

Appellate Division Confirms that "Magic Words" Are Not Necessary For Law Against Discrimination Claims

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In the recent case of *Mallon v. Hudson Savings Bank*, No. A-4438-16T1 (App. Div. July 23, 2019), the Appellate Division reaffirmed the principle that no "magic words" are necessary for an employee to invoke the protections of the New Jersey Law Against Discrimination ("NJLAD").

The plaintiff began working for the defendant bank in 1975. After multiple promotions, she attained the position of First Vice President in 2004. Over the ensuing years, the plaintiff sought further promotions and believed that a "glass ceiling" kept her from rising any higher in the ranks. After an ethics complaint was lodged against her in 2011, the bank's management transferred the plaintiff to the human resources department and reduced her management responsibilities. The plaintiff maintained her title and salary.

After her change in position, the plaintiff sent a memo to several of the bank's executives in which she stated that she considered the change in position to be a "punishment" and a "demotion" made in response to her continuous requests for a promotion. The executives believed the memo did not constitute a valid complaint of discrimination and therefore did not require an investigation. The bank's chief operating officer responded to the letter stating that the plaintiff's claims were "spurious."

Thereafter, the bank discovered further evidence that the plaintiff had engaged in various improper practices. Plaintiff then had a contentious meeting with the bank's head of human resources, at which she was accused of engaging in improper conduct. She, in turn, accused the bank of discriminating against her, and the head of human resources allegedly responded by laughing at the allegation. The bank later fired her, citing multiple violations of its policies. The bank never investigated her complaints of discrimination.

The plaintiff later sued for gender and age discrimination and retaliation under the NJLAD. After a jury trial, the plaintiff was awarded nearly \$1 million in damages. The bank appealed on multiple issues. Among the bank's chief arguments was that the plaintiff had not engaged in "protected conduct" under the NJLAD and therefore, could not prevail on her retaliation claim. To prove a claim of retaliation, a plaintiff must establish: (1) he or she engaged in a protected activity known to the employer, such as making a good faith complaint of unlawful discrimination; (2) an adverse employment action; and (3) causation. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. 354, 372-73 (2007). In essence, the bank argued that

the plaintiff's complaints were general claims of unfair treatment rather than actual claims of discrimination and that the claims were contrived in response to the 2011 ethics complaint.

The Appellate Division disagreed, explaining that "there are no magic words for expressing a complaint of discrimination," and that it was clear from the bank executive's conduct and from internal documents that the executives understood her complaints to be complaints of discrimination. In reaching that conclusion, the court noted that "our case law cautions against a narrow reading of the LAD's protections." Moreover, the court determined there was sufficient evidence in the record to uphold the jury's verdict that the plaintiff's complaint was made in good faith and not as a response to the allegations of improper conduct made against her.

This case makes clear that employers must take seriously and investigate an employee's claims of improper treatment, even where the employee in question does not specifically allege -- or the employer does not believe the claim entails -- a form of discrimination, and even where the employee in question has struggled with performance or other issues. The bank here introduced compelling evidence that the plaintiff was a problematic employee with a history of troubling conduct and that any adverse action taken against her was due to that troubling history. However, the jury perhaps was not as easily swayed as it might have been because the bank did not take the plaintiff's complaints seriously, never investigated the complaints, and engaged in a contentious course of conduct with the plaintiff.