

CLIENT ALERT

Employment, Labor & Immigration

February 2004

Volume V No. 10

New Jersey Court Bars Discrimination Claim of Illegal Alien

The Appellate Division of the New Jersey Superior Court recently decided a case addressing the conflict that arises when an illegal alien, who was not entitled to work in the United States, alleges that her employer discriminated against her in violation of state law. In *Crespo v. Evergo Corporation*, the court held that the plaintiff could not pursue her claims under the New Jersey Law Against Discrimination ("LAD") for discriminatory discharge, because she was not authorized to hold the position at all. The decision makes clear, however, that there are circumstances under which the court will reach a different result.

Factual Background

On March 24, 2000, defendant Evergo Corporation ("Evergo") hired plaintiff Rosa Crespo as a warehouse employee. Prior to offering her employment, Crespo had represented that she was legally entitled to work in the United States, and presented Evergo with a fraudulent Social Security card.

In March 2001, Crespo notified her supervisor, defendant Inuk Lee, that she was pregnant. In October 2001, Crespo began her maternity leave. In December 2001, Crespo wanted to return to work and telephoned Evergo. Crespo spoke to Lee's secretary, who told her that Lee had said that Crespo could not return to work at that time, because business was slow. Lee's secretary further indicated, according to Lee, Crespo should call back in January 2002.

In January, Lee's secretary told Crespo that Lee was on vacation and could not talk to her. According to Crespo, this telephone call constituted the termination of her employment. Following the call, Crespo allegedly learned that Evergo had hired someone to replace her, and that Lee had commented that Crespo was not being allowed to return to work because "she just

had a baby and people like her are irresponsible." Crespo filed a lawsuit against Evergo and Lee asserting a claim of discriminatory discharge under the LAD.

The LAD

The LAD guarantees all persons the opportunity to obtain employment free from discrimination. The LAD also provides, however, that an employer may lawfully restrict employment to United States citizens when federal law requires such a restriction.

The Immigration Reform And Control Act Of 1986

Under the Immigration Reform and Control Act of 1986 ("IRCA"), it is illegal for an employer to knowingly hire an alien who is not authorized to work in the United States, or to continue employing such an alien with the knowledge that he or she is or has become unauthorized to work. Therefore, if an employer discovers that an employee is an alien unauthorized to work, the employer must terminate his or her employment. The IRCA also makes it a crime for an illegal alien to use fraudulent documents to obtain employment.

The Trial Court

The trial court granted the defendants' motion for summary judgment in part and denied it in part. The court held that Crespo could not pursue her claim for economic damages (front pay, back pay, and lost benefits), because she was not authorized to hold the job, but could pursue her claim for non-economic damages (punitive damages, emotional distress damages, and attorney's fees).

On appeal, the defendants challenged the trial court's Order permitting Crespo to pursue her claim for non-economic damages.

The Appellate Division

The Appellate Division reversed the trial

Sills Cummis Epstein & Gross

A Professional Corporation



court's Order to the extent that it permitted Crespo to pursue non-economic damages, and held that Crespo's claims should have been dismissed in their entirety.

In reaching its decision, the Appellate Division relied upon the decision in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, in which the U.S. Supreme Court held that a National Labor Relations Board award of back pay to an illegal alien was "foreclosed by federal immigration policy, as expressed by Congress in [IRCA]." The Appellate Division cited the Supreme Court's explanation that permitting the illegal alien to recover back pay would have undermined the policies underlying IRCA in that it would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."

Following the Supreme Court's reasoning, the Appellate Division held that Crespo could not maintain her claims. The Appellate Division disagreed with the trial court that Crespo should be able to pursue non-economic but not economic

damages, holding that there was no basis for the distinction.

The Appellate Division emphasized that it was only considering the narrow issue of whether an illegal alien could maintain a LAD claim of discriminatory termination. The court distinguished such a claim from one in which an illegal alien alleges that the employer engaged in unlawful conduct during his or her employment, which might lead to a different result.

Indeed, the court explained that, if this case had involved aggravated sexual harassment during the employment, or other "egregious circumstances," then the need to vindicate the policies underlying the LAD may have been stronger and overcome the countervailing policies underlying the immigration law.

The court noted that illegal aliens are not necessarily barred from pursuing employment claims. For instance, illegal aliens have recovered from employers who violated wage and hour laws by failing to pay them for work that they had performed, and are entitled to pursue relief under workers' compensation law. The court further explained that illegal aliens have the right to access courts

and file lawsuits to enforce contracts and seek redress for negligently inflicted personal injuries and other civil wrongs. Nonetheless, the court concluded that an illegal alien cannot recover economic or non-economic damages specifically arising out of the termination of his or her employment, where he or she was not authorized to hold the position in the first instance.

Conclusion

While the *Crespo* case provides employers with some protection from lawsuits by illegal aliens, potential pitfalls remain. Preliminarily, an employer must ensure that it is taking the necessary steps to avoid hiring an alien who is not authorized to work in the United States. In addition, an employer should maintain and enforce its anti-harassment and anti-discrimination policies and procedures, which should help it avoid and defend against lawsuits by any of its employees.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

IMMIGRATION NEWSFLASH

H-1B Visa Cap Reached

The U.S. Citizenship and Immigration Services (USCIS) announced on February 17, 2004 that it has received enough H-1B petitions to meet this year's congressionally mandated cap of 65,000 new workers. USCIS will not accept any new H-1B petitions as of February 18, 2004 for first-time employment subject to the FY 2004 annual cap. Moreover, cases received after February 17, 2004 will be returned to the petitioner. Employers may only file petitions starting April 1, 2004 requesting FY 2005 H-1B employment. Therefore, October 1, 2004 must be the earliest start date for employment stated on the H-1B Petition, Form I-129. New H-1B employment at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization is not subject to the annual cap. It is unlikely that Congress will seek to raise the limit of available H-1B visas during the current congressional session.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973.643.6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973.643.5795
laron@sillscummis.com

For further Corporate Immigration information, please contact:

Susan Storch, Chair
Corporate Immigration
973.643.5983
sstorch@sillscummis.com

NEW JERSEY

THE LEGAL CENTER
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102
TEL: 973.643.7000
TEL: 973.643.6500

NEW YORK

399 PARK AVENUE
NEW YORK, NY 10022
TEL: 212.643.7000
FAX: 212.643.6550