

February 1, 2011

I. EMPLOYMENT LAW

Third Circuit Reinstates Disability Benefits After Finding Termination of Benefits was Arbitrary and Capricious

In *Miller v. American Airlines, Inc.*, ___ F.3d ___, 2011 WL 208291 (3d. Cir. (Pa.) January 25, 2011), Plaintiff, Robert T. Miller, was employed as a commercial airline pilot for American Airlines for nearly ten years. In August 1998, Miller suffered a psychotic episode while on duty and was subsequently admitted to the hospital. He was prescribed various medications as part of his treatment regimen. Miller's FAA medical certification, required for all commercial pilots, was revoked.

Miller applied for long-term disability ("LTD") benefits under the American Airlines, Inc. Pilot Retirement Benefit Program Fixed Income Plan (the "Plan"), which was subject to ERISA. Miller began receiving treatment from a psychiatrist, Dr. Abel Gonzalez, in September 1998. Dr. Gonzalez diagnosed Miller as suffering from anxiety disorder and brief reactive psychosis. American awarded Miller LTD benefits in November 1999.

In May of 2003, American informed Miller that it could no longer substantiate his disability and terminated his benefits. Dr. Gonzalez subsequently submitted documentation which included notes stating that Miller remained asymptomatic, that he was not taking any medication, and that pursuant to FAA regulations he was still not able to work. After receiving this information, American determined that Miller "[m]edically qualifies for [the] disability pension program" and reinstated his LTD benefits.

Over the years, American periodically requested medical updates from Miller to document his disability. On October 16, 2006, Dr. Gonzalez provided four progress notes stating that Miller's diagnosis was the same, that he was doing well, that he was "in general asymptomatic with good mental stability," and that he was not taking any medication. On October 23, 2006, American sent Miller a letter notifying him that his LTD benefits were terminated because verification of his continued disability could not be established as required by the plan.

Upon receiving this letter, Miller contacted American and inquired as to why his benefits were terminated. In response, American referred him to the termination letter and did not provide any additional information. Miller appealed the decision. To support his claim, Miller submitted a letter from Dr. Gonzalez which stated that Miller has been continually and permanently disabled due to medical reasons. American referred the case to medical evaluators in order to further

evaluate the disagreement as to Miller's eligibility. The medical evaluators determined that Miller was not disabled. Based on this, American reaffirmed the termination decision.

Miller filed suit against American asserting that American impermissibly terminated his long-term disability benefits, and informed him of this action in a vague and misleading letter. He further alleged that American's review of his case failed to consider all of his relevant diagnoses, as well as the unique requirements of his employment as a pilot. The District Court granted American's Motion for Summary Judgment, ruling that American's termination decision was proper. On appeal, the court considered whether the administrative process that American employed complied with the procedural mandates of ERISA and, if not, whether the proper remedy is a remand to the plan administrator or a reinstatement of benefits.

American contended, at the outset, that there was "overwhelming evidence of the absence of a disability" that supported the termination of Miller's benefits, and that, as such, the court should not consider whether any procedural irregularities tainted their decision-making. American argued that because Gonzalez labeled Miller as asymptomatic, Miller had actually been erroneously awarded benefits in the past and this had gone unnoticed. The appeals court disagreed. The court found that the record revealed American exercised frequent oversight in Miller's case. American reviewed and relied on documentation from Dr. Gonzalez stating that Miller was asymptomatic and, on multiple occasions over several years, found that this description supported the payment of benefits. Yet, after receiving additional reports containing the same description, American terminated Miller's benefits. As such, the court found that the record did not contain "an abundance of evidence" of ineligibility such that it should ignore any procedural defects in the termination decision. The court then turned to the question of whether the termination of benefits was arbitrary and capricious.

The court reversed the decision of the District Court and held that the termination of Miller's benefits was arbitrary and capricious in light of the numerous substantive deficiencies and procedural irregularities that pervaded American's decision-making process. The deficiencies and procedural irregularities included the court's conclusions that American reversed its initial position that Miller was disabled and terminated his benefits without receiving supporting information that differed in any material way from the information upon which it previously relied, and that American considered Miller's failure to obtain his FAA medical certification when it was not required under the Plan. The court also found equally troubling American's noncompliance with ERISA's notice requirements under § 503, as well as American's failure to fully evaluate Miller's anxiety diagnosis and to reconcile the demanding job requirements of a commercial pilot with Miller's continuing anxiety and risk that he would experience a recurring psychotic episode. Finally, the court afforded slight weight to the fact that American operated under a conflict of interest in light of its incentive to deny benefits claims. The court further held that Miller was entitled to retroactive reinstatement of his disability benefits.

II. GENERAL LITIGATION

Plaintiff May Proceed with Punitive Damages Claim Despite Jury's Finding that Plaintiff Failed to Prove Common Law Tort of Intentional Infliction Of Emotional Distress

In *Rusak v. Ryan Automotive, L.L.C., et al.*, ___ A.3d ___, 2011 WL 382229 (N.J.Super.A.D. February 08, 2011), Plaintiff began working as a salesperson at Gearhart BMW in August 2001. She continued her employment after the dealership was acquired in 2003 by defendant, Ryan Automotive, L.L.C. (Ryan). The dealership became known as Denville BMW, and plaintiff, the only full-time female salesperson, consistently garnered awards for her work, including the "Ryan Pinnacle Award," recognizing "top sales performers" who also received near perfect scores on customer surveys. Plaintiff also typically ranked first or second in sales volume.

In April 2005, Ryan hired co-defendant Nilesh Kotecha as general manager of the dealership. Plaintiff alleged that Kotecha constantly made crude comments and used vulgarities towards her or in her presence. In addition, Kotecha would often subject plaintiff and another female employee to explicitly graphic stories. After one such incident in February 2006, Plaintiff left work and did not return. Plaintiff claimed that during that time she was under a doctor's care for anxiety attacks.

In February of 2007, plaintiff filed a complaint alleging three causes of action: a violation of the LAD in that she was discriminated against and harassed on the basis of her gender; retaliation in violation of the LAD; and the common law tort of intentional infliction of emotional distress. She sought compensatory damages for lost wages and emotional distress, as well as punitive damages and counsel fees.

At the close of plaintiff's case and at the end of the case, defense counsel moved to dismiss the claims for punitive damages under the LAD. The trial judge denied both motions. The jury found for plaintiff on her LAD claims and awarded her compensatory damages for back pay. It rejected, however, her claim for LAD emotional distress damages.

Because the court found it critical to the arguments raised on appeal, in the opinion it discussed at length the jury verdict sheet reviewed by the judge and the attorneys during the charge conference, as well as the jury's responses to the questions posed. The court focused on question six which asked, "Did the acts of the [d]efendants constitute such willful, wanton and reckless conduct that you find for [plaintiff] on the legal theory of intentional infliction of emotional distress as defined by the Court?" The jury answered in the negative. The jury also answered "No" to question seven, which asked, "Should [p]laintiff ... be awarded damages to compensate for her emotional pain and mental anguish?"

After receipt of the verdict, the judge dismissed the jury. Plaintiff objected, arguing that the punitive damages phase should commence. The judge disagreed, concluding that the jury's answer to the above-cited interrogatories, and its rejection of plaintiff's LAD emotional distress claim, meant that the jury found that defendants' conduct did not support an award under the Punitive Damages Act ("PDA").

Plaintiff moved for reconsideration of the dismissal of her punitive damage claim. The judge denied plaintiff's motion. Final judgment incorporating the award of counsel fees was entered, and the appeal followed.

The Appellate Court found that the trial judge erred in interpreting the jury's negative answer to question six as the equivalent of a factual finding under the PDA with respect to defendants' state of mind. The court provided:

The common law tort has four elements, one of which is that plaintiff prove she suffered emotional distress. The issue of whether plaintiff suffered emotional distress was hotly contested at trial. Indeed, defendants argued that other events in plaintiff's life caused whatever stress she experienced. It is reasonable to deduce that the jury answered question six in the negative because it concluded plaintiff did not suffer emotional distress as a result of defendants' discriminatory conduct. The reasonableness of that conclusion comports with the jury's answer to question seven, i.e., that plaintiff should not receive any award for emotional pain and mental anguish damages. In short, the jury's answer to question six cannot be interpreted as a factual finding that defendants did not act with the requisite mental state to support an award under the PDA.

As a result, the court reversed the order denying reconsideration of the refusal to submit plaintiff's claim for punitive damages to the jury and remanded for a trial limited to that claim.

Law Firm Not Disqualified for Representation of Both Plaintiff and Defendant in Different Capacities in Same Matter

In *Twenty-First Century Rail Corp. v. New Jersey Transit Corp.*, ___A.3d. ____, 2011 WL 320782 (N.J. App. Div. Feb. 3, 2011) plaintiffs, Twenty-First Century Rail Corporation (21st Century) and Frontier-Kemper/Shea/BEMO Joint Venture (FKSB) filed a complaint seeking contract and tort remedies against defendants related to the construction of a light rail line known as the N30 Project.

The law firm of Peckar & Abramson, P.C. (P & A) represented one of the defendants in this action. However, in 2004 P&A provided limited advice to the plaintiff regarding the planning and construction contracts for the same light rail line. An invoice dated March 31, 2004, revealed that P&A lawyers, Bruce Meller and Charles Kenny Jr., met with Richard Raab, president of FK Constructors, on March 8, 2004, and reviewed contractual provisions, engaged in legal research, conducted a handful of telephone conversations with Raab and another representative of FK Constructors, and prepared a report letter. The culmination of P&A's retention was a four-page letter authored by Kenny (the Kenny letter).

More than a year passed before P&A became involved in the N30 project again. In 2005, Meller received a telephone call from Paul Killian of Akin, Gump, Strauss, Hauer & Feld (Akin Gump). The certifications of Meller and Killian as to the circumstances of their 2005 encounter diverged on one significant aspect: whether there was a discussion about P&A's 2004 representation of FKSB. During a document review conducted in 2010, Mark Groff of Akin Gump found the 2004

Kenny letter and P&A's retainer agreement among FKSB's files. After P&A refused Akin Gump's demand for withdrawal, FKSB filed a motion to disqualify. The trial court denied the motion. This appeal followed.

The Appellate Division affirmed the trial court's denial of the plaintiff's motion to disqualify P&A. The court provided that in cases of successive representation an attorney may be disqualified pursuant to New Jersey Rule of Professional Conduct 1.9(a) if: (1) the moving party is a former client of the adverse party's attorney; (2) there is a substantial relationship between the subject matter of the attorney's prior representation of the moving party and the issues in the present lawsuit; and (3) the interests of the attorney's current client are materially adverse to the moving party. The Court analyzed the applicability of the case *City of Atlantic City v. Trupos*, 992 A.2d 762 (N.J. 2010), the leading case on Rule 1.9 in New Jersey and held that the plaintiff failed to make any showing that the advice rendered in 2004 was substantially related to the disputes that are the subject of this case, or that P&A learned anything in the earlier representation that would be relevant in this case.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

© Thomas Paschos & Associates, P.C. (2011) All Rights Reserved.