

May 1, 2012

I. EMPLOYMENT LAW

Doctrine of Equitable Tolling and the Doctrine of Substantial Compliance Tolls the Limitations Period on Claim Under the Conscientious Employee Protection Act Where Claim is Pursued After an Unfavorable Choice of Law Determination in Another Jurisdiction

In *Schmidt v. Celgene*, ___ A.3d ___, 2012 WL 1605157 (N.J.Super. May 9, 2012), Plaintiff David Schmidt was an employee of Celgene, a Delaware corporation with headquarters in New Jersey and no offices in Texas. Schmidt worked and lived in Texas since 2000, but his supervisors during that period were in New Jersey. As a national account manager, Schmidt dealt with distributors of pharmaceuticals, including Caremark. In May 2007, two of Caremark's senior officers complained to Schmidt's supervisors describing Schmidt as aggressive, negative, argumentative, and noting that Schmidt failed to communicate about anything other than his complaints. Representatives of other account holders also complained about Schmidt's inaccessibility and a regional sales director for Celgene reported that three-quarters of his managers objected to working with Schmidt.

On December 20, 2007, Schmidt was relieved of all duties and responsibilities. Thereafter, Schmidt retained his title, salary and benefits but received no cash bonuses or stock options. On May 14, 2008, employees of Celgene's human resources section met with Schmidt in Texas and advised him that he was laid-off as part of a reduction in force. According to Celgene's records, Schmidt was terminated effective June 30, 2008.

During the May 14, 2008 meeting, Schmidt delivered a copy of a complaint he filed with a Texas district court that day. In that complaint, Schmidt named Celgene, Caremark and individual employees of both corporations as defendants. He charged Celgene, but not Caremark, with violation of CEPA and breach of contract and his supervisor and Celgene with slander and disparagement. He charged Caremark and two of its employees with slander and disparagement and interference with his employment relationship.

Celgene filed its answer to the Texas complaint and asserted that under Texas choice of law principles, Texas law, not New Jersey law, applied. The Texas court ultimately held that "Texas law applies to Plaintiff's claims against Celgene; New Jersey CEPA law is not applicable to the claims made by Plaintiff against Celgene." The court order directed Schmidt to file an amended pleading within twenty days. Schmidt complied and filed an amended complaint excluding the CEPA count on March 22, 2010. Schmidt did not seek interlocutory review of the Texas court's order on choice of law.

Two months after Schmidt amended his Texas complaint to exclude the CEPA count and to rely upon an allegation that Celgene breached the promise not to retaliate made in its handbook, Schmidt commenced

this litigation in New Jersey. On May 14, 2010, 178 days after the initial Texas order declaring the applicability of Texas law and seventy-three days after the subsequent confirming order, Schmidt filed a New Jersey complaint charging not only Celgene, but also Caremark, with a violation of CEPA based on Celgene's retaliation and Caremark's participation in it. While the Texas case was still proceeding, the New Jersey trial court granted defendants' motions to dismiss Plaintiff's Complaint.

Plaintiff appealed. Although the trial court dismissed Schmidt's New Jersey CEPA complaint on several alternative bases, the appeals court found that Schmidt's ability to proceed on a CEPA claim filed after the one-year limitation period was the threshold consideration. Because Schmidt timely alleged a CEPA violation by Celgene in the Texas action, the court considered whether the doctrines of substantial compliance or equitable tolling permit him to proceed with this untimely claim in New Jersey. The court found that the primary reason for Schmidt's delay was attributable to his initial selection of the Texas forum and his subsequent decision to pursue a remedy for a CEPA violation in New Jersey after an unfavorable choice of law determination by the court in Texas. As such, the court concluded that the doctrines of substantial compliance and equitable tolling did not permit him to proceed in New Jersey. Accordingly, the court affirmed the trial court's dismissal of plaintiff's complaint.

II. INSURANCE LAW

An Endorsement To an Insurance Policy Restricts the Coverage Provided By the Basic Policy, the Endorsement Is Generally Controlling

In *Gabriele v. Lyndhurst Residential Community, L.L.C.*, --- A.3d ----, 2012 WL 1758138 (N.J. Super. A.D. May 18, 2012), Defendant Lyndhurst Residential Community entered into a contract with defendant Daibes Brothers to be the construction manager to construct a building called Riverside Plaza Development. Lyndhurst also entered into a contract with defendant Bravante Automatic Sprinkler to perform sprinkler work. This contract obligated Bravante to name Lyndhurst and Daibes as additional insureds under its comprehensive general liability policy, which had been issued by third-party defendant International Insurance of Hanover (Hanover). Bravante obtained an endorsement to its policy providing such additional insured coverage.

On August 3, 2005, Salvatore Gabriele, Bravante's sprinkler foreman, was killed when a pallet fell off the sixth floor of the building striking him in the head. The administrator of Gabriele's estate brought a survivorship and wrongful death action against Lyndhurst, Daibes and various other contractors on the job site. Lyndhurst and Daibes sought coverage from Hanover as additional insureds under the Bravante policy. Hanover disclaimed coverage pursuant to two exclusions in its policy.

Daibes filed a third-party complaint against Hanover seeking a declaration that Hanover was obligated to provide a defense and indemnity for any judgment that might be entered in the Gabriele action. This third-party complaint was brought before the trial court for decision by cross-motions for summary judgment. The court concluded in a written decision that neither of the two exclusions relied upon by Hanover applied to the Gabriele claim against Daibes and therefore declared that Hanover was obligated to provide Daibes coverage in the underlying action.

During trial, the claim against Daibes was settled for the \$1 million liability limit of the Hanover policy,

with Hanover reserving its right to appeal the declaration of its obligation to provide Daibes with coverage.

On appeal, Hanover argued that coverage for Daibes under the policy was precluded by exclusions both for a claim for personal injury to “an employee of any insured” and for any liability for personal injury that does not arise solely out of the named insured Bravante's work.

The “CVX Endorsement” to the Hanover insurance policy contained a general employee exclusion from insurance coverage for personal injury to an employee of "any insured" arising out of or in the course of, or as a consequence of, employment by any insured, excludes coverage to an additional insured for personal injury or death of an employee of the named insured.

The court held that when an endorsement to an insurance policy restricts the coverage provided by the basic policy, the endorsement is generally controlling. This conclusion, the court noted, is supported by the general principles of insurance law. Applying this principle, the court was satisfied that the CVX endorsement excluding coverage to Daibes for the Gabriele accident reflects the intention of the Hanover policy. The court concluded that since the first exclusions precluded coverage to Daibes for the Gabriele action, there was no need to consider the second of the exclusions.

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