

LABOR & EMPLOYMENT LAW ALERT

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New Jersey High Court Awards Unemployment Benefits to Striking Nurses

The New Jersey Supreme Court held in late January that 100 striking nurses at a Burlington County hospital are entitled to collect unemployment benefits because the hospital hired replacement nurses and the work stoppage did not substantially curtail operations. *Lourdes Medical Center of Burlington County v. Board of Review*, A-70/71-07 (Jan. 27, 2009). The decision turned on state law which prohibits benefits only if there has been a “stoppage of work” due to a strike, N.J.S.A. 43:21-5(d). Regulations define “work stoppage” to mean “a substantial curtailment of work...[where]...not more than 80 percent of the normal production of goods and services are met.” N.J.A.C. 12:17-12.2(a)(2).

In 2004, approximately 240 nurses at Lourdes went on strike. In response to the strike, the hospital at first hired replacement nurses, which increased by about \$1 million per month the total cost for nursing staff. Later, Lourdes hired new nurses on a permanent basis. Management costs generally increased during the strike. For example, the hospital had to hire additional security guards and its public relations personnel were diverted from handling usual matters to focus full-time energies on strike-related activities. Additionally, the receipt of a \$750,000 obstetrics department grant and the opening of a new laboratory were temporarily delayed. Before the strike, operational losses for the hospital were \$600,000 per month, and afterward losses rose to between \$1.4 and

\$1.75 million per month.

In 2004, the hospital's losses were projected to exceed those of 2003 by \$8 million. Despite the considerable financial difficulties produced by the strike, Lourdes



continued to function at full service. It found replacement nurses, maintained its patient and employee census, and did not curtail its hospital procedures.

The striking nurses were granted unemployment benefits, the hospital appealed, and the appeals examiner sustained the grant. The appeals examiner noted that, during the strike, the hospital “operate[d] at normal occupancy levels” without a decrease in the census of patients, “did not reduce the medical procedures or services provided to the public,” and “maintain[ed] all of the same quality services to the public.” The appeals examiner took into account that Lourdes incurred a cost of \$1 million per month to replace the striking registered nurses with agency nurses and “hired approximately 40 new nurses.” One-third of the striking nurses had returned to work by the date of the hearing. Despite the great cost to the hospital caused by the strike, the appeals examiner concluded that there was not a “stoppage of work” as defined by N.J.A.C. 12:17-12.2(a)(2) or N.J.S.A. 43:21-5(d). The examiner rejected Lourdes’ argument that the regulation “should not apply to a hospital’s production.”

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Therefore, the examiner held that the striking nurses were entitled to unemployment benefits. The Board of Review affirmed the decision of the appeals examiner.

The Appellate Division reversed because the Board did not consider, in determining whether a work stoppage occurred, “the financial expense to which the hospital was put to maintain normal levels of service to the community.” *Lourdes Med. Ctr. v. Bd. of Review*, 394 N.J. Super. 446, 467 (App. Div. 2007).

The Court reversed the Appellate Division, holding that the Appellate Division erred in not deferring to the findings of the Board. It also concluded that loss of revenue attributable to the strike, which does not result in a substantial curtailment of work at the hospital, is not the equivalent of a “stoppage of work.” It reinstated the Board’s decision to grant the striking nurses unemployment benefits. Central to the Court’s decision were three important holdings: (1) the “eighty percent” rule was not arbitrary and

capricious, (2) the hospital was not entitled to special consideration even though it is required by law to remain open and serve the public, and (3) the hospital’s revenue loss and high expenses, associated with the strike, were irrelevant because the hospital remained open and operated at normal levels.

The Bottom Line: The Court’s decision is a major victory for unions and a defeat for employers, especially regulated employers like hospitals, trying to operate during a strike. Hospitals and other regulated entities will be penalized in unemployment proceedings for hiring replacement workers during a labor dispute in order to maintain required service levels. In the end, this decision may have the effect of forcing employers to shut down completely, either in the face of a strike or through a lockout, rather than lose leverage at the bargaining table. Whether this decision encourages an increase in strikes remains to be seen. ■

FMLA Jury Award Doubled Because Employer Fails to Make Good Faith Inquiry into Law.

Managers and in-house counsel who fail to do research into whether employees are covered by the Family Medical Leave Act (“FMLA”) may subject their companies to liquidated damages if it turns out that they violated the law. That’s

the lesson one company just learned when a federal judge in Pennsylvania doubled a jury’s award in an FMLA case after finding that an in-house lawyer’s failure to research whether a pregnant worker was covered by the FMLA was

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evidence of the company's bad faith. *Brown v. Nutrition Management Services Co.*, Civil Action No. 06-cv-2034 (E.D.P.A. 2009).

In *Brown*, the employer fired a female employee shortly after she told it she was pregnant. The employer decided that the employee was not covered by the FMLA because she was a "brand new employee." The FMLA, which provides for up to twelve weeks of leave for the serious health condition of the individual or covered relative, covers only those employees who have worked for the employer for at least one year. In fact, however, the employee had worked for a predecessor employer in the same position for several years before the employer took over a service contract from that predecessor. It seems that the employer never considered the possibility that it was a "successor employer" under applicable FMLA regulations, and that the employee's earlier hire date would control. At trial, the employer's Director of Human Resources, who was also a lawyer, testified that he did not do any research to determine whether there were any factors that might lead him to the conclusion that the employee was covered by the FMLA.

The jury, having found that the employer was a "successor employer" under the FMLA and that the employee was a covered employee, awarded her \$74,000. The judge added more than \$6,600 in interest to the verdict and then doubled that figure, for a total judgment of \$161,200. The judge found that under the FMLA, courts must award liquidated damages -- doubling the jury's verdict -- unless the defendant can show it acted in good faith. Indeed, under the FMLA, a prevailing party is entitled to liquidated

damages equal to the amount of damages awarded for lost compensation plus interest unless the defendant's "act or omission which violated (the law) was in good faith and (the defendant) had reasonable grounds for believing that the act or omission was not a violation . . ." 29 U.S.C. § 2617(a)(1)(A)(iii).

In this case, the court found, there was no evidence of good faith because the company never researched the question of whether the plaintiff was covered under the law. The court stated: "[The employer's] reliance on [the in-house lawyer/H.R. Director's] cursory determination was inadequate to ascertain whether [plaintiff's] prior employer was covered by the FMLA and, if so, whether [the employer] was a successor in interest." There was no evidence of good faith because "[The employer] presented no evidence that it researched or had an attorney research the requirements of the FMLA, or was otherwise aware of the factors governing whether the FMLA would apply to [plaintiff's] request for leave." Because the employer made "no legal inquiry into the requirements of the FMLA [it had] no reasonable ground to believe [the plaintiff's] termination was not a violation."

The Bottom Line: Before deciding to fire an employee who asks for a leave that could be covered by the FMLA (or any other statute for that matter), make sure that you make a reasonable inquiry into whether the employee might be covered and under what circumstances. Ask labor counsel before you pull the trigger. Failure to do so could result not only in a violation of law and a lawsuit, but liquidated damages in the event that you lose. ■

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President Obama Signs New Law Creating Additional Rights to Recovery for Employees Claiming Discriminatory Pay

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act, overturning a controversial 2007 Supreme Court decision dealing with discrimination in employee compensation. The Act now makes it easier for employees to sue their employers for pay discrimination by relaxing certain statutory deadlines for filing a claim.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court ruled that the statute of limitations for challenging pay discrimination under Title VII of the Civil Rights Act of 1964 (180 days) begins to run at the time the discriminatory pay decision is made, even if the adversely affected employees are not immediately aware that they are being paid less than similarly situated employees. The ruling effectively barred pay discrimination lawsuits by employees who do not become aware of the discriminatory pay practices until many months or even years after the discriminatory pay decision was made.

The Ledbetter Act amends Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to provide that an unlawful discriminatory compensation practice occurs when (1) a discriminatory compensation decision or practice is adopted; (2) an employee becomes subject to a discriminatory

compensation decision or practice; or (3) an employee is affected by the application of a discriminatory compensation decision or practice, including each time compensation resulting, in whole or in part, from the discriminatory decision or practice is paid. Thus, each paycheck incorporating discriminatory pay will start the running of a new statute of limitations for challenging discriminatory compensation. The Act will be retroactive in its effect, dating back to May 28, 2007, the date of the *Ledbetter* decision.

The Bottom Line: Expect more discriminatory pay lawsuits, and expect them to go back farther into the past. Given these circumstances, review and revise employment policies regarding salary and benefit decisions. Be comprehensive and pro-active, not merely defensive and reactive. Examine the wages and benefits of your employees to ensure that there are no problematic disparities and, if so, fix them. Make sure that decisions about salaries and benefits are well documented and objectively defensible. Because decision makers may be long gone by the time a lawsuit is filed, make sure that relevant documentation is kept in a place where it will be found when and if a lawsuit is filed. Adjust document retention policies so that documents relating to pay and benefits decisions are kept for longer periods of time. ■

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Supreme Court Protects from Retaliation Comments Made During an Employer's Internal Discrimination Investigation

Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against employees because they have either (1) filed a charge of discrimination or participated in an administrative proceeding or investigation under Title VII or (2) “opposed” conduct made unlawful by Title VII. In *Crawford v. Metropolitan Government of Nashville*, No. 06-1595 (Jan. 26, 2009) the U.S. Supreme Court resolved a conflict among the various circuit courts of appeal when it unanimously held that employees who disclose discriminatory conduct during an employer's internal investigation are protected from retaliation.

In *Crawford*, an employee who was fired soon after talking about a supervisor's sexual harassment during an internal investigation, sued her employer for retaliation even though she never stepped forward on her own initiative to make any report of sexual harassment. Rather, she was interviewed as part of her employer's internal investigation that was prompted by rumors circulating in the workplace about the conduct of a particular supervisor. During the interview, the employee stated the supervisor sexually harassed her. Soon afterward, the employee was fired along with two other employees who had reported harassment.

The employee sued her employer for retaliation under Title VII. The trial court dismissed the claim because the employee had not “opposed” the supervisor's conduct; she did not initiate a

complaint, but merely answered questions by investigators in an already-pending investigation. The Sixth Circuit Court of Appeals affirmed this decision.

The Supreme Court reversed the Sixth Circuit's decision. The Court explained that the term “oppose” should be given its common dictionary definition and that the common understanding of that term encompassed conduct far less active than instigating a complaint of discrimination. An employee's reported belief that an employer has engaged in unlawful discrimination virtually always constitutes “opposition” to the activity, even if it is not stated in the form of a complaint. The Court concluded that disclosing a supervisor's sexually inappropriate conduct in response to her employer's questions during an internal harassment investigation was protected against retaliation. To hold otherwise, the Court explained, would encourage employees to keep quiet about illegal activity during internal investigations out of a fear of lawsuit-immune reprisals.

The Bottom Line: The Court's decision makes sense. Despite the academic debate over what constitutes “opposition” under Title VII, the truth is that no employer should ever tolerate retaliation against any employee who agrees to cooperate in an internal investigation. This does not mean that *Crawford* does not create new complications

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for employers; there is a risk that those persons who were interviewed as part of an investigation might sue if they suffer a subsequent adverse employment action no matter how tenuous the connection. However, employers are already sensitive to the need to objectively support any adverse action, and will continue to make

sure that whatever adverse actions occur are supported by legitimate business reasons. That remains our advice now. Supervisors and employees should know that retaliation against complainers and witnesses will not be tolerated. Continue to make sure that employment actions are documented. ■

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The first Amendment protects all kinds of speech, including non-verbal, eye-catching symbolic speech, in a traditional public forum.

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“Hands Off The Rat,” Declares New Jersey High Court

Unions everywhere broke out the bubbly on February 5, after the New Jersey Supreme Court ruled that Lawrence Township’s ordinance that prohibited a union from flying a giant inflatable rat, known as “Scabby,” violated the First Amendment to the Constitution. The case arose after a union organizer who re-inflated the rat after previously being instructed to remove it was convicted of violating the ordinance and he was fined. A trial de novo and an appeal sustained the conviction. The Court saw things a bit differently. When the Township tried to defend its ordinance on grounds of safety and aesthetics, the Court, smelling a rat, pointed out that a balloon announcing a grand opening would have been permissible, while a ten foot tall Rat which accompanied a hand billing union protest over the use of non-union labor ran afoul of the ordinance. This content based distinction, favoring commercial over non-commercial speech, was fatal to the ordinance. Since the

sign ordinance was found to be content-based, the Court was bound to review the ordinance under a strict scrutiny standard, meaning that the ordinance could not survive unless it was justified by a compelling governmental interest and was narrowly tailored. The Court, bursting the Township’s balloon, observed that the rat balloon had not been shown to be more harmful to aesthetics or safety than a similar item displayed as an advertisement or commercial logo used in a grand opening promotion. The ban was thus found to be an unconstitutional restriction on the union’s right to free speech.

The Bottom Line: Rats, like cockroaches, have been around for centuries, and it’s going to take a lot more than a simple ordinance to exterminate them. The First Amendment protects all kinds of speech, including non-verbal, eye-catching symbolic speech, in

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a traditional public forum. So long as the rat doesn't trigger legitimate safety concerns, and complies with neutral time, place and manner restrictions applicable to everyone, there is no basis for grounding the inflatable rodent. Now, if only employers would follow our advice and salt their property with giant inflatable cats. ■



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Upcoming Speaking Engagements:

Bressler Labor and Employment Practice lawyers will be speaking on the following subjects in the coming months:

February 24, 2009: The New Jersey State Bar Association. Richard Szuch will be speaking on issues relating to employment law and the highly compensated employee. Edison, NJ.

March 4, 2009: The ADP 2009 Human Capital Management Seminar. Jed Marcus will be speaking on issues, recent developments and trends in labor and employment law. One Penn Plaza, 23rd Floor, New York, NY.

March 18, 2009: The New Jersey State Bar Association Annual Labor and Employment Law Forum. Jed Marcus will be speaking on professional ethics issues in labor and employment. New Brunswick, NJ.

April 23, 2009: The Association of Trial Lawyers of America Boardwalk Seminar 2009. Jed Marcus will be speaking on issues relating to the direct examination and cross-examination of plaintiffs in employment cases. Atlantic City, NJ.

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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