THE PASCHOS LAW UPDATE NEWSLETTER
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I. EMPLOYMENT LAW

A Failure-To-Promote Claim Does Not Constitute "Discrimination In Compensation" Under the Lilly Ledbetter Fair Pay Act of 2009

In *Noel v. The Boeing Company*, --- F.3d ---, 2010 WL 3817090 (3d. Cir. (Pa.) October 1, 2010), plaintiff, a black Haitian national, began working for Boeing in 1990 as a sheet metal assembler. Noel was hired at Labor Grade 5 and repaired Chinook 47 aircraft. Boeing employees were occasionally offered an opportunity to work at offsite locations. Because employees working offsite received greater pay, per diems and additional training, offsite positions were coveted and individuals volunteered for these assignments. Any promotions and corresponding raises were limited to the duration of the offsite assignment. According to the Collective Bargaining Agreement that governed Noel's employment, seniority was not the only factor that Boeing considered when assigning workers offsite. Skill and ability were the determining factors, and seniority was only considered when those factors were equal.

The complaint contained, in pertinent part, allegations that Boeing did not send Noel to one offsite location in May 2002 when white, non-Haitian employees who held the same job as Noel but were junior to him were sent offsite; and in 2003, while at an offsite location, Noel was promoted to Labor Grade 8 while his junior, white, U.S.-born co-workers were promoted to Labor Grade 11.

Plaintiff brought a cause of action against Boeing alleging employment discrimination under Title VII. The District Court granted summary judgment in the Boeing Company's favor and plaintiff appealed.

On appeal, Noel argued that the recently enacted Lilly Ledbetter Fair Pay Act of 2009 ("FPA") renders his otherwise out-of-time administrative filing timely, preserving his failure-to-promote claim. According to Noel, because of the alleged discriminatory employment action, he received less pay than his white coworkers. Noel argued that the FPA makes clear that "in pay discrimination matters an unlawful employment practice occurs each time an individual is affected by application of a discriminatory compensation decision." Thus, Noel argued that since Boeing's failure to promote him resulted in lower pay, each paycheck he received started the administrative clock anew.

Throughout the litigation, Noel never argued that he was denied equal pay for equal work. He attempted to connect his lack of promotion with the resulting lower salary for the first time on

appeal. Therefore, the court concluded that despite Noel's assertions to the contrary, he alleged a failure-to-promote claim and not a discrimination-in-compensation claim. Having determined that Noel actually pled a failure-to promote claim, the court addressed an issue of first impression: whether, under the FPA, a failure-to-promote claim constitutes “discrimination in compensation.”

The Court found, on the basis of a plain and natural reading, that the FPA does not apply to failure-to-promote claims. Because Noel filed his failure-to-promote discrimination charge with the EEOC outside of the 300-day period, and because a failure-to-promote claim is not a discrimination-in-compensation charge within the meaning of the FPA, the court affirmed the District Court's Order granting Boeing summary judgment.

New Jersey Courts Consider Whether to Recognize an LAD Claim for Failure to Accommodate a Disability that Did Not Require Plaintiff Prove an Adverse Employment Consequence

In *Victor v. State of New Jersey*, 4 A.3d 126 (N.J. September 13, 2010), Roy Victor, an African-American state trooper, brought an action against the State of New Jersey, the New Jersey State Police, and others asserting discrimination claims based on race and disability pursuant to the Law Against Discrimination (LAD). Plaintiff's specific allegations, which spanned the time period from 1995 through July 2004, included claims of failure to promote, disparate treatment, hostile work environment, and retaliation, all based on race and disability, as well as a claim that defendants failed to accommodate plaintiff when he sustained a back injury.

Plaintiff's failure to accommodate claim was narrowly focused. That claim for relief related only to a four-hour period of time on December 11, 2003, when plaintiff was ordered to return to full duty as a road trooper after telling his supervisor that he had injured his back on one of the immediately preceding days. This is the limited factual background that the Court considered regarding plaintiff's failure to accommodate claim.

On appeal, the Court was asked to consider whether an adverse employment consequence is an essential element of a plaintiff's claim that his employer discriminated against him by failing to accommodate his disability. The trial court concluded that the failure to accommodate was itself an adverse employment consequence, as a result of which plaintiff was only required to prove, as part of his prima facie case, that the employer failed to offer him a reasonable accommodation. The Appellate Division disagreed, reasoning that an adverse employment consequence is an essential element of all disability-based employment discrimination claims and concluding that plaintiff could not succeed on his failure to accommodate claim because he did not suffer any adverse employment consequence.

The court noted that the question raised in this appeal was “whether there can be a ‘freestanding’ failure to accommodate claim, that is, a claim based on a failure to accommodate a disability that does not result in any adverse employment consequence.”

The Court provided a lengthy discussion of the issue and held:

In spite of our recognition that the broad remedial sweep of our LAD demands vigilance in our protection of the rights of persons with disabilities, and as compelling as their plight is in facing workplace challenges that are uniquely theirs, we are constrained to refrain from resolving today the question of whether a failure to accommodate unaccompanied by an adverse employment consequence may be actionable. We do so because, in the end, this record is a poor vehicle in which to find the definitive answer to that important question. Looking at plaintiff's evidence, this record simply does not permit him to recover for a failure to accommodate, for two reasons … First, there is no evidence in this record that plaintiff was disabled on December 11, 2003, the only date when he asserts he was not accommodated. Second, there is no evidence that plaintiff sought a reasonable accommodation as we or any other court has defined it.
The Court provided some help to employers in concluding that the employer's duty to offer a reasonable accommodation does not cloak the disabled employee with the right to demand a particular accommodation.

II. INSURANCE LAW

Defamation and Tortious Interference Claims Bearing a "Substantial Nexus" to Breach-Of-Contract Claims Excluded Under Insurance Policy

In Liberty Ins. Corp. v. Tinplate Purchasing Corp., --- F.Supp.2d ----, 2010 WL 3943678 (D.N.J. October 6, 2010), Plaintiff, Liberty Insurance, issued to Tinplate a series of General Liability Policies, each providing $1 million in coverage. Defendant, Trakloc was an additional insured.

Pacific Rollforming, LLC (“Pacific”) commenced litigation against defendants. Pacific entered into Master Area License Agreements (“License Agreements”) with entities to whom defendants, Trakloc and Tinplate, were successors-in-interest. These License Agreements granted to Pacific the exclusive right to manufacture and market, in certain territories, a proprietary drywall and stud framing system known as Trakloc. The Complaint alleges that Trakloc and Tinplate breached many of the contractual obligations set forth in the License Agreements. The Complaint also contained a cause of action for defamation, made against Trakloc and Jablow (an officer thereof), alleging that the allegations of breach of contract also constitute libel and slander.

Plaintiff, Liberty, denied defendants' request for defense and indemnification citing four exclusions to the personal and advertising injury provisions and filed a Complaint for Declaratory Judgment. The parties filed cross-motions for summary judgment.

The parties dispute the meaning of certain terms and exclusions of the policy and the extent of the resulting coverage. Plaintiff argues that the claims are not covered because they fall within any of four exclusions to the policy: “breach of contract,” “contractual liability,” “material published with knowledge of falsity,” or “knowing violation of the rights of another.” Defendants

argue that that plaintiff's no-coverage allegations are unsupported by the text of the policy and that Liberty has violated its contractual duty to defend.

Each of the insurance policies issued to defendants included an Endorsement for Personal and Advertising Injury, defined in relevant part as “oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or service.” The Liberty policies also contained an exclusion titled “Breach of Contract,” which excluded coverage for “‘[p]ersonal and advertising injury’ arising out of a breach of contract, except an implied contract to use another's advertising idea in your advertisement.” Plaintiff and defendants disagree as to whether this “breach of contract” exclusion applies. Plaintiff argues that the defamation and tortious interference claims arise out of the breach of contract claims and are excluded from coverage. Defendants argue that the tort claims are “separate and distinct” from the breach of contract claims.

That court found that the phrase “‘arising out of’ has been defined broadly in other insurance coverage decisions to mean conduct ‘originating from,’ ‘growing out of’ or having a ‘substantial nexus' with the activity for which coverage is provided.’ The “substantial nexus” test is the standard test for interpreting the phrase “arising out of” as it is used in New Jersey insurance policies.

Plaintiff argued that, under the relevant case law, the defamation and tortious interference claims “flow from or bear a substantial nexus with” the breach of contract claims alleged by Pacific. In other words, “in the absence of the license agreements and their alleged breach, there would be no defamation or tortious interference claims.” Defendants concede that certain counts of the Complaint arise out of breach of contract, but argue that the alleged acts of oral and written disparagement are “separate and independent” of the licensing agreements.

The Court found that the defamation and tortious interference claims bore a “substantial nexus” to the breach of contract claims, and were therefore excluded under the policy. Defendants argued that the “substantial nexus” test is “not the law in this jurisdiction.” The court disagreed holding that “the ‘substantial nexus’ test is precisely the law as announced by the Supreme Court of New Jersey in *American Motorists*. 155 N.J. 29, 35, 713 A.2d 1007 (1998). Finally, defendants argued that the plaintiff is “conflating the mere existence of the License Agreements with a breach of the License Agreements,” and that the tort claims are “separate and independent” from the claims for breach of contract. The Court found these arguments unpersuasive holding:

The exclusion applies because Pacific's allegations of defamation and tortious interference arise from the same essential facts and circumstances as Pacific's breach of contract claims. The alleged defamatory statements themselves constitute breaches of the License Agreements. If Pacific were to prove its defamation and interference with contract claims against defendants, it will necessarily have also proved breach of contract. In sum, the defendants' request for defense and costs for the defamation and tortious interference claims of the Pacific action falls squarely within the “breach of contract” exclusion in their policy with Liberty.

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legal advice.