Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

New Significant NJ Court Decisions

During the past several months, federal and state appeals courts in New Jersey have issued three significant employment law decisions with far reaching implications for employers. Each of these decisions is discussed below.

Haybarger v. Lawrence County Adult Prob. & Parole 667 F.3d 408 (3d Cir. 2012)

Individual Supervisors May Be Held Liable under the FMLA

In this decision, which presented an issue of first impression, the United States Court of Appeals for the Third Circuit held that a supervisor may be held individually liable for violations of the Family and Medical Leave Act (FMLA). The plaintiff in *Haybarger* worked as an office manager for defendant. During the course of her employment for defendant, plaintiff missed work frequently due to various health problems that required medical attention. Plaintiff's employment was terminated six months after the supervisor's decision to place plaintiff on probation for her "conduct, work ethic and behavior". Plaintiff sued her employer alleging a violation of the FMLA, and also sued her supervisor in his individual capacity.

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The District Court dismissed the suit against plaintiff's supervisor, finding that he did not qualify as an "employer" for purposes of FMLA because he lacked the final authority over the decision to fire plaintiff. The Third Circuit reversed the District Court, holding that the FMLA permits individual liability for supervisors both at public agencies such as defendant, *and* for supervisors at private employers. In reaching this broader holding, the Third Circuit looked at the text of the FMLA and concluded "that liability for FMLA violations may be imposed upon an individual person who would not otherwise be regarded as the plaintiff's employer." The Court rejected the notion that only supervisors with final decision-making authority can be considered employers for purposes of the FMLA.

Employer Lesson

Employers must now be mindful that there is clear precedent in the Third Circuit for finding individual liability against supervisors in FMLA cases and supervisors should be trained on the requirements of the FMLA and non-retaliation against employees who have taken FMLA leave.

Quinlan v. Curtiss-Wright Corp. 2012 N.J. Super. LEXIS 49 (App. Div. Apr. 5, 2012)

Plaintiff Bears the Burden of Proving Future Damages

In this decision, the latest chapter of a long-fought case, the Appellate Division of the Superior Court of New Jersey addressed the issue of who bears the burden of persuasion concerning mitigation of future damages. The plaintiff in *Quinlan* sued her employer under the New Jersey Law Against Discrimination (LAD), alleging that her employer discriminated against her based on her gender by failing to promote her, and terminated her in retaliation for complaining about the discriminatory failure to promote. The case was tried to a jury, who awarded plaintiff $4,565,479 in compensatory damages, including $3,650,318 in future economic losses, including front pay. In addition, the jury awarded plaintiff an identical sum of $4,565,479 in punitive damages. After appeals of other issues were ultimately decided by the New Jersey Supreme Court, the case was remanded to the Appellate Division for a determination of issues not considered by the Supreme

Court, including the propriety of the front pay award and the adequacy of the jury instructions regarding the same.

The trial court judge had instructed the jury that defendant bore the burden of proving that plaintiff will fail to mitigate her future losses with respect to front pay. The Court vacated the front pay award, concluding that such an obligation would impose a burden on the employer "in the prohibited realm of speculation." Because the front pay issue was "inextricably intertwined with the quantum of punitive damages awarded", the Court also vacated the award of punitive damages. The Court held that the trial court should require plaintiff to prove "the likely duration of her future lost income" and must adequately inform the jury that the "plaintiff bears the burden of proving that the damages she claims are either permanent or will last for a reasonably determinable time."

Employer Lesson

This case provides employers some reprieve with respect to burden of proof of damages in LAD cases, and distinguishes back pay, where it is the employer's burden to prove that plaintiff failed to mitigate his or her past damages, from front pay, where it is now clearly the plaintiff's sole burden. Employers should look to this decision for guidance in fashioning appropriate jury instructions where mitigation of future damages is an issue.

Cowher v. Carson & Roberts
2012 N.J. Super. LEXIS 55 (App. Div. Apr. 18, 2012)

Employees May Sue under LAD for Perceived Membership in Protected Group

In this decision, the Appellate Division of the Superior Court of New Jersey held that under the LAD an employee could sue his former employer based on anti-Semitic slurs that his superiors directed at him even though he was not actually Jewish. Although New Jersey explicitly recognizes discrimination claims based on perceived disability, prior to the *Cowher* decision, claims based on perceived membership in other protected groups had not been explicitly recognized. In

Cowher, the plaintiff was subjected to several opprobrious anti-Semitic remarks during the course of his employment with defendant. Plaintiff sued his employer alleging that the employer created a hostile work environment based on its belief that plaintiff was Jewish. The Appellate Division held that "there is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the act and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure."

Employer Lesson

This decision significantly expands the rights of individuals claiming employment discrimination, even when they are not in a protected class. Employers will no longer be able to escape liability by claiming that the aggrieved employee is not actually a member of the protected class, and should train their human resources professionals and managers accordingly.

For additional information concerning any of these three decisions, please feel free to contact the following attorneys from our Employment and Labor Practice Group.

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