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The New Jersey Supreme Court holds that the statute of limitations begins to run under the New Jersey Law Against Discrimination as of the date of the discrete retaliatory act, but a post-discharge retaliatory act may be independently actionable.

Good News and Bad News: New Jersey Supreme Court Limits Scope of Continuing Violations Doctrine but Expands Post-Employment Retaliation Claims

By Eric A. Savage and Frank A. Custode

Introduction

On January 14, 2010, in a significant and rare pro-employer decision, the New Jersey Supreme Court in *Fernando Roa and Liliana Roa v. LAFE and Marino Roa* limited the continuing violations doctrine, which had been used by plaintiffs to expand the statute of limitations period under the New Jersey Law Against Discrimination (NJLAD). In *Roa*, the court made clear that under the NJLAD, the statute of limitations begins to run for a discrete retaliatory act, such as a discharge, on the date the act takes place. Rejecting a tactic often employed by plaintiffs, the court held that a timely claim for post-discharge retaliation does not revive an untimely retaliation claim based on a discrete act of which the employee knew or should have known. However, the court went on to hold that discrete post-discharge retaliatory conduct, in this case the cancellation of health insurance, is independently actionable even if it does not relate to an employee's present or future employment.

Factual Background

In 2003, plaintiffs Fernando and Liliana Roa worked for Gonzales and Tapanes Foods, Inc. ("G&T") where Marino Roa, Fernando's brother, supervised the plaintiffs. Marino was romantically involved with two female subordinates, one of whom left a gift for Marino on Valentine's Day. Marino asked Fernando to lie and claim the gift was for him. Fernando did so initially, but eventually told Marino's wife the truth. In response, plaintiffs allege that Marino began to harass and threaten them, culminating with their termination.

G&T terminated Liliana's employment on August 24, 2003. On September 15, 2003, she received notice that she was ineligible for unemployment compensation benefits because the company had stated that her termination was due to misconduct, but Liliana successfully appealed that decision. On October 3, 2003, G&T terminated Fernando's employment. While Fernando was still employed by the company, Liliana underwent

surgery that resulted in medical expenses of approximately \$6,000. Plaintiffs thought the expenses were covered by Fernando's health insurance, but on November 11, 2003, Fernando's health insurer notified him that it would not pay for the surgery because he was not covered at the time the medical services were rendered. Although the premature termination of Fernando's health benefits eventually was corrected, the insurer did not pay the claim until February 2004.

Nonetheless, Liliانا's delay in receiving her unemployment compensation benefits and medical benefits allegedly caused plaintiffs to suffer financial problems and stress. On November 5, 2005, plaintiffs sued G&T and Marino, alleging, among other things, that the company engaged in unlawful retaliation in violation of the NJLAD. The trial court granted defendants' motion to dismiss the complaint on the basis of the NJLAD's two-year statute of limitations. Plaintiffs appealed to the Appellate Division, which agreed that Liliانا's claim was time-barred. It pointed out that her discharge occurred in August 2003, and the latest alleged retaliatory act occurred when she received notice of the Appellate Tribunal's decision regarding her unemployment compensation benefits in October 2003, more than two years prior to the filing of the lawsuit. However, the Appellate Division reversed the trial court's dismissal of Fernando's retaliation claim, finding that his claim for post-discharge retaliation regarding the cancellation of his health insurance was timely filed in November 2005, if Fernando did not become aware of the cancellation until November 2003, and that the claim was actionable even if the conduct was not related to his "current or prospective employment." Critically, the Appellate Division found that the insurance cancellation could constitute the last in a series of retaliatory acts under the continuing violations theory, thereby making Fernando's October 2003 claim actionable as well. Defendants appealed to the New Jersey Supreme Court.

Analysis

The two issues before the court were: (1) whether the post-discharge retaliatory act (cancellation of insurance) constituted the last act in a continuing violation, thereby reviving the untimely discharge claim; and (2) whether the post-discharge retaliation must relate to present or future employment in order to be actionable.

On the first issue, the court held that the limitations clock begins to run from the date of the discrete retaliatory act – in this case, Fernando's discharge – and that post-discharge retaliatory conduct does not encompass or revive the untimely discharge retaliation claim. In so holding, the court explained that the continuing violation theory was developed to protect an employee from being time-barred for claims arising from a series of acts, where no single event alerted the employee to the existence of a claim, but which together show a pattern of discrimination. The primary example would be acts which by themselves would not support a lawsuit but, taken as a whole, could constitute a hostile work environment. However, the continuing violations theory does not permit the aggregation of discrete discriminatory acts, like a termination or refusal to promote, any one of which is significant enough to put the employee on notice of a possible claim. As a result, a lawsuit based on a discrete act of discrimination or retaliation must be brought within two years of the event, notwithstanding later actions that might rise to the level of a continuing violation.

With respect to the second issue, the court held that a discrete post-discharge act of retaliation is independently actionable even if it does not relate to present or future employment. Therefore, the court found that Fernando could still pursue his cancellation of benefits retaliation claim under the NJLAD. In so finding, the court recognized "the discovery rule," which postpones the accrual of a cause of action as long as the party did not know and reasonably could not have been expected to know of the claim. In other words, the court recognized that Fernando should be given the opportunity to prove that he was unaware of the cancellation of his insurance until November 2003, which would make his post-discharge retaliation claim timely filed.

In deciding these issues, the court did not foreclose an employee's use of untimely claims as evidence to support the discrimination claim. Indeed, the court expressly stated that although plaintiffs' discharge claims were time-barred, they could be used at trial as evidence to demonstrate conduct such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute" in accordance with the New Jersey Rules of Evidence.

This decision is noteworthy for employers for a number of reasons. The decision clearly defines that the limitations period for retaliatory

discharge begins to run on the date the discharge occurred. In this regard, it gives employers and their counsel clarity and a fortified statute of limitations defense for claims involving discrete acts such as terminations, refusals to promote, transfers and other tangible employment actions. At the same time, it makes clear that even stale facts that cannot support a lawsuit may find their way into evidence at trial. However, the decision also instructs employers that they do face liability for independent post-discharge retaliatory acts regardless of when the employment termination occurs. It thus emphasizes the need for careful dealing with former employees to avoid possible retaliation claims.

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