

December 1, 2010

**Season's Greetings and a Happy New Year to all of our clients and friends,
from Thomas Paschos & Associates, P.C.**

I. GENERAL LITIGATION

Court Holds Group Home Falls Within the Protection of the Charitable Immunity Act for Off Site Injury

The case *Komninos v. Bancroft Neurohealth, Inc.*, --- A.3d ---, 2010 WL 5058404 (N.J.Super.A.D. December 13, 2010), arises from the death of Stephen J. Komninos, a developmentally disabled young man, who died in October 2007 after he choked on a bagel. At the time of his death, Stephen was a resident of a community group home in Cherry Hill operated by defendant Bancroft Neurohealth, Inc. ("Bancroft"). All of the co-defendants who joined Bancroft in this appeal have either been employed by, or otherwise affiliated with, Bancroft.

The essential, undisputable facts are that Bancroft was responsible for Stephen's care, twenty-four hours a day, seven days a week, 365 days a year. Stephen's care plan specifically included "community" outings, such as making a retail purchase. Defendant Allibone, a Bancroft employee, was assigned to Stephen's care on October 4. Allibone and Stephen left Bancroft premises in a Bancroft van. Allibone drove to the 7-Eleven. Allibone purchased items at the 7-Eleven. Stephen choked on one of those items, while he was in the Bancroft van, in the presence of Bancroft employee Allibone.

Plaintiff's amended complaint principally alleged that each of the defendants acted in a "negligent and/or grossly negligent" manner that led to Stephen's death. As to defendant Allibone individually, the complaint alleged intentional conduct, in addition to negligent and/or grossly negligent acts or omissions. Plaintiffs also asserted causes of action for wrongful death and survival, among other things.

The motion that led to this appeal was filed on behalf of the Bancroft defendants, seeking partial summary judgment on the basis of charitable immunity under the Charitable Immunity Act. Returnable on the same day was a motion by the Bancroft defendants to dismiss the claims of punitive damages, which had been predicated on alleged wrongful conduct more severe than simple negligence. Plaintiffs opposed both motions, and the trial court heard extensive oral

argument. Upon considering the parties' contentions, the trial judge denied the motion for charitable immunity (and the motion to strike the punitive damages), both without prejudice.

The appeals court, viewing the totality of Bancroft's programmatic objectives, in tandem with its budget, was satisfied that Bancroft was entitled to the protections of a charitable organization under the Charitable Immunity Act. The court held that Bancroft's immunized status is established by its core educational purposes. "In combination, the educational and charitable elements of Bancroft's mission fortify one another in placing Bancroft within the zone of the Act's protection." Further, the court held that Stephen was a Bancroft beneficiary at the time that he was mortally injured as required to receive the protections of the Act. As such, the court overturned the trial court's denial of partial summary judgment respecting charitable immunity as to plaintiffs' claims of ordinary negligence. However, it remanded for further proceedings plaintiffs' claims alleging gross negligence and more severe wrongdoing, as such are not immunized under the Act.

II. EMPLOYMENT LAW

A Private Employer is not Prohibited from Refusing to Hire an Individual Because That Individual Has Claimed Bankruptcy

In *Rea v. Federated Investors*, --- F.3d ---, 2010 WL5094250 (3d Cir., Pa. December 15, 2010), Appellant Dean Rea filed a complaint in the United States District Court of the Western District of Pennsylvania alleging that Federated Investors violated 11 U.S.C. § 525(b) when it refused to hire Rea because he had previously declared bankruptcy. The District Court granted Federated's motion under Rule 12(b)(6) to dismiss for failure to state a claim, holding, in accordance with the majority of other courts to have addressed the issue, that § 525(b) does not create a cause of action against private employers who engage in discriminatory hiring.

By way of background, Rea filed for bankruptcy in 2002 and his debts were discharged in 2003. In 2009, Rea applied for employment with Federated through the placement firm Infinity Tech Services. Although it appeared after Federated interviewed him that Rea would be hired by Federated, Infinity later informed Rea that Federated had refused to hire him because of his bankruptcy.

The applicable law, Section 525 of the Bankruptcy Code, prohibits discrimination against an individual solely because he or she is or has been a debtor or bankrupt. Section 525(a) provides that the Government may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" any person that has been bankrupt. (emphasis added). Section 525(b) provides that "No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt.

Federated moved to dismiss Rea's action, arguing that § 525(b) does not prohibit a private employer from refusing to hire an individual because that individual has claimed bankruptcy. Rea asserted that the Court was required to read § 525(b) broadly to effect its remedial purpose, and that under that expansive reading, § 525(b) does include such a proscription.

Noting that there was a lack of binding precedent to inform its determination, the District Court employed basic principles of statutory construction to reach its conclusion. The court noted that unlike section 525(a), Congress omitted the language prohibiting a private employer from “deny[ing] employment to” a person that has been bankrupt in section 525(b). As such, the Third Circuit affirmed the District Court’s holding, in accordance with the majority of other courts to have addressed the issue, that § 525(b) does not create a cause of action against private employers who engage in discriminatory hiring.

EEOC Charge Must Specifically Identify Discrimination Being Alleged to Pursue Legal Action

In *Mozdzierz v. Accenture, LLP*, 2010 WL 4273323 (E.D.Pa. Oct. 29, 2010), Plaintiff was employed as a software programmer with Defendant Accenture. While employed by Defendant, Plaintiff developed severe back pain that precluded him from performing his duties without accommodations. Plaintiff went out on long-term disability in 2002. Sometime between 2002 and 2004, a dispute arose between Plaintiff and Defendant regarding whether Defendant was providing Plaintiff with reasonable accommodations for his disability. In February 2004, Plaintiff filed a charge with the Equal Employment Opportunity Commission (“EEOC”) alleging employment discrimination in violation of the ADA. Plaintiff and Defendant entered into a settlement agreement which provided that Plaintiff’s “employment with Accenture will cease at the end of 2004.

On December 9, 2004, Defendant sent a letter to its employees who had been on disability leave since September 1, 2002, informing them of a change in its policy regarding disability leave. As a result of an error, Plaintiff received this letter. The letter stated that instead of terminating Plaintiff on January 1, 2005, as Defendant's policies had previously indicated, Defendant had decided to allow employees who were on disability leave to retain their leave-of-absence status. When Defendant realized that it had sent this letter to Plaintiff, it sent another letter to Plaintiff explaining that his receipt of the December 9, 2004 letter was in error. The letter explained to Plaintiff that he would not be included in the policy change because in the settlement agreement with Accenture plaintiff relinquished his employment rights with Accenture after December 31, 2004. Defendant terminated Plaintiff's employment and canceled his medical benefits shortly thereafter.

Plaintiff filed a new charge with the EEOC on June 10, 2005, in which he checked the boxes on the form indicating discrimination based on “Retaliation” and “Other.” The EEOC subsequently issued Plaintiff a right-to-sue letter. Plaintiff filed a complaint against Defendant on September 19, 2006, and Defendant moved to dismiss.

Plaintiff alleged in Count I of the Amended Complaint that Defendant discriminated against him based on his disability in violation of Title I of the ADA. Defendant argued that Plaintiff's disability discrimination action must be dismissed because Plaintiff had not exhausted his administrative remedies. Plaintiff countered that his disability discrimination claim is within the scope of his previous EEOC charge and therefore it is not barred.

In the instant case, Plaintiff checked the "Retaliation" and "Other" boxes on his EEOC charge. He did not check the "Discrimination" box. In addition, Plaintiff does not allege in the EEOC charge that Defendant had discriminated against him because of his disability. Plaintiff argues that because he checked the "Other" box on the EEOC charge, "Plaintiff is entitled to the reasonable inference ... that 'other', in light of the apparent scope of the investigation, must mean something more than retaliation. Since disability discrimination is the only other relevant focus, it is reasonable to conclude that's exactly what was considered." The court held that Plaintiff cannot use the "Other" box on the EEOC charge to bootstrap his way into a discrimination cause of action. If Plaintiff wished to allege discrimination, he should have simply checked the "Discrimination" box. To hold otherwise would transform the "Other" box on EEOC charges into a litigation wildcard that could later be turned into any cause of action a plaintiff wishes to assert.

The court found that Plaintiff's failure to check the "Discrimination" box on his EEOC charge resulted in a lack of information in the charge that would have led the EEOC to investigate a possible discrimination claim. "The EEOC Determination makes no mention of a discrimination claim, and there is no basis to find that the EEOC should have investigated a discrimination claim on Plaintiff's behalf." The court held that Plaintiff's disability discrimination claim therefore was not "fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Accordingly, the court dismissed Count I of the Amended Complaint for failure to state a plausible claim for relief.

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