



LABOR & EMPLOYMENT DEPARTMENT

ALERT

RECENT NJ SUPREME COURT DECISION AFFIRMS APPELLATE DIVISION'S WARNING TO EMPLOYERS: ENDING EMPLOYMENT RELATIONSHIP DOESN'T END EXPOSURE TO LIABILITY

By Daniel N. Kuperstein

The New Jersey Supreme Court recently took a close look at when an employer's exposure to liability for retaliation should end under the New Jersey Law Against Discrimination (NJLAD). The court affirmed an Appellate Division decision that had held that employers can be liable for retaliation under the NJLAD for conduct occurring after an employee's termination, and it reversed that decision with respect to its application of the "continuing violation theory" to the case.

Although its immediate impact on employers may not be entirely clear, the decision serves as an important reminder that employers' post-employment conduct can be just as important as their conduct during the employment relationship.

The Facts in *Roa*

The court's decision in *Roa v. LAFE*, 2010 N.J. LEXIS 3 (Jan. 14, 2010), involved claims that an employee and his wife, who worked at the same company, were the victims of retaliation by their employer, a food products distributor. At the heart of the case was the issue of whether the two-year statute of limitations for their retaliation claims under the NJLAD had expired, preventing them from going forward with their lawsuit.

The employees, Fernando Roa and Liliana Roa, claimed that the company retaliated against them because Fernando refused to lie about their supervisor's

extramarital affairs. Interestingly, the supervisor was also Fernando's brother.

The employer's alleged acts of retaliatory misconduct, occurring both before and after Fernando and Liliana were fired, included: threatening to fire them; opposing Liliana's application for unemployment benefits on false grounds; discharging Fernando shortly after revealing the truth about his supervisor's affairs; and prematurely cancelling Fernando's health insurance benefits after he was fired.

Under the anti-retaliation provisions of the NJLAD, it is an unlawful employment practice for any person to take reprisals against another person because that person has: (1) opposed any practices or acts forbidden by the NJLAD; or (2) has filed a complaint, assisted or testified in any proceeding under the NJLAD. It is also unlawful to (3) interfere with, coerce, intimidate or threaten 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 the NJLAD.

The court upheld the Appellate Division's decision to dismiss Liliana's NJLAD retaliation claims as time-barred. The Appellate Division found that Liliana knew that the company had engaged in alleged retaliatory conduct at the time of her discharge, or at the latest, when she received the decision that she was ineligible for

unemployment benefits resulting from the employer's alleged retaliatory conduct. Both of these events occurred over two years prior to the filing of their lawsuit and were therefore outside of the applicable statute of limitations' time period.

The court found Fernando's retaliatory discharge claim to be untimely but held that his claim based on the premature cancellation of his health insurance benefits, discovered after his discharge, could proceed under the "discovery rule." This rule allows for a tolling period (a pause on the time period for filing a claim) of the applicable statute of limitations time period to account for the time that a party is reasonably unaware of either: (1) the fact that he or she has been injured; or (2) that the injury was due to the fault or neglect of an identifiable individual or entity.

The court held that the Appellate Division erred by applying the "continuing violation theory" to Fernando's claim for retaliatory discharge, and therefore, that the claim was time-barred. This theory acts as an exception to statutes of limitations of federal and state anti-discrimination statutes. Generally, it allows claims based on conduct occurring outside of the statute of limitations' time period to become actionable if that conduct is sufficiently linked to a pattern of conduct that is within the statute of limitations' time period.

Significantly, the court set forth a framework for analyzing post-employment retaliation claims under the NJLAD—a framework that, when compared with the Appellate Division's interpretation of the law, was more favorable to employers.

The Significance of the *Roa* Decision for Employers

Prior to *Roa*, there were no cases in New Jersey examining post-employment retaliation under the

NJLAD, only under the Conscientious Employee Protection Act (CEPA). New Jersey courts "cut off" liability for employers in this area by holding that the CEPA does not apply to claims for post-employment retaliation. Thus, the Appellate Division's decision in *Roa* expanded the law of retaliation in New Jersey, providing a new avenue for employer liability.

Yet, the impact of this most recent *Roa* decision is not entirely clear. Although the court's reversal of the Appellate Division's application of the "continuing violation theory" will likely limit employers' potential for liability, its affirmation of the Appellate Division's expansion of the retaliation law, i.e., to include liability for conduct occurring after discharge, may lead to an increase in the filing of post-employment retaliation claims because of the new sense of "stability" in the law resulting from the approval of the state's highest court.

Additional Considerations

To avoid liability for post-employment retaliation claims, employers should review their anti-discrimination and anti-harassment policies, separation agreements and all policies pertaining to discharged and former employees in order to ensure that they comply with the changes in the law.

In addition, employers should exercise caution when engaging in conduct that may affect former employees, such as providing recommendations, cancelling health insurance benefits or opposing employee applications for unemployment insurance benefits.

For more information regarding this alert, please contact Daniel N. Kuperstein at 973.994.7579 or dkuperstein@foxrothschild.com or any member of the firm's Labor & Employment Department. Visit us on the web at www.foxrothschild.com.



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