Non-Employees Gain Important Protections in New Jersey

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New Jersey courts have issued two rulings that make non-employees (whether they are suppliers or independent contractors) eligible for protection against discrimination under the state's Law Against Discrimination (LAD) and its whistleblower law, the Conscientious Employee Protection Act (CEPA). Both of these rulings greatly expand the potential pool of plaintiffs who can file claims against businesses in New Jersey's employee-friendly courts.

In *J.T.'s Tire Service, Inc. v. United Rentals North America* (issued on January 6, 2010), New Jersey's Appellate Court once again stretched the boundaries of the LAD by allowing plaintiff, an owner of a tire supply company, to move forward with her claim against a customer/vendor for quid pro quo sexual harassment. The Court rationalized its ruling based upon the LAD's prohibition against refusing to do business on the basis of sex, indicating the LAD contemplated the type of action engaged in by the defendant.

Plaintiff, a female owner of J.T.'s Tire Service, complained that a branch manager of defendant, United Rentals, North America, Inc., threatened to cease doing business with plaintiff's company if she refused his sexual advances. When plaintiff refused the sexual advances of defendant's branch manager, defendant stopped buying tires from plaintiff.

Ultimately, plaintiff acquiesced and agreed to have lunch with the manager, and defendant resumed its purchase of tires from plaintiff. Defendant's manager, however, insisted upon having a sexual relationship with plaintiff and when plaintiff refused, defendant began delaying payments and convinced his employer to cease doing business with plaintiff completely.

The Court recognized that this was a case of first impression and the provision of the LAD the Court was seeking to apply, refusing to do business on the basis of sex, has only been judicially tested a few times. New Jersey Appellate Division cases, *Nini v. Mercer County Cmty. Coll*; *Rubin v. Forest S. Chilton* and *Horn v. Mazda Motor of Am., Inc.* are examples. Using these cases, the Court ruled there should be no distinction between a refusal to enter into a contract (prohibited by the LAD) and the termination of a contract based upon sex.

One further step was taken by the Court to justify its reversal of the lower court's decision to grant summary judgment to defendant, ignoring defendant's argument that sexual harassment is only prohibited in the employment context when there is an employee/employer relationship. Because the defendant had already conceded, and the court had already determined, that refusing to do business based upon one's gender violates the LAD, the Court ruled that the sexual

harassment was conduct committed because of plaintiff's sex. That is to say, "sexual harassment is a form of sex discrimination that violates the LAD". Using the *Lehmann v. Toys 'R' Us., Inc.* standard, the Court concluded that plaintiff had been subjected to quid pro quo sexual harassment.

Just over two years earlier, the state Supreme Court issued a ruling in *D'Annunzio v. Prudential Insurance Company* that a non-employee who was an independent contractor could challenge his contract termination under the New Jersey Conscientious Employee Protection Act (CEPA). CEPA provides a cause of action for an employee who is dismissed or otherwise undergoes negative employer action as a result of reporting or refusing to participate in an allegedly illegal, unethical, or unsafe activity of the employer or its business partners. The Court interpreted the statute's definition of "employee" ("any individual who performs services for and under the control and direction of an employer for wages or other remuneration") as potentially including an independent contractor if the company closely controlled the work of the independent contractor. Using a test for employee/independent contractor status developed by the NJ Superior Court, Appellate Division in *Pukowski v. Caruso*, the Court in *D'Annunzio* determined that, because CEPA was social legislation designed to remedy the problem of employer retaliation against whistleblowers, "the test for an 'employee' under CEPA's coverage must adjust to the specialized and nontraditional worker who is nonetheless integral to the business interests of the employer." Applying the twelve Pukowski factors to the reality of D'Annunzio's work relationship with Prudential, the Court determined that he was an employee, and thus protected by CEPA because of 1) the extent of Prudential's control over D'Annunzio's work, 2) his economic dependence on the work relationship, and 3) the functional integration of his work with the core functions of Prudential's business. In particular, the Court noted the detailed instructions that D'Annunzio had been given with respect to how he was expected to do his work, the close supervision of his work, and the requirement that he spend four hours per day on site at the office to which he was assigned.

These two cases suggest that the state's courts are reading remedial legislation far more broadly than many employers and their attorneys might expect. In particular, the ruling that a supplier/purchaser business relationship is subject to the state's Law Against Discrimination has the potential to increase litigation claiming sexual or other forms of harassment that heretofore was primarily confined to the employment context. Although the LAD provision used by the successful plaintiff in *J.T.'s Tire Service* is not a new addition to the statute, it has been used infrequently to challenge alleged discrimination in supplier/purchaser or other business relationships. It is likely that we will see greater use of this litigation strategy in the future.