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Chair's Column

by Paul L. Kleinbaum

Welcome to another excellent edition of the *Labor and Employment Law Quarterly*. As I write this column, the National Labor Relations Board is at full strength, the first time since 2003. In addition, on Oct. 29, 2013, the Senate confirmed Richard Griffin's nomination as general counsel. You may recall that Griffin's appointment as board member by President Barack Obama was invalidated by the D.C. Circuit in *Noel Canning v. NLRB*,¹ a case that was just heard by the Supreme Court this term (see below). General Counsel Griffin was the keynote speaker at the NLRB conference on Nov. 22, 2013. He was introduced by Ret. Chief Justice James R. Zazzali. Griffin's remarks were interesting and informative, and included new initiatives he is planning. All the panels were excellent and well received by an overflow crowd.

This United States Supreme Court term promises to be an interesting one. There are a number of significant labor and employment law cases on the Court's 2013-14 docket. Here is a sampling of those cases.

Noel Canning v. NLRB, *supra*, is the labor case of this term. It was argued on Jan. 13, 2014. The Court will review the decision of the D.C. Circuit, which invalidated President Obama's Jan. 4, 2012, recess appointments of three members of the NLRB. The case raises the issue of whether the president's recess appointments were within his power under the appointments clause of the Constitution. The D.C. Circuit held that the president's constitutional authority to make recess appointments extended only to those made during the intercession recess of the Senate to fill vacancies that first arise during that recess. Two other federal appellate courts, including the Third Circuit, also invalidated NLRB decisions for similar reasons following *Noel Canning*.²

In *Mulhall v. Unite Here Local 355*,³ the Court heard oral argument on Nov. 13, 2013. It reviewed an 11th Circuit decision that held a "neutrality agreement" between a union local and Florida Greyhound Track and Casino violated Section 302 of the Labor Management Relations Act (LMRA).⁴ The issue is whether the neutrality agreement constituted a "thing of value" that



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Battaglia v. UPS: **A Lesson on Proving Protected Activity and Damages Under the LAD and CEPA**

by Omar A. López

The New Jersey Supreme Court, in *Battaglia v. United Postal Service*,¹ continued its expansive interpretation of the New Jersey Law Against Discrimination² (LAD), while more strictly applying the language of the Conscientious Employee Protection Act³ (CEPA). Plaintiffs will likely benefit from the Court's unanimous holding under the LAD, and should take heed of the Court's warnings regarding jury charges under both acts. But perhaps the most important aspect of the decision deals with proving emotional distress damages under the LAD. The facts of this case are intricate and warrant examination.

The Facts

In 2001, the plaintiff, Michael Battaglia, worked as a center manager at a United Postal Service (UPS) facility, where he supervised Wayne DeCraine, a supervisor.⁴ In his position, Battaglia overheard DeCraine making vulgar and derogatory comments about women, prompting Battaglia to require DeCraine to write himself up in accordance with UPS policy. During this time, Battaglia also verbally admonished DeCraine for remarks he made regarding another female worker.⁵ In 2003, Battaglia was offered and accepted a promotion to division manager, although he later turned down the position due to illness.⁶ After UPS filled his original position during his absence, Battaglia accepted a demotion and transfer. In 2004, DeCraine became Battaglia's supervisor.⁷

Battaglia witnessed DeCraine, a previous subordinate who was now Battaglia's division manager, making inappropriate sexual comments, including vulgar references about women, their anatomy, and his desire to engage in sexual relations with women. Battaglia even overheard DeCraine having a discussion regarding his preferred pornographic websites.⁸ Battaglia complained to DeCraine about the behavior, saying DeCraine would "[get] himself in trouble" and that his actions were a disservice to the employees he was supposed to be lead-

ing.⁹ Notably, DeCraine's comments did not occur in the presence of any female employees, nor did Battaglia allege that female employees overheard the remarks.¹⁰ Battaglia also confronted DeCraine about the propriety of an alleged relationship DeCraine had with a female employee. Despite Battaglia's complaints, DeCraine persisted in his conduct.¹¹ In addition, on one occasion in 2004, Battaglia told DeCraine that other employees were imbibing alcohol during lunch, failing to return to work after such lunches, and abusing corporate credit cards.¹² Although his original complaints did not reference fraud, Battaglia contended at trial that this conduct amounted to fraud.¹³

Battaglia then sent an anonymous letter to human resources, containing admittedly vague allegations of inappropriate language, sexual relationships among employees, reports of employees drinking at lunch, as well as complaints about management leadership styles.¹⁴ At trial, Battaglia asserted that UPS never took action regarding the letter, even though DeCraine and others made clear they were aware of the letter.¹⁵ Battaglia denied being the author. However, UPS's investigator later determined Battaglia was the author and shared this information with management. In Jan. 2005, Battaglia was demoted again. According to UPS, performance problems, a history of belligerence and obsessive behavior, and a breach of confidentiality were the cause of Battaglia's demotion.¹⁶

Procedural History

Battaglia filed a superior court complaint that included LAD and CEPA causes of action, asserting the true cause of the demotion was retaliation for Battaglia's complaints under either act.¹⁷ In 2009, the jury returned a verdict on both the CEPA and LAD causes of action, awarding \$500,000 in economic damages and \$500,000 for emotional distress, although the emotional distress award was remitted to \$205,000 upon UPS's motion.

Following cross-appeals to the Appellate Division, the appellate court affirmed the CEPA award, but reversed the award regarding the LAD and the entry of emotional distress damages.¹⁸ After motions to reconsider were denied, both parties petitioned for *certiorari* to the New Jersey Supreme Court, which was granted.

The LAD Claim

Justice Helen Hoens, writing for a unanimous Court, first reversed the Appellate Division's decision regarding the LAD verdict. The Court began by reaffirming that the LAD should be interpreted to effectuate its broad remedial purposes of "eradicating the cancer of discrimination."¹⁹ In addition, the LAD's anti-retaliation provision makes it illegal "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act[.]"²⁰ In LAD retaliation claims, the employee must prove the employee engaged in a protected activity known to the employer; the employee was subjected to an adverse employment decision; and, there is a causal link between the protected activity and the adverse employment action.²¹ Further, the protected activity—a complaint about discriminatory behavior or hostile work environment—must have been made reasonably and in good faith.²² Conversely, an "unreasonable, frivolous, bad-faith or unfounded" complaint is insufficient to establish liability for retaliation under the LAD.²³

According to the Court, the Appellate Division erred when it decided that, because Battaglia's complaints could not make out a cognizable claim of discrimination against female UPS employees, Battaglia could not claim protection under the LAD's anti-retaliation provisions after his complaints.²⁴ In overturning the appellate court, the Court held that, in order to engage in protected activity, the LAD does not require a showing of the existence of a separate, identifiable victim of actual discrimination, noting that such a narrow holding would not advance the broad purposes of the LAD. Rather, the Court held that a plaintiff need only prove he held a good faith belief the conduct complained of violates the LAD.²⁵ Plaintiffs need not understand the intricacies of the LAD in order to be successful in a claim for retaliation under the statute.²⁶ Rather, a plaintiff holding a reasonable and good faith belief that the complained-of conduct violates discrimination laws, even if the belief is technically inaccurate, is still protected by the LAD.

Notably, the opinion highlights a flawed investigation by UPS—one that consisted of an investigator's limited efforts and reliance on the investigator's preexisting beliefs rather than an investigation into the substance of Battaglia's complaints. With respect to the investigation, the Court noted that "as the jury concluded, the corporate response [consisted of] action against the individual who complained."²⁷ The Court's rebuke should dissuade employers from conducting sham investigations into complaints under the LAD. Concluding that the LAD claim had improperly been reversed, the Court reinstated the LAD verdict.

Emotional Distress Damages Under the LAD

Next, the Court considered whether a LAD plaintiff could recover damages for future emotional distress without an expert opinion. In addressing this issue, the Court reaffirmed that the proofs required to prove emotional distress under either statute are far less than that required under tort-based claims, such as intentional infliction of emotional distress, as "the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments."²⁸ However, the Court, agreeing with the Appellate Division, found that the lay evidence presented by Battaglia on the issue of permanent emotional distress was insufficient to allow damages for future emotional distress. Although the emotional injury suffered by "the LAD plaintiff...is obvious, once remedied through a verdict, any claim that those effects will endure so as to support a future award must be proven by credible, competent evidence lest that verdict be the product of speculation."²⁹

As a separate basis for upholding the reversal of the emotional distress award, the Court found that the charge instructing the jury to consider the plaintiff's age and life expectancy in determining damages improperly encouraged the jury to award future emotional distress damages.³⁰ Notably, the Court made no mention of whether the plaintiff actually sought prospective emotional distress damages. Thus, the holding could amount to a sweeping prohibition against a jury considering a plaintiff's age and life expectancy without an expert opinion, whether or not future emotional distress damages are sought or awarded. Nevertheless, the Court left undisturbed prior precedent that a plaintiff may recover statutorily recognized emotional distress damages under both the LAD and CEPA without expert testimony.³¹

The CEPA Claim

The Court next addressed the fraud-based CEPA claim. CEPA is designed to protect employees who blow the whistle on illegal or unethical activity committed by their employers or co-employees, even in the absence of employer complicity.³² As UPS demoted but did not discharge Battaglia, the Court recognized that such action still qualifies as a retaliatory action under CEPA.³³ The first element of proving a fraud-based CEPA claim requires that “[a] plaintiff must demonstrate that... he or she reasonably believed that his or her employer’s conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy[.]”³⁴ However, a plaintiff need not prove an actual violation of the law, rule, regulation or clear mandate of public policy in order to succeed on such a claim.³⁵

First, the Court found that Battaglia did not hold a reasonable belief the actions complained of were fraudulent. Battaglia’s complaints about extended lunches, consuming alcohol at lunch, and minor credit card misuse did not rise to the level protected by CEPA.³⁶ The Court held that CEPA plaintiffs must meet the statutory requirements of protected activity—even if not required to prove actual fraud—as the act does not protect complaints of minor or trivial infractions of internal company policy.³⁷

Next, the Court turned to the portion of the jury charge that described the factual conduct the jury must find in order to return a CEPA verdict. The relevant portion of the charge described the conduct as “[dealing] with credit cards, [dealing] with meal practices[,] and other things.”³⁸ The Court held the charge erred for two reasons. First, the Court held that such a description did not sufficiently articulate the plaintiff’s conduct that constituted protected activity. Second, by including the term “and other things,” the Court held that charge allowed for the jury to take into account facts of which

the plaintiff was not aware. By including the offending language, the charge was based on facts “untethered to any belief, reasonable or not, of plaintiff’s.”³⁹ Thus, because of the lack of “complete and accurate guidance” in the jury charge, the Court held the CEPA verdict could not stand.⁴⁰

Beyond Battaglia

*Battaglia v. United Postal Service*⁴¹ provides several lessons for employment practitioners, employees, and employers. First, employers would be well-advised to conduct good-faith investigations into complaints of LAD and CEPA violations, and steer away from preconceived plans to terminate. Further, the Court’s decision may be seen as a move toward a zero-tolerance policy against adverse employment action resulting from complaints that refer to discriminatory conduct under the LAD—whether or not individuals of a protected class actually heard the discriminatory comments. Next, when drafting jury charges, attorneys should take care to avoid the inclusion of the plaintiff’s age and life expectancy in the absence of an expert opinion, whether or not future emotional distress damages are actually sought. Further, a jury charge on a fraud-based CEPA claim must accurately specify the plaintiff’s protected activity or risk reversal on appeal. Finally, even if a fraud-based CEPA claim may be properly founded on coworker conduct,⁴² such a claim requires more than complaints of drinking alcohol at lunch, taking long lunches, or minor misuse of the company credit card. After all, although CEPA protects whistleblowers, it is not enough to “blow any whistle.”⁴³ ■

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Endnotes

1. 214 N.J. 518 (2013).
2. N.J.S.A. 10:5-1 *et seq.*
3. N.J.S.A. 34:19-1 *et seq.*
4. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 527.
5. *Id.* at 527-28.
6. *Id.*
7. *Id.* at 528-29.
8. *Id.* at 529.
9. *Id.*
10. *Id.* at 548.
11. *Id.* at 529.
12. *Id.* at 530.
13. *Id.*
14. *Battaglia v. United Postal Service, Inc.*, No. A-0226-09A2 (App. Div. Aug. 12, 2011) (slip op. at 9-11).

15. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 532.
16. *Id.* at 532-536.
17. In the interest of brevity, the author has omitted a discussion of the breach of contract claim.
18. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 540-41.
19. *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988); *Lehmann v. Toys 'R Us, Inc.*, 132 N.J. 587, 604 (1993).
20. N.J.S.A. 10:5-12(d).
21. *See Craig v. Suburban Cablevision Inc.*, 140 N.J. 623, 630-31 (1995).
22. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. 354, 373 (2007).
23. *Id.*
24. *Battaglia v. United Postal Service*, 214 N.J. at 547.
25. *Id.* at 547-48.
26. *Id.* at 549-50.
27. *Id.* at 551.
28. *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).
29. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 554; *but see Lockley v. Turner*, 779 A.2d 1092, 1099 (App. Div. 2001) (“[e]motional turmoil, however, cannot be so neatly categorized; it is not turned on and off like a spigot”), *aff'd in part, rev'd in part on other grounds sub nom. Lockley v. State, Dep't of Corr.*, 177 N.J. 413 (2003).
30. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 554-55.
31. *Id.* at 552.
32. *Estate of Roach v. TRW*, 164 N.J. 568 (2000); *Higgins v. Pascack Valley Hospital*, 158 N.J. 404 (1999).
33. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 556.
34. *Dwonzar v. McDevitt*, 177 N.J. 451, 462 (2003).
35. *Battaglia v. United Postal Service, Inc.*, 214 N.J. at 557-58.
36. *Id.* at 560.
37. *Id.* at 560-61.
38. *Id.* at 561.
39. *Id.* at 562.
40. *Id.*
41. 214 N.J. 518.
42. *Estate of Roach v. TRW, Inc.*, 164 N.J. at 612-13.
43. *Carmona v. Resorts Int'l Hotel, Inc.*, 189 N.J. at 371.