

The NJLAD's fee-shifting provision: A ray of hope for employers

Harassment and retaliation claims are on the rise in workplaces across the country. Some cases are legitimate, but many are not. They're brought by employees seeking to have a court rule on trivial workplace disputes that have no sufficient factual or legal basis.

Now there's a ray of hope for employers that have been victimized by such frivolous lawsuits. A January decision by the Appellate Division of the Superior Court of New Jersey may help employers recover attorneys' fees and costs. We first covered *Michael v. Robert Wood Johnson University Hospital* last month. (See "Did everything employee asked and still got sued? You may get attorneys' fees," page 3, February 2008, New Jersey Employment Law.) The case interpreted the "bad faith" circumstances under which employers who have won New Jersey Law Against Discrimination (NJLAD) cases can recover some of the money they spent defending themselves.

While the Appellate Division cautioned that a court may take into account the economic circumstances of the unsuccessful plaintiff, this decision may provide some measure of respite to employers who are faced with discrimination cases that are brought in bad faith.

A 'bad faith' claim

Alice Michael worked part-time at the Robert Wood Johnson University Hospital for approximately 20 years. Her complaints began shortly after her supervisor initiated a change in the vacation policy. Michael objected to a new rule that said employees requesting vacation more than 35 days in advance had to arrange for someone else to cover their shifts.

This change prompted Michael to file a lawsuit alleging a host of wrongs committed by the hospital—that she was the victim of age discrimination, a hostile work environment, breach of contract and retaliation.

In support of her age discrimination claim, Michael argued that she had not been reimbursed for tuition for two

Deciding whether or not to seek attorneys' fees

While the *Michael* case goes through a final round in court, employers can draw some lessons.

This decision may signal that some courts are at least open to the idea of awarding attorneys' fees under the right circumstances. Currently, not many employers take advantage of the New Jersey Law Against Discrimination's bad faith provisions.

In order to take full advantage of the relief provided in this case, the best course of action for employers is to have their attorneys evaluate:

- Whether or not the complaint alleges largely non-cognizable causes of action—allegations with no basis in law and fact
- Whether or not the employee had already achieved full satisfaction of all claims before the suit was instituted
- The misconduct of the employee and the employee's counsel during the course of the litigation
- Whether or not the plaintiff has the ability to pay an award of counsel fees.

The answers to all those questions will help determine if it is worthwhile to try to recover attorneys' fees.

courses, while younger employees had been paid back. But the evidence showed the hospital had in fact reimbursed Michael for more than 30 courses over the years. Michael also complained that the hospital changed its performance evaluation form and her job description. Michael, however, did not suffer any adverse employment action, and instead received every scheduled raise, lost no opportunities for advancement and was never suspended or received any disciplinary action. As to the vacation policy dispute that apparently started it all, Michael admitted the new policy uniformly applied to all members of her department.

All in all, Michael did not present a convincing case in any respect. The court dismissed her case, a ruling that an appeals court upheld.

Talk about reimbursement!

The hospital then asked the court to award attorneys' fees pursuant to New Jersey's frivolous claims statute and the NJLAD, which provide for recovery of reasonable attorneys' fees and costs if the plaintiff's case was brought in bad faith.

The court agreed with the employer and awarded counsel fees. The Appellate

Division reversed and returned the matter back to the trial court to determine whether or not Michael acted in bad faith in bringing her case.

The Appellate Division found that bad faith would require a showing of "a reckless disregard or purposeful obliviousness of the known facts." The Appellate Division instructed the trial court to consider the extent to which a plaintiff has the ability to pay an award of counsel fees, and also the extent to which a plaintiff pursued the matter because of her own views or desires or relied, either exclusively or partially, upon the advice of counsel.

The Appellate Division cautioned, however, that an award of attorneys' fees to an employer must be balanced against the strong policy in New Jersey against inhibiting the ability of a plaintiff to file a meritorious civil rights action without fear of suffering a fee award.



Dina M. Mastellone is an associate at Genova, Burns & Vernoia (www.gbvlaw.com), a New Jersey-based law firm with offices in Livingston, Red Bank, Camden, New York and Philadelphia. She

can be reached at (973) 533-0777 or dmastellone@gbvlaw.com.