

# CLIENT ALERT

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### **New Jersey Supreme Court Requires Additional Element For LAD Retaliation Claims**

The New Jersey Supreme Court has issued a decision that should make it more difficult for employees to prevail on retaliation claims under the New Jersey Law Against Discrimination (“LAD”). In *Carmona v. Resorts International Hotel, Inc.*, the Court held that, in LAD retaliation cases, the plaintiff bears the burden of proving that his or her underlying complaint of discrimination was made reasonably and in good faith. Additionally, the Court held that a hearsay objection will generally not bar an employer from offering into evidence at trial the investigative report upon which it based its decision to terminate the plaintiff’s employment.

#### **The Facts**

Beginning in 1999, plaintiff Reginald Carmona worked as a hotel front desk clerk for defendant Resorts International Hotel, Inc. (“Resorts”). Carmona was frequently absent from work because, he contended, of relapses from his recovery from cocaine use.

By August 2001, one more absence would have subjected Carmona to termination under Resorts’ progressive discipline policy. His supervisor informed him that the policy did not apply to approved medical leave absences. Instead of seeking an approved leave, however, Carmona, who was Hispanic, explored instances in which other employees had received approved medical leaves of absence. Based upon the experiences of another Hispanic employee, William Santiago, and a Caucasian employee, Carmona concluded that the absenteeism policy was applied in a racially discriminatory manner against Hispanics, but he did not complain to Resorts.

Three months later, on November 5, 2001, Carmona and Santiago were observed

“upgrading” rooms for hotel guests in exchange for tips, which violated Company policy. The next day, Carmona complained to Resorts that he and Santiago had not been placed on medical leave because of their race.

Meanwhile, Resorts was investigating whether Carmona and Santiago had improperly upgraded rooms. Santiago admitted to investigators that he had upgraded rooms in exchange for gratuities and implicated Carmona in the misconduct. According to Santiago, Carmona used a supervisor’s computer password to make the upgrades. Further investigation revealed that Carmona, who had twice previously been reprimanded for this same misconduct, upgraded twenty-seven rooms and that Santiago upgraded twenty-six.

Carmona admitted to investigators that he had upgraded rooms without authorization, but denied receiving gratuities in exchange for doing so. Resorts investigators prepared a report based upon their investigation. On November 9, 2001 – three days after he complained about discrimination – Resorts terminated his employment.

Carmona filed a lawsuit against Resorts that included a claim for retaliation under the LAD, which prohibits an employer from taking reprisals against an employee for complaining about discrimination or engaging in other protected activity under the statute.

#### **The Trial Court**

At trial, Carmona contended that Resorts discharged him in retaliation for alleging discrimination and that the investigation into his room upgrades was merely a pretext to justify the retaliation. During the trial, Resorts sought to admit the investigative report into evidence, but the court barred its admission, concluding that it constituted hearsay.

Before deliberations, the trial court instructed the jury that in order to establish a *prima facie* case of retaliation under the LAD, a plaintiff must establish that: (1) the plaintiff engaged in protected activity under the LAD; (2) the employer knew that the plaintiff engaged in protected activity; (3) the employer subjected the plaintiff to an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action. Resorts asked the court to instruct the jury that Carmona was also required to prove that his underlying complaint of discrimination was based upon a reasonable good faith belief that discrimination was occurring, but the court refused.

The jury returned a verdict in Carmona's favor and awarded him approximately \$178,000. The trial court also awarded him approximately \$113,000 in legal fees and costs. Resorts appealed.

### **The Appellate Division**

The Appellate Division affirmed, stating that it would not add a good faith requirement to retaliation claims that was not set forth in the LAD and concluded, in any event, that "all reasonable juries" would reject retaliation claims not based upon a reasonable good faith belief of discrimination. The Appellate Division also held that the trial court's evidentiary rulings were within the judge's discretion. Resorts sought certification, which the Supreme Court granted.

### **The Supreme Court**

The Court explained that, in considering LAD claims, it looks for guidance to caselaw under Title VII of the Civil Rights Act of 1964 ("Title VII") and to New Jersey statutes such as the Conscientious Employee Protection Act ("CEPA"). The Court acknowledged that the plain language of the LAD does not require a

retaliation plaintiff to prove that he or she had a reasonable good faith belief that he or she was engaged in protected activity. Nonetheless, according to the Court, such a requirement is "entirely consonant with the purpose of the LAD" and consistent with the federal requirement under Title VII. Also, a similar requirement exists for whistleblower claims under CEPA.

The Court stated that the legislature "could not have intended that the LAD provide a safe harbor to one who files a baseless, meretricious complaint" and that "the LAD cannot protect one who preemptively files a complaint solely in anticipation of an adverse employment action by the employer." The Court noted that this issue had not previously been before it, but that the U.S. Court of Appeals for the Third Circuit had addressed it twice and, in both instances, interpreted the LAD to require a showing that the underlying complaint was based upon the plaintiff's "reasonable belief" that the employer was engaged in an unlawful employment practice.

The Supreme Court concluded that in retaliation cases under the LAD, "the plaintiff bears the burden of proving that his or her original complaint – the one that allegedly triggered his or her employer's retaliation – was made reasonably and in good faith." Accordingly, the jury instructions in this case were deficient.

The Court then addressed the admissibility of the investigative report. Under the New Jersey (and Federal) Rules of Evidence, hearsay is "a statement ... offered in evidence to prove the truth of the matter asserted." Resorts argued that the report was not offered to prove the truth of the matter asserted, but as evidence of its investigation of Carmona's misconduct and as evidence of its true motivation for terminating his employment. The Court held that, "within the usual

limits that govern the admissibility of evidence as a whole, an investigative report concerning an employee is admissible as non-hearsay statements whenever the employer's motivations are directly at issue." The Court noted that federal courts and courts in other states applying analogous evidence rules have reached the same conclusion.

The Court cautioned that "like any other evidence, the tender of an investigative report must be relevant." Thus, for instance, a report will not be admissible unless the employer acted based upon its contents. In addition, hearsay statements contained within the report must either be independently admissible or redacted.

### **Conclusion**

The *Carmona* decision is a positive development for employers. It limits the ability of employees to avert appropriate disciplinary action by concocting frivolous discrimination allegations. It also permits employers at trial to admit internal investigative reports into evidence to demonstrate that an adverse employment action was based upon legitimate, non-discriminatory reasons.

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