N.J. SUPREME COURT POISED TO DECIDE A TRIO OF EMPLOYMENT CASES WITH BROAD IMPLICATIONS AND ALSO TAKES JURISDICTION TO EFFECTUATE ITS HOLDING IN *AGUAS*

By Kevin J. O'Connor*

New Jersey's Supreme Court has rendered several ground-breaking decisions of late, and is poised to decide three more critical cases that could have lasting impact in the employment context for decades to come.

- **Aguas v. State of New Jersey, and Court's Action in Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366 (App Div. 2014).**

On February 11, 2015, the Court rendered its decision in Aguas. That case held that for claims alleging vicarious liability for supervisory sexual harassment, the Court has adopted as the governing standard the test set forth by the United States Supreme Court in Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998). The employer in a hostile work environment sexual harassment case may assert as an affirmative defense that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," provided that the employer has not taken an adverse tangible employment action against the plaintiff employee.

Aguas has the potential to impact many LAD cases, and the Court has already put it to work in a significant case that was rendered last year by the Appellate Division, Dunkley. In Dunkley, the Appellate Division had recognized the limits on vicarious liability of an employer for harassing acts of a non-supervisory employee, as well as the significant proofs that must be marshaled in order to prove constructive discharge. The Court established that co-worker backlash against an employee for having made a discrimination complaint cannot, standing

alone, be enough to impose liability on an employer for either retaliation or constructive discharge. Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366 (App Div. 2014). Dunkley also provided a great recitation of the significant hurdle that must be made to prove constructive discharge.

On March 16, 2015, the Court granted certification in Dunkley for purposes of remanding the case to the Appellate Division to consider, in light of Aguas, whether there was a genuine issue of fact for trial on the claims. 221 N.J. 217.

- **Kaye v. Rosefielde, Certification Granted.**

In Kaye v. Rosefielde, 432 N.J. Super. 421 (App. Div. 2013), the Appellate Division affirmed a number of rulings by the lower court in a dispute between a business and its owners and an attorney who had served as general counsel for the business and had allegedly defrauded plaintiffs.

The Court later granted certification to decide whether "the Appellate Division err[ed] by affirming the trial court's holding that economic damages are a necessary prerequisite for disgorgement of the employee's salary…." Argument was held on February 3, 2015 and the decision could have broad implications in any number of contexts where a disloyal employee is sued and the employer seeks to disgorge his/her earnings during the period of disloyalty. It is often difficult to prove actual economic damages to a business when an employee or partner is disloyal.

- **State v. Ivonne Saavedra, Certification Granted.**

On March 14, 2014, the Court granted leave to appeal to consider the following issue: "Can defendant be indicted for theft and official misconduct for taking confidential documents

from her public employer, North Bergen Board of Education, to support her claims under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14?"

When the New Jersey Supreme Court issued its decision in Quinlan v. Curtiss-Wright, 204 N.J. 239 (2010), it spurred much debate among legal commentators about whether the Court had opened a Pandora's Box and sanctioned employee theft of documents. The majority in State v. Saavedra, 433 N.J. Super. 501 (App. Div. 2013) ruled that nothing in Quinlan served to grant employees a license to steal documents and avoid criminal ramifications. The Court ruled that a former public employee will be permitted to stand trial criminally for allegedly stealing "highly confidential original documents" from her employer, the North Bergen Board of Education ("the Board").

The employee claimed as her defense that she only did so to gather evidence to support civil claims of harassment and retaliation against the Board. The former employee of the Board had filed a motion to dismiss the criminal indictment against her for second-degree official misconduct and third-degree theft of movable property (public documents), using Quinlan as a sword. She argued that "Quinlan says it's legal to take confidential documents" and argued for a ruling that criminal prosecution was prohibited under public policy grounds.

In rejecting these arguments, the majority in Saavedra observed that the Court in Quinlan noted in several portions of its decision that an employee's decision to engage in self-help could backfire both within the civil case itself or by creating broader legal liability. The majority noted that the Justices in Quinlan had even expressly warned that where employees choose to steal documents, "their conduct may also be illegal." The Court declined to recognize any public

policy basis for dismissal of the indictment. Saavedra demonstrates that while the Quinlan case may provide for civil protections on the part of an employee engaged in employment discrimination litigation with a former employer, nothing in Quinlan serves to prevent criminal prosecution of employees for conduct that is criminal. Moreover, as the majority recognized, the Quinlan case did not alter the applicable statutes that are implicated when an employee undertakes self-help, as occurred in the case before this Court.

- **Joel S. Lippman, M.D. v. Ethicon, Inc., 432 N.J. Super. 378 (App. Div. 2013).**

Lastly, the Court has granted certification to review the Appellate Division's decision in Joel S. Lippman, M.D. v. Ethicon, Inc., 432 N.J. Super. 378 (App. Div. 2013). It recently heard argument, and this case is of high importance to employers. The issue for consideration is "Can employees who are responsible for monitoring and reporting on employer compliance with relevant laws and regulations – so-called "watchdog employees" – seek whistleblower protection under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"), and, if so, under what circumstances?"

Argument was held in January 2015 and a decision is imminent. The Court will decide the appropriateness of a test that was used by the Appellate Division in cases where it was the employer's job to monitor compliance with the laws and advise upper management. That test is as articulated by the Appellate Division, as follows:

> "In the interest of assisting both the trial courts and the attorneys who practice in this field, we will distill our holding in this case to the following *Dzwonar*-guided paradigm. To establish a prima facie cause of action under CEPA, employees who perform "watchdog" activities as their employment function must demonstrate the following. First, the employee must establish that he or she reasonably believed that the employer's conduct was violating either a law, government regulation, or a clear mandate of public policy. Second, the employee must establish that 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. To 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. Third, the employee must establish that he or she suffered an adverse employment action. And fourth, the employee must establish a causal connection between these activities and the adverse employment action."

The importance of the anticipated ruling in Lippman cannot be overstated. Employers who face CEPA whistleblower claims need guidance from the Courts and a test that does not create an issue of fact for the jury to determine on each occasion.

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