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# Labor & Employment News



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## **Can You Fire and Then Refuse to Rehire a Drug Addict?**

**Ila Bhatnagar, Esquire**

Under the Americans with Disabilities Act ("ADA"), an employer who has a blanket policy of not rehiring former employees who were terminated for misconduct may risk exposure to discrimination claims, if the discharge was for substance abuse and the former employee is now rehabilitated. The United States Supreme Court has left open the possibility, and suggested an employer violated the ADA where a former employee with an exemplary 25-year work record was discharged for appearing at work under the influence of illegal drugs and/or alcohol, and the company refused to rehire him after he subsequently recovered from the addiction and re-applied for employment. In rejecting the former employee's application, the employer relied upon its unwritten policy that it would not rehire employees previously dismissed for misconduct.

In Raytheon Co. v. Hernandez, 124 S.Ct. 513 (2003), the former employee asserted he was no longer abusing drugs or alcohol at the time he re-applied for employment and by refusing to rehire him for a job that he was previously clearly qualified for, the company was discriminating against him because of a disability, i.e., his past drug use and/or "regarding him as a drug addict," both of which are grounds for an ADA cause of action.

The Equal Employment Opportunity Commission reviewed the employee's charge of discrimination and issued a Right to Sue Letter finding that there was reasonable cause to believe that the employer violated the ADA by declining to rehire him because of a disability. The employee subsequently filed suit proceeding under a "disparate treatment" theory. Generally, employment discrimination lawsuits alleging that a policy, custom or

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## **What Your Lawyer Can't Tell You**

**Christine P. O'Hearn, Esquire**

Imagine this scenario. Your company has retained labor counsel. You share information with your attorney related to potential claims and/or litigation matters, consult your attorney and seek advice related to employee discipline, firing, etc. An employee of your company contacts your attorney seek-

ing personal representation to bring a claim against your company and/or disclosing a potential claim against your company. According to a recent opinion by the New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 695 (2004), the lawyer is precluded from advising the employer that the employee contacted the firm,

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## Costs For Defending An NJLAD Case Just Went Up—And It's Not Because Of Attorneys' Fees

**Susan M. Leming, Esquire**

It's now more expensive to defend a plaintiff's claims under the New Jersey Law Against Discrimination ("NJLAD") at trial. Not only does a defendant have to be conscious of exposure to wage loss claims (including back pay and front pay), punitive damages, emotional distress damages and, if the plaintiff is successful, costs of suit and attorney's fees — but now, a defendant may also be liable for damages to compensate for the negative tax consequences a plaintiff may face as a result of receiving a lump sum damages award.

While other state and federal courts had previously addressed the issue of a plaintiff's right to recover damages for the negative tax consequences of a lump sum award with mixed results, New Jersey had not yet addressed the issue until recently. In a case of first impression, a trial court held that a successful plaintiff in a discrimination case under the NJLAD is entitled to seek damages and be compensated for any negative tax consequences incurred as a result of a lump sum award against an employer. In Ferrante v. Sciarretta, 365 N.J. Super. 601 (Law Div. 2003), the trial court enhanced the jury award of over \$1 million dollars to include an additional \$107,000.00 to compensate for the plaintiff's negative tax consequences as a result of her lump sum jury award.

While the NJLAD statutory provisions regarding recoverable damages do not currently specify compensation for negative tax consequences, the trial court relied upon the "underlying philosophy of the New Jersey anti-discrimination laws" to broadly construe and interpret the damages contained within the statute to include damages as negative tax consequences. In Ferrante, the court also explained that the policy behind the statute was to make plaintiffs whole for the wrongdoing they endured. Since the practical aspect of the tax consequences of a sizeable award a plaintiff receives from a judge or jury would result in a substantial reduction of the award, the plaintiff would not receive the full benefit of the award and, thus, would not be made whole. Based upon this analysis, the trial court opened the door for plaintiffs to dig deeper into the pockets of defendants and hold them responsible for additional damages.

Procedurally, the court held the amount of negative tax consequences is not readily subject to determination by a jury. Further, the precise amount of any lump sum award and, therefore, the likely negative tax consequences is not known until after a verdict is entered. As a result, Ferrante instructed that a post-trial motion is the only viable procedural mechanism to consider this issue. However, a defendant is still entitled to notice that a plaintiff intends to seek such

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## What Your Lawyer Can't Tell You

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that the employee is seeking representation to bring a claim against the employer and/or that the employee disclosed a potential claim against the employer.

Although other jurisdictions have previously addressed the issue, Opinion 695 is the first New Jersey Opinion to squarely address the issue. The Committee concluded that an attorney who disclosed such information to an existing client would violate newly adopted Professional Rule of Conduct 1.18 which prohibits the "use or revelation of information from a prospective client." The Committee emphasized that people seeking representation have a reasonable expectation that communications with an attorney will not be used against them or disclosed if the attorney does not undertake representation and a lack of confidentiality would create a chilling effect that would be "crippling and an unacceptable hindrance to the public's ability to gain access to attorneys."

While the confidentiality of communications between an attorney and a prospective client are important, where the attorney has a pre-existing attorney-client relationship with the employer, the Committee's Opinion impedes the attorney's ability to fully represent the employer and creates conflicting obligations for the attorney. It also creates an uncomfortable situation in the event that the attorney is requested to review matters related to the employee and/or the employer subsequently learns that the attorney was aware of the possible claim and failed to disclose the information to the employer.

In addition, the Opinion provides a mechanism by which employees can easily disqualify an employer's attorney from representing the employer in litigation brought by the employee. By one telephone call, discussion, e-mail, voice-mail or other unsolicited communication, an employee can disclose information to the employer's attorney such that even if the attorney declines representation and properly advises the employee to seek counsel elsewhere, the attorney will likely be disqualified from representing the employer in subsequent litigation filed by the employee.

In short, another favorable decision for employees may put a wedge between employers and their attorneys.

## ***The Impact of the Domestic Partnership Act on Employers***

***Christine P. O'Hearn, Esquire and***

***Michelle A. Carter, Esquire***

On January 12, 2004, Governor McGreevey signed the Domestic Partnership Act ("the Act"). New Jersey is the fifth state (in addition to California, Vermont, Hawaii and Massachusetts) to recognize civil unions. The Act recognizes the legal status of same-sex couples and unmarried, opposite-sex couples age 62 or over, under various New Jersey laws. The Act contains provisions which protect against discrimination, provide visitation and decision making rights in health care settings, and provide the right to certain health and retirement benefits.

The Act amends various pre-existing labor statutes and also includes new provisions which impact employers. Some of the newly enacted provisions include:

- amendment of the New Jersey Law Against Discrimination to include prohibition of discrimination against an individual based upon domestic partnership status such that discrimination based upon domestic partnership status is now equivalent to discrimination based upon marital status or any other protected class (race, age, sex, etc.);
- amendment of N.J.S.A. 52:14-17.26(d) to include domestic partners under the definition of "dependents" for purposes of eligibility for health insurance coverage under the State Health Benefits Plan and providing option for an employer other than the State that is participating in the State Health Benefits Program pursuant to N.J.S.A. 52:14-17.34 to adopt a resolution providing that "dependents" include domestic partners;
- amendment of the State Retirement System to include "domestic partner" and "domestic partnership" within the definitions of "widower", "widow" and "spouse" and providing option for an employer other than the State that is participating in the State Retirement System to adopt a resolution providing that "dependents" include domestic partners.

Significantly, the Act does not mandate private employers provide health insurance or any other benefit to domestic partners. Obviously, an employer may voluntarily provide such benefits. However, the Act specifically provides that a private employer who decides not to provide domestic partners with the same health benefits and rights as spouses is protected from any claim of discrimination. If an employer elects to provide such benefits to domestic partners,

health insurers in New Jersey are required to offer such coverage under the Act.

In order to create a domestic partnership pursuant to the Act, both partners must meet the following requirements: share a common residence; be jointly responsible for each other's common welfare and basic living expenses; not related by blood or affinity; both are of the same sex, at least 18 years old; both jointly file an Affidavit of Domestic partnership; and neither person has been in domestic partnership that was terminated less than 180 days prior to the filing of the current affidavit of domestic partnership.

One significant exception to the above requirements to establish a domestic partnership relates to heterosexual couples over the age of 62. The Act provides that two persons that are each at least 62 years old and are not of the same sex may establish a domestic partnership if they meet all of the other above requirements.

Despite the provisions setting forth the specific procedures to establish a domestic partnership, an employer, as well as other entities, may, but is not required to treat a person as a member of a domestic partnership, notwithstanding the absence of an Affidavit of Domestic Partnership. Therefore, if an employee is of a same sex couple, but has not filed an affidavit of domestic partnership, an employer may elect whether it will recognize the employee's partner as domestic partner.

The Act is not effective until July 11, 2004. However, employers, and their human resource personnel, should begin to review the Act and consider its potential impact. Public employers who participate in the State Health Benefits Plan and/or State Retirement System must prepare to comply with the mandatory provision of benefits to domestic partners. Private employers must make the determination as to (1) whether they will elect to recognize domestic partners as spouses and/or dependents thereby entitling the domestic partner to health insurance and/or other benefits; and, if so, (2) whether they will elect to recognize domestic partners without an Affidavit of Partnership having been filed. Such determinations should become part of the employer's written employment handbook and/or benefits plan. Employers may also need to amend benefit plan documents. In addition, employers must ensure the policy is applied uniformly to all employees. Recognition of some but not other partnerships may leave the employer vulnerable to claims of discrimination based on some other protected status such as race, age, sex, national origin, etc.

## ***Rehire a Drug Addict?***

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practice instituted by the employer is discriminatory are brought under one of two theories – disparate treatment or disparate impact.

Under a disparate treatment theory, like the one advocated by the employee in Raytheon, a plaintiff must prove that the employer treated members of a protected class less favorable than others with respect to a term, condition or privilege of employment; that is, the alleged conduct itself is discriminatory. (A protected class is one such as race, ethnicity, gender, disability, age, marital status). The employee in Raytheon argued he was treated differently as a disabled person and that Raytheon's policy of not rehiring former employees was discriminatory because any employee discharged for substance abuse who later recovered from the addiction would never be eligible for rehire. Essentially, he alleged that Raytheon's policy, which was neutral on its face, discriminated against those with the disability of addiction to illegal drugs/alcohol. Such allegations, however, more properly fit under a "disparate impact" theory of discrimination, which applies when an employer's *facially neutral* policy has a disproportionate impact upon a protected class, causing the members of that class to be treated more harshly.

The employee in Raytheon, ultimately unsuccessful on his discrimination claim, may have lost on a mere technicality—the Court ruled that he attempted to change legal theories too late in the litigation. Most significantly, the Court specifically left open the question of what the outcome would have been had the employee properly asserted his lawsuit pursuant to a disparate impact theory from the outset, and implicitly suggested that Raytheon's policy did in fact have a disproportionate, discriminatory effect on those individuals who had recovered from substance abuse.

While being addicted to illegal drugs is not protected as a disability under the ADA, rehabilitated *past* drug users are protected, and discriminating against such individuals is an ADA violation. Thus, it is likely that this issue will be re-visited in the near future.

Furthermore, the ADA is a federal statute. In New Jersey, disability lawsuits are more frequently brought pursuant to New Jersey's Law Against Discrimination, which protects against "handicap" discrimination and

which is far more expansive than the ADA. As a result, if the same factual scenario which arose in the Raytheon case was asserted in New Jersey under the NJLAD, there would likely be a very different result, in favor of the recovered addict employee.

Employers must be aware that even policies which are neutral on their face and which may not appear discriminatory may nevertheless have a discriminatory impact upon a protected class. Employers who have adopted a policy of not rehiring those previously discharged for misconduct, whether formally or by practice, should ensure their personnel records specify the nature of the prior misconduct for future reference. In addition, rather than simply applying such a policy in a mechanical fashion, an employer should be certain that human resource personnel verify that the prior misconduct was not related to prior substance abuse or any other medical condition which could arguably be protected as a disability.

## ***Costs For Defending An NJLAD Case Just Went Up—And It's Not Because Of Attorneys' Fees***

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damages and a plaintiff's economic expert must reference such damages in any pre-trial report. Ferrante permitted the plaintiff to serve an amended economic expert report after the jury verdict calculating the amount of negative tax consequences. Therefore, a defendant must now consider this issue and whether they wish to present any rebuttal expert testimony and/or report in this regard to be submitted to the trial court post-verdict. The failure to do so may result in a plaintiff submitting uncontested evidence to the trial court in this regard and an enhanced damages award.

## ***New Jersey Supreme Court Holds Employer Compelled Recreational Activity May Be Compensable Under Workers Compensation Act***

*Christine P. O'Hearn, Esquire*

The Workers Compensation Act, N.J.S.A. 34:15-7 provides that an employer must compensate its employees for accidental injuries arising out of and in the course of their employment except when "recreational or social activities" are "the natural and proximate cause of the injury." The exception to exclusion for such activities generally requires the employee show that the activity is a "regular incident of employment" and that the activity produced a "benefit to the employer beyond improvement in employee health and morale."

The New Jersey Supreme Court's recent decision in Lozano v. Frank DeLuca Construction, 178 N.J. 513, Slip Op. A-104-02 (March 10, 2004) expands and liberally construes this exception and may result in more compensable employee claims.

In Lozano, a construction laborer injured in an accident while driving a go-kart filed a workers compensation claim alleging that his injuries were sustained in the course of his employment. The employee was assigned to work at the home of a customer with the owner of the construction company and a supervisor. The customer had several go-karts and a track on his property. At the end of the day, and after the assigned work had been completed, the employee claimed that the employer told him to "get in the go-kart" several times despite the employee advising the employer that he did not know how to drive. The employee claimed the supervisor encouraged him by saying "it was easy." The employee claimed that he believed the employer's persistent statements to "get in the go-kart" was a command to him and as a result, he got into the go-kart. The employee crashed on his first lap and was seriously injured.

The employer asserted that the injuries were not work related and, therefore, not compensable. The workers compensation court granted the employer's motion to dismiss the claim and held that the employee had been engaged in recreational activity which was outside the scope of his employment. The employee appealed to the Appellate Division which subsequently affirmed the ruling. The New Jersey Supreme Court granted the employee's petition for certiorari and reversed the dismissal of the claim.

The Court rejected the broad construction of the exception for "recreational or social activities" and the argument that any injury caused by or related to such activity was not compensable. After reviewing the legislative history of the statutory provisions and prior case law, the Court held that when an employee can demonstrate that the employer required or compelled participation in a recreational or social activity, it is equivalent to any other "compensable work related assignment."

It is the employee's burden to establish the allegation of compulsion. An employee may prove compulsion by evidence of a direct command or indirect pressure through "the imbalance of power between the employer and employee." However, if the employee's claim of compulsion is based upon implicit or indirect compulsion, the employee must show that he had an "objectively reasonable basis in fact for believing that the employer had compelled participation in the activity." The Court suggested that whether an employee's belief of compulsion is objectively reasonable will be a fact intensive issue to be determined on a case-by-case basis. Relevant factors to be considered include whether the employer directly solicited the employee's participation in the activity; whether the activity took place on the employer's premises, during work hours and/or in the presence of supervisors, executives or clients, and whether the employee's refusal to participate could expose the employee to the risk of negative consequences such as termination, demotion, or reduced wages. These factors are not exclusive and the Court specifically recognized that other fact patterns may suggest compulsion.

Although the Court maintained the general exclusion for recreational or social activities that are merely sponsored or encouraged by the employer, however, the Lozano decision may spur new claims seeking compensation for injuries suffered in "recreational or social activities" in which the employee alleges he was expressly or implicitly compelled to participate.



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### **Around the Firm** .....

**Warren W. Faulk**, Partner, was recently honored by the Camden County Bar Association as the recipient of the 2003 Devine Award.

**Jacqueline Barrett**, Associate, successfully passed the New Jersey and Pennsylvania Bar Examinations.

**Ila Bhatnagar**, Associate and **Christine P. O'Hearn**, Partner, recently served as moderator and panelist for a seminar entitled "Understanding Federal Rules of Civil Procedure" sponsored by the Camden County Bar Association.

**Joseph M. Nardi**, Partner and **Susan M. Leming**, Associate provided Employment Practice Training Sessions for supervisors and managers employed by the 30 municipalities who are members of the Camden County Municipal Joint Insurance Fund.

**Louis R. Lessig**, Associate, recently provided a seminar on HIPAA for the Woodbury Chamber of Commerce. Mr. Lessig will also be a panelist at the Tri-State HRMA 18<sup>th</sup> Annual Conference on May 14, 2004 for presentation of "Navigating your way through the Proposed Changes at the Division of Civil Rights" along with the Division of Civil Rights Director, Frank Vespa-Papaleo, Esquire.

**Christine P. O'Hearn**, Partner, was recently appointed by the New Jersey Supreme Court to the District IV Ethics Committee.