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Labor and employment law trends of interest to New Jersey employers.

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RECENT NEW JERSEY EMPLOYMENT LAW DECISIONS

In the following three cases, New Jersey courts have rendered decisions addressing the enforceability of arbitration clauses in employment contracts, the use of sexual harassment policies as defense to hostile work environment claims, and CEPA's application to non-compete agreements. New Jersey employers should be aware of these decisions and their implications so they may adjust employment policies and procedures accordingly.

New Jersey Supreme Court Holds Arbitration Clause in Employment Application Is Valid and Enforceable

In *Martindale v. Sandvik, Inc.,* a case decided on July 17, 2002, the New Jersey Supreme Court held that an arbitration agreement contained in an employment application was valid and enforceable as a matter of law and, that if such an agreement is clear and unambiguous, it could govern both common law and statutory claims. In doing so, the court rejected the plaintiff's arguments that the agreement was a contract of adhesion.

When Ms. Martindale first applied for employment at Sandvik, Inc. in 1994, she signed an employment application which contained both an arbitration clause and a waiver of her right to jury trial. Sandvik hired Martindale as a benefits administrator and she worked for two years before taking maternity leave. During her absence, the firm downsized and Martindale's position was eliminated. Martindale alleged discrimination, and brought suit in New Jersey State court under the New Jersey Family Leave Act and the New Jersey Law Against Discrimination. Sandvik moved to dismiss Martindale's court claim in favor of arbitration based on the arbitration clause in the employment application. Sandvik's motion was granted and Martindale appealed.

The New Jersey Supreme Court held that the arbitration clause was valid and enforceable based on general contract law, case law and public policy favoring arbitration. The court stressed that even if the employment contract were one of adhesion, the arbitration clause would not necessarily be rendered void. Before invalidating a contract of adhesion, the court would have to inquire into the subject matter of the agreement, the relative bargaining power of the parties, the degree of economic compulsion motivating the applicant and any public policy considerations.

The court noted that when Martindale first applied for a position at Sandvik, the Director of Human Resources met with Martindale and advised her to review the employment application at her leisure. Despite being offered the opportunity to ask the director questions about the clause and the contract as a whole, Martindale failed to make any such inquiries, and she took the application home for further review before signing. The court noted that the contract was clear and unambiguous and provided a prospective employee sufficient notice that any disputes arising from the employment relationship would be submitted to arbitration and would not be heard by a jury.

This decision not only reaffirms New Jersey's commitment to enforcing arbitration clauses under principles of general contract law, it also marks a victory for New Jersey employers, who may protect themselves from litigation by including in employment applications an unambiguous arbitration clause and a statement waiving particular statutory rights.

Existence of Sexual Harassment Policy Is By Itself Insufficient to Shield Employer from Liability for Hostile Work Environment

In *Gaines v. Bellino*, decided on July 24, 2002, the New Jersey Supreme Court held that Hudson County's anti-discrimination policy and procedure was not enough to shield it as an employer from vicarious liability in a hostile work environment claim. Gaines, a Correction's Officer at Hudson County Jail, was subjected to unwanted sexual advances and harassing remarks by her supervisor, Bellino. Gaines asserted that Bellino not only forcibly kissed her, but later made references to the incident in the presence of Gaines and other parties, including a superior officer. On a later occasion, Bellino, Gaines and a different superior officer were together in the office when Bellino suggested that he and the supervisor should rape Gaines and remarked that if they were to do so, no one would believe Gaines' account of the assault. Despite being advised by co-workers and others that she should report Bellino's behavior, Gaines refused to do so. The warden, who discussed the incidents with Gaines after receiving a number of anonymous calls about sexual harassment during the night shift, sent Bellino a cease-and-desist letter and tried to convince Gaines to file a complaint, but took no other action.

Gaines brought suit against both Bellino and Hudson County. The County was granted summary judgment by the lower court based on its due care defense; namely, that it had a sexual harassment policy and procedure, which procedure was never followed by the plaintiff. The New Jersey Supreme Court, however, held that the mere existence of the anti-discrimination policy is not enough to shield an employer from vicarious liability; if the plaintiff brings forward enough evidence to show that the policy may not have been effective, the case will proceed to trial on the issue of whether the employer exercised due care to protect employees from a hostile work environment.

Gaines has since been cited by the New Jersey courts as supporting the notion that summary judgment is not available when there is an issue of fact as to whether an employer failed to publicize and enforce anti-harassment polices. See *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.,* 822 A.2d 647, 2003 N.J. Super. LEXIS 171, 171 (N.J. Super. Ct. App. Div. 2003); *Velez v. City of Jersey City,* 358 N.J. Super. 224, 235, 817 A.2d 409, 415, 2003 N.J. Super. LEXIS 85 (N.J. Super. Ct. App. Div. 2003). This places a burden on employers to not only establish effective policies and procedures for reporting discriminatory incidences in the workplace, but also to take steps to ensure that such policies and procedures are known to employees and are enforced. Employers are well advised to implement company-wide training aimed at educating all employees about the existence and terms of the anti-harassment policy, with special emphasis on the complaint mechanism.

Broad Non-Compete Agreements May Result in Employer Liability Under CEPA

In *Maw v. Advanced Clinical Communications Inc.,* decided on April 16, 2003, the Superior Court of New Jersey, Appellate Division held that when the facts construed in favor of the plaintiff could show that a non-competition agreement she was asked to sign in connection with her continued employment is a violation of public policy, dismissal prior to discovery is premature. The court also held that there is individual liability under CEPA, and that a plaintiff need not choose between incompatible CEPA and common law claims until after full discovery.

During her continued employment with Advanced Clinical Communications, Inc. ("ACCI") as a graphic designer, Maw was asked to sign a non-compete agreement, the terms of which included a provision waiving her right to seek employment with competitor companies within two years of her leaving the employment of ACCI. Maw refused to sign the agreement and was terminated. She instituted suit under CEPA and common law for wrongful termination. The trial court granted ACCI's motion to dismiss the charges, finding that requiring a current employee to sign a non-compete agreement does not constitute a per se violation of public policy.

On appeal, the Superior Court reversed the Law Division based on its analysis of the non-compete agreement in light of the circumstances surrounding Maw's employment. The Court cited *Graziano v. Grant, Solari Insustries, Inc. v. Malady* and *Whitmyer Bros., Inc v. Doyle* for the general rule that a restrictive covenant is enforceable only if reasonable under the circumstances. Under the Solari-Whitmyer test, a non-compete agreement must protect the legitimate interests of the employer without imposing undue hardship on the employee or injuring the public. The court noted that as a graphic designer, Maw had no more access to or knowledge of confidential information than the members of the ACCI clerical staff, who were not required to sign non-compete agreements. When Maw did have access to confidential information and trade secrets, her level of understanding was so limited as to pose little threat to ACCI's interests. Moreover, ACCI's business interests were far outweighed by the burden placed on Maw by the non-compete agreement; the temporal and geographical breadth of the agreement, which covered a span of two years after termination and extended to employment with any entity in the field regardless of location, severely restricted Maw's ability to procure a new position. The Superior Court thus held that a non-compete agreement of this breadth in these circumstances could be held to violate public policy because the facts as asserted by the plaintiff, if true, support the claim that the purpose of the non-compete clause was not to protect legitimate business interests, but rather to restrict competition.

After concluding that the case should go to discovery to determine whether the evidence supports a claim of wrongful termination, the court addressed the issue of whether there is individual liability under CEPA and whether a plaintiff has to choose between incompatible causes of action before discovery. After examining the language and purpose of CEPA, the Superior Court held that there is, in fact, individual liability under the act, and thus ACCI's president would remain a defendant in Maw's claim. The court also ruled in favor of Maw on the cause of action issue, holding that forcing the plaintiff to choose between her CEPA and common law claims before complete discovery would deny her the ability to make an informed choice.

In light of the *Maw* decision, New Jersey employers must ensure that non-compete agreements are clearly aimed at legitimate business interests such as maintaining confidentiality, and that the agreements restrict employees no more than is necessary and reasonable to protect those interests.

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