

# NEWSLETTERS

# THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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## THE PASCHOS LAW UPDATE NEWSLETTER

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## March, 2015

### I. EMPLOYMENT LAW

#### State Sovereign Immunity Precludes Plaintiff's ADA Claim, Even Though Defendants Did Not Fully Raise Argument Until Motion for Judgment Notwithstanding the Verdict (JNOV)

In *Royster v. New Jersey State Police*, 2015 N.J. Super. LEXIS 36 (March 10, 2015), the New Jersey State Police ("NJSP") employed plaintiff Brian Royster, an African-American, from 1986 until his retirement in 2011. He initially worked as a trooper and later as a detective. In or around October 2001, plaintiff interviewed for a position in the Equal Employment Opportunity/Affirmative Action Unit (the "EEO/AA Unit"). Plaintiff did not get the job. In January 2002, the NJSP promoted plaintiff to detective sergeant. In general, the NJSP permitted sergeants to be assigned to another unit without requiring them to participate in a formal interview process. In late 2002, plaintiff took advantage of this opportunity and, when there was an opening in the EEO/AA Unit, he obtained an assignment there without submitting to another interview.

In November 2003, plaintiff began a four-month medical leave of absence due to an illness. In December 2003, while still on medical leave, plaintiff met with Colonel Joseph R. Fuentes to convey his belief that he had been passed over for a promotion. Plaintiff also expressed his general concerns that the EEO/AA Unit failed to timely investigate matters and that the NJSP generally disciplined African American troopers more severely than white troopers. In March 2004, plaintiff returned to work from his medical leave.

Plaintiff was eligible for a promotion on April 13, 2004. Two days later, plaintiff's supervisor prepared a confidential memorandum reporting to Fuentes three instances of plaintiff's purported unprofessionalism. In August 2004, the supervisor provided an addendum to the memo supplying additional examples of alleged unprofessional conduct by plaintiff. In October 2004, the NJSP substantiated one of the allegations, but was unable to substantiate the remaining allegations. The NJSP then removed plaintiff from the EEO/AA Unit in May 2004.

Subsequently assigned to the Organized Crime Unit North, plaintiff was assigned surveillance work that deprived him of constant access to a restroom, necessary for his medical condition. He was later reassigned to other duties where he had such access. He retired in 2011.

Plaintiff filed his initial complaint against defendants asserting claims for violations of the Law Against Discrimination, the Americans with Disabilities Act, and the Conscientious Employee Protection Act. Plaintiff later waived the LAD claims. The jury returned a verdict in plaintiff's favor on the ADA and CEPA claims.

On appeal, defendants primarily argued that plaintiff's ADA claim -- that they failed to accommodate his medical condition -- is precluded by the doctrine of state sovereign immunity. Defendants also argued that the judgment on plaintiff's CEPA claim must be vacated because plaintiff failed to establish a prima facie case of a CEPA violation and because the judge committed numerous trial errors.

The appellate panel held that the doctrine of state sovereign immunity precludes plaintiff's

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ADA claim, even though defendants did not fully raise that argument until their motion for a judgment notwithstanding the verdict (JNOV). As a result, the panel vacated that part of the judgment awarding plaintiff damages under the ADA and dismissed the ADA claim with prejudice.

The panel rejected defendants' arguments that plaintiff's job responsibilities precluded him from making a CEPA claim and that plaintiff failed to produce sufficient evidence for the jury to consider plaintiff's CEPA allegations. However, the panel vacated the CEPA judgment and remand for a new CEPA trial on liability and damages because the panel found that the entire CEPA verdict was fatally flawed.

### **Employee Does Not Forfeit Retaliation Rights Under Title VII for Physically Defending Herself Against Harasser**

In *Speed v. WES Health Sys.*, 2015 U.S. Dist. LEXIS 23818 (E.D.Pa. February 26, 2015), the court was faced with an issue of first impression in the Third Circuit, one addressed by only a handful of federal courts: whether an employee forfeits her retaliation rights under Title VII for physically defending herself against a sexual advance after an employer fails to take corrective measures about a hostile work environment.

Ms. Speed was hired by WES Health System as a behavioral health worker in February 2012. As part of her job duties, she was required to work in close physical proximity to Macon Garway, WES's clinical coordinator. According to the complaint, in May 2012, Garway began to sexually harass Ms. Speed. By November 2012, the alleged harassing behavior escalated and became more frequent. Ms. Speed alleged she complained orally and in writing to her supervisor in late 2012. Other female employees also complained to WES about Garway's offensive and inappropriate remarks. After Ms. Speed complained to WES, WES did not discharge "Garway, separate him from working with Speed, or otherwise supervise him."

On or about April 12, 2013, Garway made a physical advance toward plaintiff and for no other reason than to defend and protect herself, Plaintiff struck Garway on the side of his face. Immediately after this incident, Speed again complained to her supervisor. After investigating Speed's complaints, Defendant WES Health System determined that Garway had in fact sexually harassed Plaintiff. Based on the determination that Speed's complaints were founded, Garway's employment was terminated by Defendant. On that same date, Defendant discharged Plaintiff as well, which she contends was in retaliation for her complaining about the sexual harassment.

Plaintiff filed a complaint against WES alleging sexual harassment, a hostile work environment, and retaliation in violation of Title VII and the Pennsylvania Human Relations Act. WES responded by arguing that her claims should be dismissed because she admitted that she was terminated for "the efforts she made to defend herself."

The court rejected Defendant's argument providing that:

In effect, Defendant seeks a ruling that if an employee strikes a co-worker, regardless of the circumstances, an employer's decision to terminate must necessarily be upheld in every case, even where retaliation is a plausible alternative explanation. I am not persuaded that the law requires such a result....Here, Speed does not contend that she struck Garway to protest his conduct, but rather that she struck him to defend against his conduct. She does not contend that he deserved to be struck, but rather that she deserved to be protected against his unwanted physical advances....At a minimum, under the totality of the circumstances discussed above, Plaintiff has alleged enough to move forward with discovery and attempt to prove pretext.

As such, the court denied Defendant's Motion to Dismiss.

## **II. INSURANCE LAW**

### **New Jersey Supreme Court Held that an Insurer May Rely on an Unpublished Decision When Forming Its Coverage Position**

In *Badiali v. New Jersey Manufacturers Insurance Group*, 2015 N.J. LEXIS 133 (February 18, 2015), Augustine W. Badiali suffered injuries in a car accident with an uninsured motorist while he was working. Both his personal insurance policy through New Jersey

Manufacturers Insurance Group (NJM) and his employer's auto insurance policy through Harleysville Insurance Company were equally responsible for compensating him with each being responsible for 50% of Mr. Badiali's total damages. In 2008, the case went to arbitration where the arbitrator awarded \$29,148.62 to Badiali, which was to be split between NJM and another carrier (\$14,574.31 each).

A provision in the NJM policy provided that such an arbitration decision is binding "unless the arbitration award exceeds [\$15,000]," in which case, either party may demand a jury trial. NJM proceeded to reject the arbitration award on the basis that the total amount of the award of \$29,148.62 was more than the \$15,000 threshold.

The trial court affirmed the award, finding NJM liable for \$14,574.31. The Appellate Division affirmed, relying on its holding in *D'Antonio v. State Farm Mut. Auto. Ins. Co.*, 262 N.J. Super. 247 (App. Div. 1993), an underinsured motorist (UIM) action, in which it found that the question of whether a case is of sufficient magnitude to justify a trial rests on the extent of the carrier's liability, rather than that of the tortfeasor. NJM subsequently paid the award in full.

In March 2011, plaintiff commenced a second action against NJM, asserting claims for breach of contract, bad faith, and consumer fraud. NJM moved for summary judgment, relying on a 2004 unpublished Appellate Division decision, which held, under essentially the same circumstances, that the insurer (also NJM) was entitled to reject the arbitration award at issue and demand a trial de novo. *Geiger v. N.J. Mfrs. Ins. Co.*, No. A-5135-02 (App. Div. Mar. 22, 2004). NJM conceded that *Geiger* lacked precedential authority, but maintained that its existence proved that NJM's conduct was reasonable, fair, and honest, and that it had "fairly debatable" reasons to reject the arbitration award at issue and seek a trial de novo.

The trial court granted summary judgment in favor of NJM on all counts. Plaintiff appealed, and the Appellate Division affirmed holding that, as a matter of law, the mere existence of unpublished case law supporting NJM's rejection of the arbitration award precluded a finding of bad faith against NJM, regardless of whether NJM relied on or was aware of that unpublished case. Plaintiff appealed.

The New Jersey Supreme Court affirmed the Appellate Division's holding that the insurer's position was "fairly debatable", and that it had not acted in bad faith. The court's decision reaffirmed New Jersey's "fairly debatable" rule that holds to prevail on a bad faith claim against an insurer, "a plaintiff must show 'that no debatable reasons existed for denial of the benefits'."

Ruling on an issue of first impression, the court also held that an insurer's reliance on an unpublished decision supporting its coverage position "precludes a finding of bad faith." The court explained that "[i]n our view, it is illogical to suggest that [the insurer] NJM, or any corporation, cannot rely on previous unpublished opinions—especially those in which they were specifically involved—in forming their business decisions." As such, the court held that the insurer's position in reliance on an unpublished decision "was at least fairly debatable" in addition to being "based on a reasonable and principled reading of its policy language."

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