

# NEWSLETTERS

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## THE PASCHOS LAW UPDATE NEWSLETTER

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## May, 2017

### I. EMPLOYMENT LAW

#### LAD Back Pay Award Could Not Be Offset by Unemployment Compensation Benefits

In *Acevedo v. Flightsafety International Inc.*, --- A.3d ---, 2017 WL 8752812017 (N.J. A.D. March 6, 2017), plaintiff, Rex Fornaro, a flight instructor, filed a disability discrimination and retaliatory discharge claim against his employer, defendant Flightsafety International, Inc. At trial, the jury found that Flightsafety fired Fornaro because he is disabled and because he requested reasonable accommodation for his disability. The jury awarded Fornaro back pay of about \$83,000, but the trial judge reduced the award by \$14,000, which represents one half of the unemployment compensation Fornaro had received since his termination. The trial judge reasoned that because both Fornaro and Flightsafety had contributed to the state unemployment fund, reduction by half was the equitable result.

Fornaro appealed, arguing that the trial court should not have reduced the damages, and Flightsafety cross-appealed, arguing that the damages should be reduced by the entire amount of the unemployment compensation.

The Appellate Division reversed the trial court and reinstated the full jury award to Fornaro. The court held that New Jersey's collateral source statute (N.J.S.A. 2A:15-97), which requires that damages be reduced in some cases where the plaintiff has already received compensation from another "collateral" source could not be applied to cases under the New Jersey Law Against Discrimination. The reasoning for this exception is that the NJLAD is remedial legislation intended to eradicate discrimination, protect employees, and deter employers from engaging in discriminatory practices. The Appellate Division provided that "shifting the benefit of unemployment compensation from the wronged employee to the discriminating employer does not serve the LAD's deterrent purpose."

#### Any Time FMLA Leave Is Given "Negative Weight," It Is Illegal Retaliation

In *Egan v. Delaware Port Authority*, 851 F.3d 263 (3d. Cir (Pa.) March 21, 2017), Plaintiff, Egan, worked for the Port Authority as a Projects Manager for Special Projects from 2008 through 2012. In March 2012, Egan was transferred on special assignment to the Engineering Department. Egan suffered from migraine headaches and claimed that the frequency of his migraines increased with his transfer to the Engineering Department. When he began experiencing migraines, he requested intermittent FMLA leave. While he was on FMLA leave, Egan was informed that all "economic development functions" were being eliminated, his "temporary reassignment" to the Engineering Department was "deemed completed," and he was terminated (along with another employee).

Egan filed a complaint alleging violations of the ADEA, ADA, and FMLA. At trial, plaintiff did not present any direct evidence that his use of leave motivated the employer's termination decision. Nonetheless, at the close of trial, the plaintiff requested that a "mixed-motive instruction" be given to the jury. This instruction would allow the jury to find for the plaintiff if it determined the employer relied at all on plaintiff's leave when making the termination decision — even if there was another, lawful reason for the decision. The district court

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refused to issue such an instruction because there was no direct evidence the employer's decision was motivated, even in part, by the plaintiff's use of leave. After the jury returned a verdict for the defense, the plaintiff appealed.

The Third Circuit reversed holding that a plaintiff "does not need to prove that invoking FMLA rights was the sole or most important factor" motivating the adverse action. The employee needs to show only "that his or her use of FMLA leave was a 'negative factor' in the employer's adverse employment action."

The Court went on to hold that, to be entitled to the mixed-motive instruction, the plaintiff "was not required to produce direct evidence" that his use of leave was a negative factor. Instead, such an instruction was warranted if there was any evidence "from which a reasonable jury could conclude that ... [the plaintiff's] use of FMLA leave was a negative factor in the employment decision" — even if that evidence was circumstantial."

The Court's decision was precedential because it examined for the first time whether U.S. Department of Labor's regulations interpreting the FMLA "[embody] a permissible construction of the FMLA" that conforms with the U.S. Supreme Court's *Chevron v. Natural Resources Defense Council* decision establishing the standard for granting deference to a government agency's interpretation of a statute it administers. The panel deferred to the *Chevron* standard because the FMLA does not specifically provide for a retaliation claim.

In a concurring opinion, Judge Kent A. Jordan agreed with the panel's ultimate judgment, but criticized *Chevron*, as well as *Auer v. Robbins*, 519 U.S. at 462, 117 S.Ct. 905 (1997) stating that the deference prescribed "erodes the role of the judiciary, it also diminishes the role of Congress" by allowing agencies to make the law when the laws are unclear.

## **II. INSURANCE LAW**

### **Conclusory Allegations Do Not Give Rise to Bad Faith**

In *Williams v. State Farm Fire & Cas. Ins. Co.*, No. 16-9028, 2017 U.S. Dist. LEXIS 50261 (D.N.J. Apr. 3, 2017), Plaintiffs sought coverage under their homeowners' insurance policy issued by State Farm for property damage sustained in a fire loss on January 12, 2016. State Farm denied coverage and Plaintiffs' filed a Complaint alleging that Defendant's refusal to pay benefits breached the insurance policy. Plaintiffs also alleged that Defendant breached the duty of good faith and fair dealing in processing Plaintiffs' homeowner's claim. State Farm filed a Motion to Dismiss as to the bad faith claim. The Court granted the motion and agreed that Plaintiffs had failed to state a cognizable bad faith claim. The Court recognized that New Jersey defines bad faith as: (1) the lack of a "fairly debatable" reason for failing to pay a claim, and (2) knowing or reckless disregard for the lack of a reasonable basis in denying the claim. The lone allegation in the Complaint as to the second element was Plaintiffs' assertion that the Insurer had "reckless disregard for the rights of the Plaintiffs."

The Court held:

Plaintiffs reference a "reckless disregard for the rights of the Plaintiffs" but do so in conclusory fashion, thereby leaving the Court to infer reckless indifference from the fact that Defendant denied coverage; however, the Court declines to make such an inference. Plaintiffs do not provide sufficient factual allegations to suggest an absence of a reasonable basis on the part of Defendant for denying coverage. The mere allegation that Defendant's denial of coverage inferentially establishes bad faith relies on the very speculation forbidden by *Twombly* and *Iqbal*. Accordingly, the Court dismisses Plaintiffs' claim for bad faith.

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