THE PASCHOS LAW UPDATE NEWSLETTER
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I. EMPLOYMENT LAW

Employer Must Show Economic Injury to Successfully Invoke Key Employee Exception Under the Family and Medical Leave Act

In *Johnson v. Resources for Human Development, Inc.*, --- F.Supp.2d ---, 2011 WL 1838877 (E.D.Pa. May 16, 2011), Plaintiff Angie Johnson filed an action against her former employer, Resources for Human Development, Inc. (RHD), and its Executive Director, Robert Fishman (Fishman). Johnson claimed that Defendants terminated her in retaliation for her engaging in an activity protected by the state whistleblower law and that Defendants violated her federal rights under the Family and Medical Leave Act ("FMLA").

Plaintiff was the director of RHD's Adolescent Career and Employment Services ("ACES") program. ACES provided training for at-risk youth on how to find, secure, and retain employment. In July of 2004, plaintiff learned of an inappropriate relationship between an RDH employee and a participant in the ACES program. Plaintiff reported this to her then supervisor. In a meeting arranged to discuss the matter, RHD's Executive Director, Robert Fishman, insisted that the relationship was between two consenting adults. Plaintiff never reported the allegedly improper relationship to other authorities and the issue was never discussed further with plaintiff.

In December 2008, RHD's Executive Director had a meeting with plaintiff and her supervisors. Plaintiff was confronted about why she was absent from work on a particular day in November 2008. Johnson said that she was at a doctor's office. Fishman suspected that Johnson was lying. Fishman told her to provide the doctor's name and phone number so that her visit could be verified, and he warned her that if she did not do so by the end of the day he would issue an instruction to others to dismiss her. Johnson failed to provide Fishman with the information by the end of the day.

Later that same day, Plaintiff visited a medical provider due to anxiety. The next morning, Johnson called her supervisors and Fishman to inform them that she would be out from work sick. That day, Human Resources approved her for FMLA leave. One of the FMLA forms she was given stated that her current position fell within the FMLA definition of a "key employee" and "[a]ccordingly, if it is determined that there is a need to replace your functions during your absence, RHD is permitted to do so under FMLA. In January 2009, RHD hired someone to fill Johnson's position permanently as the director of ACES.

In February 2009, Johnson visited RHD to inform them that she was cleared to return to work a week early. Plaintiff was informed that she had been terminated. She was given a letter stating that because she was a key employee, RHD did not hold her position open for her and she had been replaced. The letter further stated that "RHD has chosen to declare you ineligible for rehire within the company" due to "behavioral issues in the months and days preceding your disability leave."

Plaintiff asserted three causes of action against Defendants: (a) a retaliatory discharge claim under the Pennsylvania Whistleblower Law, (b) a common law wrongful discharge claim under the Pennsylvania Child Protective Services Law and Whistleblower Law, and (c) a Family Medical Leave Act ("FMLA") claim. Defendants moved for summary judgment on all claims. The court granted summary judgment on the claims under the Whistleblower Law and under the Child Protective Services Law.

The court denied Defendant's Motion for Summary Judgment on the claim that Plaintiff's termination violated FMLA. Defendants argued that Johnson's interference claim failed because she was not entitled to restoration due to the "key employee" exemption. The exemption allows employers to deny restoration if they show two elements: that the employee was key and that restoration would cause substantial and grievous economic injury.

The court found that there was no genuine issue of disputed fact with regard to whether Johnson was a key employee. However, the court held that Defendants failed to cite to anything to show that RHD believed it would have been economically injured by restoring Johnson to an equivalent position as FMLA requires. As such, the court held that Defendant failed to show that Johnson's termination was exempted under the key employee exemption.

Defendants also argued that Plaintiff would have lost her job even if she had not taken FMLA leave. The court held that a material fact existed as to whether Defendants would have discharged Plaintiff if not for her request for FMLA leave. Therefore, summary judgment was denied.

II. PROFESSIONAL LIABILITY

Attorney Who Loses Client to Another Attorney May Not Maintain an Action for Tortious Interference with Contract Unless Wrongful Means Were Used to Induce the Client.

In *Nostrame v. Santiago*, --- A.3d ----, 2011 WL 2297726 (N.J.Super.A.D., June 10, 2011), Plaintiff Frank Nostrame, a New Jersey attorney, was retained by defendant Natividad Santiago to represent her in connection with a proposed medical malpractice action, under a contingent fee agreement. Plaintiff performed certain preliminary work, and filed a complaint.

Santiago then entered into a contingent fee retainer agreement with defendant Mazie, Slater, Katz and Freeman, LLC (Mazie Slater), a New Jersey law firm, to represent her in the medical

malpractice action. On the same day, Santiago sent a letter to plaintiff discharging him as her attorney and directing him to turn over his file to Mazie Slater. Mazie Slater settled the claim on her behalf for a total of $1,200,000. Under Mazie Slater's contingent fee agreement with Santiago, this settlement resulted in an attorney's fee of $358,396.31.

Plaintiff asserted a lien of $11,623.75 on that fee for the legal work he performed in connection with Santiago's malpractice action. The trial court determined that plaintiff was entitled to the full amount of his lien. Mazie Slater paid plaintiff that amount. Plaintiff also brought a tortious interference with contract action against Mazie Slater. Plaintiff's complaint alleged in pertinent part that "Natividad Santiago was induced to discharge plaintiff and dissolve the contingent fee contract between them by [Mazie Slater]." The complaint named not only Mazie Slater but also Santiago, her daughter Betsy Santiago, and fictitious John Does as defendants. Shortly after the filing of this complaint, Mazie Slater filed a motion to dismiss on its own behalf and on behalf of Natividad and Betsy Santiago. The trial court denied defendants' motion to dismiss and defendants appealed.

The court analyzed the case under Restatement § 768(1) which governs tortious interference with contract by a competitor seeking to pursue its own economic interests by encouraging a prospective customer to discontinue a terminable at will contract with another party. The court held no tortious interference under the four-factor test set out in Restatement § 768(1), finding the relation concerned a matter involved in the competition between Mazie Slater and Nostrame; Mazie Slater was not alleged to employ wrongful means; Mazie Slater's action did not create or continue an unlawful restraint of trade and Mazie Slater's purpose was in part to advance the firm's interest in competing with Nostrame.

The court further held that whatever interest plaintiff may have had in maintaining his contract with Santiago was outweighed by her interest in exercising her right to select counsel of her own choosing, including her right to discharge plaintiff, and to retain new counsel who she believed could better represent her in the medical malpractice action.

Plaintiff also argued that even though his complaint did not allege that Mazie Slater used any "wrongful means" to induce Santiago to discharge him and retain Mazie Slater, he should be allowed to conduct discovery to determine whether such wrongful means may have been used. The court rejected this argument holding that a plaintiff cannot simply assert that "any essential facts that the court may find lacking can be dredged up in discovery."

III. INSURANCE COVERAGE

Right to Trial By Jury Attaches To a *Rova Farms* Bad Faith Claim

In *Wood v. New Jersey Mfrs. Ins. Co.*, --- A.3d ----, 2011 WL 2314954 (N.J. June 14,2011) Plaintiff, Karen Wood, a U.S. Postal Service employee was injured when she was attacked by a dog on her mail route. The dog was owned by John Critelli and kept by his grandmother,

Alfonzia Caruso. Caruso was insured by New Jersey Manufacturers Insurance Company ("NJM"), with a policy limit of $500,000. At a non-binding arbitration, the court-appointed arbitrator valued the case at $600,000. NJM rejected the award and demanded a trial. Prior to trial, the counsel assigned by defendant to represent Caruso and Critelli recommended that defendant authorize him to settle the case for the full $500,000 limit of the policy.

NJM believed that the case could be successfully defended and the liability kept below the policy limits. NJM authorized an offer of $300,000, which Wood's attorney rejected. Wood's attorney then sent a *Rova Farms* letter, stating that Wood was willing to settle the case at or below NJM's $500,000 limit, and if Wood obtained a verdict exceeding the limit, Wood would look to NJM to pay any excess amount. Wood placed defendant on notice that, in her view, the $300,000 settlement offer had been made in bad faith.

The jury found Caruso 51% negligent, and a final judgment was entered against Caruso for $1,408,320.33. NJM paid the full amount of the $500,000 policy to Wood in partial satisfaction of the judgment.

Because there was a deficiency between the judgment returned against defendant's insureds Caruso and Critelli and the sum in fact paid on their behalf by defendant, plaintiff negotiated and entered into an assignment of Caruso's *Rova Farms* claim against defendant. Plaintiff commenced a declaratory judgment action alleging that defendant in bad faith had failed to settle plaintiff's underlying claim within the policy limits, thereby wrongfully exposing defendant's insureds—of whom she was an assignee—to any excess. In that declaratory judgment action, plaintiff therefore sought to hold defendant liable for the entire judgment entered against defendant's insureds. Plaintiff filed for summary judgment.

The trial court explained that under *Rova Farms*, an insurer has an affirmative duty to explore settlement possibilities. It has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage. It must do this in good faith which ... requires it to consider the interests of the insured as well as its own. The court found that there was no indication that defendant took any initiative to settle the case after the first and only offer. The court entered summary judgment in plaintiff's favor and against defendant in the amount of $965,838.53, representing the excess of the judgment plaintiff had secured above the $500,000 policy limits previously paid by defendant.

On appeal, the appellate division held that there were genuine fact-sensitive determinations that needed to be made about the reasonableness of defendant's handling of settlement negotiations in the underlying tort action. The panel was confronted with the question of "who the appropriate factfinder will be." It explained that no "reported cases in New Jersey have clarified whether bad faith claims in this context should be heard by a judge or by a jury." However, "[g]iven the absence of full briefing on the issue, and the respective tactical judgments that both parties presumably would want to undertake after their receipt and review of this opinion," the Appellate Division demurred, electing to "leave it to the trial court on remand to resolve any dispute over whether the factfinder in the remand proceeding should be a jury or the court."

Plaintiff sought certification, which was granted but “limited to the issue of whether an insured's claims of bad faith against its insurer under *Rova Farms* are to be decided by a judge or jury.” The Supreme Court held that “[f]undamentally, and regardless of how it is couched or what label is affixed to it, a *Rova Farms* bad faith claim is and always has been a breach of contract claim, and it is beyond question that a breach of contract claim was at common law and remains today an action triable to a jury.”

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