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November, 2012

I. GENERAL LITIGATION

The Scope Of Duty Owed By A General Contractor Does Not Encompass The Manner And Means Of Using Equipment Selected, Supplied And Controlled By The Subcontractor.

In *Tarabokia v. Structure Tone*, --- A.3d ---, 2012 WL 5627434, N.J.Super.A.D., November 16, 2012 (NO. A-3822-11T2), Plaintiff Raymond Tarabokia appealed from an order entered by the Law Division granting a motion by defendant Structure Tone for summary judgment and dismissing Tarabokia's complaint.

In 2008, Tarabokia was acting as an employee of Hatzel & Buehler (H&B), an independent electrical subcontractor hired by general contractor Structure Tone to install wiring and lighting fixtures at an office building construction site. However, there was no written contract between Structure Tone and H&B, but rather, just a series of work orders.

Tarabokia was assigned to set anchors in a concrete ceiling supported by steel beams. H&B's foreman directed Tarabokia as to where to set the anchors, and also provided him with the DX351 powder-actuated the anchoring tool to be used for this task, which tool would recoil when fired. H&B also provided Tarabokia with an extension pole, which allowed him to remain at ground level while utilizing the DX351, and further allowed him to maximize his productivity. H&B further provided Tarabokia with training on the equipment, through the manufacturer and required Tarabokia to attend weekly safety meetings.

As a result of his work with the DX351 over the course of several weeks, Tarabokia alleged to have suffered permanent injuries to both arms. Tarabokia brought suit against Structure Tone, alleging negligence. Structure Tone filed a motion for summary judgment, which motion was granted by the Law Division, and the Complaint was dismissed. The main issues raised on appeal of that order were whether a general or prime contractor has a duty to assure the safety of an employee of the subcontractor, and whether the scope of such a duty would encompass the manner and means of using equipment supplied by the subcontractor at the work site.

The Appellate Division affirmed the Law Division's holding. In so holding, the Appellate Division noted that Structure had no special or direct contractual relationship with H&B, but rather, had only a series of work orders which did not address worker safety concerns. Further, the site-specific safety management plan expressly placed on the subcontractors responsibility for ensuring the safety of the subcontractors' employees. The Appellate Division further noted that Structure Tone did have knowledge as to the tool being utilized by Tarabokia, that he was not handling the DX351 properly for extended periods of time, or that such extended use or mis-use could result in such an injury. Finally, the Appellate Division noted that Structure Tone had not caused or contributed to the dangerous condition.

II. EMPLOYMENT LAW

Third Circuit Affirms Dismissal Of Female Fire Inspectors' Gender Discrimination Lawsuit

In *Kimber-Anderson v. City of Newark*, 2012 WL 5278679 (3d Cir. (N.J.) October 26,

2012), appellants were Fire Prevention Specialists ("FPS") who worked for the City of Newark. In New Jersey, an FPS generally takes specific coursework and passes a state-administered examination to become certified. State law requires that, to have authority to approve the results of the inspection of certain larger buildings an FPS must be certified. Prior to being hired, Appellants, all of whom are women, obtained the requisite state certification. Several years after Appellants were hired by the City, several additional FPS hires were made. Those new employees were men and did not obtain state certification prior to being hired.

Believing that the men who had been hired were favored over Appellants in a number of ways because of their gender, Appellants brought the present lawsuit in the District Court, claiming that the City engaged in gender-based discrimination in violation of state and federal law. The state law claims were brought under the New Jersey Law Against Discrimination ("NJLAD"), for disparate treatment and hostile work environment. The City moved for summary judgment on each of Appellants' claims and the District Court granted that motion. Appellants filed a timely appeal.

Appellants argued that the District Court erred in dismissing their claims because the facts support those claims. Among other things, the Appellants claimed that the male employees were hired by corrupt processes, were not qualified for their positions, and continued to be retained despite their failure to obtain certification in a timely fashion. They also contended that, while the City paid for the male employees' certification coursework, those expenses were not covered for Appellants.

The court found that Appellants were unable to meet the prima facie case under the NJLAD threshold because they could not demonstrate that they suffered an adverse employment action that others outside of their protected class did not suffer. Appellants complained that their coursework was not paid for, but the undisputed facts demonstrated that the City had a uniform policy of covering coursework for current employees only. Further, two of the Appellants conceded that coursework they took during their employment was paid for by the City. That the City would not pay for coursework taken by an individual prior to being hired does not constitute gender discrimination. As such, the Third Circuit affirmed the District Court holding.

Employer Memorandum Identifying an Employee's Wage Claim May Constitute a Violation of CEPA

In *Flecker v. Statue Cruises, LLC*, 2012 WL 5499894 (N.J. Super. A.D. November 14, 2012), unpublished, Plaintiff was employed as a deckhand by Statue, which provides passenger ferry service from ports in New York and New Jersey to Liberty Island and Ellis Island. Plaintiff was a member of a collective bargaining unit whose employment contract with Statue called for the forty to forty-five employees subject to the collective bargaining agreement (CBA) to be paid for overtime at a rate of time and one-half of the employee's straight time for hours worked in excess of forty-eight hours per week.

On September 10, 2009, plaintiff filed a single-count class action complaint alleging that the CBA was contrary to the Wage and Hour Law. After filing the complaint, a Statue executive authored a memorandum informing employees about the lawsuit. The memo identified plaintiff as the named party in the lawsuit and advised employees that in an effort to mitigate damages, they would not schedule union employees to work more than forty hours per week until the issues raised in the complaint were resolved. Immediately thereafter, plaintiff was confronted, threatened and harassed by coworkers. Plaintiff also claimed his hours were reduced from forty to fifty hours per week to approximately thirty-five hours per week after the memo was issued. In addition, plaintiff alleged that the stress of his daily encounters with co-workers forced him to resign from his position. Plaintiff then filed a claim of retaliation under the Conscientious Employee Protection Act (CEPA), New Jersey's whistle-blower statute.

The trial court entered summary judgment in favor of the employer and the case was dismissed. In granting the motion, the court adopted defendants' position that the

memorandum was not an adverse employment action because it was not a completed personnel action that impacted plaintiff's employment. The court similarly rejected plaintiff's contention that defendants' retaliatory conduct included reducing his hours of work. The court observed that plaintiff's hours had been on the decline even before he filed his lawsuit. Turning to the purported confrontations with his co-workers, the court found that these encounters, while creating a hostile work environment, were not sufficiently egregious, when compared to circumstances addressed in reported decisions where courts have found the working environment sufficiently hostile, to support a CEPA claim.

On appeal, the court reversed the trial court's ruling and reinstated the case, noting there was sufficient evidence for a reasonable jury to conclude that the employer knew or should have known its memorandum would incite the plaintiff's co-workers and that such action could ultimately force the plaintiff to resign.

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.

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