

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

JACQUELINE R. BARRETT, ESQUIRE
jbarrett@brownconnery.com

WILLIAM F. COOK, ESQUIRE
wcook@brownconnery.com

HENRY OH, ESQUIRE
hoh@brownconnery.com

CHRISTOPHER A. ORLANDO, ESQUIRE
corlando@brownconnery.com

MICHAEL J. MILES, ESQUIRE
mmiles@brownconnery.com

GINA M. ROSWELL, ESQUIRE
groswell@brownconnery.com

Inside this Issue:

- New Jersey Supreme Court Issues Key Ruling on Retaliation Claims Under the Law Against Discrimination **2**
- New Jersey Supreme Court Expands NJLAD to Recognize a Cause of Action for Peer Harassment in **3**
- Appellate Division Decision Re-Affirms NJLAD is "Not a Civility Code" **4**
- Around the Firm **6**

© 2007 Brown & Connery, LLP
All Rights Reserved

New Jersey Law Against Discrimination Expanded to Prohibit Discrimination Based Upon "Gender Identity or Expression"

Henry Oh, Esquire

On December 19, 2006, Governor Corzine signed legislation amending the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 et seq., to include "gender identity or expression" in the list of protected characteristics. The amendment is effective June 17, 2007.

The NJLAD prohibits employers from engaging in unlawful employment discrimination based upon certain protected characteristics and presently includes characteristics such as sex, race, religion, national origin, marital status, handicap, sexual orientation, etc. New Jersey Courts interpreting the NJLAD have held the NJLAD does not prohibit all forms of discrimination, but only discrimination against the characteristics that have been specifically enumerated in the statute. Jones v. College of Medicine and Dentistry of New Jersey, 155 N.J. Super. 232, 236 (App. Div. 1977), *certif. denied* 77 N.J. 482 (1978). In its present form, "gender identity or expression" is not within the enumerated protected characteristics. The inclusion of "gender identity or expression" as a protected characteristic now means that an employer cannot discriminate against an individual on that basis. "Gender identity or expression" is defined as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth. 'Gender identity or expression' includes transgender status." The stated goal of the amendment is to prohibit "such practices of discrimination when directed against any person by reason of gender identity or expression, of that person or that person's spouse . . ."

Prior to the amendment, one Appellate Division panel had already addressed the issue of discrimination based on gender identity in Enriquez v. West Jersey Health Systems, 342 N.J. Super.

501 (App. Div. 2001). In Enriquez, the Court held that a transsexual physician terminated from employment could not establish a *prima facie* case for discrimination under the NJLAD based on her affection or sexual orientation since although the NJLAD prohibited discrimination based upon sexual orientation, the physician was not a homosexual or bisexual or perceived to be homosexual or bisexual. The Court held, however, the prohibition against discrimination because of an individual's "sex" stated in the NJLAD should be interpreted to include gender, protecting against discrimination on the basis of sex or gender. The statutory amendment appears consistent with the Court's analysis in Enriquez and now codifies this protection against discrimination based on gender identity. The amendment to the NJLAD provides that an employer must permit an employee to "appear, groom and dress consistent with [their] gender identity or expression," within the context of still permitting an employer to require that an employee "adhere to reasonable workplace appearance, grooming and dress standards."

Employers must be aware of this new protected classification and review existing policies, making any necessary modifications to ensure they do not discriminate on such grounds.

New Jersey Supreme Court Issues Key Ruling on Retaliation Claims Under the Law Against Discrimination

William F. Cook, Esquire

On February 21, 2007, the New Jersey Supreme Court issued its opinion in Carmona v. Resorts International Hotel, Inc., 189 N.J. 354 (2007), and provided important guidance for the lower courts and litigants regarding retaliation claims brought under the Law Against Discrimination (“NJLAD”). See N.J.S.A. 10:5-1 et seq., Carmona also addresses important evidentiary issues, specifically, the admissibility of investigation reports prepared by employers and offered as evidence at trial to show legitimate, non-discriminatory reasons for adverse employment action taken against an employee.

Under the NJLAD, employers are not permitted to take adverse employment action, or retaliate, against an employee who has “opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.” N.J.S.A. 10:5-12(d). For example, if the employee is terminated in retaliation for having made complaints regarding discrimination in the workplace, the employee may bring a lawsuit alleging retaliation and, if successful, the employer may be required to pay the employee damages including reinstatement to employment, back pay, future lost wages and benefits, damages for emotional distress. Further, if the employer’s conduct is deemed egregious, the employer may also be required to pay punitive damages.

Generally, to assert a retaliation claim, an employee must present evidence that: (1) the employee engaged in protected activity; (2) the activity was known to the employer; (3) the employee suffered an adverse employment decision; and (4) there existed a causal link between the protected activity and the subsequent adverse employment action. Young v. Hobart Group, 385 N.J. Super. 448, 465 (App. Div. 2005); Craig v. Suburban Cablevision, 274 N.J. Super. 303, 310 (App. Div. 1994), aff’d, 140 N.J. 623 (1995); N.J.S.A. 10:5-12(d). If this *prima facie* case of retaliation is established, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the decision (for example, poor performance, reduction in force, etc.). Young, 385 N.J. Super. at 465 (citing Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 549 (App. Div. 1995)). In other words, the defendant must show that the reason for the adverse employment action had no causal link or relationship to plaintiff’s protected activity. If the employer presents such evidence, the burden shifts back to the employee to show the employer’s justifications are mere pretext for actual retaliation. This requires the employee to show the employer’s justifications are not credible, not the “true reason”, and that a retaliatory motive was the true reason for the adverse employment action.

The general framework for retaliation claims as set forth above has been well established. However, Carmona addresses, for the first

time, an important aspect of retaliation cases, namely, the nature of the employee’s “protected activity.” In 1999, Reinaldo Carmona was employed as a front desk agent at Resorts hotel in Atlantic City. Carmona was responsible for checking guests into and out of the hotel. In November 2001, Resorts fired Carmona. Resorts claimed the termination resulted from Carmona upgrading guests to better rooms and soliciting tips from guests in exchange for the upgrade. However, Carmona alleged he was terminated in retaliation for having made an internal complaint to management in November 2001 regarding discriminatory application of Resorts’ sick leave policy. Specifically, Carmona complained that management provided medical leave to a Caucasian female but failed to provide medical leave to two Hispanic employees – Carmona, for a drug problem, and another employee, for Bell’s Palsy. Resorts began an internal investigation upon receipt of Carmona’s complaint but prior to the completion of the investigation, Carmona was fired for the upgrading scheme. It is important to note that Resorts began investigating the upgrading scheme the day *before* Carmona made his complaint of discrimination related to the sick leave policy. Further, it appears plaintiff was aware of the alleged discrimination related to the sick leave policy for several months but never made a complaint until the day after the investigation regarding his alleged misconduct was commenced by Resorts.

The jury found plaintiff was terminated in retaliation for having made complaints of discrimination and awarded him approximately \$175,000 in compensatory damages. The trial court awarded plaintiff an additional \$111,000 in attorneys’ fees.

In an opinion written by Justice Roberto Rivera-Soto, the New Jersey Supreme Court reversed the trial court and vacated the jury’s verdict. The Court held that for a plaintiff to succeed under the NJLAD, he must not only prove the elements described previously, but must also show that his underlying complaint was reasonable and made in good faith. Without this requirement, Justice Rivera-Soto explained, an employee could file a NJLAD retaliation claim even if the employee’s underlying complaint, such as a complaint about the unfair application of an internal policy, is baseless and lacks any merit whatsoever. This good faith requirement has long been the requirement under federal law. The Court explained the reasoning for its good faith requirement as follows:

We recognize this requirement as an element of plaintiff’s required proofs in a LAD-retaliation claim because its absence may well lead to abuse. Common sense tells us that the Legislature could not have intended that the LAD provide a safe harbor to one who files a baseless, meretricious complaint. It also

Continued on page 5

New Jersey Supreme Court Expands NJLAD to Recognize a Cause of Action for Peer Harassment in Schools

Christopher A. Orlando, Esquire

In a unanimous decision, L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ., 189 N.J. 381 (February 21, 2007), the New Jersey Supreme Court held the New Jersey Law Against Discrimination (“NJLAD”), N.J.S.A. 10:5-1 et seq., provides a cause of action by a student against a school district for student-on-student sexual harassment. The decision is a landmark case and is the first time the New Jersey Supreme Court has expanded the NJLAD to the school environment as opposed to the work environment.

In L.W., the male plaintiff alleged the harassment began when he was in the fourth grade. Plaintiff alleged his classmates began taunting him with homosexual epithets such as “gay,” “homo,” and “fag.” The harassment increased in regularity and severity as L.W. advanced through school. Initially, plaintiff did not understand the teasing and alleged asked “what does ‘gay’ mean? . . . [T]hat’s what everyone says I am, so what does it mean?” In fifth and sixth grade, the frequency of the ridicule increased from once a month or once a week to almost daily. Only then did school officials learn of the problem. At one point during the fifth grade, plaintiff was so upset he refused to attend school. Following a complaint by his mother, plaintiff’s classmates wrote apology letters. Plaintiff returned to school but the problem continued.

In seventh grade, the bullying and harassment occurred daily and escalated to physical aggression and molestation. The school was at all times aware of the incidents of harassment, as they occurred around the time plaintiff’s mother reported the incidents or shortly thereafter. Within days of entering high school, the abuse culminated with a pair of physical attacks. Ultimately, the harassment caused plaintiff to withdraw from school and enroll elsewhere.

Thereafter, plaintiff’s mother filed a complaint under the NJLAD, alleging the school district failed to take corrective action in response to the harassment her son endured because of his perceived sexual orientation.

The school district argued the NJLAD did not recognize a cause of action for student-on-student or peer harassment. The school district heavily relied upon federal law, specifically Title VII, which does not recognize such claims. However, the New Jersey Supreme Court rejected that argument, as did the Appellate Division. The Court explained:

Because the Act’s broad statutory language is clear, we hold that the LAD recognizes a cause of action against a school district for student-on-student affectional or sexual orientation harassment. We also hold that a school district is liable for such harassment when the school district knew or should have known of the harassment but failed to take actions reasonably calculated to end the mistreatment and offensive conduct. Our conclusion furthers the legis-

lative intent of eradicating the scourge of discrimination not only from society, but also from our schools, thus encouraging school districts to take proactive steps to protect the children in their charge.

Id. at 389-390.

The Court reasoned that students in schools should be afforded the same protections against harassment as employees at workplaces. “Students in the classroom are entitled to no less protection from unlawful discrimination and harassment than their adult counterparts in the workplace.” Id. at 406. While Title VII, the federal anti-discrimination counterpart to the NJLAD, does not recognize student based harassment, Title IX does recognize such claims on the federal level. However, Title IX requires a student show a school acted with deliberate indifference to his or her rights related to the harassment and the prevention or remediation of the harassment in order to recover damages. Here, the New Jersey Supreme Court rejected that higher burden. Instead, the Court adopted the same NJLAD standard for school based harassment as is applied in cases which arise from the work environment. The Court held, “[w]e reject the Title IX deliberate indifference standard because we conclude that the Lehmann standard should apply in the workplace and in the school setting. We find no need to impose a separate standard because the discrimination is in a school.” Id. The Lehmann standard was adopted several years earlier and established standards for circumstances under which an employer would be held liable under the NJLAD for harassment in the workplace. Lehmann v. Toys “R” Us, Inc., 132 N.J. 587 (1993). Under Lehmann, an employer is liable under the NJLAD when the employer knew or should have known of the harassment and failed to take remedial action to effectively stop the harassment.

Recognizing that the school environment is different from a workplace, the Court modified the Lehmann standard when applying it to schools. The Court explained, “[a]lthough the above discussion provides a framework for the adjudication of student-on-student harassment disputes that occur in an educational setting, the application of a modified Lehmann standard in the present and future litigation requires further guidance.” Id. at 12. The Court articulated a twofold test to determine the liability of a school district for student harassment. First, the jury must examine allegations of harassment allegedly suffered by the plaintiff, and second, the factfinder must take into account all past allegations of harassment by any student and the school district’s response to such allegations. In doing so, the jury must weigh “the reasonableness of a school district’s response to peer harassment in light of the totality of the circumstances” as related to the specific circumstances. Id. The Court identified a number of factors for consideration including:

Continued on page 5

Appellate Division Re-Affirms NJLAD is “Not a Civility Code”

Susan Leming, Esquire

New Jersey employers recently won a battle in the war against employees’ broad rights and protections afforded by the New Jersey Law Against Discrimination (“NJLAD”). The Appellate Division in Cutler v. Borough of Haddonfield, et al., 390 N.J. Super. 238 (App. Div. 2007), recognized that “not every offensive utterance will give rise to a hostile work environment.” By way of the Cutler decision, the Appellate Division bolstered previous caselaw which held the NJLAD is not a “civility code” for the workplace and should not be used by employees as a tool to address workplace banter.

Plaintiff, Jason Cutler, a Jewish police officer in the Borough of Haddonfield, sued the Borough and several individual defendants alleging a hostile work environment based upon his religion or ancestry. Plaintiff also tangentially alleged that he was denied a promotion in retaliation for filing a lawsuit. Specifically, the plaintiff claimed one of his co-workers referenced “those dirty Jews” in connection with a discussion about the Macabee Games coming to Cherry Hill. The co-worker apologized shortly after the statement was made; plaintiff stated the comment was inappropriate. Incident reports were prepared by the officers involved. It was at this time – for the first time – that plaintiff reported other inappropriate behavior exhibited toward him based on his religion or ancestry. After an internal affairs investigation was conducted by the Police Department, the speaker of the comment was issued a letter of counseling and sent to sensitivity training. No other inappropriate comments were made by the co-worker. The plaintiff heard the “dirty Jews” comment again at an unrelated disciplinary matter, though it was neither intended for nor directed at the plaintiff. Rather, the comment was merely part of testimony elicited at a hearing related to the initial incident. Plaintiff, in attendance at the hearing, became upset upon hearing the comment and filed a tort claims notice, and subsequently, a lawsuit.

In addition to the above incident, plaintiff alleged that a sticker of the Israeli flag was placed on his locker, that he was exposed to anti-Semitic comments during his tenure with the Borough and he was not permitted to wear a yarmulke for Passover. Plaintiff further alleged that the Borough failed to take his complaints seriously and did not conduct an appropriate investigation as to his complaints.

Testimony was presented at trial to show another side of the plaintiff and paint a clearer picture of the work environment within the Police Department. Officers often would engage in ongoing joking, laughing and “breaking chops.” 390 N.J. Super. at 247. A “humor file” was also maintained by the officers. The “humor file” was comprised of racial or ethnic materials – including items directed at Jewish people. Plaintiff admitted, under oath, that “everyone took [the humor file] to be funny and no one took offense because it was not intended to be malicious and aimed at any one group.” Id. Further evidence was admitted showing that plaintiff participated in ribbing directed at other officers based upon their respective religions. Id.

Only the claims against the employer, the Borough of Haddonfield, proceeded to trial. After almost seven weeks of trial, the jury found that plaintiff proved he was subjected to a hostile work envi-

ronment based upon his religion. However, the jury awarded zero damages. Plaintiff appealed the jury’s decision and the Borough cross-appealed.

The Appellate Division held that while the co-worker’s comment in Cutler was disturbing, neither the comment by itself or along with the various additional comments and incidents alleged by plaintiff were sufficient to support plaintiff’s claims of a hostile work environment. 390 N.J. Super. at 254. The Court opined that “the comments allegedly made by plaintiff’s supervisors about plaintiff’s Jewish nose or that Jews ‘make all the money’ or Jews being good at math fall into the category of teasing.” Id. at 255. Based on the totality of the circumstances surrounding plaintiff’s work environment, “the comments and pranks were sporadic and not sufficiently severe or pervasive to create a hostile work environment under the NJLAD.” Id. It was further noted by the Court that plaintiff “never objected or complained [until the co-worker’s comment at the hearing], which is strong evidence that he acquiesced in the activities as part of the give-and-take in which [plaintiff] regularly participated.” Id.

In reaching its conclusion, the Court also relied upon its holding in Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 147 (App. Div. 1999). The Heitzman decision established that:

[a]n employment discrimination law such as the NJLAD is not intended to be a general civility code for conduct in the workplace. Discourtesy or rudeness should not be confused with racial [or ethnic] harassment, and a lack of racial [or ethnic] sensitivity does not, alone, amount to actionable harassment. Thus, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. Conduct must be extreme to amount to a change in the terms and conditions of employment.

The Appellate Division also reiterated its recent holding in El-Sioufi v. St. Peter’s University Hospital, 382 N.J. Super. 145, 179 (App. Div. 2005), that “not every offensive remark, even if direct, is actionable . . . epithets or comments which are ‘merely offensive’ will not establish a hostile work environment. Instead, the comment must be extreme to amount to a change in the terms and conditions of employment.” Also, the Court noted that “on rare occasions a single comment will support an actionable claim” but that “such a factual scenario is highly unusual.” Cutler, 390 N.J. Super. at 251 (quoting El-Sioufi, 382 N.J. Super. at 179-80) (emphasis added).

The Cutler decision will likely be appealed to the New Jersey Supreme Court. Thus, the Appellate Division’s decision may not be the final word in this case. However, for now the decision provides substantial authority for employer-defendants in NJLAD hostile work environment claims.

New Jersey Supreme Court Expands NJLAD . . .

Christopher A. Orlando, Esquire

Con't from page 3

the students' ages; developmental and maturity levels; school culture and atmosphere; rareness or frequency of the conduct; duration of harassment; extent and severity of the conduct; whether violence was involved; history of harassment within the school district, the school, and among individual participants; effectiveness of the school district's response; whether the school district considered alternative responses; and swiftness of the school district's reaction.

Id. at 409.

After determining the reasonableness of the school's response, the jury must then consider, "the cumulative effect of all student harassment and all efforts of the school district to curtail the maltreatment." *Id.* Thus, the Court has opened the door for all acts of alleged harassment and the school districts response to those allegations to be used as evidence to prove that the school district was negligent in responding to a plaintiff's alleged harassment. In summary, the court held that in the school setting, a school district may be found liable under the NJLAD for student-on-student sexual harassment that creates a hostile educational environment when the school district knew or should

have known of the harassment, but failed to take action reasonably calculated to end the harassment.

This decision could potentially open the proverbial flood gates of litigation by students against school districts for claims of student harassment (based on sexual orientation, race, gender, or any other class protected under the NJLAD) which the district failed to prevent and/or remediate. Therefore, school districts must now wholly re-evaluate how they handle allegations of harassment by students. In *L.W.*, the district had an anti-discrimination policy, however, it was not reinforced through assemblies, letters to parents or any other widespread communication. It is critical that school districts review their existing harassment policies and procedures and update such policies and procedures if needed. Finally, school districts must educate their employees as to this new potential liability and their duty and obligation to prevent, report and remediate any student based harassment. The Court recognized "a school cannot be expected to shelter students from all instances of peer harassment. Nevertheless, reasonable measures are required to protect our youth, a duty that schools are more than capable of performing." The failure to adopt and implement these types of reasonable measures may result in significant exposure to claims of harassment.

New Jersey Supreme Court Issues Ruling . . .

William F. Cook, Esquire

Con't from page 2

tells us that the LAD cannot protect one who preemptively files a complaint solely in anticipation of an adverse employment action by the employer. The LAD was and is intended as a shield to protect employees from the wrongful acts of their employers, and not as a sword to be wielded by a savvy employee against his employer.

Id. at 530.

Accordingly, the Court held in NJLAD retaliation claims:

the plaintiff bears the burden of proving that his or her original complaint — the one that allegedly triggered his or her employer's retaliation — was made reasonably and in good faith. The obverse also holds true: an unreasonable, frivolous, bad-faith, or unfounded complaint cannot satisfy the statutory prerequisite necessary to establish liability for retaliation under the LAD.

Id. at 530.

In addition, the New Jersey Supreme Court also addressed an important evidentiary issue in employment litigation. At trial, Resorts offered an investigation report related to the upgrade scheme as evidence of its legitimate reasons for the action taken against Carmona. The trial court held the report was not

admissible evidence and precluded it at trial. The Supreme Court disagreed and reversed, holding the report was admissible at trial. The Court noted while the report could not be offered to prove that Carmona did in fact steal monies or engage in the upgrading scheme, it was relevant and could be offered as evidence of Resorts' basis or motive for the termination. Thus, Resorts could offer the report to show the termination was not caused by and/or related to the internal complaint of discrimination but was in fact due to the allegations of misconduct. Such evidence is often critical in order for the employer to show, and offer documentary proof, that it did not have a retaliatory or discriminatory motive.

In sum, *Carmona* is an important decision that will significantly impact future retaliation claims. *Carmona* aligns New Jersey case law with federal precedent that precludes any NJLAD retaliation lawsuit involving an employee's bad faith complaint about the inner workings of the employer's business. In addition, *Carmona* reinforces the vital need for employers to prepare comprehensive investigation reports regarding employee conduct. If the employer does so, such evidence will be admissible at trial and the employer should have a greater likelihood of success in avoiding potential liability for a subsequent NJLAD retaliation claim.

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

Christine P. O'Hearn, a partner with the firm, recently received designation as a Certified Civil Trial Attorney from the New Jersey Supreme Court.

Louis R. Lessig, an associate with the firm, will present a legislative update at the Tri-State HRMA 21st Annual Conference entitled, "Building a Winning Hand" at the Enterprise Center at Burlington County College on May 3, 2007. Mr. Lessig will also present "The Game of Jeopardy - FMLA Style" at the Society for Human Resource Management's 59th Annual Conference in Las Vegas in June 2007.

William F. Cook, an associate with the firm, moderated a seminar regarding jury selection sponsored by the Camden County Bar Association on February 27, 2007. Mr. Cook was also recently appointed the Charity Chairperson for the Young Lawyers Division of the Camden County Bar Association.

© 2007 Brown & Connery, LLP
All Rights Reserved