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New Jersey's Appellate Division: Failure to Prove Emotional Distress Damages and Failure to Prove Intentional Infliction of Emotional Distress Does Not Necessarily Foreclose Punitive Damages under the New Jersey Law Against Discrimination

Employees bringing suit for discrimination under the New Jersey Law Against Discrimination (LAD) frequently bring a common law claim for intentional infliction of emotional distress. What happens to a plaintiff's claim for punitive damages under the LAD when a jury (i) determines that defendants did not act with willful, wanton and reckless conduct to sustain the claim for intentional infliction and (ii) does not award the plaintiff any damages for emotional distress? In Rusak v. Ryan Automotive, L.L.C., 2011 N.J. Super. LEXIS 24 (App. Div. Feb. 8, 2011), New Jersey's Appellate Division ruled that discrimination plaintiffs are not necessarily foreclosed from recovering punitive damages by such jury findings. The proofs for punitive damages under the LAD are not the same as those for recovery under an intentional infliction cause of action.

Rusak v. Ryan Automotive, L.L.C.

Judith Carrie Rusak was a salesperson for a car dealership that was acquired in 2003 by Ryan Automotive, L.L.C. (Ryan). In 2005, Ryan hired a general manager who, according to Rusak, subjected her to insults, crude comments, and graphic sexual stories. Rusak also claimed that when she told that general manager that a co-worker (and one of the general manager's hires) showed her and another female employee pornographic material, the general manager cursed at her and told other employees that he was going to fire her. Rusak did not return to work and alleged that as a result of this conduct, she experienced anxiety attacks.

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Rusak sued Ryan and the general manager, alleging that she was discriminated and harassed in violation of the LAD on the basis of gender, was retaliated against in violation of the LAD, and was the victim of intentional infliction of emotional distress. She sought compensatory damages for lost wages and emotional distress, punitive damages, and counsel fees.

The jury concluded that Ryan was subjected to a sexually hostile work environment and that her report about receiving a pornographic email was a substantial or motivating factor in the general manager's decision to discharge her. The jury did not find that defendants' acts constituted "willful, wanton or reckless" conduct for purposes of the intentional infliction count and further decided that Ryan should not be awarded emotional distress damages. It did award Ryan $80,108.80 to compensate her for lost wages and back pay. In light of the jury's findings on the intentional infliction claim, the trial judge did not proceed to the punitive damages phase of the trial. Ryan appealed.

The Appellate Division concluded that the evidence supported submission of Ryan's punitive damage claim to the jury. The Court found that Ryan's proofs demonstrated a continuous pattern of hostility directed at her because of her gender and that the general manager was in an upper management position. The Court acknowledged that there was proof to the contrary, but further determined that such contrary proof did not warrant taking the punitive damage question from the jury. The Court buttressed its conclusion by reviewing other cases in which much less egregious conduct supported submission of punitive damages to the jury.

The Appellate Division then considered the effect, if any, on the jury's answer to the interrogatory on the verdict sheet that defendants' conduct was not willful, wanton and reckless. The Court concluded that the trial judge erred by interpreting the jury's negative answer as the equivalent of a factual finding under the Punitive Damages Act with respect to defendants' state of mind. First, the Court ruled that it was improper to read that question as incorporating within its terms the requisite state of mind necessary to support any award of punitive damages because the tort of intentional infliction did not require anything more than intentional or reckless conduct. Second, the Court determined that Ryan never consented to that question acting as a necessary predicate on which her punitive damage claim was based. The Court also found that the jury could have answered the question in the negative, because it concluded that Ryan did not suffer emotional distress as a result of defendants' discrimination.

The Appellate Division remanded for a trial on punitive damages. Should that trial go forward, the Court offered guidance on what the jury should be told so that the jury's attention would be focused only on those issues relevant to the punitive damage phase of the trial. First, the jury should be instructed that it had already been determined that defendants engaged in unlawful harassment and retaliation under the LAD and that Ryan was awarded compensatory damages for lost wages and back pay, along with the amount of that award. The Court also directed the jury be told that it had been determined that Ryan did not suffer emotional distress damages under the LAD and that the purpose of punitive damages was different from the purpose of compensatory damages.

HR Tip of the Month: The Benefits of Properly Drafted and Administered Document Retention Policies

In a discrimination case in which the plaintiff is alleging that the employer treated others more favorably, a company manager testifies at deposition about another employee who violated the same policy as did the plaintiff. That other employee's personnel file is then requested, but the employer cannot produce it because the file had been purged pursuant to the company's document retention policy. The plaintiff cries foul, and at trial, wants the jury advised that the contents of that personnel file were harmful to the company. Should such an instruction be given?

This hypothetical is analogous to the scenario presented in Hicks v. Wegmans Food Market, 2011 U.S. Dist. LEXIS 13047 (D.N.J. Feb. 10, 2011). The court refused to give an adverse inference charge to the jury because it did not find any bad faith by the employer. In the absence of any such bad faith, the company's destruction of the personnel file pursuant to its ordinary document retention practices prior to the date that it first knew that the file might be connected to plaintiff's case did not want warrant the issuance of a spoliation inference.

Document retention policies serve a number of goals. Many categories of business documents are required by applicable federal, state, or local statute or regulation to be kept for specific periods of time. A properly implemented document retention policy will enable a company to monitor and comply with these requirements. Retention (or destruction) policies also help save companies

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from being buried under the sheer magnitude of documents, both paper and electronic, which are generated year after year. In addition, a properly administered document retention policy can limit a company's exposure in another important way: documents that are purged in good faith pursuant to such a policy will not damage the company's case (though by the same token, purged documents would not be available to support a company's defense).

Even if a company has a written document retention policy, there are a couple of important points to note. First, it is critical for a company to follow its own policy. A company's failure to follow its policy on a consistent basis or an employer's haphazard destruction/retention of documents may subject it to a variety of unfavorable outcomes, from liability to sanctions to adverse jury instructions. Second, when employment litigation arises or appears reasonably foreseeable, additional legal obligations arise to preserve certain documents, which would trump standard document retention policies. These obligations are commonly known as a "litigation hold," and have become increasingly critical in the conduct of litigation in recent years, with the advent of electronic communications.

If you have any questions regarding your company's document retention policy, please contact one of the attorneys in Sills Cummis & Gross P.C.'s Employment and Labor Practice Group.

Update to the November 2010 HR Tip of the Month:

In our November 2010 HR Tip of the Month, we cautioned about the consequences of disciplining employees for postings on social media websites, given the decision of the National Labor Relations Board (NLRB) to sue American Medical Response of Connecticut, Inc. (AMR) for discharging an employee who posted negative comments about her supervisor on her personal Facebook page. We reported that the NLRB case was expected to go to hearing in January 2011. In early February 2011, the NLRB issued a press release announcing the settlement of its complaint against AMR. According to that press release, AMR agreed to, among other things, revise its rules to ensure that it would not improperly restrict employees from discussing wages, hours and working conditions with co-workers and others while not at work and also that it would not discipline or discharge employees for engaging in such discussions.

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For a copy of this press release, see, http://www.nlrb.gov/news/settlement-reached-case-involving-discharge-facebook-comments.

If you would like additional information, please contact:

Trent S. Dickey, Esq.
Chair, Employment and Labor Practice Group
tdickey@sillscummis.com | (973) 643-5863

David H. Ganz, Esq.
Of Counsel and Client Alert Editor, Employment and Labor Practice Group
dganz@sillscummis.com | (973) 643-4852

Jill Turner Lever, Esq.
Of Counsel and HR Tip of the Month Editor, Employment and Labor Practice Group
jlever@sillscummis.com | (973) 643-5691