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It Pays to Discover

By Vito A. Gagliardi, Jr., Esq.

In a recent decision by the New Jersey Appellate Division, a defendant employer was rewarded for its fidelity in producing discovery and its tenacity in pursuing discovery from a very difficult plaintiff; following extensive motion practice, the employer-defendant obtained a dismissal with prejudice based upon plaintiff's failure to provide complete discovery. The case is instructive for employers and their attorneys alike, because it demonstrates how investing in motion practice can lead to a successful result over time.

On February 7, 2013, the Appellate Division issued its decision in Fik-Rymarkiewicz v. UMDNJ, et al., wherein plaintiff alleged employment discrimination, hostile work environment and retaliation in violation of the New Jersey Law Against Discrimination ("LAD"), against her former employer and two supervisors. In short, plaintiff asserted that she suffered unlawful prejudice on the job after becoming a mother. Factually, plaintiff returned to work after maternity leave in October 2005. She subsequently filed an internal discrimination complaint with UMDNJ's Office of Affirmative Action in January 2006, and was later terminated in September 2006. Through her suit, she sought compensatory and punitive damages for emotional distress and asserted a lost wage claim (although she found new employment five months after her termination).

Discovery ensued. While the employer defendant apparently cooperated fully during the discovery process, plaintiff did not. She was defiant and obstructive during her deposition and refused to produce certain tax documents and the name of her immigration attorney (she alleged that her and her husband's immigration status was jeopardized when she was terminated). During the course of her deposition, defense counsel advised plaintiff to answer the questions unless otherwise instructed by her attorney, and repeatedly warned that he would move to dismiss her complaint if she refused to cooperate. This warning was deemed to be significant by the trial court, and the appellate court reviewing the trial court's orders.

Plaintiff's difficult behavior led defendants to make motion practice pursuant to *R. 4:23-5(a)(1)*. The motion was granted and, on April 5, 2010, the trial court dismissed plaintiff's complaint without prejudice. Plaintiff was directed to cooperate in another day of depositions and to provide the requested tax documents. When plaintiff appeared for her

deposition a few days later, she testified that, of the six years of tax records being sought, she "shredded her 2004, 2005, 2006 and 2007 tax returns" and would not provide the 2008 and 2009 returns because they reflected earnings after the end of her employment. Despite this record, plaintiff moved to reinstate her complaint alleging that, as required by the Rule, she had produced fully responsive discovery. Not surprisingly, at oral argument in August 2010, the trial court found that plaintiff did not provide the discovery required. The trial court gave plaintiff the benefit of the doubt that she "may have been confused" and gave her an additional thirty days to provide the outstanding discovery. As a result, on September 8, 2010, the trial court denied defendants' motion to dismiss the complaint with prejudice and ordered that plaintiff's complaint could be reinstated if she produced the outstanding discovery by October 8, 2010. On the very last day, October 8, plaintiff's counsel produced her W-2 forms for 2005 to 2008, and represented that plaintiff did not have her federal returns. Plaintiff refused to sign IRS authorizations suggested by defense counsel so that he could obtain the records directly from the government. Finally, on February 4, 2011, plaintiff's counsel produced the outstanding tax returns, but they were unilaterally redacted without a reason being provided.

Thereafter, plaintiff moved to reinstate her complaint asserting that she had produced fully responsive discovery. Defendants cross-moved and requested that the judge dismiss the complaint with prejudice. Finally, defendants were rewarded for their patience. While the motion practice undoubtedly was frustrating and expensive, the trial court agreed that plaintiff was "still not in compliance with the discovery" and dismissed the complaint with prejudice.

Affirming the ruling of the trial court, the Appellate Division was complementary about the patience showed by the trial court -- the sort of patience which typically is frustrating to defendants and their counsel in employment matters. The appellate court found that the trial court imposed no more than what the rule mandated, requiring plaintiff to produce "full and responsive" discovery as a condition to reinstatement of her complaint. The appellate court found it significant that the discovery was not on a minor issue, but rather highly relevant; for example, with the pending wage claim, the tax records sought by defendants were deemed to be reasonable and appropriate. On the other hand, plaintiff's "refusal to comply [with the discovery demands was] deliberate and contumacious," and therefore the trial court's dismissal with prejudice was deemed to be not unjust or unreasonable.

Lessons Learned

- Defendants in an employment action cannot pursue motion practice regarding plaintiff's discovery deficiencies unless they have complied with the discovery requested of them or have made appropriate objections. This is not to suggest that a defendant simply provide everything a plaintiff has requested, but rather that it make comprehensive and reasonable objections, putting the burden on the plaintiff to challenge any bona fide objections. If a plaintiff fails to do so, then the defendant's discovery is deemed complete and motion practice regarding plaintiff's deficiencies is permissible.
- Practice patience: while it may be tempting to move aggressively through the various stages of motion practice to get a motion to dismiss with prejudice, patience is required. There are legions of appellate decisions overturning trial court rulings that did not give

plaintiffs sufficient opportunity to provide discovery. In the instant case, though Plaintiff clearly was obstructing the discovery process, nonetheless, the trial court gave Plaintiff an additional 30 days to reply. While that may have frustrated the defendant, the trial court's reasonableness and flexibility were highly significant in the appellate court's analysis upholding the dismissal with prejudice by the trial court.

- Methodical adherence to the steps required by the rules are imperative for both defense counsel and the trial court, but this methodical adherence can have tremendous results, as a dismissal with prejudice ultimately is a cost-effective way to resolve contentious employment litigation.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.