

May 1, 2011

I. EMPLOYMENT LAW

Court Must Apply Proper Burden Shifting Framework When Deciding Motion for Summary Judgment in Title VII Case

In *Andes v. New Jersey University City*, 2011 WL 1053619 (3d Cir. N.J. March 24, 2011), Dr. Andes, an Assistant Professor at New Jersey City University applied for the position of Dean of Graduate Studies and Continuing Education at NJCU. In April 2003, NJCU informed Dr. Andes that the search for the dean position was being discontinued due to NJCU's financial difficulties. However, in August 2003, a different individual was promoted to the deanship; Dr. Andes was never interviewed or considered for the position. In February 2004, Dr. Andes filed a charge of discrimination against NJCU with the Equal Employment Opportunity Commission ("EEOC"), asserting claims of discrimination on account of his race (Asian) and national origin (Filipino) based on NJCU's failure to promote him to Acting Dean at NJCU. The EEOC issued a Notice of Dismissal and Right to Sue letter in January 2005.

In February 2005, Dr. Andes applied for another promotion, this time to Full Professor. NJCU promoted three of Dr. Andes's colleagues in April 2006 instead; Dr. Andes alleged that at least two of NJCU's seven Promotions Committee members were never presented with and/or reviewed his application materials. Dr. Andes filed a second charge with the EEOC in July 2006, alleging that the failure to promote him to Full Professor was based on his race and/or national origin, and was in retaliation for his prior discrimination complaints. The EEOC issued a Notice of Dismissal and Right to Sue letter regarding this second charge in August 2007, which served as the predicate for the instant suit filed in November 2007.

The District Court granted NJCU's motion for summary judgment and dismissed Dr. Andes's claims, holding that while Dr. Andes established a prima facie case of discrimination, he failed to rebut as pretextual NJCU's proffered reasons for not promoting him. Dr. Andes appealed.

The Third Circuit Court agreed with the District Court that plaintiff satisfied the first two prongs of the burden shifting analysis. First, the Court agreed that plaintiff established a prima facie case by alleging that three similarly situated colleagues who were not Asian or Filipino were promoted, and that at least one of those colleagues did not hold a degree as advanced as Dr. Andes's own. Second, the Court held that NJCU reasonably rebutted plaintiff's prima facie case with the submission that Dr. Andes was not promoted because he did not meet all the requirements of NJCU's promotion guidelines and/or because his colleagues who were promoted were in fact more qualified than Dr. Andes.

However, the Third Circuit Court disagreed with the District Court's holding that the plaintiff had failed to show that the university's rationale was pretextual. The Court noted that to survive summary judgment, the plaintiff need only raise doubt as to the legitimacy of the defendant's proffered reason for its adverse action; it need not prove its discrimination case. However, here, the District Court based its decision in part on Dr. Andes's failure to proffer "affirmative" evidence suggesting that illegal discrimination was a motivating factor in NJCU's decision. Such "affirmative" evidence is not required at summary judgment.

The Court noted that at summary judgment, the non-moving party must demonstrate weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence. And, the court must view these implausibilities, inconsistencies, incoherencies and contradictions, however weak, in the light most favorable to the non-moving party. In this instance, the District Court did not do so. As such, the Court held that it could not determine whether any genuine issues of material fact exist as to Dr. Andes's discrimination claims without applying the proper legal standard. Therefore, the Third Circuit Court remanded so that the District Court may assess whether Dr. Andes pointed to sufficient evidence to create an issue of fact as to the pretextual nature of NJCU's reasons for failing to promote Dr. Andes, or to other circumstantial evidence from which a jury could have inferred discriminatory intent.

II. INSURANCE COVERAGE LITIGATION

Counsel Provided By Insurer Does Not Create an Inherent Conflict of Interest

In *Eckman v. Erie Ins. Exchange*, --- A.3d ----, 2011 WL 1535267 (Pa.Super. April 25, 2011), Appellant, Colleen Eckman was sued by Solid Waste Services, Inc. d/b/a/ J.P. Mascaro & Sons for one count of defamation (libel per se), alleging willful, malicious and false statements purportedly made during a local election campaign (the Mascaro litigation).

A representative of Erie Insurance, Appellee, acknowledged receipt of the complaint by letter to Appellants. The letter committed to providing a defense with a lawyer chosen by Appellee if an insured was sued for a covered personal injury. However, noting policy exclusions for intentional acts and punitive or exemplary damages, the letter included a reservation of rights, and concluded by advising Appellants of their right to retain an attorney at their own expense to represent their interests.

Appellants then retained the law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin, which notified Appellee of its representation by letter. Claiming a conflict of interest in any counsel retained by Appellee, the firm requested permission to defend Mrs. Eckman in the Mascaro litigation, "with legal services paid for by Erie." Appellee rejected the request, but engaged the law firm of McCormick & Priore to represent Mrs. Eckman.

Appellants filed a complaint for declaratory judgment and a motion for preliminary injunction against Appellee, asking the trial court to order Appellee to provide Mrs. Eckman with counsel of her choice at Appellee's expense to defend her in the Mascaro litigation. After a hearing the trial court denied the motion, concluding that Appellants failed to establish the prerequisites for injunctive relief. Appellants appealed.

On appeal, Appellants argue their position is supported by Pennsylvania Rule of Professional Conduct 1.7, conflict of interest, which provides in pertinent part that:

[a] **concurrent** conflict of interest exists if:

* * *

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Pa.R.P.C. 1.7 (a)(2). However, the Court found that the Appellants offered no evidence of a breach of ethical obligations by Appellants' designated counsel. Rather, they suggested that any attorney selected by Appellee to represent insureds under a reservation of rights has a conflict, suggesting, without foundation, that any or all attorneys paid by an insurer would breach their ethical obligations to the insured/client, by methods not specified, to frame claims as excluded from coverage. The Court disagreed and held that Appellants claim that their right to relief is clear is contradicted by controlling law and does not merit relief. Appellants' position on the necessity of post-trial motions centered on the particular procedural posture of the case. They asserted that the "proceeding on remand" did not permit, much less require, post-trial motions. Appellants did not dispute that this matter, as a whole, obviously included a trial, however, they focused on the events following remand, insisting that those proceedings did not "constitute a trial" for the purposes of Rule 227.1, thus post-trial motions were unnecessary. In support of their argument, appellants asserted that following remand, no new evidence was introduced (other than an accounting of costs, attorneys' fees and interest), therefore, the decision Appellants challenged was based solely on legal arguments and the factual record developed prior to the first appeal. Appellants further argued that "proceedings that do not involve the introduction of evidence do not count as trials for purposes of triggering the post-trial motion requirement."

Appellants also claimed that without injunctive relief irreparable harm will result. Appellants asserted that irreparable harm to a client is inherent in a conflict of interest situation. The Court found that this argument consisted of nothing more than a variation on the earlier unsupported speculation that selected counsel would engage in "subtle, behind the scenes" improper conduct to establish that Mrs. Eckman's alleged actions were excluded from coverage under the policy. As such, the Court found Appellants failed to develop their argument that irreparable harm is "inherent" and held that Appellant's second argument would not merit relief.

Based on the above, the Pennsylvania Superior Court held that Appellants failed to show that they were entitled to a preliminary injunction.

III. GENERAL LITIGATION

Truthfulness is a Defense to a Claim for Tortious Interference with Contractual Relationship

In *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, --- A.3d ---, 2011 WL 1817129 (Pa. May 13, 2011), plaintiff, Walnut Street Associates (WSA), provided insurance brokerage services to employers for health insurance benefits for employees. WSA was the broker for health insurance provided to employees of Procacci Brothers Sales Corporation (Procacci). Procacci also hired Brokerage Concepts, Inc. (BCI) to act as a third party administrator of the self-funded employee benefit program. BCI in turn paid commissions to WSA based on premiums paid by Procacci.

In 2005, Procacci advised BCI it would be terminating its contract with BCI due to high costs and that it would be moving its business to another third-party administrator. Shortly thereafter, BCI's employee Kimberly Macrone wrote a letter to Procacci asking it to reconsider its decision, and in the process advising Procacci of the amount of compensation WSA had been receiving as broker of record. The amount was apparently higher than Procacci believed WSA had been earning, but there was no dispute that Macrone's statements about WSA's compensation were true. As a result of Macrone's letter, Procacci terminated its longstanding contractual relationship with WSA.

WSA filed an action against BCI for tortious interference with contractual relations by disclosing the amount of WSA's compensation. In its answer and new matter, BCI alleged that it could not be held liable for tortious interference because the information it provided to Procacci was truthful, or otherwise justified and privileged, and not confidential. The parties went to trial on the tortious interference claim.

BCI requested a jury instruction on truthfulness as a defense pursuant to Section 772(a), but the court denied it. Instead, the court's instruction on tortious interference tracked two other Restatement provisions, Restatement (Second) of Torts §§ 766 and 767. The jury found that BCI had intentionally and improperly interfered with the WSA/Procacci contract, caused Procacci to terminate that contract, and awarded WSA \$330,000 in damages.

On appeal, the Pennsylvania Superior Court reversed, holding that Macrone's truthful statements to Procacci regarding WSA's compensation could not support a claim for tortious interference with contractual relations. The court relied on Restatement Section 772(a), which provides that one who intentionally causes a third person not to perform a contract with another does not interfere improperly with the other's contractual relation by giving the third person truthful information. Because Macrone's statements to Procacci about WSA's compensation were true, the court held as a matter of law that BCI's interference with the WSA/Procacci contract was not actionable as tortious interference.

The Pennsylvania Supreme Court granted allocatur in part to determine whether the Pennsylvania Superior Court erred in adopting and applying Restatement (Second) of Torts § 772(a), and holding that truthful statements could not form the basis of a claim for tortious interference with contractual relations. The Court found that WSA's suggestion that the Superior Court lacked the authority to apply Section 772(a) simply because the provision had not yet been explicitly adopted by this Court is mistaken. The Pennsylvania Supreme Court held "[t]here is nothing improper in [the intermediate appellate] courts deciding new or close issues, consistently with their duty to master, and act consistently with, this Court's teachings." As such, the Court affirmed the Pennsylvania Superior Court decision holding that BCI's truthful statements to Procacci were not actionable in this claim for tortious interference.

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