

## N.J. HUMAN RESOURCES LAW ALERT™

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

### **Employer May Be Entitled to Award of Counsel Fees if Employee Brought Case in "Bad Faith"**

A New Jersey state appellate court recently held that an employer that is forced to incur the expense of litigation to defend a bad faith claim brought by its employee may be entitled to reimbursement of those litigation expenses from the employee.

A part-time employee of Robert Wood Johnson Hospital filed suit against the hospital, claiming age discrimination. Eventually, the trial court granted summary judgment in favor of the hospital, and the Appellate Division affirmed.

Promptly after the appellate court affirmed the summary judgment, the hospital moved before the trial court for an award of counsel fees and costs in its favor, relying on the provision in New Jersey's Law Against Discrimination which allows an award of counsel fees in favor of a prevailing employer if the claim was filed in "bad faith."

The trial court found that the plaintiff had indeed brought her claim in bad faith, and awarded \$129,692.79 in counsel fees and costs in favor of the hospital.

On appeal of the counsel fee award, the Appellate Division agreed with the trial court's conclusion that an employer is entitled to an award of counsel fees upon a showing of bad faith on the part of the employee, but nonetheless reversed and remanded the case to the trial court for more specific findings on the issue of whether "bad faith" was actually present in this case.

The Appellate Division explained that "bad faith" has different meanings in different legal contexts. Under the LAD, the Court explained, "bad faith"

requires proof that the plaintiff acted with "a reckless disregard or purposeful obliviousness of the known facts." The mere fact that the plaintiff's case was dismissed prior to trial does not prove that the plaintiff commenced the litigation with such "disregard" or "obliviousness." "That a claim may turn out in the end to be groundless is not the necessary equivalent to it having been commenced in bad faith."

Further, the Court explained, in considering an employer's application for counsel fees under the LAD, the trial court should take into consideration "the financial ability of a non-prevailing party." To award counsel fees against the employee without considering her financial circumstances "could have the effect of deterring a fearful plaintiff from presenting a valid claim."

For both of those reasons, the appellate court remanded the case to the trial court to determine whether "bad faith" was actually present, and if so, what dollar amount would constitute a reasonable award of counsel fees in light of the employee's financial circumstances. (*Michael v. Robert Wood Johnson University Hospital*, N.J. App. Div. 1/15/08)

### **Conclusion**

Notwithstanding the fact that the case was remanded to the trial court for more specific findings, this decision is potentially helpful to a prevailing employer in a LAD case. To the extent that an employer is able to produce evidence that the employee went forward with a LAD claim in disregard of clear facts that undermined the claim, the employer may be able to recoup its litigation expenses.

## Employer Wins Damages Against Former Employee for Breach of Contract

A New Jersey state trial court recently awarded a total of \$45,000 in damages in favor of a consulting firm against its former employee, where the employee walked off the job after the employer recruited the employee overseas, brought him to the United States, trained him and assigned him to a temporary employment position with a customer.

The plaintiff, a computer consulting firm, sought damages from its former employee, an Indian non-immigrant classified as an "H-1B employee." The consulting firm had recruited the employee in India pursuant to a contract that provided for liquidated damages in favor of the consulting firm for its expenses in recruiting and bringing the employee to the United States in the event the employee were to breach the employment agreement. After the consulting firm brought the employee to the United States and he commenced work on an assignment with a client of the consulting firm, the employee abruptly resigned his employment.

After a non-jury trial, the trial court entered judgment in favor of the consulting firm, awarding it \$18,000 in liquidated damages representing the firm's expense in recruiting the employee, plus an additional \$27,000 in damages for the firm's loss of the contract with its client. (*Jean Martin, Inc. v. Jatgap*, Law Div., 11/16/07)

### Conclusion

Although courts are reluctant to enforce a liquidated damages provision in an employment contract, they will do so where the provision represents a "reasonable forecast of just compensation", rather than a penalty. For the growing number of New Jersey employers who are recruiting employees from overseas, this decision provides a valuable illustration of how an employer can recoup its recruitment expenses where the recruited employee breaches the agreement.

## Saiber LLC's Employment Law Practice Group

Saiber 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 28 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).

\*\*\*\*\*

*The information provided in this alert is for general information purposes only. The information provided is not personalized legal advice. The views offered in this alert may not be suitable for everyone. The reader should review the information provided herein in light of his or her own particular situation and with the advice of his or her own legal counsel.*

Sean R. Kelly, Esq.  
Saiber LLC  
One Gateway Center, 13th Floor  
Newark, NJ 07102  
P 973-622-3333 F 973-622-3349  
[srk@saiber.com](mailto:srk@saiber.com)  
[www.saiber.com](http://www.saiber.com)