

## N.J. HUMAN RESOURCES LAW ALERT<sup>TM</sup>

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

### **Disability Discrimination: Court Dismisses Suit by Recovering Alcoholic**

The United States District Court in New Jersey recently dismissed a case brought by a recovering alcoholic who had returned to work after FMLA leave and claimed that he was wrongfully terminated for failing a random breath test.

The Court rejected the former employee's FMLA claim because the incident occurred after plaintiff had returned from and exhausted his FMLA leave. With respect to the former employee's alternative claim under the N.J. Law Against Discrimination, the Court ruled that the employer's conduct in terminating plaintiff's employment was not an act of discrimination, but rather reflected a legitimate reason for termination – *i.e.*, the plaintiff's failure of the alcohol test. Moreover, the Court ruled, even if the employer's test results were mistaken, that would amount to nothing more than a mistake, and not unlawful discrimination. (Byrd v. Federal Express Corp., D.N.J., March 4, 2008).

### **Conclusion**

Regardless whether alcoholism may constitute a legally protected "disability", showing up at work under the influence of alcohol clearly provides a legitimate basis for termination of employment. An employee under the influence of alcohol is unable to perform the essential functions of his job, and therefore is unable to make a prima facie case of discrimination.

### **Discrimination: Federal Court Sides with Employer Based on Test Results**

A federal district court in New Jersey recently granted summary judgment in favor of the U.S. Government defendants in an action brought by a former Federal Air Marshal who claimed that she was fired in violation of Title VII based on her race, national origin, and gender.

The Court held that the former employee had failed to make out a prima facie case of discrimination because she was unable to show that she was qualified for her job or that she had been subjected to discrimination. In reaching that conclusion, the Court relied on evidence showing that the plaintiff had been fired because she failed certain objective job qualification tests concerning firearms, aircraft countermeasures and physical fitness. Although the Court noted that the plaintiff submitted evidence that she had been the target of discriminatory comments and insults during the course of her training program, the objective test results nonetheless made it clear that the government had a legitimate, non-discriminatory basis to terminate her employment. (Sosa v. Chertoff, D.N.J., March 21, 2008).

### **Conclusion**

It is not enough for a plaintiff to prove that the employer had a discriminatory attitude, or even that the employer made discriminatory comments. Rather, the employee must offer evidence of each and every element of his claim, including that he was fully qualified for his job.

## No “Whistleblower” Claim Where Conduct Complained of Is Not Wrongful

A New Jersey appellate court recently affirmed a summary judgment in favor of New Jersey Transit dismissing a whistleblower claim by a former employee.

The former employee had worked as a security supervisor for N.J. Transit. In the course of her work, she reported finding on a loading dock several recycling bins filled with blueprints and other documents concerning N.J. Transit's bridges and tunnels. She believed this disposal of the documents constituted a serious security breach, however, N.J. Transit noted that the loading dock was kept locked and secured at all times.

Affirming the trial court's summary judgment in favor of N.J. Transit, the Appellate Division noted that no law, regulation or policy was violated by N.J. Transit's disposal of the documents in recycling bins on a secured loading dock. Therefore, because the former employee had no reasonable basis to believe that N.J. Transit was engaging in any wrongful activity, she did not meet the statutory definition of a whistleblower. Moreover, the Court noted that even if plaintiff were a true whistleblower, she failed to offer evidence that the stated performance-based reasons for her firing were pretextual. (Massarano v. NJ Transit, N.J. App. Div., May 9, 2008).

### Conclusion

Not every concern voiced by an employee is adequate to blow the whistle within the meaning of New Jersey's Conscientious Employee Protection Act, commonly known as the whistleblower law. To be protected under that law, the employee must report a situation that he reasonably believes to constitute a violation of law or public policy.

## 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.*