

N.J. HUMAN RESOURCES LAW ALERT™

A publication of Saiber Schlesinger Satz & Goldstein, LLC's Employment Law Group
Sean R. Kelly, Esq., Editor

This issue of the Alert focuses on two recent federal court decisions in New Jersey. In both cases, the courts dismissed disability discrimination claims against the employer. However, these two cases illustrate how different circumstances may lead to different results where the employer seeks dismissal of the retaliation claims that frequently accompany such claims of discrimination.

Appeals Court Affirms Summary Judgment Dismissing Discrimination Claims and Retaliation Claims Against Employer

The Third Circuit Court of Appeals recently affirmed a decision by the federal court in New Jersey which had granted summary judgment in favor of AT&T, dismissing claims by a former employee who alleged discrimination under the Americans with Disabilities Act and the New Jersey Law Against Discrimination, as well as violations of the Federal Family and Medical Leave Act.

The plaintiff worked for AT&T as a Customer Service Manager for about three years. She applied for temporary disability, claiming acute stress disorder and generalized anxiety. After continuing on temporary disability for about three months, she resumed working by "telecommuting" from home. When her supervisor eventually told her that she could no longer continue telecommuting but rather would be required to appear in the office in person, the employee failed to report to the office, and AT&T terminated her employment.

The former employee sued AT&T, claiming disability discrimination and retaliatory discharge based on her having taken FMLA leave. AT&T moved for summary judgment, and the federal district court granted the motion on all claims.

On appeal, the appellate court affirmed. With respect to the former employee's NJLAD claim, the court explained that she had failed to provide the requisite expert medical evidence to support a finding of a "disability". Similarly, the court affirmed the dismissal of her ADA claim, explaining that even

though the ADA claim, unlike the NJLAD claim, required expert medical testimony, it nonetheless was subject to dismissal, because the record did not indicate that her alleged impairment substantially limited a major life activity.

Turning finally to the FMLA retaliation claim, the court held that the former employee had failed to provide any evidence to show that there was a causal connection between her decision to take FMLA leave and the eventual termination of her employment. The court pointed out that the employee had refused to attend a meeting to discuss possible accommodations for her alleged disability. Thus, the evidence suggests that AT&T terminated her employment because of her insistence on working from home, rather than in retaliation for her having taken FMLA leave. The court therefore affirmed the dismissal of the FMLA retaliation claim as well. (*Ashton v. American Telephone and Telegraph Co.*, 3d Cir., 2/27/07)

Conclusion

In this case, as in many others, the dismissal of the discrimination claim was relatively straightforward; the more difficult issue related to the retaliation claim. Here, the employer was able to prevail on the retaliation claim as well, largely because the employer successfully documented a legitimate reason for firing the employee -- i.e., her insistence on working from home, and her refusal to enter into an interactive negotiation for the accommodation of her disability.

Court Dismisses Discrimination Claims, But Allows Retaliation Claims to Survive

The federal court in New Jersey recently released a decision (although the case was actually decided back in 2004) in which the Court granted the motion of Burlington County to dismiss discrimination claims filed by a former employee, but denied the County's motion to dismiss the related retaliation claims.

The plaintiff was a corrections officer at the Burlington County Jail for more than six years. After he sustained back injuries at work, he was given light duty for a few weeks. When he attempted to extend the period of light duty, the County advised him that its policy was to allow a maximum of only six weeks of light duty. After the employee left the country for family reasons for almost three months without first obtaining leave from his employer, he was terminated.

The former employee's complaint alleged, among other things, disability discrimination under the ADA, as well as retaliation in violation of that same statute.

Turning first to the ADA discrimination claim, the Court dismissed the claim on two different grounds: first, that the former employee had failed to present any evidence that he was a "qualified individual", in that he was apparently unable to perform the essential functions of his job as a corrections officer; and second, that the County had, in all events, provided the former employee with a reasonable accommodation for his disability by granting him a period of light duty in accordance with the County's standard policy.

The retaliation claim, by contrast, survived the County's motion. In particular, the court noted that the former employee established each of the elements of a prima facie case for retaliation, including at least some evidence of a "causal connection" between the employee's protected activity (taking disability leave) and the employer's adverse action (termination of his employment.) The court noted that even though the County apparently was not aware of the former employee's administrative complaint to the New Jersey Division on Civil Rights until after disciplinary action had already been taken against the former employee, the former employee had complained of discrimination to his superiors and filed a grievance with his union, both of which actions were well known by the County before it imposed sanctions against the former employee. Therefore, the former employee had offered at least some evidence, albeit

disputed, of retaliation, and those claims were permitted to go forward. (*Blades v. Burlington County*, D.N.J., 8/3/04)

Conclusion

The employer in this case was unable to succeed in obtaining the dismissal of the retaliation claims because, unlike the employer in *Ashton*, above, the record here showed that the employer had knowledge of the employee's disability-related claim before the employer took adverse employment action against him. On these facts, it was impossible for the employer, no matter how diligent or careful, to document the sequence of events so as to avoid that result. In such a situation, the employer has little choice but to defend at trial on the basis that its decisions were motivated by legitimate business considerations, and not in retaliation for the employee's exercise of his FMLA rights.

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.

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Saiber Schlesinger Satz & Goldstein, LLC
One Gateway Center, 13th Floor
Newark, NJ 07102
P 973-622-3333 F 973-622-3349
www.saiber.com