

September 2003

Editor: Christine P. O'Hearn,
Esquire

Labor & Employment News



BROWN & CONNERY, LLP

www.brownconnery.com

LABOR & EMPLOYMENT GROUP:

WILLIAM M. TAMBUSI, ESQUIRE

wtambuss@brownconnery.com

CHRISTINE P. O'HEARN, ESQUIRE

cohearn@brownconnery.com

SUSAN M. LEMING, ESQUIRE

sleming@brownconnery.com

LOUIS R. LESSIG, ESQUIRE

llessig@brownconnery.com

ILA BHATNAGAR, ESQUIRE

ibhatnagar@brownconnery.com

MICHAEL F. WALLACE, ESQUIRE

mwallace@brownconnery.com

MICHELLE A. CARTER, ESQUIRE

mcarter@brownconnery.com

New Jersey Courts Will Not Second Guess Employer's Determination of Poor Performance and Termination Based Upon A Satisfaction Clause

Susan M. Leming, Esquire

Far too many times an employer terminates an employee for poor performance pursuant to a satisfaction clause in an employment agreement, only to be faced with a breach of contract suit by the employee claiming that their performance was satisfactory. In Silvestri v. Optus Software, Inc., 174 N.J. 113 (2003), the New Jersey Supreme Court recently made clear that courts will not second guess an employer's good faith determination that an employee's performance was unsatisfactory.

In Silvestri, the employer was a computer software company. Plaintiff was hired as the director of support services. The plaintiff was responsible for communicating with resellers of company's software, supervising technical staff and coordinating ongoing training related to company products. The employment contract provided the employer

with the right to terminate the director "for a failure or refusal to perform faithfully, diligently, or completely his duties . . . to the satisfaction of the company." This type of provision is commonly referred to as a satisfaction clause. Nine months into plaintiff's employment, the company terminated plaintiff on grounds that it was disappointed with his attitude and performance. Plaintiff filed suit for breach of contract and tortious interference, contending that the employer's dissatisfaction with his performance was unreasonable and his termination was a breach of his employment contract.

The employer maintained the sole reason for termination was genuine dissatisfaction with performance. The employer set forth evidence, including copies of e-mail communications, of complaints from customers and clients regarding the plaintiff's performance

(Continued on page 2)

Inside this issue:

NJLAD—Supervisory Authority is in the Eye of the Victim 4

Refusal to Sign Non-Compete May Give Rise to CEPA Claim 5

Severance and Unemployment Benefits 6

Merit System Board Order Reinstating Civil Service Employee Is Not a Final Order

Christine P. O'Hearn, Esquire

When the Merit System Board renders a decision reinstating an employee who was removed by the appointing authority, it will generally then direct the parties to attempt to resolve and settle issues related to back-pay and counsel fees pursuant to N.J.A.C.

4A:2-2.10(f) within sixty (60) days. If settlement on an amount cannot be reached, either party may request that the Board review and determine the issue. N.J.A.C. 4A:2-2.10(g).

In Phillips v. Department of Corrections, Bu-

(Continued on page 3)

Satisfaction Clause

(Continued from page 1)

and attitude. The employer also presented evidence that the plaintiff was advised of the complaints and the need to improve his performance prior to his termination.

The plaintiff challenged the reasonableness of the employer's dissatisfaction with his performance. Plaintiff claimed the dissatisfaction was the result of a "micro-manager" who overreacted to customer criticism and could not be reasonably satisfied.

The plaintiff argued the employer's dissatisfaction with his performance should be determined by an objectively reasonable standard and/or determined by a jury. The employer, however, argued its dissatisfaction with plaintiff's performance should be judged by a subjective standard giving deference to the employer.

The trial court granted summary judgment to the employer by applying a subjective standard to the employer's determination of the plaintiff's performance and refusing to substitute its judgment for that of the employer. The Appellate Division reversed and held an employer must meet an objective, reasonable person test when invoking a satisfaction clause permitting termination of employment. The New Jersey Supreme Court reversed the Appellate Division's decision and reinstated the decision of the trial court.

The New Jersey Supreme Court recognized that agreements containing a promise to perform in a manner satisfactory to another is a common form of contract. Such satisfaction contracts generally are divided into two categories: (1) contracts that involve matters of personal taste, sensibility, judgment or convenience; and (2) contracts that contain a requirement of satisfaction as to the mechanical fitness, utility, or marketability. Satisfaction contracts of the first type are generally interpreted on a subjective basis, with satisfaction dependent on the personal, honest evaluation of the party to be satisfied. Absent language to the contrary, contracts of the second type, involving operative fitness or mechanical utility, are subject to an objective test of reasonableness because the extent and quality of performance can be measured by objective tests.

Applying these principles to employment contracts,

the New Jersey Supreme Court reasoned that the employer, not some hypothetical reasonable person under an objective standard, is best suited to determine if the employee's performance was satisfactory. The Court explained "[i]n the case of a high-level business manager, a subjective test is particularly appropriate to the flexibility needed by the owners and higher-level officers operating a competitive enterprise. When a manager has been hired to share responsibility for the success of a business entity, an employer is entitled to be highly personal and idiosyncratic in his satisfactory performance." The Court also recognized that application of another's notion of satisfactory performance would undermine accepted notions of business judgment and individualized competitive strategy and freedom of contract. For all these reasons, the Court concluded, "idiosyncratic judgments as to what constitutes satisfactory performance are expected and should be permitted."

Therefore, the Court held that when an employment contract contains a clause reserving the right to terminate for failing to perform to the company's satisfaction, a subjective test of performance governs the employer's resort to the satisfaction clause unless there is language in the contract to suggest that the parties intended an objective standard. Thus, a genuine dissatisfaction of the employer, honestly held, is sufficient for discharge. The Court did note, however, that although a subjective standard would be applied, the employer must nevertheless act in accordance with his duty of good faith and fair dealing. The Court explained

"there must be honest dissatisfaction with the employee's performance. The employer may not claim dissatisfaction as the reason for termination when another reason is the actual motivation, even if that other reason is neither discriminatory nor contrary to public policy and would therefore pass muster as the basis for discharge of an at-will employee. Moreover, the dissatisfaction with the discharged employee must be honest and genuine. If, however, the employer's dissatisfaction is honest and genuine, even if idiosyncratic, its reasonableness is not subject to second guessing under a reasonable person standard. In other words, standing alone, mere dissatisfaction is sufficient so long as it does not mask any other reason for the adverse employment action."

(Continued on page 3)

Satisfaction Clause

(Continued from page 2)

The Court adopted the following test for determining claims of breach of contract where the employer relies upon a satisfaction clause:

As in an at-will employment setting, the burden of persuasion is on the employee challenging termination under a satisfaction clause in an employment contract. The employee prevails in such a cause of action if he proves that he was discharged before the expiration of the contract and either (1) that the employer was not dissatisfied with him/her, or (2) that the employer, whether dissatisfied or not, did not discharge him on account of the dissatisfaction.

Applying this test to the facts presented, the Court held the contract clearly showed the parties intended a subjective test and, therefore, the employer was entitled to summary judgment because the plaintiff did not allege any issue of illegal or improper motivation for his dismissal and there was overwhelming evidence in the record that the employer was genuinely dissatisfied with the plaintiff's performance.

In summary, when there is a satisfaction clause in an employment agreement, the employer's decision will be given significant deference by the Court. However, such employment agreements must be carefully drafted to ensure that the contractual language expressly and clearly states the employee may be dismissed if they fail to perform to the satisfaction of the employer. Contract provisions which include objective, measurable performance criteria (such as profitability, gross sales, etc.) will be measured by objective standards and not subjective performance determinations. Further, an employer must be prepared to provide evidence of the dissatisfaction with the employee, that the dissatisfaction was genuine and the motivation for termination. To do so, employers must carefully document poor performance of employees and maintain records such as performance evaluations, memorandums, e-mail communications, etc. in order to substantiate its dissatisfaction.

Merit System Board Order . . .

(Continued from page 1)

reau of Parole, New Jersey Superior Court, Appellate Division, Slip Op. A-5581-01T2F (Unpublished, February 26, 2003), the Appellate Division held that the decision of the Merit System Board to reinstate an employee is not a final order unless and until all issues regarding backpay and counsel fees have been determined. As such, until such time, the reinstatement order may only be appealed upon leave granted pursuant to R. 2:5-6.

Although the appointing authority in Phillips did not seek leave to file an interlocutory appeal, the Appellate Division nevertheless granted leave to appeal nunc pro tunc (retroactively) to avoid further delay. Thus, the Appellate Division may be inclined to accept appeals related to reinstatement of employees on an interlocutory basis.

Of course, the parties may always consent to a stay of the Board's reinstatement order pending appeal, however, it is unlikely that the employee, having prevailed at the Board level, will agree to do so. Thus, as a practical matter, once the Board renders its decision directing reinstatement of the employee, the appointing authority must (1) promptly reinstate the employee; (2) seek immediate appellate review of the reinstatement order as an interlocutory appeal pursuant to R. 2:5-6; or (3) seek a stay of the reinstatement order pending appeal first with the Board and, if necessary, the Appellate Division. Failing to do any of the above will render the appointing authority in violation of the Board's Order to reinstate the employee and potentially subject to a finding of contempt and/or imposition of sanctions, fines, etc.

Supervisory Authority is in the Eye of the Victim

Ila Bhatnagar, Esquire

The New Jersey Appellate Division handed another victory to employees who sue for sexual harassment under the Law Against Discrimination (LAD). Previously, courts made clear that conduct in violation of the LAD committed by supervisory employees will render the employer vicariously liable for sexual harassment. In Entrot v. BASF Corp., 359 N.J. Super. 162 (App. Div. 2003), the Appellate Division held that whether an employee is a supervisor turns on the victim's perceptions of the employee's authority. Thus, improper conduct by a co-worker, whom the victim reasonably perceives to be a supervisor, may be imputed to the employer, making the employer vicariously liable for the co-worker's actions.

In Entrot, the plaintiff was one of five team leaders on a project involving the implementation of business software. The alleged harasser, a co-worker, was the project leader, whose duties were to set priorities for the team, schedule implementation dates, and help make strategic decisions. Plaintiff claimed the co-worker wrote her job description and was responsible for evaluating her job performance. However, the co-worker never completed a performance evaluation for Entrot. Entrot and the co-worker became entangled in more than a professional relationship. Entrot later alleged that the co-worker created a hostile work environment by sexually harassing her. The co-worker denied Entrot's claims, stating that an intimate relationship between them began during overnight business trips. Upon discovering her relationship with the co-worker, Entrot's husband threatened the co-worker and informed her employer that the co-worker was stalking Entrot. Entrot refused to return to work and immediately went on disability leave.

The plaintiff sued the employer alleging sexual harassment. The employer argued that since the co-worker was not a supervisor, it was not liable for his conduct. The employer argued the co-worker was not from the same department as plaintiff, had no authority to hire or fire her, and had no significant input on personnel decisions. The employer also claimed it had a no-tolerance sexual harassment policy which was distributed to all employees.

The trial court granted summary judgment to the employer on grounds that the plaintiff failed to show the co-worker was a supervisor or any other basis upon which the employer was vicariously liable for his conduct. The Appellate Division reversed and held that trial court's definition of a supervisor was too restrictive.

The Appellate Division held the co-worker's conduct could be imputed to the employer for purposes of vicarious liability because the supervisory status of any employee depends on the nature of the employer's delegation of authority to the harassing co-worker. If the co-worker has the authority to control the work environment, harassing behavior by the co-worker will cause the employer to be liable. Indicia such as the power to fire and demote, influence compensation and direct job functions is probative of supervisory status but not determinative. The co-worker's power to shape the workplace atmosphere is the key determinant of liability. Relevant evidence includes how the alleged harasser controlled the workplace in subtle and indirect ways and the co-worker's ability to restrict the victim-employee's freedom to ignore the harassing conduct.

Thus, the Appellate Division held a jury should determine whether an individual is a supervisor such that vicarious liability will attach to the employer.

Therefore, employers should carefully select and delegate responsibility to employees who have the ability to control the workplace environment and should make their authority (or lack thereof) clear to other employees. However, even if an employee is not considered a supervisor within an organization and even if an employee's job description does not include typical supervisory duties, the employee may nevertheless be deemed a supervisor subjecting the employer to vicarious liability for the employee's conduct if the victim reasonably perceived—even mistakenly—the co-worker as having the ability to adversely affect his/her work environment.

This decision is yet another signal from the New Jersey Supreme Court that employers will be held to stringent standards in the workplace and have a significant, affirmative responsibility to control the work environment and prevent sexual harassment.

Termination of Employee for Refusal to Sign Non-Compete Agreement May Give Rise to Claim By Employee Under CEPA

Christine P. O'Hearn, Esquire

Restrictive covenants and non-compete agreements are often scrutinized by courts to determine whether the restrictions are reasonable under the circumstances. Factors generally include consideration of the legitimate interests of the employer, the hardship upon the employee given the nature of the profession, geographic area, type and duration of restriction, the employee's ability to continue working in his or her field and whether the restrictions are injurious to the public or otherwise against public policy.

In a case of first impression, the Appellate Division held in Maw v. Advanced Clinical Communications, 359 N.J.Super. 420 (App.Div. 2003), that an employee who is terminated for refusing to sign an employment agreement containing a covenant not to compete can assert a wrongful termination claim against the employer under the New Jersey Conscientious Employee Protection Act ("CEPA") and/or a common law wrongful termination claim.

In Maw, the employee was hired as a graphic designer in November 1997 until she was fired in March 2001 for refusing to sign an employment agreement containing a non-compete covenant. The employer decided to require all employees above a certain level in the organization to execute an employment agreement. The non-compete precluded plaintiff from becoming employed by a competitor or customer of the employer for two (2) years following her employment. There was no geographical limitation. The sole reason for plaintiff's termination was her refusal to sign the agreement. The plaintiff filed suit against the employer claiming her termination violated CEPA and was otherwise violative of public policy.

The plaintiff alleged the non-compete violated public policy because it served no legitimate business justification, did not protect any legitimate business interests and was intended solely to stifle competition. She further argued the restrictions would create an undue hardship on her and substantially limit her employment opportunities. She claimed she did not have significant access to confidential information in the course of her duties and was no different than clerical and administrative staff who were not required to sign the agreement. Plaintiff argued she stated a CEPA and wrongful termination claim because she refused to sign a non-compete which violated public policy.

The trial court dismissed plaintiff's claim holding that non-

competes are not per se invalid or violative of public policy and, therefore, plaintiff failed to state a CEPA claim. The Appellate Division reversed holding that the employee's refusal to sign a non-compete and/or restrictive covenant which she believed to be in violation of public policy may, depending upon the circumstances, violate public policy sufficient to state a claim for wrongful termination under CEPA and under common law.

The Appellate Division reviewed the non-compete provision and found that it may be unduly burdensome in terms of time and geography. Thus, the hardship to the plaintiff may outweigh any legitimate interests of the employer. The Court held that "[a]t this early stage of the litigation, that is enough to support plaintiff's claim to a viable cause of action." The Court relied upon New Jersey's strong prohibition against restraint of trade and against burdening employees by restricting their right to engage in their chosen field of employment.

The Appellate Division rejected the employer's argument that any dispute regarding the restrictions should be determined only after the employee executes the covenant and subsequently leaves employment. The Appellate Division explained "we find no reason to require an employee to sign what may be a legally unenforceable noncompete clause, under the threat of discharge, and then wait to litigate the agreement should the employer seek to enforce it at a later date."

Therefore, employees now have yet another potential cause of action against employers. Employers should be cognizant that presenting overarching restrictive covenants and/or non-compete provisions to employees and requiring execution for continued employment may give rise to a CEPA and/or wrongful termination claim by the employee. Thus, employers should carefully consider the legitimate interests they seek to protect by such restrictions, the necessity of the particular employee in executing the agreement in terms of their work duties and access to confidential information, and whether the restrictions are likely to be considered unenforceable or unduly burdensome for the employee.



BROWN & CONNERY, LLP

Our Web Address:

www.brownconnery.com

360 Haddon Avenue
P.O. Box 539
Westmont, NJ 08108
Phone: (856) 854-8900
Fax: (856) 858-4967

129 North Broadway
Suite 302
Camden, NJ 08102
Phone: (856) 365-5100
Fax: (856) 858-4967

6 North Broad Street
Woodbury, NJ 08096
Phone: (856) 812-8900
Fax: (856) 853-9933

1500 Market Street
12th Floor, East Tower
Centre Square
Philadelphia, PA 19102
Phone: (215) 592-4352
Fax: (856) 858-4967

This publication is issued periodically to update Brown & Connery clients and other interested persons as to legal developments. The contents of this newsletter do not constitute legal advice or opinion and should not be regarded as a substitute for specific advice and consultation with an attorney. You may contact an attorney at Brown & Connery, LLP for any specific advice and/or counsel on legal matters.

Maintaining Employee on Payroll for Severance Payments May Render Employee Ineligible for Unemployment Benefits

Christine P. O'Hearn, Esquire

Many employers offer severance pay to employees upon termination and/or layoff. Although payment of severance monies does not generally bar an employee's claim for unemployment benefits, the method of payment of severance monies may in fact bar the employee's unemployment benefits claim.

Pursuant to N.J.A.C. 12:17-8.7(b), "receipt of severance or separation pay in periodic payments or in a lump sum shall not be a bar to eligibility for unemployment benefits. However, in Darby v. Board of Review, 359 N.J.Super. 470 (App.Div. 2003), the Appellate Division held that an employee was not entitled to unemployment benefits during the time that she remained on active payroll status for purposes of severance pay even though her employment relationship had effectively ended.

In Darby, the employer and employee entered into a severance agreement and release which provided that her employment relationship ended effective March 23, 2001 but

that she would remain on active payroll status for an additional fourteen (14) months until May 31, 2002. She also remained on the employer's health insurance program at the employer's expense and continued to participate in the employer's 401K program for the same time period. The Appellate Division found these factors rendered the employee still "active" and, therefore, ineligible for unemployment benefits.

Thus, employers should be aware that maintaining employees on the payroll as active employees for purposes of payment of severance pay and/or continuation other benefits such as health insurance, retirement plans, etc. may render the employee ineligible for unemployment benefits until the time that they are permanently removed from the employer's records as an active employee.