

LABOR & EMPLOYMENT LAW ALERT

JANUARY 2009

Jed L. Marcus, Esq.

New Jersey High Court Clarifies Burden On “Common Law” Whistleblowers

The New Jersey Supreme Court just expanded the scope of common law “Pierce” retaliation claims by holding that a former in-house attorney who claimed she was fired for complaining to supervisors about allegedly unethical conflicts of interest in the legal department did not have to complain first to an external authority in order to sustain a retaliatory discharge claim. *Tartaglia v.*

PaineWebber, A-107/108-06 (Dec. 18, 2008). The common law claim is based upon *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58 (1980), in which the Court established a cause of action for a firing contrary to a clear mandate of public policy.

Tartaglia, an in-house lawyer for a large financial institution, claimed that she was fired because she complained to her supervisors about certain alleged conflicts of interest in dealing with internal disputes involving its financial advisors, and about sexual harassment. In addition to the *Pierce* claim, Tartaglia brought claims for sexual and handicap discrimination, and breach of contract. At trial, the court dismissed Tartaglia’s retaliation claim because she did not first complain, or at least threaten to complain, to an external authority about the alleged misconduct. The Appellate Division affirmed, holding that merely voicing complaints about corporate behavior within the corporation is not sufficient to uphold a retaliatory discharge claim.

The Supreme Court reversed. Justice Helen Hoens, speaking for the Court, found that neither *Pierce* nor several other precedential rulings relied upon by the Appellate Division (*House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 49-51 (App. Div. 1989); *Young v. Schering Corp.*, 141 N.J. 16 (1995)) found that an employee who merely voiced complaints within the corporation could not state a retaliatory discharge claim. According to Justice Hoens, writing for a unanimous Court, stated that “[n]othing in *Pierce* ... mandates an actual or even threatened external complaint as an element of the cause of action.”

At the same time, mere complaints, without something more, is also not enough. According to Justice Hoens, an employer cannot be held liable simply because an employee is “grousing or complaining” about work conditions in general. Instead, “although she need not have voiced a complaint to an external authority, she must demonstrate that she took other actions reasonably calculated to prevent the objectionable conduct,” Hoens said. Thus, the employee’s objection must communicate a disagreement with a corporate policy or action, and must also be made to someone senior enough to do something about it.



Absent settlement, there will be a new trial. The Court therefore went on to instruct that at trial, Tartaglia will have to specify the ethical rules she claims were flouted. She will also have to show that she made the complaint to a senior enough executive.

There was another reason for reversing the case, involving the destruction of documents. During the first trial, the court refused to instruct the jury that it could draw an adverse inference against defendants if it found that they either withheld or destroyed material evidence, including a memorandum about plaintiff dictated by an individual defendant a few months before her termination and records of Paine Webber's investigation regarding Plaintiff's internal complaint of sexual harassment. The trial judge denied plaintiff's request for this instruction because he found no evidence that material documents were intentionally destroyed. The Appellate Division disagreed with this determination, finding instead that there was a

factual dispute as to whether the documents at issue actually existed at the time a duty to preserve arose and, if so, whether they were purposely destroyed in anticipation of litigation.

The Lesson: Employers can learn several important lessons from the *Tartaglia* case. First, employers must adequately train its supervisors to listen and report any complaints that might be construed as "whistleblower" complaints. Once these complaints are reported, there must be an effective investigation. Second, all relevant personnel documents, including those related to the complaint and the investigation, must be preserved. Failure to maintain and protect these documents not only reduces chances of victory at trial, but also increases the chances that a jury will be instructed that they can draw an inference that the employer destroyed the documents and that it did so to hide the truth. ■

■
...employers must adequately train its supervisors to listen and report any complaints that might be construed as "whistleblower" complaints.
■

Employers Who Remove Wage and Hour Claims to Superior Court are Entitled to a Jury Trial

Most employers faced with wage and hour claims before the New Jersey Department of Labor do not know that they are entitled to remove the case to Superior Court. Under DOL regulations, employers who remove the case are supposed to inform the DOL of their intent to request a jury trial at least two days before the administrative hearing and pay a fee. But

a recent Appellate Division case held that failure to follow DOL rules does not bar an employer's right to a jury trial once the case is removed. *B&H Securities, Inc. v. Pinkney, et al.* This decision is important to employers who wish to have their legal matters receive the protections offered by the rules of Superior Court and/or obtain a trial in front of a jury.

LABOR & EMPLOYMENT LAW ALERT

In *B&H*, B&H Securities fired an employee because it suspected that he would follow two other former employees in establishing a competing business. B&H was already involved in a lawsuit with those two former employees. The fired employee subsequently filed a claim against B&H with the Department of Labor for unpaid wages under the Wage Act. He complained that B&H still owed him \$815,38 for two unused vacation days, \$4,076.90 severance pay and a \$25,000 bonus. At that point, B&H filed a motion to amend their complaint in the Superior Court against the other two former employees to add the former employee as a defendant. It also moved to consolidate the wage and hour claims with the action in Superior Court, even though B&H failed to take the formal steps of demanding a jury trial and paying the requisite fee. The Superior Court granted B&H's motions, and the former employee appealed.

The Appellate Division affirmed, rejecting the employee's argument that a Wage Act claim removed to the Superior Court continues to be an administrative claim under the Department of Labor's jurisdiction and is not converted to a Superior Court action. The Appellate Division noted that any legislative attempt to divest the Court of jurisdiction by categorizing cases, such as a Wage Act claim, would conflict with the New Jersey Constitution providing the Court's exclusive authority and responsibility for administration of the judicial system.

We have been asked by many employers whether they should remove a wage and hour claim. That, of course, depends on the facts and circumstances of every case. The DOL

investigates a complaint, decides if the employer has violated the law, and assesses whatever charges and penalties it deems appropriate. Typically, most complaints are settled before an administrative hearing. Absent settlement, there is an administrative hearing which, in our opinion, subjects the employer to risks that would not exist in a Superior Court. Normative rules of evidence are not evenly applied, and discovery is far more limited. Moreover, the case is handled by the very agency that is prosecuting the employer. Even if the Administrative Law Judge rules in an employer's favor, that decision can be overturned by the Commissioner of Labor.

Once in Superior Court, however, the employer is entitled to all appropriate procedural and substantive protections. The employer is entitled to the full panoply of discovery before trial, including the deposition of the employee and all necessary fact witnesses. The rules of evidence will also be applied more rigorously by a trial court, and it is more likely that any motion to dismiss filed by the employer will be taken more seriously. Finally, the employer is entitled to a jury trial. Whether that makes sense will depend on each case. ■



Shannon M. Ryman, Esq.

■

**Most employers
faced with wage
and hour claims
before the New
Jersey Department
of Labor do not
know that they
are entitled to
remove the case
to Superior Court.**

■

Federal Contractors Must Use E-Verify

On January 15, 2009, certain federal contractors and subcontractors must begin using the E-Verify system administered by the U.S. Citizenship and Immigration Services (USCIS). The use of the E-Verify system will help employers determine whether employees are authorized to work in the United States.

What is E-Verify?

E-Verify (formerly known as the Basic Pilot/ Employment Eligibility Verification Program) is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

What Do the Regulations Require?

This new rule requires federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States.

Who is Required to Enroll in E-Verify?

All employers, including federal contractors, may enroll in E-Verify at any time without waiting

for the effective date. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

If you have already enrolled in E-Verify and you are awarded a federal contract after January 15, 2009, you will need to update your company profile through the "Maintain Company" page once the contract has been awarded. Once you designate your organization as a federal contractor, all E-Verify users at your company will need to take a federal contractor tutorial that explains the new policies and features that are unique to federal contractors.

How Do You Enroll Your Company in E-Verify?

Before you can start using E-Verify, you need to enroll your company in the program. When you enroll your company, you will be asked to provide basic contact information for your company and agree to follow the rules of the program. At the end of the enrollment process, you will be required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between your company and DHS.

If your company has not yet enrolled in E-Verify, then you have 30 days from the date of contract award to enroll and 90 days from the date you enroll with E-Verify to initiate

■

The use of the E-Verify system will help employers determine whether employees are authorized to work in the United States.

■

LABOR & EMPLOYMENT LAW ALERT

verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees. After this 90-day phase-in period, you will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and filled out a Form I-9. Please note that pre-screening of job applicants is not allowed; the system may be used for new hires only after the employee has been offered the job and has accepted. Please also remember that you must continue to use E-Verify for the life of the contract for all your new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

Who Must Be Verified Under E-Verify?

Verification of employees through E-Verify is limited to new hires only, unless you are a federal contractor who has been awarded a contract on or after January 15, 2009. Employees whom you have already verified through E-Verify should not be re-verified. However, an employee's previous employment authorization through E-Verify from another employer does not satisfy your obligation to use E-Verify once you have hired them.

What Contracts are Covered by the Rule?

The rule requires the insertion of the E-Verify clause for prime federal contracts with a period of performance longer than 120 days

and a value above the simplified acquisition threshold (\$100,000). The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over \$3,000. As for contracts outside the United States, the rule applies only to employees working in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

What about Existing Indefinite-Delivery/ Indefinite-Quantity Contracts?

Existing indefinite-delivery/indefinite-quantity contracts should be modified by Contracting Officers on a bilateral basis in accordance with FAR 1.108(d)(3), to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

What Types of Contracts are Exempted?

The rule exempts: Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services; Contracts of less than the simplified acquisition threshold (\$100,000); Contracts less than 120 days; and Contracts where all work is performed outside the United States.

■
Employees whom you have already verified through E-Verify should not be re-verified.
■

Are Contracts for Agricultural and Food Products Exempt from the Rule?

Nearly all food and agricultural products fall within the definition of “commercially available off-the-shelf (COTS)” items. Federal contracts for COTS items are exempt from the rule. Federal contracts for food and agricultural products shipped as bulk cargo, but that otherwise would be considered COTS items, such as grains, oils and produce are also exempt. Subcontracts that only provide supplies, such as food, are exempt from the rule.

The new rules related to E-Verify are somewhat complicated. Please be sure to call us and we will be pleased to work with you. ■



Robert M. Tosti, Esq.

■
**Federal contracts
for COTS items
are exempt from
the rule.**
■

Bressler Now Authorized to Award New York CLE Credits for its Seminars and Programs.

We are pleased to inform our clients and friends that New York has now authorized Bressler Amery & Ross to award New York CLE credits for its seminars and programs. We are already a CPE Sponsor approved by the New Jersey State Board of Accountancy. This means that

lawyers licensed in New York and CPAs can look to us and our programs for cutting edge discussions on important legal issues while earning their required credits. Please watch for our announcements on seminars and programs in the coming months.

LABOR & EMPLOYMENT LAW ALERT

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 the plaintiff 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:

*Jed L. Marcus, Esq.
jmarcus@bressler.com
973.966.9678*

*Robert M. Tosti, Esq.
rtosti@bressler.com
973.514.1200*

*Michael T. Hensley, Esq.
mhensley@bressler.com
973.514.1200*

*Shannon M. Ryman, Esq.
sryman@bressler.com
973.660-9687*

BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

17 State Street
New York, NY 10004
212.425.9300

325 Columbia Turnpike
Florham Park, NJ 07932
973.514.1200

2801 SW 149th Avenue
Miramar, FL 33027
954.499.7979

www.bressler.com

This communication provides general information and is not intended to provide legal advice. Should you require legal advice, you should seek the assistance of counsel.

©2008 Bressler, Amery & Ross, P.C.
All rights reserved.

ATTORNEY ADVERTISING