

November 1, 2010

I. EMPLOYMENT LAW

Landmark New Jersey Supreme Court Case Sets Forth When Payment of Discriminatory Wages Triggered Pursuant to New Jersey's Law Against Discrimination

In *Alexander v. Seton Hall Univ.*, --- A.3d ----, 2010 WL 4721311 (N.J. November 23, 2010), plaintiffs, three female tenured professors at Seton Hall University, filed this action claiming that they were paid unequal wages in comparison to younger and/or male employees. The catalyst for plaintiffs' pursuit of this claim was a 2004-2005 annual report ("Report"), compiled by the University, which detailed the salaries of its full-time faculty members by "College," "Gender," "Rank," and "Salary." The Report revealed that higher salaries were paid to newer, younger faculty members as compared to those paid to longer-term, older faculty members. A gender-based pattern of disparate compensation was also apparent. The plaintiffs, each over sixty years in age and boasting at least nineteen years of service to the University, claimed that the discrimination permeates several University departments.

Their complaint sought damages back to their respective dates of initial hire. The University moved to dismiss based on timeliness grounds. The trial court framed the issue as whether plaintiffs could bring an action alleging illegal pay discrimination when disparate pay was received during the statute of limitations period, but was the result of an allegedly intentional discriminatory pay decision that occurred outside the limitations period. The motion court declared that its analysis would be controlled by the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S.Ct. 2162, 167 L. Ed.2d 982 (2007) (establishing framework for analyzing accrual and timeliness in Title VII wage discrimination claims), and held that any and all disparate wages paid to plaintiffs, including those paid within the two-year period immediately prior to the complaint's filing, were simply the result of allegedly intentional discriminatory pay decisions that occurred outside of the limitations period. The trial court's final order of dismissal was affirmed on appeal.

The New Jersey Supreme Court granted plaintiffs' petition for certification. The issue on appeal concerned the payment of allegedly discriminatory, unequal wages on the basis of gender or age. The University viewed the Law Against Discrimination (LAD) violation that has been alleged as one that, to the extent it arose, accrued as a discrete act of discriminatory animus when the wage was established. Plaintiffs, on the other hand, argued that through operation of the continuing violation doctrine that has been used in workplace harassment claims, each paycheck that perpetuates a discriminatory wage continues the original LAD violation and sweeps in all prior and current discriminatory, disparate paychecks. Based on that argument, plaintiffs maintain that they are entitled to equitable relief from the two-year statute of limitations.

The New Jersey Supreme Court concluded that there is no necessary or beneficial purpose to be drawn from adoption of the Ledbetter approach. The court held that the payment of wages on a discriminatory basis proscribed by the LAD is, and remains, an actionable violation of New Jersey's anti-discrimination law as long as the wage remains tainted by the original discriminatory action. Each payment of such discriminatory wages thus constitutes a renewed separable and actionable wrong that is remediable under the LAD. The two-year statute of limitations applies to such violations, cutting off the untimely portion and, as a result, operating as a limit on the back period for which a plaintiff may seek recovery under the LAD. The court further held that plaintiffs' complaint was timely in respect of the allegedly discriminatory wages paid during the two years immediately prior to the filing of their complaint. As such, the court reversed and remanded for reinstatement of plaintiffs' timely claims of wage discrimination.

II. GENERAL LITIGATION

Court Considers Extent to Which a Party May Inquire Into an Expert's Finances and Litigation History in Gathering Information to Prove Expert's Positional Bias.

In *Gensollen v. Pareja*, --- A.3d ----, 2010 WL 4668826 (N.J.Super.A.D., November 19, 2010), Dr. Ronald Gersson served as a medical expert for defendants in an underlying personal injury action. In the underlying matter, plaintiff served defendants with a notice to take the deposition of Dr. Gerson and at the deposition plaintiff's counsel inquired into Dr. Gerson's finances and litigation history.

Dr. Gerson was represented at the deposition by his own counsel. At the deposition, Dr. Gerson testified that ninety-five percent of his litigation work was for defendants. In an attempt to prove potential bias, plaintiff's counsel moved the trial court for an order compelling Dr. Gerson to provide the information sought in his document request. The document request sought documentation indicating the percentage of Dr. Gerson's findings in the past five years that supported the premise that plaintiff suffered no type of permanent injury; documentation indicating the percentage of his work that is defense related and the percentage of his work that is plaintiff related; and documentation indicating what monies in the past five years have been paid by defense attorneys to him for conducting medical exams. Dr. Gerson cross-moved for a protective order. The trial judge granted plaintiff's motion and denied Dr. Gerson's without explanation.

Dr. Gerson moved for reconsideration, arguing among other things that the trial judge overlooked an unpublished opinion in another matter, in which the appellate court rejected a plaintiff's claim to similar discovery from Dr. Gerson. In seeking reconsideration, Dr. Gerson also submitted his own certification in which he attempted to quantify the burdensome nature of full compliance with plaintiff's document request. Plaintiff's counsel responded with his own certification in which he argued that greater information to prove "positional bias" was necessary- despite Dr. Gerson's acknowledgement that he represented the interest of defendants in "well

over” ninety-five percent of the cases in which he is asked to provide an IME-because counsel apparently believed the percentage was even greater.

In reversing the trial court order, the appellate court found that contrary to what plaintiff argued and what the trial judge concluded, the pursuit of discovery from an expert is neither limitless nor may it continue unceasingly until the expert concedes positional bias. Instead, the court held that in the vast majority of cases, discovery should stop once the expert provides information that would permit the requesting party to argue to a factfinder that the expert is a “professional witness” or “hired gun” who mostly offers opinions that largely seek to vindicate a particular position.

The court did note that it was reluctant to provide a bright-line rule to be applied in all such matters. Each discovery request must inevitably turn on its own particular facts and circumstances. The court provided “...in ruling on similar discovery requests, trial judges must recognize that licensed professionals do not surrender their privacy rights when hired to render an expert opinion for monetary consideration.”

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