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APRIL 2007

In a case of first impression, the New Jersey Supreme Court ruled that individuals pursuing statutory retaliation claims under the state's fair employment practices law must show they possessed a reasonable good-faith belief for initiating a complaint that triggered an alleged retaliatory employment action. This decision underscores the importance and utility of investigating and documenting employees harassment, discrimination and retaliation complaints.

## East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

### N.J. Supreme Court Rules that a Retaliation Case Requires Underlying Complaint Be Made "Reasonably and in Good Faith"

By Bryan M. Churgin and Jacqueline Hall

In a case of first impression, the New Jersey Supreme Court in *Carmona v. Resorts International Hotel*, No. A-83-05 (Feb. 21, 2007), held that a plaintiff asserting a statutory retaliation claim under the New Jersey Law Against Discrimination (LAD) must, as part of the *prima facie* case, prove that a complaint was filed reasonably and in good faith. In addition, the court held that, within the limits of New Jersey's evidentiary rules, an employer's investigative report concerning a terminated employee's statutory claim(s) can be admitted into evidence if the report is relevant and is offered to show the decision-maker's motive in taking adverse action against the plaintiff.

#### Factual Background

The plaintiff, Reinaldo Carmona ("Carmona"), a Hispanic front desk agent employed by Resorts Atlantic City hotel ("Resorts"), missed work on several occasions because of a drug dependency problem. By August 2001, he had accumulated enough "unauthorized absences" to subject him to discipline under Resorts' absenteeism and progressive discipline policy.

Approximately two months later, Carmona complained to Resorts about what he believed was Resorts' racially discriminatory application of its medical leave and absenteeism policy. The day before Carmona lodged his complaint, however, Resorts observed Carmona and a Hispanic coworker, William Santiago ("Santiago"), improperly upgrade guest rooms in exchange for gratuities. After Santiago and Carmona admitted to Resorts' investigators that they had committed this infraction, and after the hotel had completed and documented its investigation. Resorts

fired both employees. Carmona thereafter sued Resorts under the LAD, claiming that Resorts subjected him to a hostile work environment, discriminated against him concerning its medical leave of absence and attendance policy, and retaliated against him for complaining about the alleged harassment and discrimination.

The trial court refused to admit the investigative report because it was hearsay and not admissible as a business record exempt from the reach of the hearsay rule. According to Resorts, that report would have shown its legitimate, nondiscriminatory reason for discharging Carmona. The trial court further rejected Resorts' request to tell the jury that Carmona had to demonstrate he possessed a reasonable good faith belief for his race discrimination complaint. Instead, the judge reasoned that if the jury believed Carmona was fired because he complained, that complaint was reasonable as a matter of law. The jury returned a verdict for Carmona and awarded him compensatory damages and lost wages.

#### The Supreme Court's Analysis

On appeal, Resorts challenged both the trial court's refusal to issue its proposed jury instruction on Carmona's retaliation claim as well as its failure to admit the investigatory report into evidence.

Regarding the jury instruction, the Supreme Court agreed with Resorts that Carmona's bare filing of a discrimination complaint - which allegedly triggered the later claimed retaliation - did not implicate LAD's statutory protections unless he possessed a reasonable

good faith basis for making the complaint. The court analogized the LAD retaliation claim to similar ones filed under the New Jersey Conscientious Employee Protection Act (CEPA), which require a plaintiff to show that he/she reasonably believed that his/her employer's conduct violated a law, rule, regulation or public policy.

The court held that in LAD retaliation cases, the plaintiff "bears the burden of proving that his/her original complaint – the one that triggered his/her employer's retaliation – was made reasonably and in good faith" and that an unreasonable, frivolous, bad-faith or unfounded complaint is insufficient to establish liability for retaliation under LAD.

The N.J. Supreme Court also held, contrary to the lower court, that Resorts' investigative report was admissible as a non-hearsay statement relevant to show that Resorts terminated Carmona for legitimate, nondiscriminatory reasons. The court cautioned, however, that the proponent of the report must demonstrate it is relevant; namely, there must be a showing that one of the decision-makers knew about its contents and acted upon it, and that all portions of the report are separately admissible or properly redacted to omit inadmissible information.

## Lessons Learned

With these general employment law developments in mind, *Carmona* is noteworthy for New Jersey employers for several reasons.

First, it imposes a significant evidentiary proof hurdle upon plaintiffs pursuing LAD statutory retaliation claims and narrowly restricts the circumstances under which they can prevail on those claims. Unless and until the plaintiff establishes the reasonableness of the complaint giving rise to the alleged retaliatory act, or that he/she lodged the complaint for reasons other than to thwart an otherwise appropriate disciplinary action, the retaliation claim may not survive summary dismissal.

Second, *Carmona* provides an incentive for employers to investigate and create reports regarding incidents of employee wrongdoing that could lead to an adverse employment action. If the employee later challenges the employer's motivation for the adverse action, the investigative report may, if the decision

maker relied upon it, demonstrate that the employer possessed a legitimate, nondiscriminatory reason for an adverse employment action relating to the employee's wrongdoing.

Finally, *Carmona* underscores the general value and utility of documenting employee discrimination and harassment complaints, as well as whistleblower type complaints. Indeed, because the Supreme Court analogized LAD retaliation claims to those under CEPA, it is likely that the court's evidentiary ruling in *Carmona* would similarly apply to CEPA actions.

In light of *Carmona*, we recommend that employers:

- train personnel on how to conduct effective internal investigations that produce objective results and withstand scrutiny in subsequent litigation;
- promptly and thoroughly investigate and document employee discrimination and harassment complaints as well as allegations about employee wrongdoing; and
- apprise decision makers involved in personnel decisions respecting the subject employee about any investigative reports and their content.

By adopting the foregoing procedures, employers may minimize their risk of legal exposure to statutory discrimination, harassment and retaliation claims and, if litigation ensues, will be better positioned to defend against and defeat one or more of those claims.

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