NJ SUPREME COURT ISSUES DECISION CLARIFYING SCOPE OF RELIEF AVAILABLE NJLAD AND CEPA, AND NEED FOR EXPERT PROOFS ON EMOTIONAL DISTRESS DAMAGES

By Kevin J. O'Connor*

Yesterday's decision by Justice Helen Hoens of the New Jersey Supreme Court in Battaglia v. United Parcel Service, Inc., 2013 WL 3716939 (July 17, 2013) provided some significant and necessary guidance on the scope of relief available under both the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42 ("LAD") and Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8 ("CEPA"), and is a must read for anyone who practices in the employment law arena or advises companies on employment practices.

In Battaglia, a long-term employee of UPS who had served in a variety of managerial and supervisory positions sued under LAD and CEPA for a demotion he claimed was related to his internal complaints about a co-worker/supervisor, and alleged fraud by co-workers in the use of company credit cards. The chief complaints against his co-worker who was at one time a subordinate and later a supervisor, were that he made vulgar and offensive comments of a sexual nature in the workplace, and was engaged in an extra-marital affair with a female employee, to which plaintiff objected. After extensive pre-trial proceedings and a jury trial, the employee was awarded $500,000 in economic damages and another $500,000 in "personal hardship and emotional distress damages" under both LAD and CEPA.

Justice Hoens' decision offers significant clarification and guidance in several areas, including: 1) can an employee recover under LAD for objecting to vulgar and offensive comments about women by a co-worker when it is undisputed that no women were subjected to the comments or claimed a hostile work environment because of them; and 2) can an employee recover under CEPA for "blowing the whistle" on what amount to violations of internal company policies, such as restrictions on credit card use; and 3) can an employee who makes a claim under LAD or CEPA recover for emotional distress damages that extend into the future without presenting any expert testimony?

AN LAD CLAIM CAN BE SUSTAINED EVEN WHERE THE SEXIST AND VULGAR COMMENTS ARE MADE OUTSIDE THE PRESENCE OF WOMEN

The answer to the first question is yes –the Court clarified that an LAD plaintiff need not demonstrate that the vulgar, sexist and demeaning comments of a co-employee to which the plaintiff complained and objected, were uttered in the presence of women or created a hostile work environment for women. If the behavior and comments in question are severe or pervasive enough and if "the complaint is made in a good faith belief that the conduct complained of violates the LAD, it suffices for purposes of pursing a cause of action." Since the jury believed that the employer had retaliated

against plaintiff for complaining of this activity, plaintiff was entitled to damages under the LAD.

NO CEPA CLAIM EXISTS FOR "BLOWING THE WHISTLE" ON INTERNAL COMPANY POLICIES SUCH AS RESTRICTIONS ON CREDIT CARD USEAGE

In response to the second question, the Court again clarified that an employee who makes a claim under CEPA has an affirmative obligation to identify a statute, rule, regulation or general mandate of public policy that he objectively believed was being violated, as the foundation of the whistle-blowing activity. In this regard, it is essential that the Court scrutinize the evidence that the employee claims is evidence that he complained of such violations. In the case before the Court, the employee had sent an anonymous letter to the company making vague and general complaints of wrongdoing which letter fell short of accusing his co-workers of engaging in credit card fraud. Moreover, the Court held, general complaints about his co-workers violating internal company policies, such as engaging in credit-card abuse, will not qualify as protected activity. "[T]o the extent that plaintiff simply complained about other employees who were drinking at lunch or taking long lunch breaks, it would not rise to the level of activity protected under CEPA." Id. * 21.

EMOTIONAL DISTRESS DAMAGES FOR FUTURE HARM MUST BE GROUNDED IN FACT AND SUPPORTED BY ADEQUATE EXPERT TESTIMONY

The answer to the third question is one that will have an equally significant impact and may curtail emotional distress awards in the future. The trial court had permitted the jury to consider plaintiff's life expectancy in determining the amount of any emotional distress award, even without any expert testimony or indication of how long plaintiff could expect to continue suffering from alleged depression. The Court affirmed vacatur of the emotional distress award given the lack of any expert testimony on permanency, ruling that "any claim that those effects will endure so as to support a future award must be proven by credible, competent evidence lest the verdict be the product of speculation." Id. * 18.

This holding is in keeping with the trend in recent appellate decisions to ensure that front pay and emotional distress awards be grounded in fact and non-speculative.

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Battaglia is a welcome addition to the recent decisions in New Jersey which make clear that an employee must do more than simply point to a disagreement with the employer over workplace issues to get to a jury in a CEPA case. Such decisions will go far in both providing necessary guidance to employers on their obligations under CEPA, and giving assurance to businesses that CEPA will be applied as intended by the legislature. Moreover, the restriction on the awarding of future emotional distress damages to those cases where competent expert proofs exist, is a welcome clarification.

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