

## N.J. HUMAN RESOURCES LAW ALERT™

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*New Jersey's state appellate courts have issued two important employment law decisions in recent months, both of them favorable to employers.*

### **Employee Retaliation Claim Fails — Employee Must Show "Good Faith" of Underlying Complaint**

The New Jersey Supreme Court recently reversed decisions by a trial court and intermediate appellate court, and held that (1) an employee claiming retaliatory discharge must show that his underlying complaint was made in "good faith", and (2) an employer's investigative report is admissible at trial to show that the employer had a non-retaliatory reason for firing the employee.

The employee worked as a front desk clerk at a casino hotel in Atlantic City. On November 6, 2001, the clerk made an internal complaint to the employer's equal employment opportunity officer, claiming that the employer applied its medical leave policy in a racially discriminatory manner.

The day before the clerk made his internal complaint, he had been observed giving unauthorized room upgrades to customers in exchange for tips. On November 8, 2001 — *i.e.*, just two days after the clerk made his internal complaint — the employer conducted an investigation and learned that the clerk had given unauthorized upgrades on 27 occasions during the preceding month. When confronted with the report the following day, the clerk admitted to giving the unauthorized upgrades, and was fired.

The clerk sued, claiming he was fired in retaliation for his internal claim of discrimination. At trial, the court barred the employer's investigative report as inadmissible hearsay. In addition, the court denied the employer's request to instruct the jury that the clerk was required to prove that he had a good faith basis for his complaint of racial discrimination;

rather, the trial judge instructed the jury that the clerk could satisfy his burden of proof simply by proving that he made an internal complaint and that he thereafter was discharged in retaliation. The jury entered an award in favor of the clerk, and the intermediate appellate court affirmed.

The New Jersey Supreme Court reversed. First, the Court held that an employee claiming retaliatory discharge has the burden of proving that his internal complaint was made in good faith. Second, the Court held that an employer defending a claim of wrongful discharge is entitled to offer into evidence an investigative report on which the employer relied; such a report is not inadmissible hearsay.

For both of those reasons, the case was remanded to the trial court for retrial. (Carmona v. Resorts International Hotel, Inc., N.J. Supreme Ct., 2/21/07)

Conclusion: Both of these holdings are valuable for employers. First, by requiring an employee in a retaliatory discharge case to show that his internal complaint was made in good faith, the Court effectively prevents a low performing employee from fabricating a baseless complaint in an attempt to insulate himself from termination.

Second, by holding that an investigative report is admissible, the Court allows the employer to offer compelling evidence that its decision to fire an employee was based on legitimate business considerations, rather than unlawful ones.

## **Anti-Semitic Joking Did Not Create Hostile Work Environment**

A New Jersey intermediate appellate court recently held that anti-semitic joking by police officers in the presence of a Jewish fellow officer was not sufficiently egregious to give rise to a hostile work environment.

The plaintiff, a Jewish member of the Haddonfield Police Department, filed a lawsuit claiming anti-semitic discrimination in violation of New Jersey's Law Against Discrimination. The most egregious comment cited by the officer was a fellow officer's joking exclamation, "Those dirty Jews," which the plaintiff overheard in a conversation among several officers concerning a local Jewish-sponsored sporting event.

Reviewing the trial record, the appellate court found no hostile work environment, and therefore affirmed the jury's award of no damages. While recognizing that the overheard comment was highly offensive, the appellate court concluded that the comment did not constitute a legally actionable hostile work environment because (1) it was not made by a supervisor, (2) it was not directed at the plaintiff, (3) it was an isolated event, except for a few less egregious incidents involving other officers and about which plaintiff never complained, and (4) the plaintiff had willingly participated in similar banter among the officers involving religious and ethnic stereotypes. (Cutler v. Dorn, N.J. App. Div., 11/28/06).

**Conclusion:** An employer should not make the mistake of concluding from this decision that an isolated discriminatory comment will never support a claim of discrimination under the LAD. To the contrary, the New Jersey Supreme Court has previously held that an isolated racial slur, made by a supervisor and directed toward a subordinate employee, may be sufficiently egregious to support a claim of hostile work environment.

## **SSS&G's Employment Law Practice Group**

Saiber Schlesinger represents management in all varieties of employment law matters, including discrimination claims, unfair competition cases and compensation disputes, before state and federal courts, administrative agencies and arbitration panels. The firm's Employment Law Practice Group, consisting of five partners and seven associates, counsels and defends companies large and small, national and multinational, private and public.

**Sean R. Kelly, Esq.**, a Partner in the firm's Employment Law Practice Group, has over 27 years experience in advising and defending employers. A graduate of Yale College and Georgetown Law, Mr. Kelly is a former Master of the Sidney Reitman Employment Law Inn of Court, is Certified by the New Jersey Supreme Court as a Civil Trial Attorney, and frequently publishes and lectures on employment law before business and legal professional groups.

For more information on any of the items appearing in the Alert™ you may contact Mr. Kelly at the phone number or e-mail address listed below.

Also, if you know of others in the New Jersey Human Resources community who we should add to our mailing list, please send their mailing addresses to [srk@saiber.com](mailto:srk@saiber.com).

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