

# New Jersey Law Journal

VOL. CLXVII – NO. 12 – INDEX 1280

MARCH 25, 2002

ESTABLISHED 1878

## Employment Law

### Limitation Obfuscation

Recent decisions have brought further complexity, rather than simplicity, to the application of statutes of limitations

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The past year saw several New Jersey state and federal court decisions addressing the triggers of applicable statutes of limitations in employment cases, and the resulting legal landscape is confusing.

Principles governing the accrual of causes of action under state law are inconsistent with those under federal law; rules that apply to the accrual of wrongful-termination claims do not apply to constructive discharge claims; and a different statute of limitations applies in Prevailing Wage Act claims and Wage and Hour Law claims.

Moreover, while New Jersey courts have recently resolved certain issues concerning limitations in employment cases, such as the application of the notice period under the Tort Claims Act, they still have not definitively addressed other important issues, such as the discovery rule and the principle of equitable tolling.

#### Wrongful-Termination Claims

In *Alderiso v. Medical Ctr. of Ocean County, Inc.*, 167 N.J. 191 (2001), the

Supreme Court addressed the one-year statute of limitations found in the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 34:19-8, which forbids an employer from retaliating against an employee who has “blown the whistle” on illegal or otherwise improper activities of the employer.

The issue in *Alderiso* was what date would be deemed to be the applicable accrual date of the plaintiff employee’s claim for the purpose of determining when the statute of limitations began to run.

The plaintiff, a registered nurse who had been hired as a case manager, was orally advised on Jan. 14, 1997, that she was being terminated. The personnel records maintained by her employer indicated that she was terminated effective Jan. 15, 1997, which was the last date for which she was paid her salary (although she did not report to work that day).

On Jan. 16, 1998 — one year and one day after her last day on the payroll — the plaintiff filed her CEPA claim against her employer, alleging that the true reason for her termination was her refusal to follow the medical center’s improper directives concerning certain patients to whom she had been

assigned.

The trial court dismissed the plaintiff’s CEPA claim and the Appellate Division affirmed, holding that her claim was untimely. The Supreme Court, although reversing the decision of the lower courts, agreed with their basic rationale.

Specifically, the Court held that a wrongful-termination claim under CEPA accrues on the date of actual discharge, which the Court interpreted to mean “the last day for which the employee is paid a regular salary or wage. It does not include any subsequent date on which severance, health or other extended benefits are paid. For computation purposes, the first day to be included in the one-year limitations period is the day after the date of discharge.”

Since the plaintiff’s last day of paid salary was Jan. 15, 1997, the limitations period ran from Jan. 16, 1997, through Jan. 15, 1998. Thus, the plaintiff was required to have filed her claim by Jan. 15, 1998, and, therefore, her Jan. 16, 1998, filing was one day late.

Nonetheless, the Supreme Court reinstated her claim, holding that its ruling would be applied prospectively only because the issue was one of first impression before the Court, it was “plausible” that the plaintiff believed that her action accrued on the first day of her unemployment and “[t]he sting of an employer’s wrongful discharge is not truly felt until the employee is actually unemployed.” (See, also, *Zacharias v. Whatman*, 345 N.J. Super. 218 (App. Div. 2001), which extended the holding of *Alderiso* to wrongful-termination claims under the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1

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to -42) and in which the running of the statute of limitations did not commence while the employee was still being paid.)

In the companion case of *Holmin v. TRW, Inc.*, 167 N.J. 205 (2001), the Supreme Court affirmed per curiam an Appellate Division ruling that, consistent with the reasoning in *Alderiso*, used as the date of accrual of the claim the date of actual discharge and not the date of notice of termination. In *Holmin*, the Appellate Division held timely a claim of fraudulent inducement of employment that was filed by an employee more than six years after notice of termination but within six years of his date of discharge. (Interestingly, the Appellate Division in *Holmin* used the accrual date/discharge date as the first day of the limitations period. That is contrary to the Supreme Court's subsequent ruling in *Alderiso*, which held that the applicable statute of limitations does not commence running until the day after the last day on which the employee was scheduled to work and was paid. In any event, under the facts in *Holmin*, that issue would not have been outcome determinative.)

The holdings of *Alderiso* and *Holmin* — that the date of actual discharge is the accrual date of the claim — contrast with federal decisions, including *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981), both of which involved claims arising out of alleged violations of federal statutes.

In those cases, the U.S. Supreme Court held that the applicable date for triggering the statute of limitations would be the date of notice to the employee, not the subsequent date of termination. (See *Watson v. Eastman Kodak Co.*, 235 F.3d 851 (3d Cir. 2000), where the date of notice of termination, as opposed to date of discharge, was the accrual date of the claim, and, thus, the employee's claims under the Age Discrimination in Employment Act were untimely because they were not filed with the Equal Employment Opportunity Commission within 300 days of notice of termination.)

Recognizing the apparent contrast, the New Jersey courts in both *Alderiso* and *Holmin* distinguished *Ricks* on the

basis that it was a denial of tenure case and stated that, in any event, such federal precedents were for "guidance" only.

The New Jersey courts adopted the reasoning of Justice John Paul Stevens in his dissents in *Ricks* and *Chardon*, in which he argued that the actual discharge date should be used as the accrual date because, among other reasons, the wrongful conduct could be rectified prior to the discharge date; the discharge date was the easiest to identify, thus creating a bright-line rule; and a holding that the claim does not accrue until the date of discharge would promote more "harmonious working relations" during the period between notice and discharge.

#### Constructive Discharge Claims

In contrast to the holdings of *Alderiso* and *Holmin*, the Appellate Division, in the context of constructive discharge in *Daniels v. Mutual Life Insurance Co.*, 340 N.J. Super. 11 (App. Div. 2001), held that the date the employee provides notice of her resignation is the accrual date of her claim.

Interestingly, although the Appellate Division decided *Daniels* a few weeks before the Supreme Court's decisions in *Alderiso* and *Holmin*, and the Supreme Court made no reference to *Daniels* in those decisions, the Supreme Court denied certification in *Daniels* after issuing its decisions in *Alderiso* and *Holmin*.

Stating that its decision was consistent with its rationale in *Holmin* (which the Supreme Court later affirmed), the Appellate Division in *Daniels* stated that a constructive discharge claim accrues "at the point where a reasonable employee is compelled to resign due to the employer's action. At that point, the employer has engaged in a retaliatory action."

In distinguishing a constructive discharge case from an actual discharge case, the Appellate Division stated, "In short, in an actual termination situation, the retaliatory action which starts the running of the period of limitations is the separation from work. In a constructive discharge situation, the retaliatory action is the creation of intolerable conditions which a reasonable employee

cannot accept. The conditions become intolerable when the employee tenders his or her resignation."

In *Daniels*, the plaintiff employee tendered her resignation on Dec. 4, 1995, effective immediately. Nonetheless, at the request of her employer, she continued to work through Dec. 8, 1995. Thereafter, on Dec. 9, 1996, she filed her CEPA action.

Thus, if the resignation date was the applicable accrual date, her claim was time-barred, but if the actual termination date was the applicable accrual date, her claim was timely. (Pursuant to R. 1:3-1, her complaint could be filed on Dec. 9, 1996 because Dec. 8, 1996 was a Sunday.) The Appellate Division ruled that her claim accrued upon her submitting her resignation on Dec. 4, 1995, and that her claim was therefore time-barred.

Notwithstanding the holding in *Daniels*, there may be compelling arguments in the circumstances surrounding a particular constructive termination case for deeming the date of actual termination as the applicable accrual date.

Referring again to the dissents by Stevens in *Ricks* and *Chardon* (the same rationale on which the New Jersey Supreme Court relied in *Alderiso* and *Holmin*), using the actual termination date is reasonable in that an employee in a constructive discharge case could change her mind after resignation but prior to the date of actual termination (just as the employer could do following notice to the employee in an actual discharge case).

Furthermore, as Stevens also argued, the delaying of the accrual date may also promote a more harmonious working relationship in the period of time between the date of notice or resignation and the date of actual termination.

This may be particularly significant in the case, albeit rare, where the employee remains with the employer for longer than one year following the date of resignation, such that the employee, under the *Daniels* rule, would be compelled to file the action while still employed by the employer she is suing. (See, for example, in the actual discharge context, *Ricks*, where the employee was advised on June 26,

1974, that he was being denied tenure but was given a "terminal" contract that permitted him to continue working through June 30, 1975, more than a year after the notification.)

Nonetheless, the general rule from the foregoing decisions is that the accrual date for the running of the statute of limitations in New Jersey state-law employment claims depends on which party is providing notice: If the employer, the actual discharge date is the accrual date; if the employee, the date of notice of resignation is the accrual date.

### **The Continuing Impact of *Montells***

In *Montells v. Haynes*, 133 N.J. 282 (1993), the Supreme Court held that all claims brought under the LAD would be subject to a two-year statute of limitations. However, as the decision was applied prospectively only, the decision did not apply to "this case, pending cases, or to cases the operative facts of which arose before the date of this decision [July 27, 1993]." All such cases were therefore subject to a six-year statute of limitations.

The Court has clarified its holding concerning the prospective application of *Montells*. In *Ali v. Rutgers*, 166 N.J. 280 (2000), the Court held that if operative facts arise both before and after July 27, 1993, then "plaintiffs must file their actions prior to the expiration of the six-year limitations period or within two years from the date of this opinion [November 30, 2000], whichever is earlier."

### **Wage Act vs. Wage and Hour Law**

Claims brought by an employee under the New Jersey Prevailing Wage Act (N.J.S.A. 34:11-56.25 et seq.) are subject to a six-year statute of limitations. The Appellate Division held in *Troise v. Extel Communications, Inc.*, 345 N.J. Super. 231 (App. Div. 2001), that private employee claims under the PWA are for economic harm and, therefore, are akin to breach-of-contract claims subject to a six-year statute of limitations (and are not akin to claims for personal injury subject to a two-year statute of limitations).

The Appellate Division did not, however, decide whether administrative claims brought by the commissioner of labor would be subject to a six-year or two-year statute of limitations, although it said in dicta that it had "serious doubt" whether the latter limitations period would be applicable to such a claim. Furthermore, the court noted that the PWA limitations period is different from the express two-year limitations period for private causes of action found in New Jersey's Wage and Hour Law (N.J.S.A. 34:11-56a et seq.), even though the statutes are similar in many other respects.

### **Discovery Rule**

In *Villalobos v. Fava*, 342 N.J. Super. 38 (App. Div. 2001), the plaintiff, a former detective with the Passaic County Prosecutor's Office, made complaints in November 1992 regarding conduct he questioned and thereafter received two transfers, the first in 1992 and the second in 1994. Neither transfer involved a demotion in rank, salary or title.

Later in 1994, the plaintiff retired. In 1998, the plaintiff filed his CEPA action. The plaintiff argued that CEPA's one-year limitations period should be tolled by operation of the discovery rule because he was unaware until 1998 that actions prohibited by CEPA had been taken against him, specifically, that the defendants had given him "degrading assignments and transfers" in order to force him to retire.

In affirming the grant of summary judgment in favor of the defendants, the Appellate Division first noted that the discovery rule has never been applied to a CEPA claim. Moreover, the court stated that assuming the rule were applicable, it would not save the plaintiff's claim in that case, because the plaintiff knew or should have known that retaliatory conduct had been taken:

Plaintiff was employed in law enforcement for thirty years and for over twenty years in the Passaic County Prosecutor's Office. It strains credulity that this veteran detective accepted what he believed to be demotions in prestige and authority

without suspecting that he suffered the slings and arrows of an outraged prosecutor. It is even more unlikely that he did not harbor a reasonable belief that he had been victimized by retaliation at the time he resigned in 1994.

The Appellate Division further rejected the plaintiff's equitable tolling argument. As the court explained, equitable tolling applies in situations where the employee is misled or tricked by his employer and, as a result, misses the deadline for filing his claim. In *Villalobos*, the court stated that a reasonably prudent person should have realized that the transfers were retaliatory, and, therefore, the court refused to extend the protections of the doctrine.

Note that the discovery rule has been held to apply to workers' compensation claims. As the Supreme Court explained in *Earl v. Johnson & Johnson*, 158 N.J. 155 (1999), an injured employee must file his claim within two years of when he first knew "the nature of the disability and its relation to the employment," N.J.S.A. 34:15-34, which includes "knowledge of the most notable characteristics of the disease, sufficient to bring home substantial realization of its extent and seriousness," quoting *Bucuk v. Edward A. Zusi Brass Foundry*, 49 N.J. Super. 187 (1958).

Furthermore, New Jersey will allow equitable tolling of the limitations period in cases involving a continuing course of conduct, whereby acts that would normally be deemed time-barred for purposes of recovery are permitted to be included in a claim, so long as they can be linked with at least one act that occurred within the applicable period of limitations.

However, in order to be so included, the acts must be such that their "character as discriminatory acts was not apparent at the time they occurred." *Hall v. Saint Joseph's Hosp.*, 343 N.J. Super. 88 (App. Div. 2001), quoting *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439 (7th Cir. 1994).

### **90-Day Notice**

In *Costello v. Brigantine*, 2001

U.S. Dist. LEXIS 8687, 17 BNA IER Cas. 1225 (D.N.J. June 28, 2001), the court found that the plaintiff employee was not required to comply with the Tort Claims Act's 90-day notice requirement in filing his CEPA claim against various public entities, holding that CEPA claims are exempt from the requirement. The court reasoned that, like willful and malicious con-

duct exempted from the provisions of the TCA, discrimination claims are exempt, because the TCA was not intended to provide remedies for public or governmental misconduct or violations of individual constitutional or civil rights.

The court also relied on the Supreme Court's analyses in *Abbamont v. Piscataway Township*

*Bd. of Educ.*, 138 N.J. 405 (1994), and *Fuchilla v. Layman*, 109 N.J. 319, cert. denied, 488 U.S. 826 (1988), in which the Court held, respectively, that CEPA claims were not subject to the prohibition on punitive damages contained in the TCA, and that the TCA's 90-day notice provision did not apply to claims under the LAD. ■