THE PASCHOS LAW UPDATE NEWSLETTER

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I. EMPLOYMENT LAW

Manager's 'Inexcusable and Offensive' Conduct Does Not Rise to Level of Unlawful Discrimination

In *Tourtellotte v. Eli Lilly & Co.*, 2016 U.S. App. LEXIS 521 (3d Cir. Pa. Jan. 13, 2016), Margaret Tourtellotte, Karla Krieger and Ana Reyes, all former sales representatives for Eli Lilly, filed a lawsuit alleging their supervisor, Rowland, engaged in unlawful conduct. Two of the women, Tourtellotte and Reyes, took medical leaves to treat depression and anxiety they claimed were caused by the stress of working under Rowland. All three were terminated in 2008.

The three women allege Rowland engaged in conduct described as "inexcusable and offensive." Rowland made inappropriate comments, such as remarking about "all the female Barbie dolls that are now in the pharmaceutical industry." He also mocked Reyes's Hispanic accent and during a role-playing exercise, said "black people do not speak fast." Also Reyes alleged Rowland excluded her from a meeting, saying it was just for guys and told her twice he had helped a poor Hispanic woman find a more appropriate job.

The employees filed suit alleging discrimination based on race, gender, and disability under federal and state law, as well as claims of retaliation and breach of contract (based on an employee handbook's anti-discrimination language). During the course of the litigation, the district court issued several decisions dismissing some of the employees' claims and eventually only one of the three went to trial on a single claim of retaliation. After final judgment was entered against her, the three appealed.

The Third Circuit found the women had failed to meet their burden in presenting evidence to support their claims. The Court stated "While we agree with the District Court that many of Rowland's actions were 'inexcusable and offensive,' none of the alleged conduct rises to the level of unlawful discrimination. " Furthermore, summary judgment was properly granted on the breach of contract claim because the antidiscrimination policy, which contained only general language, did not create a binding contract

II. INSURANCE LAW

New Jersey Supreme Court Holds Prejudice Not Required to Deny Coverage Based on an "As Soon As Practicable" Notice Condition in a Claims Made Policy

In *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co.*, 2016 N.J. LEXIS 144(N.J. Feb. 11, 2016), First Independent Financial Group (First Independent) did not tender a claim regarding a failed real estate transaction to its insurer, National Union Fire Insurance Company of Pittsburgh (National Union) for more than six months. Although the suit was reported within the policy period, National Union denied coverage, asserting that, among other things, notice was not given "as soon as practicable" as required by the policy.

Plaintiffs and several defendants, including First Independent, reached a settlement agreement in excess of $3 million and defendants committed to pay plaintiffs a portion of that liability. To cover the remainder of the settlement amount, First Independent assigned

to plaintiffs its rights and interests under the Policy. Plaintiffs initiated this litigation against National Union seeking a declaratory judgment that First Independent was an insured under the Policy, and that plaintiffs were entitled to coverage. Plaintiffs moved for partial summary judgment and National Union filed a cross-motion for summary judgment on all counts.

The trial court granted National Union's cross-motion for summary judgment and dismissed plaintiffs' complaint with prejudice. The trial court concluded that under Zuckerman v. National Union Fire Insurance Co., 100 N.J. 304, 495 A.2d 395 (1985), the insurer did not need to "show appreciable prejudice in order to avoid coverage based on a failure to meet the notice requirement of a claims made policy."

The Appellate Division affirmed, noting the policy "clearly required that notice be provided both within the policy period and as soon as practicable." The Appellate Court also relied on Zuckerman in rejecting plaintiffs' argument that National Union had to demonstrate prejudice as a result of the delayed notice before it could deny coverage.

The Supreme Court granted plaintiffs' petition for certification. In affirming the lower courts' decisions, the Court rejected the policyholder's argument that long-standing New Jersey precedent, specifically the New Jersey Supreme Court's 1968 decision in Cooper v. Government Employees Ins. Co., 51 N.J. 86 (1968), required the insurer to show prejudice. In Cooper, the court required a showing of prejudice when an insurer disclaimed coverage based on late notice under an "occurrence" policy. However, the Court discussed, at length, the differences between "claims made" and "occurrence" policies, and declined to apply the Cooper rationale in the context of a "claims made" policy. The Court extended its strict interpretation of the claims made reporting obligations in Zuckerman.

Duty to Defend Additional Insured in Action Brought by Named Insured's Employee

In *Ramara, Inc. v. Westfield Ins. Co.*, 2016 U.S. App. LEXIS 2656 (3d Cir. Pa. Feb. 17, 2016) a Philadelphia parking garage owner, Ramara, Inc., had engaged Sentry Builders Corp. as a general contractor to perform work at the garage. Sentry, in turn, engaged a subcontractor, Fortress Steel Services, Inc., to install concrete and steel components as part of the work. Pursuant to its subcontract agreement with Sentry, Fortress purchased a general liability insurance policy from Westfield Insurance Co. naming Ramara and Sentry as "additional insureds."

While Fortress was working on the project, one of its employees was injured in an accident. The employee filed suit against Ramara and Sentry, but not against Fortress, as it was immune from suit under the Pennsylvania Workers' Compensation Act. Ramara sought a defense from Westfield, but the insurer declined on the ground that the policy did not insure Ramara for the worker's claims. Ramara then commenced the instant suit against Westfield.

The Additional Insured endorsement in Fortress's policy with Westfield defined an insured to include those for whom Fortress is performing operations, when both parties agree in writing to add such entity as an additional insured, but only for liability caused, in whole or in part, by Fortress' acts or omissions or the acts or omissions of those acting on Fortress' behalf; in the performance of its operations for the additional insured."

The insurer argued that for the owner to be an additional insured under the subcontractor's policy, and thus for it to have a duty to defend the owner, the complaint had to allege explicitly that the subcontractor's acts or omissions were a proximate cause of plaintiff's injuries. The owner argued that proximate cause is not required; instead, all that is required is that the subcontractor be a "but for" cause of the alleged injuries, and that the complaint adequately pleaded facts from which such causation could be inferred.

The Third Circuit sided with the owner, holding that, even under a proximate cause standard, the complaint alleged enough to trigger coverage for the owner. The court found that the underlying allegations partially based Ramara's liability on its failure to supervise

the work of its contractors or subcontractors. Fortress, although engaged by Sentry, was one of Ramara's subcontractors, and the worker's employment by Fortress was the sole reason that he was at the job site and sustained injuries. The court found that the worker clearly made factual allegations that potentially would support a conclusion that his injuries were "caused, in whole or in part," by Fortress's acts or omissions. Therefore, Ramara came within the "additional insured" endorsement and was entitled to a defense.

The court went on to state that, although the owner qualified as an additional insured under either a proximate cause or "but-for" cause standard, the correct interpretation of the additional insured endorsement was that it required only "but-for" causation.

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