

N.J. HUMAN RESOURCES LAW ALERT™

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Reverse Discrimination Claim Succeeds

The Appellate Division of the New Jersey Superior Court recently affirmed a jury verdict in favor of a white female police officer who claimed reverse discrimination after she was passed over for a promotion.

The plaintiff became a Trenton police officer in 1988, eventually advancing from patrol officer to detective. She passed the sergeant's exam in 1994 and was placed on the promotional list.

When a vacancy arose in 1998, the plaintiff was essentially tied in qualification -- i.e., a combination of test scores and seniority -- with a white male and a black male. The City's public safety director interviewed all three candidates and decided to promote the black male candidate to the position of sergeant.

The plaintiff sued, claiming that the black male candidate was selected instead of her based on reverse race discrimination. The jury agreed and awarded damages in her favor.

On appeal, the City argued that it was entitled to use race as a "plus" factor. The appellate court rejected that argument, noting that "the City never said it used race as a plus factor. Indeed, it urged the jury to find that race was not a factor in any respect." The appellate court went on to explain, "The use of race as a plus factor is a useful and legitimate tool, when used as part of an overall affirmative action plan to rectify racial imbalances... [H]owever,... such a plan should contain as its premise a finding of racial imbalance and express the basis for that finding, set forth a goal for remediating the imbalance, and prescribe some form of standards by which the goal will be achieved." Without such "basic legislation,"

employer does not have a true affirmative action plan, but rather is merely engaging in "arbitrary action" on an employee-by-employee basis, which constitutes reverse discrimination. For those reasons, the appellate court affirmed the jury's verdict in favor of the plaintiff. (*Klawitter v. City of Trenton*, App.Div. 7/31/07)

Conclusion

As with the federal courts' application of Title VII, New Jersey state courts have applied the New Jersey Law Against Discrimination in such a way as to allow for legitimate, well-articulated affirmative action plans. However, any such affirmative action plan must be carefully documented in order to survive a claim of reverse discrimination. This case provides perhaps the most detailed analysis yet offered by a New Jersey state court regarding the essential elements of such a plan.

An employer that wants to apply affirmative action principles in its hiring program should first consult counsel about drafting an appropriate written plan.

Employees Permitted to Assert Whistleblower Claim, Notwithstanding Foreign Judgment

A New Jersey state appellate court recently reversed a trial court decision that had barred the plaintiff former employees from asserting a "whistleblower" claim against their former employer.

The four plaintiff employees had worked in Argentina for a subsidiary of a New Jersey-based defendant corporation. They claimed they were fired in violation of New Jersey's Conscientious Employee Protection Act (CEPA) in retaliation for their whistleblowing activities in disclosing "widespread

unethical and illegal marketing and sales practices.”

A New Jersey trial court granted the former employer's motion for summary judgment dismissing the case, on the ground that the plaintiffs and their former employer had entered into a settlement agreement that had been reduced to judgment under Argentinean law and that the Argentinean judgment was entitled to enforcement in this state under New Jersey's Foreign Country Money-Judgments Recognition Act (FCMJRA). The FCMJRA provides that the judgments of a foreign country, with certain exceptions, are entitled to enforcement in New Jersey to the same extent as the judgments of another state of the United States.

On appeal, a panel of the New Jersey Appellate Division reversed that portion of the trial court's decision. The appellate court explained that the FCMJRA is subject to an exception for foreign judgments that are contrary to the public policy of the State of New Jersey. As the appellate court explained, “While New Jersey does, indeed, favor negotiated settlements, ... CEPA is the Legislature's expression of a strong public policy in that '[i]ts purpose is to protect and encourage employees to report illegal or unethical work place activities and to discourage public and private sector employers from engaging in such conduct.' ... [T]he strong public policy underlying CEPA substantially outweighs the policy favoring settlements.”

Thus, because the former employees were asserting a whistleblower claim under CEPA, which is remedial employment legislation representing the public policy of the state, the Court held that the FCMJRA was inapplicable, and that the former employees were therefore entitled to proceed with their case against their former employer, notwithstanding their settlement agreement and the Argentinean judgment. (*Aguerre v. Schering-Plough Corp.*, App. Div. 5/25/07)

Conclusion

This decision is notable for the extraordinary emphasis that the appellate court places on the public policy underlying CEPA. In deference to that public policy, the appellate court allows the former employees to proceed with their case, not only in the face of their negotiated settlement agreements with their former employer.

This case has obvious significance for any

Jersey-based employer with employees abroad. But even an employer whose activities are entirely in-state should take note of the great weight the court gives to the public policy underlying New Jersey's remedial employment legislation, such as the whistleblower statute.

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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