

ROA V. LAFE

POST-EMPLOYMENT RETALIATION CLAIMS AND THE CONTINUING VIOLATION THEORY

by Curtis G. Fox and Jay S. Becker

The New Jersey Supreme Court recently examined the continuing violation theory in a case holding that a plaintiff's post-employment retaliation claims brought under the New Jersey Law Against Discrimination (NJLAD)¹ were actionable. However, the continuing violation theory did not apply to permit the plaintiffs' timely claim based on post-discharge conduct to revive the time-barred retaliatory discharge claim.

In *Roa v. Lafe*,² the plaintiffs Fernando Roa and Liliana Roa sought damages from their employer, Gonzalaz and Tapanes Foods, Inc., doing business as LAFE Foods, and their supervisor Marino Roa. Marino was a vice-president at LAFE and was Fernando's brother. The plaintiffs alleged that Marino was romantically involved with two female subordinates, one of whom left a Valentine's gift for him that his wife found. After initially telling Marino that he would say the gift was intended for him, Fernando eventually spoke with Marino's wife and divulged the truth behind the mystery gift. The plaintiffs alleged that in response, Marino began to harass and threaten them, including threatening to fire them. Some time later, Fernando approached Carlos Pena, owner and president of LAFE, and told him about Marino sexually harassing the two women. Pena refused to take any action, and following Fernando's complaint, Marino's harassment of plaintiffs intensified.

The plaintiffs alleged that they were both ultimately terminated by LAFE in retaliation for making the complaint regarding Marino's conduct. After the termination, Fernando alleged that LAFE terminated his insurance benefits

retroactively to a date prior to his discharge.

The plaintiffs filed a complaint alleging that LAFE engaged in unlawful retaliation in violation of the NJLAD (count one) and that Marino aided and abetted in that unlawful conduct (count two).³ The defendants moved to dismiss because the complaint was filed more than two years after the termination date. The plaintiffs, however, argued that the defendants engaged in a continuing pattern of conduct in violation of the NJLAD, and that the post-employment retaliation to which they were subjected tolled the running of the limitations period for the retaliatory discharge claim. Specifically, the plaintiffs alleged that while LAFE may have wrongfully terminated Fernando's medical insurance more than two years before the complaint was filed, the claim not only was timely filed under the discovery rule because he did not learn of the cancellation until a date within two years of filing the complaint, but it also tolled the running of the limitations period for the wrongful discharge claim under the continuing violation theory.⁴

A unanimous Supreme Court rejected the defendants' argument that because the cancellation of Fernando's insurance did not involve harm to Fernando's actual employment or proposed employment elsewhere, it was not actionable under the anti-retaliation provision of the NJLAD. The defendants unsuccessfully argued that the scope of actionable retaliatory conduct under the NJLAD was limited to the employment-related acts prohibited in N.J.S.A. 10:5-12.

The Court found that the words "practices" and "acts" in the anti-retaliation provision refer to the conduct of the target of the retaliation in opposing the "practices or acts" prohibited by the NJLAD, not to the conduct of the retaliator, which is referred to generically as "reprisals."⁵ In other words, the reprisals need not involve harm to a plaintiff's actual employment, but rather must be in retaliation for a plaintiff's opposition to "practices or acts" prohibited by the NJLAD.

The Court also looked to relevant federal case law interpreting Title VII to find that retaliatory conduct need not be related to the workplace to be actionable under the NJLAD.⁶ "That is consistent with the express language of NJLAD, as well as the broad remedial purpose underlying it."⁷

Finding Fernando's claim based on the insurance cancellation both actionable under the NJLAD and timely under the discovery rule, the Court nevertheless ruled that Fernando's timely post-employment claim did not act to "sweep in" Fernando's time-barred retaliatory discharge claim under the continuing violation theory. The Court held that a discharge is a "discrete discriminatory act that places an employee on notice of the existence of a cause of action and of the need to file a claim." The statute of limitations begins to run on the day the discharge takes place. Therefore, it is axiomatic that a time-barred discharge claim can never be saved by timely post-employment claims.⁸

Notably, as the law currently stands in New Jersey, post-employment retaliation is actionable under the NJLAD but not under the Conscientious

Employee Protection Act, (CEPA).⁹ While courts in New Jersey have routinely compared CEPA to the NJLAD, applying the legal tests and frameworks developed under one to the other,¹⁰ this is one area where the two statutes are not in sync. However, since the Supreme Court's decision in *Roa*, it is now clear that an employer may become liable under the NJLAD for post-employment retaliatory conduct against a former employee. ■

Endnotes

1. N.J.S.A. 10:5-1 *et seq.*
2. 200 N.J. 555 (2010).
3. The plaintiffs also alleged that the defendants' conduct violated the public policy of New Jersey (count three) and that LAFE negligently supervised Marino (count four). The Appellate Division affirmed the trial court's dismissal of these claims, finding that not only had appellant waived the issues by not briefing them under R. 2:6-2(a)(5), but they were also deficient as a matter of law. *Roa v. Lafe*, 402 N.J. Super. 529, 545 (App. Div. 2008). The plaintiff did not file a petition for certification, therefore the dismissal of counts three and four were not before the Supreme Court. *Roa*, 200 N.J. at 565, n.3.
4. The plaintiffs also alleged that when Liliana sought unemployment benefits, the defendants "lied" by claiming she had been fired for her "misconduct" when, in reality, her discharge was retaliatory, thereby delaying the receipt of her unemployment benefits. The Appellate Division affirmed the dismissal of these claims as untimely where the defendants' allegedly retaliatory acts were discovered more than two years before filing the complaint. *Roa*, 402 N.J. Super. at 542.
5. "It shall be unlawful...for any person to take *reprisals* against any person because that person 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) (emphasis added).

6. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64, 126 S. Ct. 2405, 2412, 165 L.E.2d 345, 357 (2006) (reasoning that limiting Title VII to employment and workplace-related conduct would permit employers to engage in a range of retaliatory conduct that would undermine the provision's purpose of preserving open access to the statute's enforcement mechanisms).
7. *Roa*, 200 N.J. at 574.
8. While post-employment retaliation claims may not revive time-barred discharge claims, the Court did leave open the possibility for the trial court to admit the time-barred claims as evidential under N.J.R.E. 404(b) of other "wrongs" to prove "motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." For instance, if the defendants claimed that Fernando's insurance cancellation was inadvertent, the trial court may find that the time-barred discharge claims were relevant to the issue of whether the cancellation was indeed a mistake or an intentional part of defendant's retaliation against him.
9. N.J.S.A. 34:19-1 *et seq.* *Beck v. Tribert*, 312 N.J. Super. 335, 344 (App. Div. 1998) (holding that CEPA applies only to adverse employment actions that are taken against an employee while he or she is still an employee, and not after termination). This distinction is likely to remain unchanged because courts have relied on the statutory text of CEPA, which prohibits retaliatory action against "employees," N.J.S.A. 34:19-3, to bar post-employment retaliation claims, whereas the NJLAD anti-retaliation provision applies to "any person." N.J.S.A. 10:5-12(d).
10. *Feldman v. Hunterdon Radiological Associates*, 187 N.J. 228, 241

(2006); *see also Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 417-18 (holding that NJLAD principles of employer liability are "fully applicable" to action brought under CEPA).

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