

*Labor & Employment News***LABOR & EMPLOYMENT GROUP:****WILLIAM M. TAMBUSSI, 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

DIANE S. KANE, ESQUIRE

dkane@brownconnery.com

ILA BHATNAGAR, ESQUIRE

ibhatnagar@brownconnery.com

JACQUELINE R. BARRETT, ESQUIRE

jbarrett@brownconnery.com

WILLIAM F. COOK, ESQUIRE

wcook@brownconnery.com

HENRY OH, ESQUIRE

hoh@brownconnery.com

Inside this Issue:

Legislature Again Seeks To Require Employers To Provide All Employees With Access To Personnel Files	2
Why Employers Must Pay Attention To Claims Of Retaliation Under Title VII	3
Statements Made By Public Employees Pursuant To Official Duties Are Not Protected By The	5
Is A Shareholder-Director Of An Organization An "Employee" Or An "Employer," And Why Does It Matter?	6
Around the Firm	7

All Rights Reserved

Pre-Judgment Interest May Be Recovered In NJLAD Claims Against A Public Entity*Jacqueline R. Barrett, Esquire*

On June 6, 2006, the New Jersey Supreme Court unanimously held pre-judgment interest may be recovered in claims brought pursuant to the New Jersey Law Against Discrimination ("NJLAD") against public entities. Potente v. County of Hudson, 187 N.J. 103 (2006).

Potente, a former investigator with the Hudson County Prosecutor's Office, was injured while on duty in December 1993. He subsequently returned to work and was assigned desk duty. In September 1994, Potente used his accumulated vacation and sick time to undergo surgery related to the accident. By November 10, 1994, he had exhausted all accumulated leave and filed for state disability benefits. Potente claimed he requested light-duty positions throughout his recovery but was advised no such positions were available. Since no light duty position was available, Potente remained absent from work even after his disability benefits expired. He then requested a leave of absence, which was denied. In November 1994, Potente was advised that his failure to return to work would result in disciplinary action. Potente did not return. As a result, he was terminated in December 1994.

In 1999, Potente filed suit against the County, the Prosecutor and his former supervisor pursuant to the NJLAD. During litigation, Potente's claim against the Prosecutor was withdrawn and his claim against his former supervisor was dismissed. However, in 2003 his claims against the County were tried before a jury which, deliberating the issue of damages only, awarded Potente \$200,000 in back pay and \$50,000 for pain and suffering. The Court also awarded attorneys' fees, pre-judgment interest and post-judgment interest.

The County appealed, arguing pre-judgment interest was not recoverable in claims brought against a public entity. However, the Appellate Division affirmed the trial court's decision. The New Jersey Supreme Court then granted the County's petition for certification. Though it reversed and remanded the matter for a new trial on an unrelated issue, the Supreme Court affirmed the lower courts and held the NJLAD permits recovery of pre-judgment interest in claims brought against public entities. The Court cited Rule 4:42-11(b), which states, "[e]xcept where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions . . . include in the judgment simple interest, calculated . . . from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later." R. 4:42-11(b). The Court noted a 1990 amendment to the NJLAD which added language providing that legal remedies available to persons under common law would also be made available under the NJLAD. Since pre-judgment interest was an available remedy under common law at the time of the 1990 NJLAD amendment, the Court concluded prejudgment interest became an available remedy under the NJLAD by application of the 1990 amendment.

As a result of this decision, public employers are now subject to pre-judgment interest awards on NJLAD verdicts.

Legislature Again Seeks To Require Employers To Provide All Employees With Access To Personnel Files

Christine P. O'Hearn, Esquire

Presently, there is no statute or regulation in New Jersey which requires a private employer to disclose or make an employee's personnel file available to an employee during or after employment. Public employees, however, do have a right to review the contents of their personnel files. Many union contracts also include such rights for union employees. New Jersey Assembly Bill No. 2340, introduced on January 20, 2006 and referred to the Assembly Labor Committee on February 6, 2006, seeks to provide all employees in the State with access to their personnel file.

The stated purpose of the statute is "to provide all workers, except workers employed by State or local government, with reasonable access to their personnel files and limit disclosure of information from those files." The statute defines personnel file as follows:

'Personnel file' means the information regarding an employee kept by or for an employer, including, but not limited to, formal evaluations, reports regarding the employee's character, work history, and documents or other information relevant to the employee's pay, benefits, work qualifications, hiring, promotion, changes in compensation, transfer, termination or other discipline, but excluding personal information regarding the planning of future employer operations referring to more than one employee, letters of reference for which the employee has given written consent to be kept confidential, and information regarding a pending or ongoing investigation which the employer elects to keep in a separate file pursuant to the provisions of section 3 of this act.

The statute broadly defines "personnel file" to include any separate files maintained related to any investigations of the employees once the investigation is concluded.

The statute would require the employer to permit an employee, the employee's attorney and/or the union representative to review a personnel file within 14 days of a written request and provide the employee with copies of any requested documents in the personnel file. Further, the statute would require personnel files be maintained for at least 12 months after termination of employment. The requirement to permit access within 14 days after a written request would apply during that 12 month period of time.

The statute provides the employee may request the employer correct inaccurate or misleading information in the personnel file and, if the employer does not do so to the "satisfaction of the employee", the employee may submit a written statement to be included in the personnel file.

Finally, the statute provides personnel files shall not be disclosed unless:

(1) Made to officers or employees of the employer who have a legitimate need for the information in the performance of their duties;

(2) Made to a law enforcement agency in connection with a criminal investigation or prosecution;

(3) Made to any court or other government agency to which the employer is required by law to disclose the information;

(4) Made pursuant to any order of a court of competent jurisdiction;

(5) Made pursuant to a lawful subpoena;

(6) Made with the prior written authorization of the individual;

(7) A disclosure of records which are required by law to be made public;

(8) A disclosure of information made available pursuant to the provisions of section 7 of P.L.2001, c.326 (C.34:15-128.3); or

(9) A disclosure of information provided to a prospective employer of a current or former employee upon request of the prospective employer or upon request of the current or former employee about the current or former employee's job history or job performance, including information about the suitability of the employee for re-employment, the employee's skills, abilities, and traits as they may relate to suitability for future employment; and, in the case of a former employee, the reason for the employee's separation.

The statute does, however, include a provision for immunity to an employer for providing information in response to a job reference. The statute provides:

c. A former or current employer, or any employee, agent or other representative authorized by the employer, including a job placement service, who, in good faith pursuant to a request of a prospective employer or the employee, discloses information pursuant to paragraph (9) of subsection a. of this section shall be immune from civil liability and shall not be liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when a claimant shows by clear and convincing evidence that the information disclosed by the employer was knowingly false or the employer acted with malicious intent or the employer violated any civil right of the former or current employee protected by federal or State law.

In summary, while codifying the common law immunity generally provided to employers is certainly beneficial to employers, if enacted, the statute would provide employees, and their attorneys, with access to employee personnel files at any time during and within 12 months after employment has ceased. This in essence provides "free discovery" to employees and their attorneys in preparing to institute litigation against an employer and/or otherwise investigate potential litigation prior to actually filing suit against employer. If enacted, employers will need to be very careful and monitor what is contained in an employee's personnel file and what other files may be maintained by supervisors, outside of the human resources department, which will likely be deemed subject to disclosure under the law.

Why Employers Must Pay Attention To Claims Of Retaliation Under Title VII

Louis R. Lessig, Esquire

The U.S. Supreme Court recently issued one of the more interesting employment law decisions of recent memory. In *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2006 WL 1698953 (June 22, 2006). The Court changed how employers and their counsel must evaluate retaliation cases based upon Title VII of the Civil Rights Act of 1964. In the past, while there was a split in the circuits as to how to evaluate retaliation claims, some Circuit Courts applied the same standard of review applied for claims of discrimination and retaliation under Title VII. However, the Supreme Court has determined otherwise.

In order to understand the Court's decision, it is necessary to review the facts of the case before the Court. Ms. White, the plaintiff, was the only woman employed by Burlington in the Maintenance Department. In her initial position as a track laborer, her duties included cutting brush from the tracks, replacing track components and clearing trash and other items from the tracks themselves. While working for a previous employer, Ms. White had operated a forklift and as a result, when the individual who worked for Burlington on the forklift was injured, she was transferred to that position.

After working at Burlington for several months, Ms. White complained to management that her direct supervisor made insulting comments and remarks in front of her male co-workers which she felt were offensive — including telling her women should not be doing this type of job. Based upon Burlington's investigation, it suspended the supervisor for ten (10) days and ordered him to attend sexual harassment training. Subsequently, Ms. White was reassigned to non-forklift work due to seniority concerns raised by her co-workers who believed that a more senior man should have received the position.

Ms. White filed an EEOC charge asserting her reassignment was based on gender discrimination and retaliation for her initial harassment complaint. Only days after the charge was filed, Ms. White disagreed with her supervisor about the vehicle assigned to transport her to assignment locations while on duty. As a result of the disagreement, she was suspended without pay for insubordination. After availing herself of Burlington's internal grievance procedure, the company subsequently determined she had not been insubordinate and reinstated her with full back pay for thirty-seven (37) days.

Later, Ms. White filed an additional retaliation charge claiming she was placed under surveillance and monitored. She also filed a retaliation charge against Burlington for the suspension.

Ultimately, Ms. White filed a lawsuit against Burlington in Federal Court, asserting the change of her job responsibilities, as well as her suspension for thirty-seven (37) days without pay, was retaliation under Title VII. A jury found in her favor and awarded \$43,500 in compensatory damages. The Sixth Circuit upheld the jury verdict.

Retaliation Versus Discrimination

In the Court's decision, it took painstaking time to distinguish between the specific sections of Title VII that deal with the anti-discrimination provision, as opposed to the anti-retaliation provision. The Court noted the anti-discrimination provision includes limiting language against actions prohibiting discrimination, "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . ."

Conversely, the Court noted the anti-retaliation provision is significantly broader in coverage. Specifically, the Court cited the statutory language which says it is not lawful for the employer:

to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner of investigation, proceeding or hearing under this subchapter.

The critical point is the fact that the statutory language designed to prohibit retaliation has no language limiting the type of retaliation specifically to work related issues or attempts to obtain work. Consequently, the Court interpreted Congress' choice of language to mean retaliation can encompass issues far beyond work or employment issues.

The New Legal Standard

While there is no question this new broader scope of retaliation claims under Title VII will cause more retaliation claims to be found sustainable under federal law, the Court was clear when it stated that this new standard only protected employees from retaliation that results in a true injury or harm. It is not enough to assert retaliation claims where a single comment is made or some other minor frustration or personality conflicts that may exist because such things are dealt with by all employees and tolerated. However, the key is whether the specific action taken results in deterring a reasonable employee from seeking the protection of Title VII.

The avenues that exist for a crafty employer to retaliate go well beyond the employment realm and could include, for example, a situation where an employee has a child diagnosed with Downs' Syndrome and as a result requires a different work schedule to do her job. If the employer alters the employee's flexible schedule it could result in precluding her from working and constitute retaliation for a prior claim she raised. Similarly, the Department of Revenue as the employer could threaten a personal audit of an employee subsequent to an administrative filing being made. Such an action could persuade others not to seek protections available under Title VII, which is the reason the anti-retaliation provision exists.

Why Employers Must Pay Attention . . .

Louis R. Lessig, Esquire

(Continued from page 3)

The new standard is the objective reasonable employee standard and is designed generally to allow for a fair assessment of the alleged harm raised by an employee. Certainly, the context of the factual scenario is critically important in assessing harm. Even if you consider the examples discussed earlier in this article, it is easy to see how flex-time may be a much more impactful method of retaliation if the employee's child has a disability. Similarly, if a group of people went to lunch and the protected employee was not invited, by itself may mean nothing. However, if the same group was part of a required internal training session and the protected employee was precluded from participating, that could result in a totally different outcome. Further examples could include, but are certainly not limited to a threat to transfer the employee to an undesirable location or threatening to move forward with a criminal complaint against the employee. One final item every employer should always keep in mind is the example of a poor job reference given in retaliation for filing an EEOC charge.

When dealing with this new standard, the Court specifically stated, "this standard does *not* require a reviewing court or jury to consider the 'nature of the discrimination that led to the filing of the charge.'" Put more simply, the reasonable employee standard deals with a review of the retaliatory action itself and not the initial circumstances that gave rise to the Title VII complaint.

Retaliation Shift

Even before *Burlington* was decided by the Court, retaliation claims were on the rise. According to the EEOC, in 1992 Title VII related retaliation claims filed equaled 10,499 or 14.5% of the overall filings received by the agency. By 2005, Title VII retaliation claims filed had increased to 19,429 or 25.8% of the overall filings. In the wake of *Burlington* and the reasonable employee standard, the actual number of filings will increase.

However, the greater concern for employers will be the number of Title VII retaliation lawsuits that will now survive either motions to dismiss or motions for summary judgment. As jury trials increase, the ability to calculate the risk for an employer to make a good business decision concerning settlement will be more difficult, because no one can sufficiently predict what a jury will do in a particular matter with any degree of certainty.

Preparing Today

Based upon the *Burlington* decision there are several things that employers should do to attempt to reduce potential retaliation claims. Employers should evaluate internal investigative procedures and the methods used to separate alleged victims from those they are claiming against.

Employers should review discipline utilized and ensure all investigations were fairly completed. As with all employment investigations and claims, an employer's documentation is key.

Most significantly, employers must train and educate its employees, particularly supervisors and management employees as to retaliation claims.

While the true ramifications from *Burlington* will not be known for some time, there is no question that the manner in which employers and their counsel review and evaluate retaliation claims under Title VII has completely changed.

Reprinted with Permission of Andrews Publications, A West Business © 2004 (edited).

Statements Made By Public Employees Pursuant To Official Duties Are Not Protected By The First Amendment

Jacqueline R. Barrett, Esquire

The First Amendment generally protects a public employee's right in certain circumstances to speak as a citizen regarding matters of public concern and prohibits an employer from taking adverse action against the employee because of such speech. However, on May 30, 2006, the United States Supreme Court held when public employees make statements pursuant to their official duties, they are not speaking as citizens for purposes of the First Amendment and the Constitution does not protect their communications from employer discipline. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

In Garcetti, Richard Ceballos, a supervising deputy district attorney, reviewed a case in which the defendant claimed an affidavit used by police to obtain a search warrant was inaccurate. Ceballos concluded the affidavit contained factual misrepresentations and advised his superiors. At a later hearing on the defendant's motion to challenge the warrant, Ceballos was called as a witness for the defense and testified as to his conclusions about the affidavit.

Ceballos claimed he was subjected to a series of retaliatory employment actions after he testified including re-assignment to a trial deputy position, transfer to another courthouse and denial of a promotion. He filed a grievance; however it was denied on ground he had not suffered any retaliation. Ceballos subsequently filed a lawsuit in the United States District Court claiming his employer violated the First and Fourteenth Amendments by retaliating against him for statements he made related to the falsified affidavit. The court granted summary judgment to the defendants concluding Ceballos' statements were not protected speech.

The Court of Appeals for the Ninth Circuit reversed, holding Ceballos' statements constituted protected speech under the First Amendment. The United States Supreme Court thereafter reversed explaining:

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a deputy ... That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

In sum, the Supreme Court held “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” Id. at 10. Therefore, a public employee has no claim for retaliation or other violation of First Amendment rights when statements are made pursuant to their official duties. However, public employees continue to retain First Amendment protections against retaliation for exercising their free speech rights as a citizen regarding a matter of public concern.

Is A Shareholder-Director Of An Organization An “Employee” Or An “Employer,” And Why Does It Matter?

Ila Bhatnagar, Esquire

Is a shareholder-director of an organization an “employee” or an “employer”? The analysis has ramifications beyond mere semantics, as it determines whether that shareholder-director will be able to sue his or her organization. In Feldman v. Hunterdon Radiological Assoc., 187 N.J. 228 (N.J. 2006), the New Jersey Supreme Court held that a six-factor test enunciated by the U.S. Court in Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) should be applied in deciding whether a physician, who was one of six shareholder-directors of a medical center (HRA), qualified as an employee for purposes of asserting a whistleblower claim under New Jersey’s Conscientious Employee Protection Act (CEPA). While Clackamas focused on determining whether shareholder physicians could be counted as employees for purposes of determining whether the workplace met the minimum number of employees to be covered under the Americans with Disabilities Act, the New Jersey Supreme Court held it applied with equal force to Dr. Feldman, who sought to assert a CEPA claim.

Dr. Feldman complained about a fellow physician, also a shareholder-director, as being incompetent to read patients’ x-rays, which caused disagreement between Dr. Feldman and the other shareholder-directors. Thereafter, Dr. Feldman was allegedly subjected to an unpleasant working environment, marginalized by the others in her group, left out of an important board meeting, and eventually constructively discharged. Based on these facts, Dr. Feldman brought suit against HRA under CEPA.

Dr. Feldman was covered by an employment agreement with HRA, which she asserted proved that she was an employee of HRA. Given Dr. Feldman’s status as a shareholder-director of HRA, the medical association argued she could not assert a CEPA claim because she was not an employee but more akin to an employer. Emphasizing the fact-sensitive nature of the inquiry, the Court stated the “professional association’s direction and control over the shareholder-director and the true power and vulnerability of the shareholder-director within the association” was determinative. The Court explained a critical factor in making any such determination is the extent to which the shareholder-director is able to “influence the organization.”

Because CEPA defines an “employee” as “one who performs services for and under the control and direction of an employer for wages or other remuneration,” the Court held Dr. Feldman fit that definition (since she performed work as a radiologist for HRA in exchange for an annual salary); however, the Court stated further evaluation was necessary of Dr. Feldman’s eligibility as a CEPA-covered employee. To decide whether Dr. Feldman could assert a CEPA claim, the Court held an evaluation as to whether she was sufficiently subject to HRA’s “control and direction,” regardless of her title, was required.

Emphasizing the necessary focus is not on labels but the reality of Dr. Feldman’s relationship with HRA, the New Jersey Supreme Court applied the Clackamas six-factor test to Dr. Feldman’s situation: (1) whether the organization can hire or fire the individual; (2) whether and, if so, to what extent the organization supervises the individual’s work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. The Court noted the individual’s particular title, such as partner, director or vice-president, is not determinative of whether the individual is more a proprietor than an employee; nor is it a foregone conclusion the individual must be an employee if he or she is working under an employment agreement.

Rather, the focus should be on the “actual power and influence of the party within the organization because ‘control’ is the principal guidepost.” Applying the Clackamas test led the Court to conclude Dr. Feldman exerted such power and influence herself that she was not an employee. She was a powerful member of HRA’s Board of Directors, with equal decision-making authority over hiring and firing issues. Notably, Dr. Feldman’s power was “at least as significant as that of any other member.” Also, any restrictions upon her by way of the employment agreement “simultaneously granted her leverage over the other shareholder-directors by means of those same restrictions.” Significantly, the Court noted under different circumstances, such as if Dr. Feldman could prove she was a shareholder-director in name only, or was less powerful than any other shareholder-director, or the power-sharing arrangement set forth in her employment agreement was not the real state of affairs, may have resulted in a different outcome.

(Continued on page 7)

Is A Shareholder-Director . . .

Ila Bhatnagar, Esquire

(Continued from page 6)

Thus, in drafting employment agreements with shareholder-directors, as well as enforcing them, employers must be aware of these important issues related to the status of the individual which will determine if a subsequent lawsuit against the organization will be permitted under CEPA or other employment related statutes. Most importantly, the six factors of [Clackamas](#) must be considered in tailoring the employment relationship in order to avoid creating the unintended result that the shareholder-director becomes more akin to an employee of the organization, with potential significant negative legal consequences.

B&C BROWN & CONNERY, LLP

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

Our Web Address:

www.brownconnery.com

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.

Around the Firm

Michael R. Mignogna, Esquire joined the firm, Of Counsel, on August 15, 2006. Mr. Mignogna, who also serves as the Mayor of Voorhees Township, Camden County, has extensive trial experience and will focus his work on the firm's personal injury, workers' compensation, real estate and land use practices.

Matthew Stecher, Esquire joined the firm as an associate attorney. Mr. Stecher is a 2005 graduate of Tulane University Law School. He will concentrate his practice on land use, environmental litigation and other commercial litigation.

Gina Roswell, Esquire joined the firm as an associate attorney. Ms. Roswell is a 2006 graduate of Rutgers University School of Law. She will concentrate her practice in commercial and labor and employment litigation.

Christopher Orlando, Esquire joined the firm as an associate attorney. Mr. Orlando is a 2005 graduate of Rutgers University School of Law. He will concentrate his practice in commercial and labor and employment litigation.

Michael Miles, Esquire joined the firm as an associate attorney. Mr. Miles is a 2005 graduate of Rutgers University School of Law. He will concentrate his practice in commercial and labor and employment litigation.

Louis R. Lessig, Esquire, an associate attorney at the firm, will be speaking at the 15th Annual Garden State Conference entitled, *Taking The Air Out Of Whistleblowers* on November 7, 2006 in West Long Beach, NJ. Mr. Lessig will also be speaking on December 8, 2006 on legislative and employment issues effecting employers for the New Jersey Employer Council of Gloucester County.

© 2006 Brown & Connery, LLP
All Rights Reserved