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Thomas Paschos

Best Strategies Defending Employment Retaliation Claims in New Jersey

New Jersey Law Against Discrimination

The Law Against Discrimination (LAD) has a specific subsection addressing employer retaliation against employees for engaging in "protected" activity.[1] The law identifies two categories of employee activity that are "protected:" (1) opposing practices or acts that are unlawful under the LAD, i.e., complaining about, or protesting against, discrimination in the workplace and (2) filing a complaint or testifying or assisting in any proceeding under this act. In addition, this section of the LAD provides that it is unlawful for an employer "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act."[2] The anti-retaliation protections of the LAD also apply to retaliation that happens after an employee is fired.[3]

New Jersey law is well settled that in order to establish a *prima facie* case of retaliation under the LAD, an employee was required to show: (1) he/she was engaged in a protected activity known to the employer; (2) he/she was thereafter subjected to an adverse employment decision by the employer; and (3) there was a causal link between his protected activity and the subsequent adverse employment action.[4] The plaintiff must prove that a retaliatory reason more likely than not motivated the defendant's action or that the defendant's stated reason for its action is not the real reason for its action. To prevail, the plaintiff is not required to prove that his/her protected activity was the only reason or motivation for the defendant's actions.[5]

The term retaliation can include, but is not limited to, being discharged, demoted, not hired, not promoted or disciplined. In addition, many separate but relatively minor instances of behavior directed against the plaintiff may combine to make up a pattern of retaliatory behavior.[6] A retaliation plaintiff must demonstrate that his underlying complaint of discrimination was brought "reasonably and in good faith."[7]

Conscientious Employee Protection Act

Under the Conscientious Employee Protection Act (CEPA), commonly known as New Jersey's "whistleblower statute," an employee may not be discharged or discriminated against in retaliation for the following activities:[8]

- Disclosing, or threatening to disclose, an activity, policy or practice of the employer (or another employer) that the employee reasonably believes is illegal, fraudulent or criminal. The disclosure may be made to either a supervisor or a public body.
- Providing information or testimony to a public body conducting an investigation, hearing or inquiry into an employer's violation of law.
- Objecting to or refusing to participate in an activity, policy or practice that the employee reasonably believes is illegal, fraudulent, criminal or incompatible with a clear mandate of public policy.

A plaintiff who brings a cause of action pursuant to CEPA must demonstrate that: (1) 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; (2) he or she performed a "whistle-blowing" activity; (3) an adverse

Thomas Paschos is a partner of the law firm of Thomas Paschos & Associates, PC. He practices in the fields of professional liability, employment litigation, insurance coverage, products liability and complex commercial litigation.

Thomas Paschos & Associates, PC
30 North Haddon Avenue, Suite 200
Haddonfield, New Jersey 08033
856.528.9811 Phone
856.354.6040 Fax
tpaschos@paschoslaw.com
www.paschoslaw.com

employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.[9] In cases involving licensed or certified health care employees, plaintiff must show that it is more likely than not that he/she reasonably believed that the alleged wrongful activity, policy or practice about which the plaintiff "blew the whistle" constituted improper quality of patient care."[10]

CEPA only requires an employee's "reasonable belief" that the employer was violating the law.[11] The employee's suspicion that the employer is violating the law does not need to turn out to be true.

Legal Standard

Some recent cases have clarified the requisite standard for retaliation claims brought under Title VII, CEPA and the LAD. In *University of Texas Southwestern Medical Center v. Nassar*,[12] the United States Supreme Court was asked to define the proper standard of causation for Title VII retaliation claims. The Court noted that Title VII provided for two types of employment claims. The first is what the Court terms "status-based discrimination," which includes prohibitions against employer discrimination on the basis of race, color, religion, sex or national origin in the workplace. The second is employer retaliation on account of an employee having opposed, complained of, or sought remedies for, unlawful workplace discrimination. For discrimination claims, claimants only need to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision. However, since Title VII's anti-retaliation provision appears in a different section of the statute, courts were unclear whether the legal standard for discrimination cases applied in retaliation cases.

In resolving this question, the majority of the Supreme Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation. The Court rejected the lower standard of proof which required employees only to prove that the employer had a mixed motive, making it more difficult for employees to prove retaliation claims.

On July 17, 2013, shortly after the Supreme Court decision in *Nassar*, the New Jersey Supreme Court addressed retaliation and came down on the opposite side under the LAD and CEPA. The case, *Battaglia v. United Parcel Service, Inc.*,[13] arose from an employee's claims that he was retaliated against for complaining to a supervisor about co-worker and supervisor misconduct and for making an anonymous complaint to the corporate HR Manager. The plaintiff-employee alleged, among other things, a retaliation claim under the LAD and under CEPA.

The Court ruled that a cause of action alleging retaliation under the LAD only requires the complaining employee's good faith belief that the unlawful conduct occurred, not an actual violation. An identifiable victim of actual discrimination is not required.

The Court also briefly discussed CEPA's waiver provisions, urging trial courts to be careful to prevent plaintiffs from bringing parallel claims under two or more statutes. Under CEPA's waiver provision, a plaintiff cannot maintain claims under both CEPA and another statute where the protected activity is the same.

Prevention of Retaliation Claims

To reduce the likelihood that an employee will have grounds to assert a retaliation claim, employers should create a working environment in which employees feel they can alert management to potential problems and participate in investigations without fear of retaliation. There are many steps employers should take to reduce the risk of retaliation claims and make claims easier to defend:

- **Establish a policy against retaliation.** Employers should have a strong policy against retaliation making it clear that retaliation will not be tolerated. The policy should encourage employees to come forward with complaints of unlawful conduct without fear of retaliation.
- **Provide employee training.** Employers should provide training on what types of conduct constitute retaliation and how to respond when a complaint is brought to their attention.
- **Communicate with the complaining employee.** Employers should refer the employee to anti-retaliation policies and explain to the employee that any hostile or negative treatment should be reported.
- **Keep complaints confidential.** The fewer people who know about a complaint, the smaller the chances are that someone will retaliate against the employee.
- **Consider taking protective measures.** Employers should consider allowing the claimant to report to a different supervisor or provide an alternative work schedule so as to reduce the risk of retaliation. Employers should be careful to ensure that any changes do not appear to be retaliatory.
- **Document everything.** Document the steps you take to prevent retaliation and to address it when you receive a complaint. P

1 *N.J.S.A.* 10:5-12(d),

2 *Id.*

3 See *Roa v. Roa*, 200 N.J. 555 (2010).

4 *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 629-30 (1995); *Romano v. Brown & Williamson Tobacco Corp.*, 284 N.J.Super. 543, 548-49 (App.Div. 1995).

5 *Kolb v. Burns, 320 N.J. Super.* 467, 479 (App. Div. 1999) (holding burden on plaintiff is to show "retaliatory discrimination was more likely than not a determinative factor in the decision").

6 *See Nardello v. Twp. of Voorhees*, 377 *N.J. Super.* 428, 433-436 (App. Div. 2005); *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 448 (2003).

7 *Carmona v. Resorts Int'l Hotel & Casino*, 189 N.J. 354, 372-73 (2007).

8 N.J.S.A. 34:19-3.

9 *Dzwonar v. McDevitt*, 177 N.J. 451 (2003)

10 N.J.S.A. 34:19-3.

11 *Dzwonar*, 177 N.J. at 462-64 (holding that CEPA "does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true [; i]nstead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred … [and] the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable").

12 133 S. Ct. 2517 (2013)

13 2013 N.J. LEXIS 734 (N.J. July 17, 2013)