specialist or other designated violence agency; or other documentation of the domestic violence or sexually violent offense by a social worker, clergy person, shelter worker, or other professional, it will be deemed sufficient.

All documentation regarding the leave must be retained by the employer in strictest confidence, unless the employee voluntarily authorizes disclosure or it is required by federal or state law, rule, or regulation.

The employer must conspicuously display notice of employees' rights and obligations under the NJ SAFE Act in the manner prescribed by the commissioner of labor and workforce development, and must use "other appropriate means to keep its employees so informed." The required posting can be located at the New Jersey Department of Labor and Workforce Development website.<sup>22</sup>

The NJ SAFE Act prohibits discrimination, harassment, and retaliation against employees who have exercised their rights under the act. Aggrieved individuals have a private right of action within one year of the alleged violation to bring suit in superior court for recovery of the full array of damages available to a prevailing plaintiff in common law tort actions, including reinstatement, compensation for lost wages and benefits, an injunction to restrain continued violations, and reasonable attorneys' fees and costs. In addition, the employer may be assessed a civil fine from \$1,000 up to \$2,000 for a first violation, and up to \$5,000 for any subsequent violations. This private right of action is the sole remedy for a violation of the act.

## Recommended Employer Best Practices

Whenever a new leave law is passed, it is essential for employers to review their internal policies and handbooks to make sure they are clear and up to date. Further, employers are urged to undertake the following:

- Conduct training of human resources representatives and managers on how the NJ SAFE Act interacts with other existing leave laws and the company's own paid and unpaid time off policies.
- Ensure employees are given proper notice under the statute, both by performing the required posting and providing employees with copies of updated policies and/or handbooks.
- Bear in mind that the threshold for coverage of this leave law is only 25 employees, rather than the 50 employees required under the federal FMLA or the NJ FLA, and certain smaller employers may not be familiar with procedures required for leave and the accurate recordkeeping necessary to track the amount of leave taken.
- Put a procedure in place for preserving the confidentiality of documentation.
- Make sure employees, as well as human resources and management, are familiar with the range of permitted reasons for extended or intermittent leave.
- Employers must, at a minimum, clearly establish a NJ SAFE Act policy and the permitted reasons for taking leave, and then apply it uniformly and consistently, keeping accurate and confidential records to protect themselves from lawsuits. ■

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## Endnotes

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2. Patricia Tjaden and Nancy Thoennes, Nat'l Inst. of Justice, *Stalking in America* (1998).
3. Julie Goldscheid and Robin Runge, ABA Commission on Domestic Violence, *Employment Law and Domestic Violence, A Practitioner's Guide* (2009) [hereinafter ABA Comm'n on Domestic Violence, *Practitioner's Guide*].
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5. Corporate Alliance to End Partner violence, 2008 Survey (2008).
6. CDC, *Cost of Intimate Partner Violence*.

7. *Id.*
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10. ABA Comm'n on Domestic Violence, *Practitioner's Guide*, *supra* note 3.
11. U.S. Gen. Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 19 (1998), available at <http://www.gao.gov/assets/230/226642.pdf> (collecting studies) [hereinafter GAO, *Domestic Violence*].
12. S. Rep. No. 103-138, n.69 (citing E. Ellis, B. Atkeson & K. Calhoun, An Assessment of the Long Term Reaction to Rape, 50 *J. Abnormal Psychology* 263, 264 (1981)).
13. See, e.g., GAO, *Domestic Violence*, *supra* note 11, at 8 n.4.
14. Judith McFarlane *et al.*, Indicators of Intimate Partner Violence in Women's Employment, 48 *Am. Assoc. Occupational Health Nurses J.* 217 (May 200).
15. C. Kim Lim, Me. Dep't of Labor & Family Crisis Services, *Impact of Domestic Violence Offenders on Occupational Safety & Health: A Pilot Study* (2004).
16. Vt. Council on Domestic Violence, *Effect of Domestic Violence at the Workplace* (2012).
17. *Id.*
18. CDC, *Cost of Intimate Partner Violence*, *supra* note 4.
19. See Legal Momentum, *State Law Guide: Employment Rights for Victims of Domestic or Sexual Violence*, (updated July 2013) (collecting existing state laws and legislative proposals specific to domestic violence and/or crime victims). California: Cal. Lab. Code §§ 230 & 230.1; Colorado: Colo. Rev. Stat. § 24-34-402.7; Connecticut: Con. Gen. Stat. § 31-51ss; District Of Columbia: D.C. Code §§ 32-131.01, 32-131.02, 32-131.03 & 32.131.04; Florida: Fla. Stat. § 741.313; Hawaii: Haw. Rev. Stat. § 378-2, § 378-72 & § 378-73; Illinois: 820 Ill. Comp. Stat. 180; Kansas: K.S.A. §§ 44-1131 & -1132; Maine: 26 Me. Rev. Stat. § 850; New Jersey: S.B. 2177, 215th Leg. (N.J. 2012); New Mexico: N.M.S.A. § 50-4A-1-8; New York State: N.Y. Exec. L. § 296-1(a) & § 292(34); North Carolina: N.C. Gen. Stat. § 50B-5.5 & § 95-270(a); Oregon: Or. Rev. Stat. §§ 659A.270-290, 659A.885; Rhode Island: R.I. Gen. Laws § 12-28-10; Washington: Wash. Rev. Code § 49.76.
20. S.B. 2177, 215th Leg. (2012), available at [http://www.njleg.state.nj.us/2012/Bills/PL13/82\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/PL13/82_.PDF).
21. An employee who is a victim of domestic violence is defined in N.J.S.A. 2C:25-19; an employee who is a victim of a sexually violent offense is defined in N.J.S.A. 30:4-27.6.
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# The ADA and Transfers of Minimally Qualified Disabled Employees to Vacant Positions When More Qualified Candidates Exist: Mandatory or Optional?

by Neha Patel

The Americans with Disabilities Act<sup>1</sup> (ADA) requires employers to make reasonable accommodations to “the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless” the employer can demonstrate undue hardship.<sup>2</sup> Under the ADA, a reasonable accommodation may include “reassignment to a vacant position.”<sup>3</sup> But does the ADA require employers to reassign a disabled employee to a vacant position for which they are minimally qualified when the employer’s policy requires hiring the most qualified candidate for the position?

The Equal Employment Opportunity Commission’s (EEOC) enforcement guidance on reasonable accommodations leaves no room for interpretation. EEOC guidance provides that disabled employees are not permitted to compete for vacant positions for which they are qualified.<sup>4</sup> However, federal circuit court decisions currently provide inconsistent and conflicting guidance on the issue. On May 28, 2013, the United States Supreme Court declined to review the Seventh Circuit’s decision in *EEOC v. United Airlines*, leaving the current circuit split unresolved.<sup>5</sup> In *United Airlines*, the Seventh Circuit overruled its prior opinion in *EEOC v. Humiston-Keeling*,<sup>6</sup> that the ADA does not require employers to transfer a disabled employee to a vacant position when a better-qualified candidate exists and the employer’s policy requires hiring the best-qualified applicant. The Seventh Circuit based its reversal on the Supreme Court’s opinion in *U.S. Airways v. Barnett*.<sup>7</sup>

## ***Barnett* Held that Transferring a Disabled Employee to a Vacant Position in Violation of Seniority System Rules is Ordinarily Unreasonable under the ADA**

In *Barnett*, the Supreme Court considered the conflict that arises when an employee seeks a transfer to a vacant position as a reasonable accommodation under

the ADA and the employer’s seniority system requires the vacant position be assigned to another employee.<sup>8</sup> The Court determined that such an assignment would not be a reasonable accommodation.<sup>9</sup>

Notably, in reaching that decision, the Court rejected the employer’s argument that the ADA “does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference.”<sup>10</sup> The Court explained that the ADA does require “preferences in the form of ‘reasonable accommodations,’” and concluded that “[t]he simple fact that an accommodation would provide a ‘preference’—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not ‘reasonable.’”<sup>11</sup>

The *Barnett* Court next articulated the test for whether an accommodation is reasonable: To defeat a motion for summary judgment, an employee “need only show that an ‘accommodation’ seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”<sup>12</sup> “Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”<sup>13</sup> If it is found that accommodation will not be reasonable in the run of cases, the employee may show “special circumstances surrounding the particular case that demonstrate that the assignment is nonetheless reasonable.”<sup>14</sup>

Applying the test to the facts at hand, the Court stated that normally a request for reassignment to a vacant position would be reasonable “were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system.” Therefore, it determined that it would not be reasonable for “an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer’s ‘established seniority system’”<sup>15</sup> The Court highlighted aspects of seniority systems that

supported its finding of unreasonableness—among other things, maintenance of employee—management relations and provision of employee benefits such as “job security and an opportunity for steady and predictable advancement based on objective standards.”<sup>16</sup> However, the Court noted that the employee may present evidence of special circumstances that would make such a reassignment reasonable.<sup>17</sup>

The only issue before the *Barnett* Court was whether the ADA requires an employer to transfer a disabled employee to a vacant position when such a transfer would violate the employer’s seniority policy. What remains unclear, however, is whether the Court suggested that such transfers in all other circumstances would be reasonable.

### **Seventh Circuit Reverses Its Precedent Based on *Barnett*, Noting that an Employer’s Policy to Hire the Most Qualified Candidate is Not Akin to Seniority Policy**

At issue in *United Airlines* was the company’s reasonable accommodations policy, which provided that transfers to vacant positions would be competitive.<sup>18</sup> While employees seeking accommodations would not automatically be transferred to vacant positions, they were guaranteed preferential treatment under the policy.<sup>19</sup> Specifically, they would be permitted “to submit an unlimited number of transfer applications, be guaranteed an interview and receive priority consideration over a similarly qualified candidate.”<sup>20</sup>

The EEOC brought suit against United based on the contention that its policy violated the ADA’s requirement that disabled employees be transferred to vacant positions for which they are qualified.<sup>21</sup> The EEOC argued that *Barnett* undermined the Seventh Circuit’s holding in *Humiston-Keeling*, that the ADA does not mandate reassignment of a disabled employee to a vacant position if the employer’s policy requires the hiring of the most qualified applicant and a more qualified applicant exists.<sup>22</sup> The district court dismissed the EEOC’s case, noting that *Humiston-Keeling* was still good law and required finding that United’s competitive transfer policy did not violate the ADA.<sup>23</sup> While the Seventh Circuit affirmed the district court’s opinion, it recommended the court reconsider *en banc* whether *Barnett* required reversal of *Humiston-Keeling*.<sup>24</sup>

The case was not considered *en banc*. Instead, the original panel vacated its earlier opinion and held that *Barnett* required overruling *Humiston-Keeling* based on

the determination that the ADA does, in fact, require employers to reassign disabled employees to vacant positions for which they are qualified.<sup>25</sup> In so holding, the court distinguished an employer’s policy to hire the best-qualified candidate from a policy requiring hiring pursuant to a seniority system, observing that “a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy.”<sup>26</sup> Accordingly, the Seventh Circuit remanded to the district court with instructions to perform the two-step, case-specific approach outlined in *Barnett*, and to first determine whether “mandatory reassignment” is ordinarily a reasonable accommodation.<sup>27</sup>

Significantly, the court pointed out that analyzing whether mandatory reassignment is ordinarily reasonable should not pose “difficulty” for the district court because the Court in *Barnett* analyzed this “very accommodation” issue and assumed it would normally be reasonable but for the existence of the seniority system.<sup>28</sup> Thus, in its guidance to the district court, the Seventh Circuit essentially removed from the analysis the very fact that the transfer would violate the employer’s policy to hire the best-qualified candidate. Moreover, the court effectively eliminated the first step of the *Barnett* analysis by presuming the reasonableness of such an accommodation, and shifted the burden to the employer to show special circumstances that demonstrate undue hardship to avoid granting such an accommodation.

### **Circuit Court Opinions on Transfers of Minimally Qualified Disabled Employees Currently Conflict**

In reversing *Humiston-Keeling*, the Seventh Circuit adopted an approach similar to the D.C. and 10th circuits concerning an employer’s obligation to place a minimally qualified disabled employee into a vacancy. The Eighth Circuit, on the other hand, continues to follow the approach the Seventh Circuit had previously adopted in *Humiston-Keeling*. Other circuit courts have not addressed this issue directly.

#### **D.C. and 10th Circuits**

In *Aka v. Washington Hospital Center*—decided before *Barnett*—the D.C. Circuit opined that the ADA’s reassignment obligation means something more than permitting “the disabled employee to submit his application along with all of the other candidates” because such an interpretation “would render [the reassignment]



provision a nullity.”<sup>29</sup> The court considered whether Washington Hospital Center violated the ADA when it required a disabled employee to apply for numerous vacancies and declined to transfer the employee to vacancies for which he was qualified because other applicants were more qualified.<sup>30</sup> The court ultimately remanded the case to district court to make that fact-specific determination.

In *Smith v. Midland Brake*—also decided before *Barnett*—the 10th Circuit looked to *Aka* and similarly determined that an employer’s obligation to reassign an employee to a vacant position under the ADA “must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position.”<sup>31</sup> The court concluded in *Smith* that requiring disabled employees to compete for reassignment or be the best-qualified applicant is unwarranted by statutory language and the ADA’s legislative history.<sup>32</sup> The court went on to hold that reassignment is one possible accommodation to be granted to a disabled employee, which, if appropriate, must be offered.<sup>33</sup> Notably, the 10th Circuit was heavily influenced by the EEOC’s then newly issued enforcement guidance:

Does reassignment mean that the employee is permitted to compete for a vacant position?

No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.<sup>34</sup>

## Eight Circuit

In direct contradiction of the Seventh, D.C., and 10th circuits, the Eight Circuit currently holds that the ADA “is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”<sup>35</sup> In reaching this holding in *Huber*, the Eight Circuit considered the positions of the 10th and Seventh circuits, and was ultimately persuaded by the Seventh Circuit’s reasoning in *Humiston-Keeling* that requiring an employer to turn away a more qualified applicant would “convert a nondiscrimination statute into a mandatory preference statute.”<sup>36</sup>

Because the Eight Circuit’s decision was based on a Seventh Circuit opinion that has now been overruled, it is possible the Eight Circuit will reconsider this issue in the near future and resolve the circuit split.

## The Third Circuit Has Provided General Guidance for Analyzing Conflicts between the ADA and Disability-neutral Policies

While the Third Circuit has not specifically addressed whether the ADA mandatorily requires employers to reassign minimally qualified disabled employees to vacancies over more-qualified candidates, it has provided guidance on how to approach such a conflict.

In *Shapiro v. Township of Lakewood*, the employer argued it had no obligation to reassign a disabled employee to a vacancy when the employee failed to monitor and apply for vacancies pursuant to the employer’s policy on interdepartmental transfers.<sup>37</sup> The Third Circuit, however, remanded the case to the district court, instructing it to apply *Barnett*’s two-step test to determine if the employer had violated the employee’s rights under the ADA by not granting a transfer.<sup>38</sup>

Based on *Shapiro*, it appears employers in the Third Circuit should utilize the *Barnett* two-step test if confronted with a conflict between a disabled employee’s request for a transfer to a vacant position and a policy that requires hiring the most qualified candidate. Indeed, relying on *Shapiro*, a district court in Pennsylvania, in an unreported opinion, applied the two-step test from *Barnett* to find that such a reassignment would not be reasonable because the employee failed to come forward with evidence contradicting the employer’s evidence that others were more qualified therefore, failed to show that such a reassignment would ordinarily be reasonable.<sup>39</sup>

## What Does This Mean for Employers?

Unfortunately, the conflicting guidance from the federal circuits prohibits multi-state employers from uniformly administering policies that require the hiring of the most-qualified candidate. Until the circuit split is resolved, employers with policies requiring the hiring of best-qualified candidates should be aware of the law in their particular circuit when confronted with transfer requests as reasonable accommodations from disabled employees. Such requests would most likely be reasonable under the ADA in the D.C., 10th, and Seventh circuits, and employers in these locations would have to show undue hardship

to avoid granting such a transfer. Conversely, employers in the Eight Circuit would not be required, under the ADA, to transfer a minimally qualified disabled employee if there was a more qualified employee for the job. Meanwhile, employers in the Third Circuit should employ the *Barnett* two-step analysis to determine if they should grant such a transfer under the ADA.

Moreover, employers should be aware that notwithstanding the guidance from the federal courts, the EEOC will vigorously pursue claims against employers who refuse to transfer minimally qualified disabled employees to vacancies. Accordingly, the safest bet would be for employers to transfer disabled employees to vacancies for which they are minimally qualified. ■

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## Endnotes

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2. 42 U.S.C. § 12112 (b)(5)(A).
3. 42 U.S.C. § 12111(9)(B).
4. EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002).
5. 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734, 186 L. Ed. 2d 192 (2013).
6. 227 F.3d 1024, 1029 (7th Cir. 2000).
7. 535 U.S. 391 (2002).
8. *Id.* at 395-96.
9. *Id.* at 405-06.
10. *Id.* at 397.
11. *Id.* at 397-98 (emphasis in original).
12. *Id.* at 401-02.
13. *Id.* at 402.
14. *Id.* 405-06.
15. *Id.* at 406.
16. *Id.* at 404.
17. *Id.* at 405-06.
18. 693 F.3d at 760.
19. *Id.* at 761.
20. *Id.*
21. *Id.*
22. 673 F.3d 543, 544 (7th Cir. 2012), *vacated*, 693 F.3d 760 (7th Cir. 2012).
23. *Id.*
24. *Id.* at 547.
25. 693 F.3d at 761-62.
26. *Id.* at 764.
27. *Id.*
28. *Id.* at 764 n.3.
29. 156 F.3d 1284, 1305 (D.C. Cir. 1998).
30. *Id.* at 1286-87.
31. 180 F.3d 1154, 1165 (10th Cir. 1999).
32. *Id.* at 1164.
33. *Id.* at 1167, 1169.
34. *Id.* at 1167 (*citing to* EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (1999)).
35. *Huber v. Wal-Mart*, 486 F.3d 480, 484 (8th Cir. 2007).
36. *Id.* at 483 (*quoting Humiston-Keeling*, 227 F.3d at 1028).
37. 292 F.3d 356, 358 (3d Cir. 2002).
38. *Id.* at 361.
39. *Haynes v. AT&T Mobility*, 2011 WL 532218, \* 4-5 (M.D. Pa. Feb. 8, 2011).

# Will the New DSM-V Mean an Increase in Disability Discrimination Litigation?

by Christina Stoneburner

After nearly 10 years of study and discussion, American Psychiatric Publishing has released for immediate use the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).<sup>1</sup>

The DSM-V sets forth diagnostic criteria, as well as a list of recognized psychiatric conditions and disorders. As many employment lawyers know, the previous incarnation, DSM-IV-TR (and the prior versions), has been used by both sides in employment litigation. The DSM can be a tool used by plaintiffs to try to prove a condition is a disability. On the flip side, the DSM can be used by defendants to disprove the assertion a condition is a recognized disability and/or whether the plaintiff was properly diagnosed with a certain condition.

The DSM-V was released with some controversy, in part because of the expanded definition of disabilities. In addition, many members of the psychiatric community believe it is no longer a true diagnostic tool, and instead is a marketing book for pharmaceutical companies. Indeed, the National Institute of Mental Health (NIMH) has publicly stated the DSM-V should not be used as a diagnostic tool, as it lacks reliability, since conditions are diagnosed merely by clinical symptoms and not objective laboratory means.<sup>2</sup> The NIMH has also announced it has launched its own research project, the Research Domain Criteria, to come up with diagnostic tools that use clinical symptoms in conjunction with more readily tested tools, such as genetics, imaging, and cognitive science.

The question remains whether the DSM-V will continue to be recognized as the Bible for diagnosing psychiatric disorders. In the meantime, DSM-V does make significant changes from DSM-IV-TR. Some of those changes are semantic, such as the change in terminology from “mental retardation” to “intellectual disability,” and some relate to adding new disorders.

Some of the ‘new’ disorders set forth in DSM-V are:

- disruptive mood dysregulation disorder (which is to be applied to children under 18 “who exhibit

persistent irritability and frequent episodes of extreme behavioral dyscontrol”);

- premenstrual dysphoric disorder;
- hoarding disorder;
- excoriation (skin picking);
- substance-/medication-induced obsessive-compulsive and related disorder; and
- gambling disorder

In addition to the ‘new’ disorders, some previously recognized disorders have undergone revisions that will expand the number of individuals who may be diagnosed with them. For example, in the past to be diagnosed with intermittent explosive disorder, physical aggression was required. Now a diagnosis could be made where the aggressive outbursts are verbal and non-injurious.

To date, there have been no new disability discrimination cases that specifically utilize the DSM-V. However, based on the above and the many other examples in the new DSM-V making it easier to be diagnosed with a disorder, it is not difficult to imagine that more employees will assert they are protected as disabled, thus increasing the frequency of such litigation.

The established law in New Jersey is that the DSM may be used as a tool for identifying a medical condition that may qualify as a disability, but that alone cannot demonstrate an employee is disabled for purposes of the New Jersey Law Against Discrimination. Rather, an employee must demonstrate he or she was, in fact, diagnosed with the medical condition, and that the medical condition was a disability under the law.<sup>3</sup>

In light of the public criticism of the DSM-V as a diagnostic tool, it does not appear that the new DSM-V by itself will have significant impact on the success of these disability discrimination claims. First, it is unclear whether these new conditions will be uniformly recognized by the psychiatric community as disorders. For example, to a layperson’s eye it is difficult to see a distinction between disruptive mood dysregulation disorder and normal teenage behavior. Second, even if

the new conditions or relaxed diagnostic criteria are accepted by the psychiatric community, employees will still require expert testimony demonstrating they have been diagnosed with a disorder and that it constitutes a disability.

One thing that is certain is the issuance of the new DSM-V will be the cause of debate in future litigation. ■

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## **Endnotes**

1. American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013).
2. April 29, 2013 Director's Blog: Transforming Diagnosis by Thomas Insel., <http://www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml>.
3. See *A.B.C. v. XYZ Corp.*, 282 N.J. Super. 294, 508 (App. Div. 1995).

# Drinks with a Side of Sexy—Weight Discrimination, the LAD, and Why “Borgata Babes” Are More Than Just Cocktail Waitresses

by Amanda E. Jackson

On July 18, 2013, the employment discrimination case of *Schiavo v. Marina District Development Company, LLC* ended in a groundswell of dissatisfaction from both disability advocates and women’s groups.<sup>1</sup> The plaintiffs, 22 women employed by the company that operates the Borgata Hotel-Casino in Atlantic City, had their case dismissed on summary judgment. The court found that the plaintiffs had agreed to be subject to what they subsequently claimed was impermissible discriminatory conduct, and held that their employer had legal and contractual rights to engage in that conduct.

Their complaint? The Borgata told them they could not gain too much weight after they were hired. After all, according to the Borgata, one is supposed to conform to an ideal when one is hired to work at the casino as a “costumed beverage server,”<sup>2</sup> better known as a ‘Borgata Babe.’

The New Jersey Law Against Discrimination (LAD) prohibits discrimination based on race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectational or sexual orientation, genetic information, sex, gender identity or expression, disability, or atypical hereditary cellular blood trait.<sup>3</sup> Although the LAD is not restricted to “immutable” characteristics, weight—by itself—has not been included by the New Jersey Legislature as one of the enumerated protected categories.<sup>4</sup>

In fact, the LAD also contains a lesser-known exception relating to personal appearance. Section 10:5-12(p) permits employers to impose “reasonable” workplace appearance, grooming, and dress standards.<sup>5</sup> Prior to *Schaivo*, however, no New Jersey court had interpreted this provision.

## Sex Sells

The Borgata markets itself as a “Las Vegas Style” haven nestled among otherwise conventional casinos that dot the Atlantic City coast. To the casual observer, the ‘Borgata Babes’ might simply appear to be men and women of various ages, sizes, national origins and, purportedly, body types hired to serve cocktails on the casino floor. To the Borgata, however, these employees are charged with a much more important mission—to captivate their audience by fueling a fantasy of unattainable desire. Indeed, each candidate must “audition” for the role and is provided a brochure by the Borgata that reinforces exactly how the casino views the position:

They’re beautiful. They’re charming. And they’re bringing drinks.

She moves toward you like a movie star, her smile melting the ice in your bourbon and water. His ice blue eyes set the olive in our friend’s martini spinning. You forget your own name. She kindly remembers it for you. You become the most important person in the room. And relax in the knowledge that there are no calories in eye candy.

Part fashion model, part beverage server, part charming host and hostess. All impossibly lovely. The sensational Borgata Babes are the new ambassadors of hospitality representing our beautiful hotel casino and spa in Atlantic City. On a scale of 1 to 10, elevens all.

Eyes, hair, smile, costumes so close to absolute perfection as perfection gets, Borgata Babes do look fabulous, no question. But once you can breathe again, prepare to be taken to another level by the Borgata Babe attitude. The memory of their warm, inviting, upbeat personalities will remain with you long after the vision has faded from your dreams.

“Are you a Babe?”<sup>6</sup>

Further, ‘Borgata Babes’ are given notice in writing upon hire that they are being employed as “entertainers,”<sup>7</sup> and that they will be required to comply with several defined personal appearance standards (PAS), including a PAS regarding weight.

For the *Schaivo* plaintiffs, the weight PAS was, at first, nebulous: “weight must be proportional to height.”<sup>8</sup> In order to maintain the correct proportion, the Borgata reimbursed employees for the cost of gym memberships, nutritionists, and personal trainers. Shifts consisted of seven hours—one hour of appearance preparation and six hours actually on the casino floor. Special costumes were created by a high-end fashion designer, well-tailored and clearly designed to cultivate the essence of glamorous sex appeal.

In 2005, however, the weight PAS was revised to require that, absent a *bona fide* medical condition, a ‘Borgata Babe’ could not gain more than seven percent over her or his weight at the time of hire.<sup>9</sup> Any employee found to be out of compliance could be immediately suspended without pay and would be provided a 90-day window to lose the extra weight. If the employee was still non-compliant, he or she was given the opportunity to transfer to a position not governed by the weight PAS or would be subject to termination.<sup>10</sup>

The Borgata subsequently revised the policy again by instituting a 90-day notice period during which any ‘Borgata Babe’ found to be out of compliance with the seven percent requirement, regardless of whether he or she had demonstrated a *bona fide* medical condition, would be allowed to work while participating in a fitness program paid for by the casino. Nevertheless, the plaintiffs pressed forward.

## The Decision

The Honorable Nelson C. Johnson, J.S.C., commenced his analysis along two lines: first, whether employers are allowed to regulate the appearance of employees and, second, if so, did the Borgata’s weight PAS go too far?

With regard to the first question, the court stated: “There can be little dispute that employers have the right to impose reasonable standards regulating employee appearance through the enforcement of grooming standards, including those that regulate weight.”<sup>11</sup> Employee appearance contributes to the overall image of a company, and it has been deemed “management prerogative” to regulate that likeness.<sup>12</sup> In fact, not only

are employers permitted to regulate employees’ appearances, but an employer is permitted to show a preference for an employee who possesses a “sexually attractive” look.<sup>13</sup> Thus, the adage that ‘sex sells’ has at least judicial acknowledgment in New Jersey, if not approval.

In focusing upon the second question—whether the Borgata’s weight PAS was reasonable under the circumstances—the court examined a number of factors in reaching the conclusion that it was reasonable as a matter of law.

Of great importance to the court was the fact that the Borgata explicitly advised the plaintiffs, even before they were employees, that appearance, including a weight restriction, was a major part of their jobs. The court found the Borgata’s terms and conditions of employment were fully disclosed in offer letters, which included the PAS. Thus, there were no secrets or surprise conditions of employment unilaterally imposed by the employer at a later date.

Equally important to the court was the fact that the women voluntarily agreed to the conditions of employment.<sup>14</sup> The court acknowledged that the term “babe” “oozes sexual objectification,” and that while some might find the term objectionable, many do not and consider it to be a form of “playful flattery; generally complimentary.”<sup>15</sup> Noting that there was no evidence showing that any of the plaintiffs were legally incompetent, illiterate, defrauded, subjected to duress or coerced into taking the job or agreeing to the revised PAS, the court found that “it cannot be credibly asserted that the plaintiffs were ignorant of the position for which they had applied”<sup>16</sup> and *all* that it entailed, including that they would be known as ‘Borgata Babes.’ In essence, if one is being hired to be a ‘Babe,’ one should not be surprised if the employer seeks to maintain that image through an appearance policy. As the court stated, “words matter,” and the plaintiffs were not free to shed the label ‘Babe’ after they had “embraced it when they went to work for the Borgata.”<sup>17</sup>

The court next examined whether the PAS led to unlawful gender stereotyping, noting that such stereotyping is allowed in the workplace as long as it does not impose a professional disadvantage on one sex or the other, or punish one sex for having a personal or physical trait that is praised in the other.<sup>18</sup> In this case, the court found the Borgata “established its weight standard in an attempt to objectively regulate appearance and applied it evenly to both sexes.”<sup>19</sup> Thus, the court found

that while the policy may play into the stereotype that fit people are more sexually attractive than those who are not, the policy did not, either on its face or in practice, impermissibly stereotype based on sex.

The court also looked at whether the Borgata's appearance standards were reasonable in light of factors present in the casino industry, namely: 1) the industry's mores and practices; 2) the marketplace in which the Borgata competes; 3) the duties to be performed by the staff; and 4) the expectations of the Borgata's patrons.

The court pulled no punches in describing the nature of the casino industry and its mores: "[c]asinos contrive an environment of high energy, show-biz and licentiousness; all calculated towards getting patrons to part with some of their personal assets while making them happy – happy enough that they will want to return despite having lost money gambling."<sup>20</sup> The court found the Borgata presented itself as a "Las Vegas Style"<sup>21</sup> hotel-casino, and that absent *unreasonable* workplace standards for appearance, grooming, and dress, they should be allowed to pursue their chosen business model as best as they see fit. This includes having attractive people in attractive costumes serve drinks to patrons.

The plaintiffs countered that the appearance policy was designed to turn them into "mere sex objects"<sup>22</sup> and, thus, was impermissible. The court dismissed the argument, stating that it stretched "far beyond existing jurisprudence"<sup>23</sup> and would require the court to hold that despite being attractive females who accepted a position in which their good looks and physiques were a key to their hiring, they were now being unlawfully stereotyped by being required to maintain their good looks and physiques.

Finally, the court found that no evidence supported the plaintiffs' allegations that the weight PAS had been unequally enforced because male counterparts had purportedly gained more than the allowable weight and had not been subject to disciplinary action.

## Current Status of the Law and Future Implications

The delineation of the lower court is clear. A weight and appearance policy must meet two thresholds to be considered lawful: 1) the policy must be facially non-discriminatory; and 2) it must be reasonable for the environment in which it is enforced.

It is evident the court recognized the societal norms of the world in which we live, and ruled that it was not the Borgata's job to change them. To wit, the sexual objectification of women is profitable. While some may view the Borgata's conduct as socially irresponsible, it is not illegal under current New Jersey law.

The Legislature, despite repeated opportunities, has not broadened the scope of the LAD to explicitly include weight. The LAD is not without protection, however, for those who suffer from weight as a disability. Obesity is a recognized disability, and the LAD's protections are triggered whether that handicap is actual or perceived.<sup>24</sup>

New Jersey shares the company of 49 states in its stance that weight, by itself, is not a protected category. Michigan stands alone in its explicit prohibition against weight discrimination.<sup>25</sup> Until the Legislature expands the provisions of the LAD to include this category, the causes of action for weight discrimination are markedly limited to those that reach the level of a disability.

And until then, the 'Borgata Babes' will have to tape their employment agreements to their refrigerator. ■

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## Endnotes

1. *Schiavo v. Marina District Dev. Co., LLC*, Docket No. ATL-L-2833-08 (Law Div. July 18, 2013); John Sanburn, Too Big to Cocktail? Judge Upholds Weight Discrimination in the Workplace, *Time Magazine*, July 16, 2013, available at <http://nation.time.com/2013/07/26/too-big-to-cocktail-judge-upholds-weight-discrimination-in-the-workplace/#ixzz2aGFW6XfU>; Jennifer Bogdan, 'Borgata Babes' Lose Suit Over Weight Bias, *Press of Atlantic City*, July 25, 2013, available at [http://www.pressofatlanticcity.com/news/press/atlantic\\_city/borgata-babes-lose-suit-over-weight-bias/article\\_7ff91fbc-f468-11e2-83b3-001a4bcf887a.html](http://www.pressofatlanticcity.com/news/press/atlantic_city/borgata-babes-lose-suit-over-weight-bias/article_7ff91fbc-f468-11e2-83b3-001a4bcf887a.html); Borgata Babes Lose Lawsuit: Waitresses Gaining Weight, Judge Rules, *Huffington Post*, July 27, 2013, available at [http://www.huffingtonpost.com/2013/07/27/borgata-babes-lawsuit-waitresses-weight\\_n\\_3664531.html](http://www.huffingtonpost.com/2013/07/27/borgata-babes-lawsuit-waitresses-weight_n_3664531.html).

2. *Schiavo*, Docket No. ATL-L-2833-08, at 3.
3. N.J.S.A. 10:5-12(a).
4. *Visick v. Fowler Equip. Co., Inc.*, 173 N.J. 1, 17 (2002); *Gimello v. Agency Rent-A-Car Sys., Inc.*, 250 N.J. Super. 338, 362 (App. Div. 1991).
5. N.J.S.A. 10:5-12(p).
6. *Schiavo*, Docket No. ATL-L-2833-08, at 3-4.
7. *Id.* at 4.
8. *Id.*
9. The plaintiffs objected to the new PAS and filed suit.
10. Despite the unequivocal language of the PAS regarding immediate suspension, no Borgata Babe found out of compliance, for the first time, was immediately suspended or terminated.
11. *Schiavo*, Docket No. ATL-L-2833-08, at 14 (citing *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (holding that appearance of company's employees contributes to the company's image, and thus a reasonable dress and grooming code is a proper "management prerogative")); *Wiseley v. Harrah's Entm't, Inc.*, 94 Fair Empl. Pract. Cas. (BNA) 402 (2004) (holding that grooming policies, even if they include sex-specific language, are not within the scope of Title VII, and by extension the NJLAD); *Rivera v. Trump Plaza Hotel & Casino*, 305 N.J. Super. 596 (1997) (holding that employer did not violate covenant of good faith and fair dealing when it fired a male employee who refused to comply with the appearance standards by cutting his hair).
12. *Craft*, 766 F.2d at 1215.
13. *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076, 1081-82 (9th Cir. 2004) (upholding the requirement that female employees wear makeup).
14. The court recognized that some may argue a lack of *true* consent to become "sex objects" because people may accept jobs out of economic necessity. The court did not consider the argument further, however, as there was no evidence to support a finding of fraud or duress.
15. *Schiavo*, Docket No. ATL-L-2833-08, at 16-17.
16. *Id.* at 16.
17. *Id.* at 18.
18. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Craft*, 766 F.2d at 1214-15.
19. *Schiavo*, Docket No. ATL-L-2833-08, at 19.
20. *Id.* at 20.
21. *Id.* at 21.
22. *Id.* at 22.
23. *Id.*
24. *Gimello*, 250 N.J. Super. at 355.
25. Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2102.



# Boeing & Joanna Gamble and the Trend Toward a More Transparent Workplace

by Michael O'Connor and Justin Burns

Employers have traditionally controlled the content of workplace investigations. Among other things, employers have frequently required the employees involved in the investigation, including the complainant, to keep the fact of the investigation, as well as any information that was disclosed, confidential.

In the recent July 2013 decision in *Boeing Company & Joanna Gamble*,<sup>1</sup> the administrative law judge (ALJ) held that when an investigation relates to the terms and conditions of employment, employers may not prohibit employees from discussing matters under investigation by the company's human resources department absent a particularized showing of need. The ALJ found that Boeing Company's use and enforcement of blanket confidentiality rules, which apply to all investigations regardless of the circumstances, constituted an unfair labor practice under Section 8 of the National Labor Relations Act (NLRA).<sup>2</sup>

The *Boeing* decision is in line with an emerging national trend toward a more transparent workplace in which employees may discuss an investigation that relates to the employees' terms and conditions of employment. This article analyzes the *Boeing* decision and related developments and their impact on the workplace under federal and New Jersey law.

## Background

### Complaint and Investigation

Joanna Gamble, an unrepresented employee, worked for the Boeing Company for over 30 years. In May 2012, Gamble complained to Boeing that her male supervisor and another male coworker had engaged in certain "unacceptable behavior" toward female employees, including using the word "bitch" and "bitch sessions" when referring to females and their meetings.

In response to Gamble's complaints, Boeing initiated a human resources investigation. At the outset of the investigation, Boeing required Gamble to sign a confidentiality notice that "directed [Ms. Gamble] not to discuss this case with any Boeing employee other than

company employees who are investigating this issue." During its investigation, Boeing's human resources department did not interview the other female coworkers who were the subject of the disparaging comments. The investigation concluded that Gamble's accusations could not be substantiated. After Gamble learned the findings of the investigation, she emailed her female coworkers and encouraged them to: 1) complain they had not been interviewed during the investigation and 2) stand together so this intolerable behavior was addressed.

When human resources first learned Gamble had discussed the investigation with her coworkers, it advised her she was in breach of the confidentiality notice, and therefore subject to discipline. After a brief investigation into whether Gamble had, in fact, breached the confidentiality notice, the company issued her a written warning for "discussing the investigation with others" and gave her notice that any future violations could lead to further disciplinary action, including termination.

### Unfair Labor Practice Charge

Approximately one month after she received the written warning, Gamble filed an unfair labor practice charge under the NLRA. She alleged the warning violated her right to engage in collective action with other employees about the terms and conditions of employment.<sup>3</sup> Several days after she filed her charge, Boeing rescinded the warning. Gamble then filed an amended unfair labor practice charge challenging the use of the confidentiality notice. The company then instituted a revised confidentiality notice, which *recommended*, rather than directed, that employees refrain from discussing the case or investigation with other employees.

### Decision of Administrative Law Judge

Boeing contended its confidentiality policy was necessary to protect the integrity of ongoing investigations, protect employees from retaliation and foster an environment where employees will readily report issues.

The ALJ held that Boeing's original confidentiality notice, which prohibited employees from discussing ongoing investigations, "was clearly unlawful" because it infringed on the employees' right to discuss among themselves the terms and conditions of their employment and otherwise engage in concerted protected activity. The ALJ based his decision on National Labor Relations Board precedent from two recent cases: *Hyundai American Shipping Agency, Inc.*<sup>4</sup> and *Banner Estrella Medical Center*.<sup>5</sup>

The ALJ further held that the revised confidentiality notice, which requested and/or recommended that employees refrain from discussing the investigation with their coworkers, would have an impermissible chilling effect on collective employee activity, as it lacked any serious assurance that an employee could disregard Boeing's "recommendation."<sup>6</sup>

The ALJ also found Boeing committed an unfair labor practice when it disciplined Gamble for discussing the investigation with her coworkers. The ALJ held disciplining an employee under an unlawful confidentiality rule is unlawful, even if the employee's conduct was not concerted, where the discipline imposed would have the effect of chilling other employees from engaging in concerted activity. However, the ALJ indicated an employer does not commit an unfair labor practice when it disciplines an employee for *actually* interfering with an investigation. In Gamble's case, since the investigation was complete at the time she discussed the case with her coworkers, there could have been no actual interference.

### The Growing Trend Toward Transparency

The *Boeing* decision reflects a growing national trend that recognizes employees who discuss the terms and conditions of their employment engage in protected activity whether they are represented by a union or not.<sup>7</sup>

State legislatures have joined this trend. For example, in May 2013, Vermont amended its Equal Pay Act to make it unlawful for an employer to require an employee to refrain from disclosing or discussing the amount of his or her wages with others or to require an employee to sign a waiver of his or her right to discuss wages.<sup>8</sup>

New Jersey is no exception. Recently, in Aug. 2013, the New Jersey Legislature amended the Law Against Discrimination to make it illegal for employers to retaliate against employees for talking about their salaries with their coworkers if it relates to the investigation of discrimination or litigation.<sup>9</sup>

So, what does this mean for New Jersey employers? What policies may an employer implement to protect the integrity of ongoing investigations? What policies go too far? When may an employer lawfully direct an employee not to discuss a particular interview?

Although this area of law is emerging, a few principles are clear:

- Employers should neither issue nor enforce blanket confidentiality rules.
- Employers may not prohibit employees from discussing investigations that relate to the terms and conditions of employment, including pay. For example, a company generally may not prohibit discussion of a hostile work environment sexual harassment complaint.
- Employers may require confidentiality in the course of an investigation only based on a particularized need for confidentiality. For example, an employer investigating potential employee theft may have a need for confidentiality to avoid tipping off a suspect. Other reasons that should withstand judicial scrutiny include the need to protect witnesses, safeguard evidence that is in danger of being destroyed, and to prevent fabricated witness accounts or a potential cover-up.<sup>10</sup>
- Employers may discipline employees for actually interfering with an investigation as long as the discipline relates to the interference and not violation of the confidentiality rule.<sup>11</sup> ■

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## Endnotes

1. *Boeing Company & Joanna Gamble*, Case 19-CA-089374. On Aug. 23, 2013, Boeing appealed the ALJ's decision by filing its exceptions to the decision. Counsel for the acting general counsel has filed its answering brief. At the time of this article, that appeal is still pending.
2. 29 U.S.C. § 158.
3. Section 7 of the NLRA states in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the NLRA states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights. 29 U.S.C. § 158.
4. 357 NLRB No. 80 (2011) (employer violated NLRA by verbally directing employees not to discuss matters under investigation with coworkers without first showing a specific individualized need for confidentiality).
5. 358 NLRB No. 93 (2012) ("blanket" prohibition against discussing matters under investigation violates the NLRA).
6. *See also Banner Estrella Med. Ctr.*, 358 NLRB No. 93 (statements having a "reasonable tendency to coerce employees" constitute an unlawful restraint).
7. For example, on May 30, 2012, the board issued the third of its reports on social media. Therein, the board rejected six of the seven social media policies it reviewed on the grounds that the policies could "reasonably be construed to chill Section 7 rights." *See* National Labor Relations Board Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59 (May 30, 2012).
8. 21 V.S.A. § 495(a)(7).
9. *See* N.J.S.A. 10:5-12r.
10. *See Banner Estrella Med. Ctr.*, 358 NLRB No. 93.
11. *Id.*; *see also Continental Group, Inc.*, 357 NLRB No. 39 (2011).

# Cats Do Not Always Land on Their Feet: What the Second Circuit's Decision in *Irizarry v. Catsimatidis* Means for Individual Liability Under the FLSA

by Michael R. DiCiara

During the recent explosion of litigation pursuant to the Fair Labor Standards Act (FLSA), one question has largely remained unanswered: Can individuals be held liable for violations under the act? While the Supreme Court<sup>1</sup> has yet to weigh in on this issue, the Second Circuit Court of Appeals, in *Irizarry v. Catsimatidis*, determined that the answer to that question—to the dismay of high-ranking corporate executives—is yes.<sup>2</sup> For those seeking solace that the holding in *Catsimatidis* applies only in the Second Circuit, there is good reason to be concerned that other courts, including those in the Third Circuit, will follow suit and find individuals are indeed liable for violations of the FLSA.

## Brief Review of *Irizarry v. Catsimatidis*

In an opinion issued on July 9, 2013, the Second Circuit Court of Appeals determined that John ‘Cats’ Catsimatidis, the CEO of Gristede’s Foods Inc. and former New York City mayoral candidate, was an employer pursuant to the FLSA and personally liable for the wage and hour violations of his corporate entities. In this case, the corporate defendants had entered into a settlement agreement with the plaintiffs for various wage and hour violations under the FLSA. After the corporate defendants defaulted on their payment obligations pursuant to the settlement agreement, the plaintiffs moved for summary judgment on Catsimatidis’s personal liability as an employer, and the district court granted the motion. Catsimatidis appealed.

Noting the remedial nature of the FLSA, and that its provisions must be applied expansively to have the widest possible impact, the Second Circuit utilized an “economic realities”<sup>3</sup> test to determine that Catsimatidis was an employer pursuant to the FLSA. The factors of the economic realities test, in addition to the totality of the circumstances, include the following non-exhaustive

elements: 1) the power to hire and fire employees, 2) supervision and control over work schedules or conditions of employment, 3) determining the rate and method of payment, and 4) maintenance of employment records.

The Second Circuit determined that, even though Catsimatidis did not satisfy all four elements of the economic realities test, the totality of the circumstances revealed he had functional control of the corporate entity as a whole, and his decisions affected not just the company’s bottom line but also impacted individual stores as well as the personnel and products therein.

The Second Circuit found Catsimatidis—the chairman, president, and CEO of Gristedes Food Inc.—exercised sufficient control over the plaintiffs to qualify as an employer under the act, and was persuaded by the following facts:

- 1) Even though he rarely exercised the power to hire or fire employees and testified he could only terminate the four or five employees that reported directly to him, Catsimatidis still exercised sufficient control over the plaintiffs because he had control over those who supervised them.
- 2) He kept track of payroll and could shut down the business, declare bankruptcy, and provide the signature necessary for a bank letter of credit.

In addition, the court noted that even though Catsimatidis was not personally responsible for the FLSA violations, he did profit from them. However, after engaging in a fairly detailed analysis of how Catsimatidis exercised the requisite control over his company, the court did not elaborate on how exactly he profited from the FLSA violations.<sup>4</sup>

## Impact of *Catsimatidis*

While *Catsimatidis* is now the prevailing law in the Second Circuit, there is good reason to believe the Third Circuit Court of Appeals would follow its sister

court. Just last year, the Third Circuit adopted a non-exhaustive, four-part test similar to the one the Second Circuit utilized in determining that Catsimatidis was an employer under the FLSA, and thus individually liable for wage and hour violations of the corporate entity.<sup>5</sup>

Moreover, as FLSA litigation is not likely to slow down any time soon, experienced plaintiff's attorneys will likely more aggressively pursue individually named defendants in FLSA lawsuits. Naming individuals in FLSA actions will afford plaintiffs the opportunity to obtain compensation for wage and hour violations if a corporate entity files for bankruptcy protection during the course of litigation. Moreover, defendants will now first have to think long and hard before making a Rule 68 offer of judgment because, if the corporate entity cannot satisfy the judgment, the burden will fall on the individually named defendants to foot the bill. That scenario would not be fun to explain to a client.

### More Individual Liability?

The question then arises regarding whether the Second Circuit decision creates greater liability for individual defendants such as Catsimatidis. The short answer is that it certainly does not help high-level executives. Individual liability is a serious issue and must

be treated as such by senior management, as they may ultimately be found liable and responsible should the corporate defendant be unable to meet its financial obligations. Accordingly, it is critical that senior management review these cases with attorneys experienced in the field to help determine whether the individual defendant falls within the definition of employer under the Second Circuit's analysis.

### Conclusion

The *Catsimatidis* decision should have a significant impact on FLSA litigation. Individuals will be named defendants more frequently and will face the very real exposure of having to pay for a corporate entity's FLSA violations. The decision will also impact litigation strategy, as threats of bankruptcy and Rule 68 offers may not deter plaintiffs from pursuing their claims.

While the ultimate impact of this case may not be realized for years, it seems clear that individuals will not have nine lives to avoid liability in FLSA actions. ■

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### Endnotes

1. Please note that Catsimatidis filed a petition for a writ of certiorari on Dec. 6, 2013. The response to the petition was due Feb. 5, 2014. U.S. Supreme Court Case No. 13-683.
2. *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013).
3. *Id.* at 104-05 (citing *Barfield v. NYC Health & Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008).
4. *Id.* at 116-17.
5. *In Re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 469-70 (3d Cir. 2012).