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"To Whom It May Concern": New Jersey Supreme Court Clarifies The Standard For Employee Retaliation Claims Under The LAD And CEPA

By Suzanne E. Peters, Esq.

Last month, the New Jersey Supreme Court issued a unanimous decision that provides clarity as to the standard an employee must meet when bringing any retaliation claim under the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1, et seq.* ("LAD") or the Conscientious Employee Protection Act, *N.J.S.A. 34:19-1 et seq.* ("CEPA"). In *Battaglia v. United Parcel Service, Inc.*, A-86/87-111 (July 17, 2013), the Court eased the standard for employees bringing retaliation claims under the LAD while simultaneously heightening the standard for fraud-based CEPA claims and claims for future emotional damages. Because the decision has positive and negative consequences for employers, employers would be wise to revisit their investigation procedures regarding internal complaints to ensure they are sufficiently thorough to avoid retaliation claims.

The Facts

Plaintiff Michael Battaglia ("Battaglia") began working for defendant United Parcel Service, Inc. ("UPS") in 1985. While serving as center manager at UPS's Bridgewater facility, Battaglia supervised Defendant Wayne DeCraine ("DeCraine") and twice had to reprimand DeCraine for making sexually inappropriate comments about women. Shortly after being offered a promotion, Battaglia became ill and declined the new position. When he returned to work from medical leave, Battaglia accepted a demotion, as UPS already had filled his prior position. Subsequently, DeCraine became Battaglia's supervisor.

While serving as Battaglia's supervisor, DeCraine again made a number of inappropriate, crude and sexual comments about women in the presence of Battaglia and other male employees. None of DeCraine's comments were made to or in the presence of any female employees. Battaglia met with DeCraine and other supervisors to discuss DeCraine's inappropriate comments and rumored affair with a female employee,

and also the rumored misuse of company credit cards by other managers who allegedly took "liquid lunches" and failed to return to work. Battaglia then sent an anonymous letter to Human Resources. In addition to the letter's broad allegations of improper behavior and unethical conduct, it specifically mentioned improper language used by UPS's leaders. Upon receiving the letter, UPS's Human Resources Manager commenced an investigation during which she interviewed three individuals, but not DeCraine. Once the investigation was completed, the Human Resources Manager admitted that she believed that Battaglia wrote the letter. Later that year, UPS demoted Battaglia, citing incidents of poor behavior.

Procedural History

Battaglia filed a complaint against UPS alleging that his demotion was in retaliation for the complaints he had made about the improper practices and behaviors of the managers, including DeCraine. Specifically, he asserted that his demotion (1) violated CEPA because it was in retaliation for the complaint he voiced about the improper use of credit cards; (2) violated the LAD because it was in retaliation for his complaints about DeCraine's inappropriate remarks about female employees and the alleged affair; and (3) constituted a breach of contract because it was contrary to the assurances contained in UPS's personnel manuals that employees would not be disciplined for raising complaints about improper activities.

The trial court dismissed the breach of contract claim, as UPS's employee manuals specifically contained a clear provision disclaiming any contractual relationship. The jury subsequently found UPS liable for unlawful retaliation in violation of both the LAD and CEPA, awarding Battaglia \$1 million -- \$500,000 in economic damages, and \$500,000 for personal hardship and emotional distress. The trial court later reduced the emotional distress damages award to \$205,000. Both parties appealed to the Appellate Division.

The Appellate Division affirmed the jury's CEPA verdict but reversed the LAD verdict and emotional distress damages award. As to the LAD claim, the Appellate Division found that Battaglia's complaints were not protected activity because he failed to identify any actual victim of discrimination, meaning that there was no evidence that any female employee had heard the remarks or was treated differently by DeCraine. As for the emotional distress award, the Appellate Division determined that, because there was no expert testimony that Battaglia's emotional distress was permanent, the trial court erred by allowing the jury's emotional distress award to include future damages. Both parties petitioned the New Jersey Supreme Court for certification, which was granted.

Analysis of Supreme Court Ruling

Reversing the Appellate Division's decision, the New Jersey Supreme Court reinstated the jury's LAD verdict and struck down the CEPA verdict. The Court did, however, affirm the Appellate Division's determination that the trial court erred by allowing future emotional distress damages without competent evidence of permanency.

In reinstating Battaglia's LAD claim, the Court explained that the LAD is

meant to protect the civil rights of individual employees as well as the public's strong interest in a discrimination-free workplace. Consequently, the purpose of the LAD is not served if an employee who voices complaints and who suffers retaliation as a consequence must also prove that there is a separate, identifiable victim of actual discrimination. Accordingly, the Court determined that, when bringing a retaliation claim pursuant to the LAD, an employee must only demonstrate that he made the complaint based on a good faith belief that the conduct at issue violated the LAD. Thus, if discriminatory comments or actions are taken, a complaint about such behavior is protected, regardless of whether any victim is identified. In this case, Battaglia had complained about DeCraine's derogatory comments regarding numerous women. The Court determined that the reporting of such conduct -- even absent evidence of actual discrimination or any identifiable victim -- was sufficient to invoke the anti-retaliation protections of the LAD.

Notably, in reviving Battaglia's LAD claim, the Court criticized UPS's investigation into the contents of Battaglia's letter. Specifically, the Court noted that UPS conducted a "limited investigation," as the Human Resources Manager only discussed the matter with three individuals and relied on her "pre-existing beliefs to discount the complaints." The Court opined that UPS should have investigated the allegations contained in the letter more thoroughly in order to determine whether DeCraine or any other individual was engaging in behavior that might violate workplace protections.

Despite reinstating Battaglia's LAD claim, the Court found that the emotional distress damage award was properly reversed by the Appellate Division. Although a plaintiff pursuing an LAD or CEPA claim can be awarded damages for emotional distress without offering expert testimony, the Court determined that, if a plaintiff is seeking emotional damages for expected future harm, he must provide credible, competent evidence of permanency of the damages in the form of an expert opinion. Because the jury considered future harm when determining Battaglia's emotional distress award without any expert opinion as to those damages, the Court reversed the award of damages for emotional distress.

The Court next discussed CEPA, acknowledging that the broad purpose of CEPA is to provide a cause of action for any employee who is subjected to retaliation for reporting workplace misconduct. However, the Court found no need to address CEPA broadly, as Battaglia's CEPA claim only involved allegations of fraudulent activity. Accordingly, the Court determined that the focus of a fraud-based CEPA claim should be only on whether the employee making the complaint had a reasonable belief that the activity was fraudulent and complained about such activity for that reason. The Court specifically noted that the statute does not protect complaints directed to minor matters, as it is not meant to "spawn litigation concerning the most trivial or benign employee complaints." Accordingly, the Court found that Battaglia did not engage in protected activity under CEPA when he complained about the use of UPS credit cards. Indeed, Battaglia admitted that he did not believe that the managers were engaged in fraud. As a result, the Court found that Battaglia merely complained about behavior amounting to violations of internal company policies, as opposed to having a reasonable belief that his managers were engaged in fraud within the meaning of the statute. Accordingly, Battaglia had no cognizable CEPA claim.

Lessons Learned from *Battaglia*

The Court's decision in *Battaglia* demonstrates that, once an employer receives any complaint of inappropriate conduct, it should immediately take action to investigate. It is irrelevant whether a victim of the alleged conduct is identified or whether the employer initially thinks that the complained-of conduct did not occur. In order to have a retaliation claim under the LAD, an employee would only need to show that he complained of certain conduct and believed -- in good faith -- that the complained-of conduct violated the LAD.

Additionally, employers should focus on the Court's criticism of UPS's investigation of the anonymous letter. Employers would be wise to train their Human Resources personnel regularly to ensure that all investigations are handled professionally, credibly and thoroughly.

Finally, although not discussed at length by the Court, *Battaglia*'s breach of contract claim was dismissed solely because UPS had clear language in its employee handbook disclaiming any contractual relationship. Employers should review their employee handbooks and update them with clear disclaimers to avoid any potential breach of contract claim.

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