New Jersey Labor and Employment Law Quarterly

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Message From the Chair

by Lisa Manshel

Welcome to the third issue of the 2018-2019 *Labor and Employment Law Quarterly*. This publication is the product of the Labor and Employment Law Section (LAELS) of the New Jersey State Bar Association (NJSBA). The leadership of the LAELS consists of five officers, each serving a two-year term, and an Executive Committee and Co-Chairs, all appointed by the Section Chair. In its appointment of incoming officers, the section alternates between attorneys who represent individuals and unions and attorneys who represent management, specifically in order to maintain the balance essential to our collaboration across the aisle. While we strive for intellect and excellence in all of our activities, the section has always prized collegiality as central to its identity as a professional organization.

Typically, the LAELS publishes four issues of the *Quarterly*. The *Quarterly* is distributed to all dues-paying members of the section. Back issues are available on the NJSBA's website, www.njsba.com, by logging in to your state bar account and then selecting the CommunityNET tab and "My Section" to navigate to the LAELS home page. Our publication, conceived, written, and edited by section members, provides an invaluable resource on developments in the legal authority, practical and strategic skills, and more esoteric issues relating to the character of the workplace and the direction of the law. The *Quarterly* often includes an article by a guest author who is an appointee or employee of a local public agency with a mandate relating to labor and employment. Periodically, we also partner with a local law school to pair law students with practicing attorneys to co-author articles. We are always interested in ideas for articles or volunteers to serve on the editorial staff. I encourage interested members of the section to reach out to Editor-in-Chief Lisa Barré-Quick or Managing Editor Hop Wechsler.

Throughout the year, the section also develops and presents seminars for the New Jersey

Institute for Continuing Legal Education (NJICLE), a division of the NJSBA. The section leadership staffs and runs more than 20 seminar-planning committees and presents half-day and full-day seminars on topics such as Diversity and Implicit Bias, the Conscientious Employee Protection Act (CEPA), Disability Discrimination, Ethics and Professionalism, Settling Cases, Trial Practice, and Workplace Harassment. Longstanding survey programs offered annually include the Labor and Employment Law Forum; the two-day Labor and Employment Law Summer Institute; the Employment Law Roundtable; and Arnold Shep Cohen's fan favorite, *Hot Tips in Labor and Employment Law*. In addition, each year the section presents the Labor Law Conference (formerly the NLRB Conference) and the New Jersey Public Employment Conference, blockbuster programs that are must-attend events for lawyers and other professionals in the private or public sector labor space. Anyone interested in joining or becoming more involved in the LAELS should attend our programs, not just to sharpen skills but to introduce yourself to our members and let us know you want to become more active.

Each May, the section presents its annual program, traditionally scheduled for the Friday of the NJSBA's Annual Meeting and Convention in Atlantic City. This year's program, *Crisis Management and Dealing with the Press in Employment Matters*, will be held on May 17, at the Borgata Hotel Casino & Spa. The section's Annual Luncheon will follow immediately thereafter. The luncheon, one of the section's most enjoyable events, includes *Labor and Employment Law Jeopardy*, our attempt at humor. We also present the Sidney H. Lehmann Award, a nonmonetary award named in memory of our friend and colleague, Sid Lehmann. The award is given to a member of the section who embodies the values of integrity, scholarship, professionalism, dedication, collegiality, and bridging the gaps between labor and management, the plaintiff's and defense bars. Past recipients have included the Honorable James R. Zazzali, J. Michael Lightner, Angelo Genova, Cynthia M. Jacob, and the Honorable Melvin L. Gelade. This year's recipient will not be announced until the luncheon.

I look forward to welcoming new members of the Labor and Employment Law Section as we continue to expand and incorporate more diverse perspectives into our initiatives. ■

Inside this issue

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Message From the Editor

by Lisa Barré-Quick

As the Labor and Employment Law Section (LAELS) prepares to celebrate the soon-to-be-announced recipient of the 2019 Sidney H. Lehmann Award at the New Jersey State Bar Association's Annual Meeting and Convention in May, the third issue of Volume 40 of the *New Jersey Labor and Employment Law Quarterly* commences with Steven R. Cohen's retrospective on last year's award recipient, the Honorable Melvin L. Gelade, and his remarkable career and ongoing contributions to the bar and the LAELS.

As employers and practitioners alike struggle with the implications of the Diane B. Allen Equal Pay Act, Daniel Santarsiero considers the recent New Jersey District Court decision in *Perrotto v. Morgan Advanced Materials, PLC* ruling that the statute may not be applied retroactively and whether this constitutes a significant scaling back of the new statute's reach.

The issue continues as Jordan Doppelt offers a timely update on case law and legislative developments relative to medicinal and recreational cannabis in New Jersey, pointing out many of the contradictions and uncertainties in current law and providing guidance to employers and employees in view of the shifting and unpredictable legal developments that continue in this critical area, including the Appellate Division's recent decision in *Wild v. Carriage Funeral Holdings*.

Turning to the Conscientious Employee Protection Act (CEPA), Kathryn K. Forman explores the Appellate Division's recent decision in *Gaughan v. Deptford Township Municipal Utilities Authority* and what appears to be the establishment of a requirement that plaintiffs demonstrate a nexus between the employer and the complained-of conduct in order for employees to enjoy CEPA protection.

In the ever-evolving arbitration space, Bradley Bartolomeo and Jed Marcus respectively explore enforceability of arbitration agreements. Bartolomeo's article focuses on those reached through electronic opt-out mechanisms in analysis of the recent Appellate Division decision in *Skuse v. Pfizer, Inc.*, while Marcus focuses on the United States Supreme Court's recent decisions in *Henry Schein, Inc. v. Archer & White Sales, Inc.* and *New Prime Inc. v. Oliveira*, wherein the Court considered who should decide decisions of arbitrability of claims and in what circumstances.

Turning to reasonable accommodation issues, Benjamin S. Teris and Kayleen Egan consider the ongoing debate over the viability of "freestanding failure to accommodate claims" in the context of state and federal law. Finally, continuing with the reasonable accommodation theme, Neha Patel explores common interactive process mistakes in our *Traps for the Unwary* segment.

As always, we thank authors and editors who have given so generously of their time to bring this issue to fruition. I would also like to take this opportunity to welcome Stacy Landau and Dean Burrell to our editorial board. We look forward to their contributions.

We continue to welcome new authors and editors. Please do not hesitate to contact me or our managing editor, Hop Wechsler, if you would like to write or become more involved in the *Quarterly*!

The Honorable Melvin L. Gelade Receives 2018 Lehmann Award

by Steven R. Cohen

The Honorable Melvin L. Gelade was named the 2018 recipient of the Labor and Employment Law Section's highest honor, the Sidney H. Lehmann Award, at the New Jersey State Bar's Annual Meeting and Convention last May.

The award was created in 2014 to honor the memory of Lehmann, a giant in the field of public sector labor law. After serving as general counsel of the Public Employment Relations Commission, Lehmann entered private practice to represent unions. He was renowned within the labor-management community for his legal acumen, professionalism, collegiality and sense of humor.

Judge Gelade was the unanimous choice of the Labor and Employment Law Section's Lehmann Award Committee, as he truly epitomizes all of the qualities the award stands for. Lehmann and Judge Gelade were very close friends, and the consensus was that Lehmann would readily approve of his selection.

Judge Gelade graduated from Rutgers University in 1964 and Rutgers School of Law-Newark in 1979. He enjoyed a diverse career in the field of labor relations, serving with the National Labor Relations Board (NLRB) (1969-1971); as a partner with Apruzzese, McDermott, Mastro & Murphy (1984-1991); as director of the New Jersey Governor's Office of Employee Relations (1991-1994); and as commissioner of the New Jersey Department of Labor (1997-2000), until his appointment to the New Jersey Superior Court on July 13, 2000. He retired from the bench in April 2013, but continues to serve on recall. Judge Gelade continues to remain active in the Labor and Employment Law Section and with the Sidney Reitman Employment Law American Inn of Court.

The previous recipients of the Lehmann Award are former Chief Justice James R. Zazzali (2014), former Region 22 NLRB Director Michael Lightener (2015), former Labor and Employment Law Section Chair Angelo Genova (2016), and former New Jersey State Bar President Cynthia Jacob (2017). ■

Steven R. Cohen is a partner and principal shareholder in Selikoff and Cohen, P.A. in Mount Laurel, representing public sector workers and unions. He is a former chair of the Labor and Employment Law Section of the New Jersey State Bar Association and the current chair of the Sidney H. Lehmann Award Committee.

When You Have to Start Somewhere: The Equal Pay Act Cannot Be Retroactively Applied to Conduct Occurring Before July 1, 2018

by Daniel M. Santarsiero

Do the pay equality protections available to members of protected classes (*e.g*, gender) apply retroactively to punish conduct occurring prior to the July 1, 2018, effective date of the Diane B. Allen Equal Pay Act (NJEPA)?[1] This question has been met with a resounding "No" by the United States District Court, District of New Jersey's recent decision in *Perrotto v. Morgan Advanced Materials, PLC*.[2] The *Perrotto* decision represents a significant scaling back of the NJEPA's reach by holding that the act applies prospectively to prohibited conduct occurring after NJEPA's enactment, and cannot be applied retroactively to conduct occurring prior to July 1, 2018.[3]

The Diane B. Allen New Jersey Equal Pay Act

The NJEPA was signed into law by Governor Phil Murphy on April 24, 2018, with an effective date of July 1, 2018.[4] The act amended the New Jersey Law Against Discrimination (LAD) and expressly prohibits an employer from compensating employee(s) whom are members of *any* protected class at a rate of compensation less than the rate paid to employees who are not members of that protected class for "substantially similar work."[5] The act is structured such that a separate violation of the NJEPA exists each time an employer pays an employee a discriminatorily lesser wage.[6] The NJEPA also prohibits acts of retaliation against employees for sharing wage and benefit information with government agencies, attorneys and co-workers.[7] NJEPA expressly provides for a six-year statute of limitations period in situations where a discriminatory disparity in pay is continuous.[8] Yet, despite the detailed framework and penalty structure set forth in the NJEPA, the act's silence concerning the issue of retroactive application has prompted litigation over whether conduct occurring prior to the July 1, 2018, effective date is covered under the act.

Plaintiff Perrotto's Claims

On April 5, 2018, plaintiff Darla Perrotto was terminated from her position in the acting capacity of "Controller/Human Resources" with Morgan Advanced Materials, PLC and Morgan Advanced Ceramics, Incorporated.[9] The defendants' termination of the plaintiff's at-will employment occurred prior to the NJEPA's enactment and effective date.[10] Perrotto filed a complaint against her former employer in New Jersey Superior Court, Essex County, alleging: 1) violations of the NJEPA on account of a gender-based disparity in pay and; 2) retaliatory compensation practices.[11] Specifically, the plaintiff in *Perrotto* alleged the defendants paid male employees higher compensation and benefits for "substantially similar work" when compared to the plaintiff.[12] Counsel for one of the defendants, Morgan Advanced Materials PLC, removed the matter to United States District Court, District of New Jersey on Sept. 18, 2018.[13]

The defendants subsequently filed a F.R.C.P. 12 (b)(6) motion to dismiss counts one and two of the plaintiff's complaint, which alleged violations of the NJEPA and retaliation on grounds that the NJEPA could not be applied retroactively to conduct alleged to have occurred before the act's July 1, 2018, effective date.[14] The defendants argued that the NJEPA is not subject to retroactive application on account of a lack of express or implied legislative intent to do so, and because the NJEPA statute created a brand new statutory scheme including new pay equality safeguards for protected classes; therefore, it could not be curative.[15] In addition, the defendants postulated that the parties to the litigation could not have reasonably expected the NJEPA to apply to the circumstances surrounding plaintiff Perrotto's termination in April 2018.[16] The court agreed and dismissed the plaintiff's NJEPA claims with prejudice, on the grounds that the NJEPA was not enacted at the time Perrotto was terminated.[17]

The United States District Court's analysis began with the traditional notions of statutory construction, expressing the strong presumption against retroactive application of newly enacted statutes.[18] In rendering its determination that the plaintiff's argument could not overcome the strong presumption against retroactive application, the court found: 1) the legislative history of NJEPA suggests that the Legislature did not intend for retroactive application; 2) retroactivity would not be curative because the statute is the "first of its kind"; and 3) the litigants' expectations favored prospective application.[19]

NJEPA's Legislative History Favors Prospective, Not Retroactive Application

In analyzing the NJEPA's plain language, the court found there was no discernable express or implied legislative intent favoring retroactive application of the statute.[20] The court focused squarely upon the Legislature's "delayed enactment" of the NJEPA stemming from the act's April 25, 2018, date of passage to its explicit effective date of July 1, 2018.[21] Relying in part upon the New Jersey Supreme Court's decision in *Twiss v. State* and Appellate Division's opinion in *Sarasota-Coolidge Equities v. S. Rotondi & Sons,* the district court reasoned that if the Legislature truly intended the act to apply retroactively to conduct occurring before the July 1, 2018, effective date of the statute, it would not have allowed for the self-imposed gap in time of nearly 65 days between the date of passage and the effective date.[22]

"The First of Its Kind"

The court found that the second prong of the test for retroactivity could not be met by the plaintiff because the NJEPA cannot be considered a curative amendment of the LAD.[23] The court reasoned that the NJEPA did not cure any perceived imperfection in the LAD or clarify and further explain the legislative intent behind the LAD.[24] Rather, the NJEPA's expansion of the LAD's two-year statute of limitations to six years for pay equity violations and potential for automatic treble damages prompted the determination that the statute was the "first of its kind" and, therefore, could not be curative.[25] Stated another way, the court found that the NJEPA did not intend to clarify existing law but rather to create liability for the first time in situations where pay inequities existed for substantially similar work performed by a member of a protected class.[26]

The Parties' Reasonable Expectations Favor Prospective Application of the NJEPA

In the court's view, the gap between the time of the plaintiff's termination and the July 1, 2018, effective date of the NJEPA equally disfavored a finding of retroactive application of NJEPA.[27] The court did not find it compelling that the NJEPA was a pending bill in the New Jersey Legislature at the time of Perrotto's termination on April 5, 2018. Citing as analogous the New Jersey Supreme Court's decision in *James v. New Jersey Manufacturers Insurance Company,* the district court reasoned that the existence of pending legislation absent some other factor could not provide a reasonable person with the expectation that the proposed bill would cover conduct occurring some three months before the bill's stated effective date.[28]

Perrotto has now answered the lingering question existing since the passage of the NJEPA by its holding that any alleged conduct occurring prior to the NJEPA's effective date is not actionable. While the court's decision in *Perrotto* may be disappointing to some, it remains clear that the NJEPA represents a significant step toward eliminating discriminatory disparities in wages that have long existed in New Jersey.[29] The *Perrotto* decision is proof that one indeed has to start somewhere to achieve the goal of equality in pay. In this instance, it is July 1, 2018.

Editor's Note: As of the date of drafting of this article there has not been a notice of appeal filed in connection with the *Perrotto* decision. ■

Daniel M. Santarsiero is a member of the firm of Lum, Drasco & Positan, LLC, and represents management in various labor and employment matters.

Endnotes

1. N.J.S.A. 34:11-56.13.
2. 2019 U.S. Dist. LEXIS 6745*.

3. *Id.*
4. nj.gov/governor/news/news/562018/approved/20180424a_equalpay.shtml.
5. N.J.S.A. 10:5-1, *et seq.*, N.J.S.A. 10:5-12(t).
6. N.J.S.A. 10:5-12(a).
7. N.J.S.A. 10:5-12(r).
8. N.J.S.A. 10:5-12(a).
9. 2019 U.S. Dist. LEXIS 6745* at *1.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at *3
14. ECF #2 Notice of Removal by Morgan Advanced Materials, PLC, Morgan Advanced Ceramics, Inc., Gerard McConvery from NJ Superior Court; Essex County, case number ESX-L-5079-18.
15. 2019 U.S. Dist. LEXIS 6745 at *4.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at *4,*5
20. *Id.* at*5.
21. *Id.*
22. *Id., citing Twiss v. State,* 124 N.J. 461, 591 (1991) and *Sarasota-Coolidge Equities, LLC v. S. Rotondi & Sons, Inc.,* 339 N.J. Super. 105 (App. Div. 2001).
23. *Id.*
24. *Id.*
25. 216 N.J. 552 (2014).
26. *Id.*
27. *Id.* at 6.
28. *Id.* at *7, *citing James v. New Jersey Manufacturers Insurance Company*, 216 N.J. 552 (2014).
29. *Income Inequality in New Jersey: The Growing Divide and Its Consequences.* Dec. 2014 Report from Legal Services of New Jersey Poverty Research Institute.

Weeding Through the Confusion of Marijuana: A Case Law and Legislation Update on Medicinal and Recreational Cannabis in New Jersey

by Jordan B. Doppelt

With what appears to be the inevitable legalization of recreational marijuana on the horizon in New Jersey, the topic of cannabis appears in the news on almost a daily basis. A topic that is discussed less frequently, but affects the lives of millions of New Jersey citizens, is the intersection of cannabis and the workplace.

Medicinal Marijuana

What Employers Need to Know

The use of medicinal marijuana is no longer a criminal offense in New Jersey, as a result of the legislative enactment of the New Jersey Compassionate Use Medical Marijuana Act (CUMMA).[1] CUMMA, however, does not grant patients blanket protections. Instead, it merely provides properly registered patients with an affirmative defense in the event they are arrested and charged with possession.[2] It also provides them with protection from some civil penalties and administrative actions.[3] The plain language of CUMMA dictates "[n]othing in this act shall be construed to require…an employer to accommodate the medical use of marijuana in any workplace."[4] The statutory language is subject to interpretation, and is sure to have an impact on employment law in New Jersey. However, only one published opinion and a handful of unpublished opinions have been issued to guide those attempting to navigate the delicate line between the rights of employees and those of employers.

The courts have produced very few unpublished cases and have not issued a new one since Aug. 2018, when the district court handed down the opinion of *Cotto v. Ardagh*.[5] That case was the first and last time the court cited to CUMMA's mandate that an employer need not provide an accommodation to an employee for their use of medicinal marijuana.[6] Presently, the little precedent that does exist favors employers.

What little guidance the Judiciary has provided has demonstrated that an employee's use of medicinal marijuana may lead to causes of action against employers for violations of the New Jersey Law Against Discrimination (NJLAD) on the basis of disability, including: 1) failure to accommodate, 2) wrongful termination and 3) aiding and abetting alleged discriminatory termination. It may also give rise to allegations of defamation, tortious interference with prospective economic advantage and retaliation.[7] To date, however, these claims have either failed or have not specifically been ruled upon.[8]

In *Cotto*, the court addressed claims of discrimination, failure to accommodate and retaliation.[9] Giving rise to that lawsuit was a situation in which an employee had been using his prescribed marijuana for years prior to and during his employment with the defendant, without issue. The plaintiff sustained a head injury at work more than five years into his employment. The plaintiff provided his employer with his medical marijuana card and doctor's prescription but was not permitted to return to work until he passed a drug test. Unable to do so, he was placed on indefinite suspension for failing to satisfy the condition of his employment. The plaintiff asserted that the decriminalization of medical marijuana under CUMMA, coupled with the NJLAD, compelled his employer to provide him with an accommodation. The court disagreed, and found in favor of the defendant as to the alleged discrimination, failure to accommodate and retaliation claims.[10]

More specifically, the plaintiff was not claiming discrimination under the NJLAD based upon his disability (in this case, back and neck pain for which he was prescribed marijuana). Instead, he claimed that he was discriminated against via his employer's refusal to accommodate his use of medicinal marijuana by waiving a drug test.[11] Stated differently, he premised his argument on the employer taking issue with a consequence

of his treatment.[12] The court, in determining whether the defendant may condition the plaintiff's employment on his passing a drug test (*i.e.*, whether that is an essential function of his employment) noted that marijuana is classified as a Schedule I substance under the Controlled Substances Act, and is prohibited under federal law.[13] Essentially, while conditions that may lead to an employee being prescribed and treated with cannabis may be protected, the employee's use of a federally prohibited controlled substance as treatment is not.

The *Cotto* court noted that no court has expressly ruled on the question of whether the NJLAD requires an employer to accommodate an employee's use of medical marijuana with a drug test waiver.[14] Despite this, courts in this state have generally found employment drug testing to be "unobjectionable" in the context of private employment.[15] The *Cotto* court held, as it pertains to the disability claims, that CUMMA does not require the company to waive its requirement for the plaintiff to pass the drug test, that the plaintiff failed to show he could perform the essential functions of his job, and that the company was within its rights to refuse to waive a drug test for federally prohibited narcotics.[16]

In addition to claiming disability discrimination, the plaintiff asserted a claim for failure to accommodate. The court held that neither CUMMA nor the NJLAD require the company to waive its drug test as a condition for employment, and they could not be compelled to do so as an accommodation for an employee using marijuana.[17] Lastly, as to the plaintiff's retaliation claim, the court again sided with the employer, and held that refusing to take a drug test is not a protected activity under New Jersey law.[18]

As previously stated, the New Jersey courts have only published one opinion interpreting CUMMA in the context of employment law.[19] In that case, *Wild v. Carriage Funeral Holdings*, a cancer patient with a valid prescription for medicinal marijuana was terminated after being involved in a car accident at work. Even though the accident was not his fault and he was not under the influence, the company still required him to undergo a blood test before he could return, which would inevitably produce a positive result.[20] The plaintiff was initially told he was being terminated due to the presence of drugs in his system, but was subsequently informed that it was because of his failure to disclose the use of his medication in violation of company policy.[21]

The plaintiff brought suit against the company and several employees for disability discrimination, perceived disability discrimination, failure to accommodate and aiding and abetting under the NJLAD, as well as defamation and intentional interference.[22] The trial court granted the defendants' motion to dismiss after determining there are no employment-related protections for licensed medical marijuana users under CUMMA, and that the adverse employment action resulted from a positive drug test and a violation of company policy.[23]

The Appellate Division reversed the lower court's dismissal of the NJLAD claims.[24] In doing so, the court relied upon the plain language of the statute, which it deemed to be unambiguous.[25] The statutory language meant that CUMMA intended to cause no impact on existing employment rights, did not create new or destroy existing employment rights, and expressed no intent to alter the NJLAD.[26] Further, CUMMA imposes no burden on the defendants, nor does it negate any rights or claims emanating from the NJLAD that may be available to the plaintiff.[27] The court ruled only that the plaintiff established a *prima facie* cause of action, leaving the merits unanalyzed and not ruled upon.[28] Accordingly, there is still no clear cut answer or defined parameters to guide employers in the handling of medicinal marijuana in the workplace.

What Employees Need to Know

Currently, the state Legislature is considering a bill that would expand protections afforded to employees under CUMMA.[29] If passed, employers would be prohibited from taking any adverse employment action against an employee who is a qualified registered patient using medical marijuana based upon their status as a registered identification cardholder or their positive drug test for marijuana components or metabolites.[30] In order to overcome this illegality, the employer would need to establish, by a preponderance of the evidence, that the lawful use of medical marijuana has impaired the employee's ability to perform their job responsibilities.[31]An employee's ability to perform their job responsibilities may be considered "impaired" when the employee manifests "specific articulable symptoms while working" that decrease or lessen their job performance.[32]

Under the bill, if an employer has a drug-testing policy and an employee or job applicant tests positive for marijuana, the employer would be required to offer them an

opportunity to present a legitimate medical explanation for the positive test. The employer would also be required to provide them with notice, in writing, of [their] right to explain.[33] Once the employee or applicant receives the notice, they will have three working days to submit explanatory information for the positive test result or they may request a retest of the original sample.[34]

Even if this proposal were to be enacted, it still does not provide an employee or job applicant with absolute protection. Rather, the bill specifically states that it does not "restrict an employer's ability to prohibit, or take adverse employment action for, the possession or use of intoxicating substances during work hours[.]"[35] Additionally, the bill would not require an employer to commit any act that would cause them to violate federal law, that would result in a loss of a licensing-related benefit pursuant to federal law, or that would result in the loss of a federal contract or federal funding.[36] Lastly, the bill protects employers from being penalized or denied any benefit under state law solely on the basis of their employing a person who is a registry identification cardholder.[37]

The most important takeaway is that this legislation is *pending* and can change substantially before it is enacted, if it is enacted at all.[38] Since being introduced on May 21, 2018, the act has been amended twice, most recently on Jan. 31 of this year.[39] Although it is regarded as having passed the first committee, it must still pass the first chamber, the second committee and the second chamber before being signed into law.[40]

In the meantime, employees cannot expect to be afforded these additional protections, nor can they rely on them. As the *Cotto* court explained: "cit[ing] past, pending, and future proposed legislation concerning the scope and status of legalized medical marijuana in New Jersey…is completely irrelevant."[41] Further, "[w]here the language of those laws is clear, [the courts] are not free to replace it with an unenacted legislative intent."[42] The same is true for laws that have not even been enacted.[43] Until such time as additional legislation is passed, employees have limited protections and employers have broad discretion as to their employees' use of medicinal marijuana.

What Employers Should Do

Employers must continue to protect themselves from violations of both state and federal law. Although an employer may not discriminate against an employee by virtue of their having a disability, they do not need to and, in fact, cannot allow the use of medicinal marijuana in their workplace. One way to approach this issue is to create and implement company policies that detail and outline the restrictions and ramifications of its use and of an employee working while under the influence. These policies should include the use of drug testing as well as clearly articulated rules as to the use of illegal substances before, during and after the work day, as well as its use on and off company grounds. Lastly, employers should familiarize themselves with the pending legislation regarding CUMMA, monitor its progress and take any additional steps that may become necessary.

In order to prepare for the possibility that an employee will have expanded protections if the additional legislation referenced above is enacted, an employer should also consider updating or drafting new policies explaining the procedure to be utilized in the event an employee tests positive for marijuana and claims that the result is due to a medical regimen. Although employers would be wise to continue to monitor developments in this area, any revisions to state law will take time to be fully implemented, if and when they are enacted.

Recreational Marijuana

The use of marijuana for a non-medicinal purpose is illegal under both state and federal law. In New Jersey, marijuana is illegal unless it "was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by [the New Jersey Controlled Dangerous Substances Act]."[44] Under federal law, it is classified as a Schedule I substance pursuant to the Controlled Substances Act.[45]

Several bills are currently pending in the state Legislature that would bring New Jersey closer to legalizing the use of recreational marijuana.[46] Senate Bill 3445 was introduced on Feb. 7 of this year. The bill, if passed, would decriminalize possession of small amounts of marijuana, hashish, and marijuana-infused products. It would also downgrade certain distribution crimes and require expedited expungement of certain offenses.[47] Similarly, Senate Bill 3621, which was introduced on March 18 of this year, would legalize the personal use of marijuana.[48] The passage of the bill is subject to voter approval and would only take effect if approved by voters in a statewide referendum.[49]

Additionally, Senate Bill 2703, titled "New Jersey Cannabis Regulatory and Expungement Aid Modernization Act," was introduced on June 7, 2018.[50] Similar to S-3445, the bill would legalize personal use of cannabis for adults. It would also create a Cannabis Regulatory Commission to regulate personal use and medical cannabis, as well as provide expungement relief for certain past marijuana offenses.[51] On March 18 of this year, the bill was recommitted to the Senate Judiciary Committee and reported from the Senate Committee as a substitute.[52] It was scheduled to be voted upon by the Legislature on March 25.[53] However, the vote was cancelled due to insufficient support for its passage.[54] A new date for the vote has not been definitively set. However, it is likely that the language of the bill will be altered before the vote takes place.[55]

What Employers and Employees Need to Know

What employers and employees alike need to understand is that marijuana is still an illegal substance under both New Jersey state and federal law. Therefore, employers need not allow its use and employees are prohibited from possessing, using and/or being under its influence, both in and out of the workplace, on a recreational basis.

What Employers Should Do

Similar to the recommendations noted above as they pertain to medicinal marijuana, employers should review and update their company policies. Since marijuana is not yet legalized in New Jersey, employers only need to prepare for the possibility that its status will change and that recreational use will be permitted. Employers should maintain a zero-tolerance workplace and include specific language on the prohibition of marijuana, legal or not, in their company policies. These policies should also include provisions for drug testing and set forth the ramifications for positive results.

Employers should also consider the possibility that the pending legislation could lead to the expungement of certain criminal records, which may be the dividing line between whether an employee is or is not employed with their company. One way to address this would be to implement and/or update existing policies pertaining to background checks and offenses that may factor into their employment.

At the end of the day, New Jersey is still an at-will employment state, meaning that an employer may fire an employee for good reason, bad reason or no reason at all, subject to exceptions such as unlawful discrimination under the NJLAD.[56] However, the use of marijuana, legal or not, does not protect an employee from termination.

Jordan B. Doppelt is an associate at the firm of Lum, Drasco & Positan, LLC.

Endnotes

1. N.J.S.A. 24:6I-1, *et seq.*
2. *Cotto v. Ardagh Glass Packing Inc.,* 2018 U.S. Dist. LEXIS 135194, *16 (D.N.J. Aug. 10, 2018) (*citing State v. Holley,* 2017 WL 6492488 *3 (N.J. Super. Ct. App. Div. Dec. 19, 2017) (*citing* N.J.S.A. § 2C:35-18)).
3. *Cotto v. Ardagh Glass Packing Inc.,* 2018 U.S. Dist. LEXIS 135194, *16-17 (D.N.J. Aug. 10, 2018) (*citing* N.J.S.A. § 24:6I-6(a)).
4. N.J.S.A. 24:6I-14.
5. *Cotto v. Ardagh Glass Packing Inc.*, 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018).
6. N.J.S.A. 24:6I-14; Cotto, *supra* note 5.
7. *Barrett v. Robert Half Corp.* 2017 U.S. Dist. LEXIS 219116 (D.N.J. Feb. 21, 2017); *Wild v. Carriage Servs.*, 2017 U.S. Dist. LEXIS 148457 (D.N.J. Sept. 13, 2017); *Wild v. Carriage Funeral Holdings*, BER-L-687-17 (Feb. 2, 2018); *Cobb v. Ardagh Glass Inc.,* 2018 U.S. Dist. LEXIS 15252 (D.N.J. Jan. 26, 2018); *Cotto v. Ardagh Glass Packing Inc.,* 2018 U.S. Dist. LEXIS 135194 (D.N.J. Aug. 10, 2018).
8. *Id.*
9. *Cotto*, *supra* note 5, at *9.
10. *Cotto*, *supra* note 5.
11. *Cotto*, *supra* note 5, at *12.

12. *Cotto*, *supra* note 5, at *13.
13. *Cotto*, *supra* note 5, at *14-15.
14. *Cotto*, *supra* note 5, at *21-22.
15. *Cotto*, *supra* note 5, at *22 (*citing for example*, *Vargo v. Nat'l Exch. Carriers Ass'n, Inc.*, 376 N.J. Super. 364, 383 (App. Div. 2005) (noting that there was nothing improper or unlawful about an employer perceiving a prospective employee as a user of illegal drugs when presented with a positive drug test) and *Matter of Jackson*, 294 N.J. Super. 233, 236 (App. Div. 1996)(noting that an employer is not required to assume or hope that the employee will limit their alcohol and drug consumption to off-duty hours, or that the effects of the drugs will be dissipated by the time the work day begins)).
16. *Cotto*, *supra* note 5, at *23.
17. *Cotto*, *supra* note 5, at *24-25.
18. *Cotto*, *supra* note 5, at *25.
19. *Wild v. Carriage Funeral Holdings*, 2019 N.J. Super. LEXIS 37 (App. Div. 2019). This decision was approved for publication on March 27, 2019.
20. *Id.*
21. *Wild*, *supra* note 19, at *10-11.
22. *Wild*, *supra* note 19, at *3-4.
23. *Wild*, *supra* note 19, at *11-12.
24. *Wild*, *supra* note 19 at *26. The claims of defamation and intentional interference, which had been dismissed without prejudice by the trial court, were remanded for the imposition of a deadline to file an amended pleading. *Id.*
25. *Wild*, *supra* note 19, at *13 *citing* N.J.S.A. 24:6I-14.
26. *Wild*, *supra* note 19, at *13-14.
27. *Wild*, *supra* note 19, at *14.
28. *Wild*, *supra* note 19, at *17-18.
29. Senate Bill No. 10 Amended, March 18, 2019, available at https://www.legiscan.com/NJ/text/S10/2018.
30. Senate Bill No. 10, *supra* note 29, at (8). The term 'adverse employment action' has been defined as "refusing to hire or employ a qualified registered patient, barring or discharging a qualified registered patient from employment, requiring a qualified registered patient to retire from employment, or discriminating against a qualified registered patient in compensation or in any terms, conditions, or privileges of employment." Senate Bill No. 10, *supra* note 29 at (8)(e).
31. Senate Bill No. 10, *supra* note 29, at (8).
32. *Id.*
33. Senate Bill No. 10, *supra* note 29, at (8)(b)(1).
34. Senate Bill No. 10, *supra* note 29, at (8)(b)(2).
35. Senate Bill No. 10, *supra* note 29, at (8)(c)(1).
36. Senate Bill No. 10, *supra* note 29, at (8)(c)(2).
37. Senate Bill No. 10, *supra* note 29, at (8)(d).
38. Assembly Bill No. 1838, which would also establish protection from adverse employment action for authorized medical marijuana patients, is also pending. However, no progress has been made since it was first introduced and referred to the Assembly Health and Senior Services Committee on Jan. 9, 2018. Assembly Bill No. 1838 Introduced, Jan. 9, 2018, *available at* https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A1838.
39. Senate Bill No. 10 Amended, Jan. 31, 2019, available at https://www.legiscan.com/NJ/bill/S10/2018.
40. 2018 Bill Tracking NJ S.B. 10.
41. *Cotto*, *supra* note 5, at *22-23.
42. *Cotto*, *supra* note 5, at *23 (*citing I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987)).
43. *Cotto*, *supra* note 5, at *23.
44. N.J.S.A. 2C:35-10.

45. *Cotto*, *supra* note 5, at *15 *citing* 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 812(c) (additional citations omitted).
46. LegiScan, NJ legislative search about marijuana, available at https://www.legiscan.com/gaits/search?sort=desc&order=Last+Action&state=NJ&keyword=marijuana (last visited March 27, 2019).
47. Senate Bill No. 3445 Introduced, Feb. 7, 2019, available at https://www.legiscan.com/NJ/bill/S3445/2018.
48. Senate Bill No. 3621 Introduced March 18, 2019, available at https://www.legiscan.com/NJ/bill/S3621/2018.
49. Senate Bill No. 3621 Introduced March 18, 2019, available at https://www.legiscan.com/NJ/text/S3621/2018.
50. Senate Bill No. 2703 Introduced, June 7, 2018, available at https://www.legiscan.com/NJ/bill/S2703/2018.
51. *Id.*
52. *Id.*
53. Sam Sutton, Vote to legalize recreational marijuana in New Jersey canceled, *Politico* (March 25, 2019), available at https://www.politico.com/states/new-jersey/story/2019/03/25/vote-to-legalize-recreational-marijuana-in-new-jersey-canceled-931801.
54. *Id.*; Payton Guion and Brent Johnson, What's next for legal weed in N.J.? Lawmakers are already planning the next vote, NJ.com (March 26, 2019), available at https://www.nj.com/marijuana/2019/03/whats-next-for-legal-weed-in-nj-lawmakers-are-already-planning-the-next-vote.html.
55. Payton Guion and Brent Johnson, What's next for legal weed in N.J.? Lawmakers are already planning the next vote, NJ.com (March 26, 2019), available at https://www.nj.com/marijuana/2019/03/whats-next-for-legal-weed-in-nj-lawmakers-are-already-planning-the-next-vote.html.
56. *Cotto*, *supra* note 5, at *7 citing *Witkowski v. Thomas J. Lipton, Inc.,* 136 N.J. 385, 396 (1994) and *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 512 (1992).

For Whom, What, and Where the Whistle Blows: Exploring the Impact of *Gaughan v. Deptford* on the Scope of N.J.S.A. 34:19-3(c)

by Kathryn Kyle Forman

An interesting distinction appears among the three subsections of the New Jersey Conscientious Employee Protection Act (CEPA), set forth at N.J.S.A. 34:19-3. CEPA generally prohibits employers from taking an adverse employment action against employees who engage in protected activity as defined by the statute. Subsection (a) shields an employee who "discloses, or threatens to disclose to a supervisor or to a public body *an activity, policy or practice of the employer, or another employer*, with whom there is a business relationship that the employee reasonably believes..." violates a law, rule or regulation or is fraudulent or criminal.[1] Subsection (c), however, offers the statutory protection to an employee who "objects to, or refuses to participate in *any activity, policy or practice* which the employee reasonably believes..." violates a law, rule or regulation or is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety, welfare, or protection of the environment.[2]

Seemingly, the language of subsection (c) can be read to protect an employee who objects to any illegal activity, regardless of the activity's relationship to the employer.[3] Although the Legislature certainly intended for CEPA's reach to be broad, New Jersey courts have cautioned that it is not boundless.[4] Recently, in *Gaughan v. Deptford Township Municipal Utilities Authority*,[5] the Appellate Division appears to have established a requirement for demonstrating a nexus between the employer and the complained-of conduct for the complaining employee to receive statutory protection.

Gaughan v. Deptford

The facts of *Gaughan* are somewhat convoluted. The matter involved a group of employees of the Deptford Municipal Utilities Authority (DMUA), and the key players in addition to the plaintiff, William Gaughan, were an employee named B.N.; an employee named S.F.; the executive director (R.H.); the superintendent (E.D.); and S.F.'s father, P.F., who was not an employee of the DMUA.[6] B.N. had a history of disciplinary issues dating back to 2008, and had been involved in a workplace altercation with S.F. in July 2014. During this incident, B.N. allegedly challenged S.F. to a fight, and R.H. separated B.N. and S.F.[7] Approximately two months later, B.N. reported to the police that P.F. had punched B.N. while B.N. was sitting in a DMUA vehicle.[8] When the police went to interview P.F., P.F. told the police that he had gone to B.N.'s house in July or August to attempt to resolve the ongoing dispute between B.N. and S.F., and B.N. had put a gun to his head and threatened his life.[9] P.F. did not report this alleged incident to the police at the time he claims it happened.[10] Law enforcement did not find probable cause to charge B.N. with criminal activity, but did charge P.F. with unlawfully entering B.N.'s home.[11]

Gaughan[12] was interviewed by the police in connection with this series of events and told the police that B.N. had anger issues, and that he wanted B.N. removed from the workplace because he feared for his own life.[13] In Sept. 2014, the union contacted R.H. and told him that Gaughan, S.F., and another employee (R.M.) had reported that they were fearful of B.N.'s conduct at work.[14]

When R.H. interviewed Gaughan, Gaughan refused to answer questions, threw a press clipping about workplace violence on the table, and accused R.H. of "sitting on [his] hands like a little faggot."[15] Two days later, Gaughan walked off the job, stating he was leaving due to B.N.-related safety concerns.[16]

DMUA's labor counsel later found that the complaints about B.N. were unfounded, and that Gaughan, S.F., and R.M. had filed complaints regarding B.N.'s conduct that "they knew or should have known to be exaggerated or false."[17] Gaughan was charged with conduct unbecom-

ing, insubordination, violation of the DMUA's collective negotiation agreement, and violation of DMUA standards.[18] A hearing officer sustained all the charges and found that Gaughan walked off the job for no reason and made derogatory and offensive comments to R.H. In light of two prior disciplinary issues, Gaughan was issued a 10-day suspension.[19]

Gaughan sued DMUA and alleged it suspended him in retaliation for complaining about B.N.'s illegal activity. The Appellate Division upheld the trial court's grant of summary judgment in favor of DMUA. The issues on appeal were whether Gaughan's claim met the first and fourth elements necessary to establish a *prima facie* CEPA claim; whether Gaughan "reasonably believed that his employer's conduct was in violation of a law, rule, or clear mandate of public policy;" and whether "his whistle-blowing activity was causally connected to" his suspension.[20]

A Nexus between the Conduct and the Employer

In reaching its decision, the court could have relied upon any one of several reasons to affirm summary judgment. First, to the extent that Gaughan alleged he blew the whistle on conduct that violated public policy, the court found that Gaughan failed to identify a clear mandate of public policy in his objection to his employer's response to B.N.'s alleged conduct, and relied instead on DMUA's internal policies and procedures, which cannot support the reasonable belief required to establish a CEPA case.[21] The court also noted that a jury would be unlikely to find that Gaughan reasonably believed that B.N. had engaged in criminal activity by threatening P.F. with a gun because Gaughan did not witness the incident, relied only upon what P.F. told him, and the police did not find probable cause to charge B.N. with a crime.[22] Perhaps most importantly, the court also found that Gaughan's report of B.N.'s conduct was exaggerated or false.[23] This lack of good faith certainly could and should have divested Gaughan of any protection to which he would otherwise have been entitled under CEPA. Furthermore, with respect to the element of causation, the court held that Gaughan's undisputed conduct of leaving work without being excused and calling R.H. a derogatory name established a legitimate, non-retaliatory basis for Gaughan's suspension, and Gaughan could not present evidence that such a basis was pretextual.[24]

The *Gaughan* court further articulated a holding that requires a whistleblowing employee to establish a nexus between the employer and the complained of conduct that goes beyond the mere fact that an employee of the employer engaged in the conduct. In deciding that Gaughan did not establish a reasonable belief to support a *prima facie* case, the court expressly referenced Gaughan's failure "to cite to any authority that holds he may assert a cognizable CEPA claim by reporting a co-employee's off-duty unlawful conduct that does not involve another co-employee, workplace activity or the employer's business."[25]

Gaughan's Application

Although the *Gaughan* court did not provide guidance on the practical application of its holding, it makes sense to read *Gaughan* in connection with the New Jersey Supreme Court's decision in *Blakey v. Continental Airlines*.[26] In *Blakey*, in the context of harassing conduct implicating the New Jersey Law Against Discrimination (NJLAD), the Court distinguished between private communications of employees and those that permeate the work environment, cautioning that although "employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace."[27]

In the context of the Supreme Court's holding in *Blakey*, the *Gaughan* decision can be understood to require that an employee is not shielded by CEPA when the employee objects to the conduct of a co-worker that, although unlawful, is generally private in nature, and neither takes place in the workplace nor in workplace-related settings, nor involves other employees, nor the employer's business. Examples of such private unlawful conduct could, in theory, include an employee's involvement in a domestic altercation or drug-related activity while off duty. However, neither *Gaughan* nor *Blakey* create a bright-line rule: Objecting to a domestic altercation that victimizes a co-worker or takes place at a work-related event, or to drug-related activity that involves co-workers or takes place in an environment connected with the workplace would still likely be fair game for CEPA protection under *Gaughan*'s holding.

A prudent application of *Gaughan* would be a fact-

sensitive test that evaluates the relationship between the alleged unlawful conduct and the employer based on the totality of the circumstances, taking into consideration the extent to which the complained of conduct: 1) occurred in the workplace; 2) occurred in a setting related to the workplace or in connection with an activity related to the workplace; 3) directly involved one or more of the employer's employees; and 4) utilized the resources of the employer's business. Such a test would arguably further the purpose and intent of CEPA without improperly expanding its scope.

Gaughan's Implications

The *Gaughan* holding does not reflect a zero sum game. While it may be a boost for employers, it is not likely to result in a big loss for workers. In the author's view, it simply reflects a common sense approach to CEPA, which was drafted specifically to target retaliation against whistleblowers who object to or report an employer's unlawful activity.

From a practical standpoint, the *Gaughan* decision may be most useful to support employers in situations similar to the one faced by the DMUA, where an adverse action against an employee is necessary, but the employee attempts to leverage his or her past objection to a co-worker's private unlawful conduct to allege that the action is retaliatory. In that vein, proper application of the *Gaughan* decision may also dissuade employees from relying on CEPA in furtherance of their own personal agendas, attempting to use the statute as a shield as they 'dig up dirt' regarding their colleagues and bring that dirt into the office under the guise of objecting to unlawful activity.

The author believes the *Gaughan* decision should not be viewed as a limitation of the rights bestowed upon employees by CEPA; instead it should be viewed as a reasonable measure by the Appellate Division to prevent an expansion of CEPA that would contravene the legislative intent and existing interpreting authority. ■

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Endnotes

1. N.J.S.A. 34:19-3(a).
2. N.J.S.A. 34:19-3(c).
3. *Id.*
4. *See, e.g.*, *Klein v. Univ. of Med. & Dentistry of N.J.*, 377 N.J. Super. 28, 45 (App. Div. 2005).
5. *Gaughan v. Deptford Twp. Mun. Utils. Auth.*, No. A-5044016T3, 2018 WL 6816090 (App. Div. Dec. 15, 2018).
6. *Gaughan*, 2018 WL 6816090, at *3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *4.
12. The court's decision does not set forth why the police elected to interview Gaughan in connection with this incident.
13. *Gaughan*, 2018 WL 6816090 at *4.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 4-5.
18. S.F. and R.M. were also disciplined for having made false or exaggerated complaints regarding workplace violence. *Gaughan*, 2018 WL 6816090, at *5, n.2.
19. *Id.*
20. *Id.* at 7-8.
21. *Id.* at 8-9 (*citing Young v. Schering Corp.*, 275 N.J. Super. 221, 234 (App. Div. 1994)).
22. *Id.* at 11.
23. *Id.* at 5.
24. *Id.* at 12.
25. *Id.* at 11.
26. *Blakey v. Cont'l Airlines*, 164 N.J. 38 (2000).
27. *Id.* at 62.

Ex-*Skuse* Me...I Acknowledged, But, Did Not Agree, to Arbitrate My Claims: Two Recent New Jersey Decisions Compound the Lack of Clarity on What Constitutes Clear and Unmistakable Assent Needed to Compel Arbitration of Employment Claims

by Bradley J. Bartolomeo

As employers attempt to find new ways to disseminate information, policies and agreements to their employees in a more efficient and manageable manner, employers using email to accomplish the goal of obtaining an employee's assent to an arbitration agreement do so at their own peril. Just as technology changes faster than articles on their prowess can be published, the New Jersey courts' position on what constitutes explicit and unmistakable assent needed to submit employment claims to binding arbitration also fluctuates.

While federal and New Jersey legislative policies generally favor arbitration, they do so only when they can confirm that the process has been mutually chosen by the parties.[1] Following the issuance of two recent cases with divergent outcomes, it remains unclear what will be deemed to constitute this mutual agreement.

These two decisions illustrate the ongoing debate and continued struggle New Jersey courts face in setting a clear standard for what evidence is needed by employers to assure the enforceability of arbitration agreements covering employment disputes by and between employers and employees. In an unpublished decision, *Horowitz v. AT&T Inc.*,[2] issued by New Jersey District Court Judge Brian R. Martinotti on Jan. 2 of this year, the court compelled arbitration because it found that employees accepted the terms of an arbitration agreement by receiving notice of it by email, clicking on a link, and failing to opt-out before the deadline provided. As a result of the employees' action (or in this case, inaction), the court found that there was a valid, bargained-for exchange, because the agreement mutually obligated the employees and the company to arbitrate employment disputes and the employees' continued employment was valid consideration for the agreement. Thus, the *Horowitz* plaintiffs were compelled to arbitrate their claims.

At direct odds with *Horowitz* is *Skuse v. Pfizer, Inc.*,[3] approved for publication on Jan. 16 of this year, wherein the New Jersey Appellate Division in a lengthy, 35-page decision, determined that Pfizer's mandatory arbitration agreement, which was emailed to employees and contained a similar opt-out mechanism, was not enforceable.

These two arguably inconsistent holdings leave significant questions for practitioners and employers unanswered: What can an employer do to safeguard itself from challenges to its roll-out of an arbitration program for the resolution of employment claims? What specific steps must an employer take in its dissemination of arbitration agreements to secure employee assent that will survive later challenges to the agreement's enforceability?

At least for now, this can only be answered by reviewing the court's respective analyses of the mechanisms by which the defendants in those cases disseminated arbitration agreements to their employees and the manner by which they attempted to, or did, secure their employees' assent to participate in same.

Horowitz v. AT&T Inc.[4]—Failure to Read the Agreement and Failure to Opt-Out of the Agreement is Enough to Constitute an Assent to Arbitration

Roy Horowitz and Kathleen Sweeney are former employees of AT&T. At the time of his termination in June 2016, Horowitz was 56 years old and had worked for AT&T for over 20 years. Similarly, Sweeney was terminated in July 2016 at the age of 51, after having worked for AT&T for over 18 years.

In Dec. 2011, the plaintiffs received emails to their AT&T email addresses advising them that AT&T created an alternative dispute resolution process that provided for third-party arbitration to resolve disputes between the company and its employees.[5] The plaintiffs were advised in this email that their participation in the program was optional but, should they "not opt out by the deadline, you are agreeing to the arbitration process as set forth in the Agreement."[6] Included in the email received by Horowitz and Sweeney was a hyperlink, which they both clicked on, thereby accessing a webpage containing the text of the arbitration agreement. Neither plaintiff opted-out of the agreement.[7] After being terminated by AT&T in 2016, the plaintiffs filed suit alleging violations of the Age Discrimination in Employment Act (ADEA). In response, AT&T filed a motion to compel arbitration on the basis of the Dec. 2011 arbitration agreement. The plaintiffs opposed the motion and argued that they never affirmatively agreed to be bound by the arbitration agreement, that their clicking on the hyperlink to the agreement did not prove they read or fully understood the terms of the agreement and that their failure to opt-out of the agreement could not be considered explicit assent as is required to compel arbitration.

The district court did not find any of the plaintiffs' arguments availing. Instead, the court found the agreement enforceable, and that the plaintiffs accepted the terms of the agreement by receiving notice of the agreement, clicking on the hyperlink to the agreement, and failing to opt-out within the proscribed deadline.[8] In coming to this conclusion, the court considered prior decisions including the seminal decision in *Leodori v. CIGNA Corp.*,[9] as well as longstanding principles of contract formation as set forth in the Second Restatement of Contracts §30 (1981).[10]

In its review of the New Jersey Supreme Court's *Leodori* decision, the court noted "that an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it,"[11] but cautioned that "the law does not require a signature for a waiver to be valid."[12] Therefore, it concluded that a failure to opt out of an arbitration program after receiving notice is sufficient conduct to signify acceptance.[13]

Remarkably, to arrive at this conclusion the court was required to distinguish another New Jersey District Court decision, *AT&T Mobility Services LLC v. Jean-Baptiste*,[14] which considered the identical AT&T arbitration agreement but arrived at a decision directly at odds with the holding in *Horowitz*. In *Jean-Baptiste*, the court found the enforceability of the arbitration agreement was contingent upon the employer's receipt of an "explicit, affirmative agreement that unmistakably reflects the employee's assent,"[15] which it did not have. Accordingly, the *Jean-Baptiste* court denied the motion to compel arbitration. Notably, the cases were distinguishable because while the *Jean-Baptiste* plaintiff had clicked on a link saying "Review Completed," the plaintiff in the *Horowitz* case did not click or sign anything that provided an "unmistakable indication" of agreement or assent.

Skuse v. Pfizer, Inc.[16]—Plaintiff was Ex-*Skuse*[d] from Arbitration Because She Did Not Provide Her "Explicit and Unmistakable Assent" to Participate in Arbitration

In *Skuse*, the employee brought suit in the New Jersey Superior Court after she was terminated for failure to follow the company's vaccination policy for flight attendants. Skuse claimed her religious beliefs (Buddhist) precluded her from receiving vaccinations containing any animal by-products. After a leave of absence, the employee sought a religious accommodation to allow her to continue to work without getting vaccinated. The employer terminated Skuse after denying that accommodation. After Skuse filed a lawsuit, the employer moved to dismiss and compel arbitration.[17] The superior court granted the motion. On appeal, the Appellate Division held that the "key issue before us is whether the parties entered into a valid mutual agreement to arbitrate plaintiff's claims."[18] The court held that there was no mutual agreement and that "the plaintiff employee never expressed in written or electronic form her *explicit and unmistakable voluntary agreement* to forego the court system and submit her discrimination claims against her former employer and its officials to binding arbitration."[19]

The crux of the employer's argument for dismissal was that the plaintiff had agreed to arbitration by her acknowledgment of her receipt and review of the company's online arbitration program "training module."

In May 2016, the employer had emailed its training module for arbitration to employees as a link to an internal computer-based training portal, containing four slides. It imposed a July 4, 2016, deadline for employees

to complete the assigned module, on which date the arbitration policy would become effective.[20] The first slide provided that, "*[a]s a condition of your employment with Pfizer, you and Pfizer agree* to individual arbitration as the exclusive means of resolving certain disputes relating to your employment,"[21] and that "[i]t is important that you are *aware* of the terms of this Agreement,"[22] "[y]ou will be able to *review* and print the Agreement,"[23] and "*[y]ou will then be asked to acknowledge your receipt* of the Agreement."[24]

The second slide contained a "Resources" tab, which "allowed" the employee to click on the tab and review the agreement.[25] It also gave the employee an "opportunity" to print the agreement.[26] Notably, the verbatim agreement was not part of the slides, and instead the employee could, but was not required to, access it through the "Resources" tab. The third slide provided, among other terms, that the employee's assent to the terms of the arbitration agreement was presumed if the employee continued to work for 60 days after receipt of the agreement, even if the employee had not acknowledged, consented to, or ratified and accepted it.[27] Below the language on the third slide a rectangular box with rounded corners appeared. To its right was a circled diagonal arrow pointing upward. Next to the arrow were the words "CLICK HERE to *acknowledge*."[28] The fourth training module slide stated, "Thank you for *reviewing* the Mutual Arbitration and Class Waiver Agreement."[29] It provided additional resources to contact with questions before guiding the employee to "Click 'Exit' to exit *this course*."[30]

The *Skuse* court based its decision that reversal was required on the New Jersey Supreme Court decision in *Leodori v. CIGNA Corp.*,[31] which established standards for assessing arbitration agreements. The court held that the agreement had not been adequately disseminated because the employer failed to notify the employees of the significance of the information presented as to the requested waiver of important legal rights.

Because the court pointed out that the employer is more often than not the party with greater knowledge of the arbitration agreement's import, in obtaining the employee's assent the court instructed that the "employer must do more than 'teach' employees about the company's binding arbitration policy. The employer must also obtain its employees' explicit, affirmative, and unmistakable assent to the arbitration policy, in order to secure their voluntary waiver of their rights under the law."[32] According to the court, "the policy must be presented in a fashion that produces an employee's agreement and not just his or her awareness or understanding."[33]

The court also questioned whether all employees who received the training module necessarily clicked on the "Resources" tab to access and review the agreement, and held that, even if they had, it was questionable whether any employee would have interpreted and understood their "acknowledgment" as an "agreement" or "assent" to waive their statutory rights and submit their claims to arbitration.[34] Accordingly, and in accordance with the long-standing Supreme Court mandate announced in *Leodori*, which requires an "explicit, affirmative agreement that unmistakably reflects [an] employee's assent" to arbitration,[35] and "concrete proof" of a waiver of an employee's rights to a jury trial and to litigate discrimination claims in court,"[36] the *Skuse* court held that the required employee assent to arbitration had not been obtained.[37]

No More Ex-*Skuse*'s: The *Skuse* Court Provides a Roadmap for Employers on How to Obtain the Concrete Proof Necessary to Establish an Employee's Explicit and Unmistakable Assent to Arbitration

One thing is clear: The courts applying New Jersey's contract principles to arbitration agreements are split on whether the failure to opt-out of an arbitration agreement after receiving notice is sufficient to signify intent to be bound by the arbitration agreement. Even within the District of New Jersey there appears to be a lack of unanimity.

Ultimately, employers bear the burden of obtaining their employees' assent to arbitrate disputes. Employers are better served by not relying on *Horowitz* and its condonation of the principle that an employee who receives notice of an arbitration agreement and fails to opt-out has provided assent. Instead, because the *Skuse* court explained what was required of employers to obtain the necessary waiver, there is no ex-*Skuse* for employers not to follow the mandate that they should obtain an explicit, affirmative agreement that unmistakably reflects the employees' assent.[38]

The *Skuse* court suggested that employers could identify the process with terms that more accurately convey what it actually is: "for example, an agreement

and a waiver of rights."[39] Although the court did not provide the exact language that should appear immediately next to the click button acknowledging assent, it noted that "the words used should have close proximity and prominence and contain the critical word 'agree' or 'agreement.' The weaker term 'acknowledge' does not suffice."[40] Additionally, employers could require employees to type their initials in order to permit clicking of a button confirming their assent.

While the Appellate Division recognized that an employer may shy away from using words such as "agree," "waiver" or "assent" in connection with this process, and that this "more straightforward method the law requires may well generate discussions by employers with some workers who may hesitate to provide their electronic agreement…the temporary inconvenience to companies in having such discussions would be offset by the benefit of achieving legally enforceable mutuality and clarity."[41] As the court concluded, and as many would no doubt agree, "we suspect that very few, if any, employees would refuse to agree to the policy if they knew such refusal would cause them to lose their jobs."[42]

Thus, whatever route an employer takes or practitioner prescribes, whether distribution by electronic means or on paper, it is absolutely necessary that the language presented to obtain an employee's assent be explicit and unmistakable, and not couched as anything other than what it actually is—an agreement to submit employment claims to binding arbitration. All other necessary requirements of an arbitration agreement (*i.e.*, provisions regarding the rights waived, the forum selected, among others) must also be clearly stated.

The takeaway from a review of these conflicting New Jersey decisions is this: The failure to follow judicial guidelines for obtaining employee waiver of their right to have their claims heard in court and before a jury can result in employers having to litigate in court rather in an arbitral forum, if that's what they prefer. Those employers who prefer arbitration because it provides a more confidential, cost-effective and quick process for resolving employment disputes are well advised to proceed on the assumption that shortcuts to achieve that goal may backfire.

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Endnotes

1. *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 440, 442, 447 (2014) (holding the words of an arbitration agreement "must be *clear and unambiguous* that a [person] is *choosing* to arbitrate disputes rather than have them resolved in a court of law") (emphasis added); *see also* 9 U.S.C. §§ 1 to 16; N.J.S.A. 2A:23B-1 to -32 (New Jersey's State Arbitration Act, which is nearly identical to the FAA).
2. *Horowitz v. AT&T Inc.*, 2019 U.S. Dist. LEXIS 60 (D.N.J. 2019).
3. *Skuse v. Pfizer, Inc.*, 2019 N.J. Super. LEXIS 7 (App. Div. Jan. 16, 2019).
4. *Horowitz v. AT&T Inc.*, 2019 U.S. Dist. LEXIS 60 (D.N.J. 2019).
5. *Id.* at *2-3.
6. *Id.* at *3.
7. *Id.* at *7-8.
8. *Id.* at *25.
9. *Leodori v. Cigna Corp.*, 175 N.J. 293, 814 A.2d 1098, 1105 (N.J. 2003). The Court also considered *Schmell v. Morgan Stanley & Co.*, No. 17-13080, 2018 U.S. Dist. LEXIS 33395 (D.N.J. March 1, 2018); *Jayasundera v. Macy's Logistics & Operations, Dep't of Human Res.*, No. 14-7455, 2015 U.S. Dist. LEXIS 100922 (D.N.J. Aug. 3, 2015) in arriving at its final decision.
10. The Second Restatement of Contracts §30 (1981) states that "[a]n offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act."
11. *Horowitz*, 2019 U.S. Dist. LEXIS at *20 (*quoting Leodori*, 814 A.2d at 1106).
12. *Horowitz*, 2019 U.S. Dist. LEXIS at *21 (*citing Schmell*, 2018 U.S. Dist. LEXIS 33395, at *4-5 (stating assent "need not be an actual signature, but must demonstrate a willingness and intent to be bound by the arbitration provision"(internal citations omitted)).

13. *Horowitz*, 2019 U.S. Dist. LEXIS at *16 (*quoting Jayasundera*, 2015 U.S. Dist. LEXIS 100922, at *1). The court provided further support for its holding, citing to *Schmell*, 2018 U.S. Dist. LEXIS 33395, at *5, holding that "[i]f Plaintiff has notice, then his continued employment without opting out constituted assent to the Agreement, and the Court should compel arbitration his claims. If Plaintiff lacked notice, then he is not bound by the Agreement, and the Court may not compel arbitration.") (citations omitted); *Jaworski v. Ernst & Young U.S. LLP*, 119 A.3d 939 (N.J. Super. Ct. App. Div. 2015) (finding that the plaintiff manifested an intent to be bound by the arbitration agreement by continuing employment beyond the deadline specified in the terms of agreement); *Uddin v. Sears, Roebuck & Co.*, No. 13-6504, 2014 WL 1310292, at *2 (D.N.J. March 31, 2014) (granting a motion to compel arbitration where the employee acknowledged receipt of the arbitration agreement and chose not to opt out of the agreement within the 30 day deadline); *see Martindale*, 800 A.2d at 879 ("[I]n New Jersey, continued employment has been found to constitute sufficient consideration to support certain employment-related arguments.")."
14. *AT&T Mobility Servs. LLC v. Jean-Baptiste*, 2018 U.S. Dist. LEXIS 117880 (D.N.J. 2018).
15. *Id.*, at *6-7, 10 (*citing Leodori*, 814 A.2d at 1105).
16. *Skuse v. Pfizer, Inc.*, 2019 N.J. Super. LEXIS 7 (App. Div. Jan. 16, 2019).
17. *Id.*, at *6.
18. *Id.*
19. *Id.*, at *3-4.
20. *Id.*, at *8.
21. *Id.*, at *9 (emphasis in original).
22. *Id.* (emphasis in original).
23. *Id.* (emphasis in original).
24. *Id.* (emphasis in original).
25. *Id.*, at *9-10.
26. *Id.*
27. *Id.*, at *11 (the language from the third slide states: "*I understand that I must agree* to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment. *Even if I do not click here, if I begin or continue working for the Company sixty (60) days* after receipt of this Agreement, *even without acknowledging this Agreement*, this Agreement *will be effective*, and I will be *deemed to have consented to, ratified and accepted* this Agreement through my acceptance of and/or continued employment with the Company.") (emphasis in original).
28. *Id.* (emphasis in original).
29. *Id.* (emphasis in original).
30. *Id.* (emphasis in original).
31. *Leodori v. Cigna Corp.*, 175 N.J. 293, 814 A.2d 1098, 1105 (N.J. 2003). The *Skuse* court framed the holding in *Leodori* as standing for the proposition that "an employee's valid waiver of statutory rights, there in the context of an employer's binding arbitration policy, "results only from an *explicit, affirmative agreement* that *unmistakably* reflects the employee's assent." 2019 N.J. Super. LEXIS 7, at *3 (emphasis in original). It further relied on the *Atalese* decision, which *Skuse* stated as holding that the words of an arbitration agreement "must be *clear and unambiguous* that a [person] is *choosing* to arbitrate disputes rather than have them resolved in a court of law." *Id.*, *citing Atalese*, 219 N.J. 430, 440, 442, 447 (2014) (emphasis in original).
32. *Skuse*, 2019 N.J. Super. LEXIS 7, at *26, *citing Leodori*, 175 N.J. at 303.
33. *Id.*, at *27. The *Skuse* court also reminded Pfizer that the last slide of the training module "merely thanks the employee for 'reviewing' the document. The whole process is called a 'training activity.' Communications so vital to the mutual process of contract formation should not hinge upon loose and inconsistent wording that is reasonably capable of being misunderstood as something short of an agreement." *Id.*, at *29.
34. As the *Skuse* court noted, "an effective waiver requires a party to have full knowledge of [his or her] legal rights and intent to surrender those rights." 2019 N.J. Super. LEXIS 7, at *18 (*quoting Knorr v. Smeal*, 178 N.J. 169, 177 (2003) (internal citations omitted)). The court further explained that it would decline to follow its sister court's holding in *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464, 119 A.3d 939 (N.J. Super. Ct. App. Div. 2015), which found a 60-day consent by default provision sufficient to manifest plaintiff's clear and unmistakable assent to arbitrate employment claims.
35. *Leodori*, 175 N.J. at 303.
36. *Id.*, at 307.
37. *Skuse*, 2019 N.J. Super. LEXIS 7, at *34-35.
38. *Id.*, at 29.
39. *Id.*
40. *Id.*, at 30.
41. *Id.*, at 31-32.
42. *Id.*, at 32.

To Delegate or Not to Delegate, That is (Sometimes) the Question: Who Decides Arbitrability...and When?

by Jed Marcus

This year, the United States Supreme Court has issued two unanimous decisions addressing exactly who gets to decide whether a dispute is arbitrable and under what circumstances. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[1] the Court held that a court may not decide an arbitrability question that the parties have delegated to an arbitrator, even if that court thinks the arbitrability claim is "wholly groundless."[2] In *New Prime Inc. v. Oliveira*,[3] the Court, in holding that the Federal Arbitration Act (FAA)[4] does not apply to certain interstate transportation workers, also held that the question of whether the exemption applies is for the court to decide, even if the parties' agreement otherwise delegates questions of arbitrability to an arbitrator.[5]

The Gateway Questions of Arbitrability: Who Decides?

Any discussion on the authority of an arbitrator must begin by acknowledging that an arbitrator has the power to decide an issue only if the parties have authorized the arbitrator to do so.[6] "[W]hether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.[7]…A question of arbitrability arises only in two circumstances—first, when there is a threshold dispute over 'whether the parties have a valid arbitration agreement at all, and, second, when the parties are in dispute as to 'whether a concededly binding contract applies to a certain type of controversy.'[8] Thus, it is left for a court to decide these "gateway questions."[9]

Nonetheless, the presumption that questions of arbitrability must be decided by a court may be overcome where the parties have "clearly and unmistakably" delegated to an arbitrator the authority to resolve issues of arbitrability.[10] This principle "flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties."[11] "[I]n order to undo the presumption in favor of judicial resolution, an arbitration agreement need not include any special 'incantation' (like, for example, 'the arbitrators shall decide the question of class arbitrability' or 'the arbitrators shall decide all questions of arbitrability').[12]…The parties' failure to use a specific set of words will not automatically bar [a] court[ ] from finding that [an] agreement clearly and unmistakably delegated the question of class arbitrability."[13]

Henry Schein: Enforcing the Delegation Clause Even When the Court Thinks the Claim is Not Arbitrable

Section 3 of the FAA provides that a court must stay litigation if it is satisfied that the issue is arbitrable under the agreement.[14] Section 4 says that a court must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue."[15] The issue before the Court in *Henry Schein* was whether or not a court could deny a motion to compel arbitration even though the arbitration agreement delegated the question of arbitrability to an arbitrator because the movant's argument for arbitration was "wholly groundless." The Fifth Circuit, hearing the case below, held that it could.[16] The Supreme Court disagreed. Justice Brett Kavanaugh, writing for a unanimous Court, reasoned that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator," observing that "[t]he ['wholly groundless'] exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the

courts must respect the parties' decision as embodied in the contract."[17]

The fascinating part of the decision is what the Court did not decide, namely, whether or not the parties, having expressly agreed to incorporate the arbitration rules of the American Arbitration Association (AAA), "clearly and unmistakably" delegated the issue of arbitrability to the arbitrator. The Court noted that "[w]e express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue."[18]

This unanswered question has practical import for both practitioners and arbitrators, because many agreements incorporate the AAA rules by reference. Relevant to this discussion are AAA Rule 6(a), which provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,"[19] and Rule 6(b), which provides, *inter alia*, that "the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."[20] Does such incorporation "clearly and unmistakably" evince an intent to arbitrate arbitrability? Here, the courts are split. The 10th and 11th Circuits concluded that the incorporation of AAA rules was "clear and unmistakable" evidence that the parties intended to delegate gateway issues to the arbitrator.[21] On the other hand, the Third Circuit held that the incorporation of AAA rules alone is not a "clear and unmistakable" delegation of authority to the arbitrator.[22]

New Prime: Even With a Delegation Clause, It is for the Court to Determine Whether the FAA Applies in the First Instance

In *New Prime*, a group of drivers for an interstate trucking company, whose operating agreements referred to them as independent contractors, filed a class action lawsuit for alleged wage violations. When the company moved to compel arbitration, the drivers resisted, pointing out that because they were "workers engaged in foreign or interstate commerce," they were exempt from the act pursuant to Section 1 of the FAA, which, among other things, exempts from coverage "contracts of employment of...workers engaged in foreign or interstate commerce."[23] In response, the employer argued that the arbitrator should decide that issue based on the parties' delegation clause, and that the exemption applies only to employees, not to independent contractors.[24]

The Supreme Court affirmed both the district court and the First Circuit Court of Appeals. Justice Neil Gorsuch, writing for a unanimous Court, emphasized that a court's authority to order arbitration "doesn't extend to all…contracts."[25] Section 1 provides that nothing in the FAA shall apply to interstate workers. Accordingly, if the workers in question are indeed engaged in interstate commerce and thus exempt from the FAA's coverage, Sections 2, 3 and 4, which authorize the court to stay a case and compel arbitration, do not apply.[26] In sum, when the question is whether the FAA applies at all, the parties' delegation clause is unenforceable.

As to the question of whether Section 1 was limited to employees rather than independent contractors, the Court framed the substantive question as: "What does the term 'contracts of employment' mean? If it refers only to contracts that reflect an employer-employee relationship, then §1's exception is irrelevant and a court is free to order arbitration…But if the term *also* encompasses contracts that require an independent contractor to perform work, then the exception takes hold and a court lacks authority under the [FAA] to order arbitration…"[27]

The Court concluded that Section 1's exemption is not only for those who meet the current definition of 'employee,' but also encompasses independent contractors.[28] The Court looked at the plain meaning of the text of Section 1 at the time it was adopted, reviewed contemporary dictionaries and legal authorities and concluded that "the evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship."[29] So, the opinion concludes, the district court did not have the authority to order arbitration.

In sum, the Court in *New Prime* relied on its own understanding of the term 'workers' as it believes Congress understood it in 1925. That reading followed from *Circuit City Stores, Inc. v. Adams*,[30] in which a divided Court held that Section 1 exempts only transportation workers engaged in interstate commerce based on what it believed was Congress's understanding of the term "engaged in interstate commerce" in 1925. Justice Ruth Bader Ginsburg suggested in her dissent to *Epic Systems Corp. v. Lewis*[31] last term, that Congress intended to exclude all workers from the FAA but joined with Justice Gorsuch in this instance, perhaps because she was satisfied with the result.

Conclusion

Henry Schein, another in the long line of cases favoring arbitration as a means of resolving disputes, instructs that if the parties want to delegate the issue of arbitrability to the arbitrator, their contract should contain "clear and unmistakable" language to that effect. They cannot rely simply on language incorporating AAA rules; incorporation by reference is not enough by itself in the Third Circuit and was not addressed by Justice Kavanaugh.

Of the two cases, *New Prime* may have a greater impact on the adjudication of employment disputes in the long run for two reasons. First, one might reasonably expect an explosion of litigation on the question of who are "transportation workers engaged in foreign or interstate commerce." Second, even if the exemption applies, an arbitration agreement may still be enforceable under state law. Under applicable federal law, if the FAA does not apply, state arbitration law governs.[32] In any event, one might also expect employers to add provisions to their arbitration agreements stating that interpretation and enforcement of the agreements will be controlled by state law rather than invoking the FAA. ■

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Endnotes

1. 139 S. Ct. 524 (2019).
2. *Id*. at 529.
3. 139 S. Ct. 532 (2019).
4. 9 U.S.C. §§ 1, *et. seq.*
5. 139 S. Ct. at 538.
6. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).
7. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83. (Quotations and citations omitted.).
8. *Id*. at 84.
9. *Id*. at 85.
10. *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003).
11. *First Options of Chicago, Inc.*, *supra* note 7 at 943.
12. *Chesapeake Appalachia, LLC v. Scout Petroleum LLC*, 809 F.3d 746, 758 (3d Cir. 2016).
13. *Id*. at 759.
14. 9 U.S.C. § 3.
15. 9 U.S.C. § 4.
16. *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d. 488 (5th Cir. 2017).
17. *Henry Schein*, *supra* note 1, 139 S. Ct. at 529.
18. *Id*. at 530, 531.
19. AAA Rule 6 can be found at https://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf.
20. *Id*.
21. *Sprint Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240 (10th Cir. 2018). *See also Emilio v. Sprint Spectrum L.P.*, 508 F. App'x. 3 (2d Cir. 2013) (enforceability of class action waiver left to arbitrator because of incorporation of JAMS rules); *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496 (2009) ("Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, which provide that '[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'").
22. *Chesapeake Appalachia, LLC*, *supra* note 12 at 762-763.

23. 9 U.S.C. § 1.
24. *New Prime*, *supra* note 3 at 541-542.
25. *Id*. at 537.
26. *Id*.
27. *Id*. at 539.
28. *Id*.
29. *Id*. at 542.
30. 532 U.S. 105, 118-119 (2001).
31. 138 S. Ct. 1612, 1643-1645 (2018) (Ginsburg, J., dissenting).
32. *See, e.g.*, *Maldonado v. Sys. Servs. of Am., Inc.*, No. 09-542, 2009 WL 10675793 at *2 (C.D. Cal. June 18, 2009) (finding that exemption applied and compelling arbitration under state law); *Valdes v. Swift Transp. Co.*, 292 F. Supp. 2d 524, 529-30 (S.D.N.Y. 2003) (same); *see also O'Dean v. Tropicana Cruises Int'l, Inc.*, No. 98-4543, 1999 WL 335381 at *1 (S.D.N.Y. May 25, 1999)("The inapplicability of the FAA does not mean...that arbitration provisions in seaman's employment contracts are unenforceable, but only that the particular enforcement mechanisms of the FAA are not available"). This rule applies even if no state law is selected to govern the dispute. *Valdes*, *supra* at 529-30.

The Viability of Freestanding Claims for Failure to Accommodate Disabilities Remains Unsettled

by Benjamin S. Teris and Kayleen Egan

Is an employer's failure to accommodate an employee's disability, in and of itself, sufficient to form an actionable claim? This question remains unresolved, and courts are divided on whether a plaintiff can pursue a "freestanding failure to accommodate claim."

Typically, a plaintiff asserting a claim based on a failure to accommodate a disability will have suffered a distinct adverse employment action coupled with the accommodation denial, such as termination or demotion. An employee might also resign due to the denial of his or her accommodation request and claim constructive discharge. In a rare scenario, an employer denies an employee's accommodation request, but the employee neither suffers a distinct adverse employment action nor resigns. The latter scenario is where the issue of a freestanding failure to accommodate claim manifests.

Federal courts are split on whether a freestanding failure to accommodate claim is cognizable under the Americans with Disabilities Act (ADA). Additionally, the New Jersey Supreme Court has analyzed the issue under the Law Against Discrimination (LAD), but ultimately refrained from resolving it. This article examines the key cases on freestanding failure to accommodate claims under the ADA and the LAD, and provides guidance for New Jersey practitioners.

Americans with Disabilities Act

The ADA's anti-discrimination provision, at 42 U.S.C. § 12112(a), prohibits an employer from "discriminat[ing] against a qualified individual on the basis of disability in regard to job applications, procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." In turn, 42 U.S.C. § 12112(b)(5)(A) defines a failure to make reasonable accommodations as a type of disability discrimination. Accordingly, because the ADA prohibits discrimination strictly in regard to hiring, discharge, etc., and defines failure to accommodate as a *type of discrimination*, the plain language of the ADA appears to require a distinct adverse employment action as an element of a failure to accommodate claim.

Notwithstanding the statutory language of the ADA, several courts of appeal, including the Third Circuit, have seemingly endorsed freestanding failure to accommodate claims. The 10th Circuit, however, recently reached the opposite conclusion.

Distinct Adverse Employment Action Not Required

The Third Circuit touched on the issue of freestanding failure to accommodate claims in two precedential opinions. However, in both cases the issue was not central to the plaintiff's claims. In *Williams v. Philadelphia Housing Authority Police Department*, the Third Circuit pronounced, with little explication, that "[a]dverse employment decisions in [the context of the plaintiff's claim] include refusing to make reasonable accommodations for a plaintiff's disabilities."[1] The focus of the *Williams* opinion was whether an employee who is "regarded as disabled" is entitled to a reasonable accommodation under the ADA.[2] Moreover, the plaintiff actually suffered an adverse employment action. In response to his request for an accommodation, the employer offered him an *unpaid* leave of absence and later terminated him.[3] As such, whether a failure to accommodate constitutes an adverse employment action was irrelevant to the plaintiff's claims.

More recently, in *Colwell v. Rite Aid Corporation*, the Third Circuit reiterated its pronouncement from *Williams* that a failure to accommodate is an adverse employment action in a disability discrimination claim.[4] The plaintiff asserted, in part, claims of constructive discharge and failure to accommodate under the ADA.[5] Although the Third Circuit affirmed the district court's grant of summary judgment with respect to the plaintiff's constructive discharge claim, it reversed the district

court's decision for the failure to accommodate claim, holding that there was a genuine issue of material fact as to whether "either party violated the duty to engage with good faith in the interactive process."[6] Notably, the Third Circuit did not focus on whether a freestanding failure to accommodate claim is cognizable under the ADA, but assumed that failing to accommodate an employee's disability constitutes an adverse employment action based on *Williams*. Also, the employee alleged an adverse employment action in the form of a constructive discharge, thereby diminishing the relevancy of the freestanding failure to accommodate claim issue.

The Seventh Circuit has also endorsed freestanding failure to accommodate claims. In *EEOC v. AutoZone, Inc.*, in a footnote, the Seventh Circuit confirmed that "[n]o adverse employment action is required to prove a failure to accommodate."[7] According to the panel, the district court had strayed from Seventh Circuit precedent "by requiring that the EEOC demonstrate an adverse employment action against [the employee]."[8] Nonetheless, the district court's purported "misstep was not decisive for the court's judgment."[9] Notably, the employee in *Autozone* had been terminated, thereby making any decision on the freestanding failure to accommodate claim issue irrelevant—which is presumably why the Seventh Circuit addressed the issue in a footnote rather than the body of the opinion.

In all of these decisions the courts either discussed the issue of freestanding failure to accommodate claims *in dicta* or resolution of the issue was unnecessary because the employee suffered a distinct adverse employment action. None of the courts engaged in a detailed analysis of the ADA to reach its determination.

Distinct Adverse Employment Action Required

In *Exby-Stolley v. Board of County Commissioners*, the 10th Circuit diverged from its sister circuits on the issue of freestanding failure to accommodate claims under the ADA.[10] In a 2-1 decision, the court held that: 1) a plaintiff must show that he or she suffered an adverse employment action to establish a failure to accommodate claim; and 2) a failure to accommodate alone is not an adverse employment action.

Laurie Exby-Stolley was employed as health inspector for Weld County, Colorado (county). While employed, she broke her arm, which required multiple surgeries.[11] Following her return to the workplace, she struggled to complete the number of required inspections for her job and received a poor performance evaluation.[12] Her physician then placed her on medical restrictions.[13] The county assigned her to a part-time office job at her same salary because it could not accommodate her in the health inspector position.[14] Eventually, Exby-Stolley asked the county to create a new position for her, which it refused.[15] She resigned, and then filed a lawsuit, alleging the county had fired her and discriminated against her by failing to reasonably accommodate her disability.[16] The jury ruled in favor of the county, finding that Exby-Stolley had not shown she was subject to an adverse employment action, which was listed as a necessary proof on the jury charge.

On appeal, Exby-Stolley argued that the trial court erred in instructing the jury "that she had to prove she had suffered an adverse employment action."[17] In the alternative, she argued that, if proof of an adverse employment action was necessary, the county's failure to accommodate was, in and of itself, an adverse employment action.[18] The 10th Circuit majority rejected both arguments.

The majority first addressed Exby-Stolley's argument "that an adverse employment action is not required to establish an ADA claim based on a failure to accommodate."[19] The majority determined that Section 12112(a), which specifies that discrimination must be "in regard to...terms, conditions, and privileges of employment[,]" establishes that an adverse employment action is necessary component of a disability discrimination claim.[20] Thus, although the term 'adverse employment act' is judicially created and absent from the ADA, it originates from the statutory language. Accordingly, the statutory language dictates "that the [adverse employment action] requirement applies to every discrimination claim under the ADA, including those based on failure to make reasonable accommodations."[21]

The majority rejected other circuits' opinions, including *AutoZone, Inc.*, *supra*,[22] because the freestanding failure to accommodate claim issue was not raised by the parties in those cases, and, thus, the issue was not thoroughly examined by the courts.

The majority also rejected Exby-Stolley's argument that a failure to accommodate is an adverse employment action—holding that "mere inconvenience or an alteration of job responsibilities" is not an adverse employment action.[23] The 10th Circuit was not persuaded by

the Third Circuit's opinions in *Colwell* and *Williams*. According to the majority, neither opinion examined the statutory language of the ADA nor provided "any other support for [the] proposition" that refusing to reasonably accommodate an employee is an adverse employment action.[24] The lack of thorough statutory analysis was understandable in *Williams* given the case involved a "clear adverse employment action arising from a failure to make reasonable accommodations."[25]

Accordingly, the majority held that a plaintiff must establish an adverse employment action to state a claim for disability discrimination under the ADA based on a failure to accommodate.[26] In other words, a freestanding failure to accommodate claim is not cognizable under the ADA.

The sharply worded dissent rejected "the majority's assertion that reading an adverse-employment-action requirement into the ADA's failure-to-accommodate claim is not 'contrary' to" the 10th Circuit's "controlling precedent."[27] According to the dissent, "the majority's misguided endeavor to incorporate an adverse-employment-action requirement into an ADA failure to-accommodate-claim" was mostly based on "'confusion[]...[in] failing to clearly differentiate between disparate treatment and failure to accommodate claims': the former require a showing of an adverse employment action and the latter do not."[28] The dissent, therefore, would have remanded the case for a new trial.

The 10th Circuit's Oct. 2018 opinion will not be the court's final say on the issue, as the full court agreed to hear the case *en banc*, with oral argument tentatively scheduled for May of this year.[29]

Law Against Discrimination

A notable difference between the ADA and the LAD is the absence of an explicit provision in the LAD requiring employers to provide reasonable accommodations to disabled employees. Instead, an employer's duty to accommodate disabled employees has been read into the LAD by the courts and implemented through administrative regulation.

Against that backdrop, the Appellate Division and New Jersey Supreme Court analyzed the issue of freestanding failure to accommodate claims under the LAD. In *Victor v. State*, the Appellate Division held an adverse employment action is a component of a failure to accommodate a disability claim under the LAD and not, in and of itself, an adverse employment action.[30] On certification, the New Jersey Supreme Court declined to endorse the Appellate Division's holding. The Court, however, stopped short of endorsing freestanding failure to accommodate claims, leaving the issue for another day.[31]

Appellate Division Says No to Freestanding Failure to Accommodate Claims

Roy Victor, a state trooper, returned to work after an extended medical leave of absence.[32] Upon return, he advised his supervisor that he had injured his back after he was cleared to return to work but before he reported to work that day.[33] He requested to perform administrative tasks rather than road patrol due to fear of exacerbating his injury.[34] His request was denied.[35] He then performed patrol duties for four hours as ordered, but took sick leave for the remaining two hours of his shift.[36] Shortly thereafter he went on paid leave for psychological issues.[37]

Victor then sued the state. He alleged, *inter alia*, a failure to accommodate claim under the LAD, solely based on the denial of his request to perform administrative duties on the day he returned to work.[38] At trial, the state requested that the jury charge include an adverse employment action as a required element of Victor's proofs.[39] The trial judge denied the request.[40] The jury returned a verdict in favor of Victor on the failure to accommodate claim. The trial judge denied the state's motion for a new trial or alternatively for a judgment notwithstanding the verdict.[41] The state appealed.

Upon review, the Appellate Division noted that although the LAD does not specifically address reasonable accommodation, New Jersey courts require employers to reasonably accommodate employees' disabilities.[42] The Appellate Division also described "[t]he failure to accommodate [a]s one of two distinct categories of disability discrimination claims…the other being disparate treatment discrimination."[43]

The Appellate Division was "at a loss to locate a state court decision addressing whether [a] plaintiff must prove an adverse employment action occurred as a result of a failure to accommodate a claimed disability."[44] In most disability discrimination cases, the "adverse employment action [is] self-evident[.]"[45] But in Victor's case, he "was not passed over for promotion, fired, transferred, reassigned, demoted or even docked wages when he was told to resume patrol duty despite his back discomfort."[46]

Looking to the ADA for guidance, the Appellate Division disagreed with the trial court's determination that a "failure to accommodate 'is in and of itself an adverse employment action'" and held that "[f]ailure to accommodate is not discrete from discrimination, but an act that may prove discrimination."[47] Accordingly, the Appellate Division reversed the trial court's denial of the state's challenge to the jury charge because "the jury must determine whether plaintiff suffered an adverse employment action," and that such action is not "presumed by the failure to accommodate…."[48]

New Jersey Supreme Court Says Yes…Maybe

The New Jersey Supreme Court granted certification on the issue of "whether a plaintiff must prove he suffered an adverse employment action as a result of his employer's failure to accommodate a physical disability under the LAD[.]"[49]

Victor argued that the Appellate Division's decision conflicted with federal precedent under the ADA, particularly *Williams*, and the Appellate Division overlooked LAD regulations on reasonable accommodation, at N.J.A.C. 13:13-2.5(b).[50] The state argued that Victor cannot recover under the LAD because he did not suffer a distinct adverse employment action.[51] The state further argued that *Williams* is not persuasive because the plaintiff was terminated in that case, thereby making the Third Circuit's pronouncement that a failure to accommodate can be an adverse employment action *dicta*.[52]

In consideration of the parties' arguments, the Court analyzed the ADA's anti-discrimination provision, at 42 U.S.C. § 12112(a), and provision on reasonable accommodation, at 42 U.S.C. 12112(b)(5)(A). Similar to the analysis in *Exby-Stolley*, *supra*, the Court determined that under the plain language of the ADA, an employer's "failure to accommodate...would not extinguish the requirement that [a] plaintiff demonstrate an adverse employment [action]."[53] The Court, however, noted that the same might not be true under the LAD, "because its reasonable accommodation provisions are not explicit" and must be interpreted under the "LAD's overarching goal [of] the eradication of the cancer of discrimination."[54]

The Court reviewed prior decisions of the Appellate Division but did not find any opinion directly supporting freestanding failure to accommodate claims. The Third Circuit's holding in *Williams* was not persuasive because it "involved an employee who was terminated rather than accommodated[.]"[55]

Reiterating the broad remedial nature of the LAD, the Court determined "[t]he LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted."[56] While noting an employee who does not suffer an adverse employment action coupled with the denial of his or her request for an accommodation might be able to assert a hostile work environment claim, the Court determined "there also might be circumstances in which such an [employee's] proofs, while falling short of [the standard for a hostile work environment claim] would cry out for a remedy."[57] That remedy might be a freestanding failure to accommodate claim.[58]

Despite teetering on the edge of holding that a failure to accommodate without a distinct adverse employment action is actionable under the LAD, the Court refrained from resolving the issue. The particular facts of the case were a "poor vehicle" for doing so because there was no record evidence that Victor was disabled or that he sought a reasonable accommodation, as courts have defined it.[59] The Court, therefore, concurred with the Appellate Division's decision to reverse the verdict and remand for a new trial, but not based on the issue of freestanding failure to accommodate claims.

The New Jersey Supreme Court has not revisited the issue since *Victor*.[60]

Practice Points

Freestanding failure to accommodate claims will rarely arise in practice. As recognized by the New Jersey Supreme Court, "[s]uch cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful in securing an accommodation will indeed suffer an adverse employment consequence."[61] In fact, the issue only arose in *Exby-Stolley* because the plaintiff mistakenly failed to assert a constructive discharge claim.[62] Nonetheless, if the issue arises in practice, given that the viability of such claims has not been settled, employment law practitioners in New Jersey can make credible arguments on either side under the ADA and LAD.

While the Third Circuit seemingly endorsed freestanding failure to accommodate claims under the ADA in *Williams*, the court's pronouncement was arguably *dicta*, because the employee in that case suffered

an adverse employment action and the court did not provide any support for its assertion. Indeed, the New Jersey Supreme Court and the 10th Circuit have both questioned whether *Williams* is persuasive precedent on the issue.

Nevertheless, *Williams* has not been overturned on this point, and was seemingly confirmed by the Third Circuit in *Colwell*. Thus, proponents of freestanding failure to accommodate claims can cite to *Williams* and *Colwell* to support their position that such claims are viable under the ADA.

As for the LAD, the New Jersey Supreme Court's language in *Victor* can arguably be read as a tacit approval of freestanding failure to accommodate claims. While the Court refrained from endorsing such claims, it refused to uphold the Appellate Division's outright prohibition of them. No court has addressed the issue in a precedential opinion since *Victor*. Although in a non-precedential decision, *Bull v. UPS*, the Third Circuit affirmed the District of New Jersey's denial of an LAD plaintiff's motion for a new trial, notwithstanding that "the jury verdict sheet failed to advise the jury that UPS's failure to accommodate Bull's disability could result in her 'de facto' termination."[63] Citing *Victor*, the Third Circuit held that "[a]lthough the New Jersey Supreme Court may later decide to strike 'adverse employment action' as a distinct element in a failure to accommodate claim, it has not yet done so."[64] Accordingly, despite *Victor* leaving an opening for freestanding failure to accommodate claims under the LAD, courts might be hesitant to allow such claims to proceed until (or unless) the New Jersey Supreme Court definitively rules on the issue.

Conclusion

Only time will tell whether the United States Supreme Court will resolve the issue of whether freestanding failure to accommodate claims are actionable under the ADA or if the New Jersey Supreme Court will revisit the issue with respect to the LAD. For now, it remains open to interpretation, and practitioners have multiple arguments to support whichever position they may take in a case.

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Endnotes

1. 380 F.3d 751, 761 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).
2. *Id.* at 768-76.
3. *Id.* at 757-58.
4. 602 F.3d 495, 504 (3d Cir. 2010).
5. *Id.* at 499.
6. *Id.* at 508.
7. 630 F.3d 635, 638 n.1 (7th Cir. 2010).
8. *Id.*
9. *Id.*
10. 906 F.3d 900, *rehear'g granted en banc*, 910 F.3d 1129 (10th Cir. 2018).
11. *Id.* at 903.
12. *Id.*
13. *Id.*
14. *Id.* at 903.
15. *Id.* at 904.
16. Exby-Stolley failed to include a claim of constructive discharge in her pre-trial order, and instead, asserted that she was fired by her employer. *Id.* at 918. Based on that failure, the trial court did not allow the plaintiff to include a jury instruction for constructive discharge. *Id.*
17. *Id.* at 905.
18. *Id.* at 917.
19. *Id.* at 921.
20. *Id.* at 907-09.
21. *Id.* at 911 (*quoting* 42 U.S.C. § 12112(a)).
22. *Id.* at 914-15.
23. *Id.* at 917.
24. *Id.* at 918.
25. *Id.*
26. *Id.* at 917.
27. *Id.* at 920.

28. *Id.* at 921.
29. *Exby-Stolley v. Bd. of County Comm'rs*, 910 F.3d 1129 (10th Cir. 2018).
30. 401 N.J. Super. 596 (App. Div. 2008).
31. 203 N.J. 383 (2010).
32. *Victor*, 401 N.J. Super. at 602-04.
33. *Id.* at 604.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 604-05.
38. *Id.* at 605.
39. *Id.* at 607.
40. *Id.*
41. *Id.* at 607-08.
42. *Id.* at 609.
43. *Id.* (*quoting Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 397 (App. Div. 2002)).
44. *Id.* at 611.
45. *Id.*
46. *Id.* at 612.
47. *Id.* at 614.
48. *Id.* at 617.
49. *Victor*, 203 N.J. 383 at 396 (*quoting* 99 N.J. 542 (2009)).
50. *Id.* at 396.
51. *Id.* at 397.
52. *Id.*
53. *Id.*
54. *Id.* at 412 (internal quotation marks and citations omitted).
55. *Id.* at 416.
56. *Id.* at 421.
57. *Id.* at 422.
58. *Id.*
59. *Id.* at 422.
60. In *Royster v. New Jersey State Police*, 227 N.J. 482, 499-500 (2017), however, the Court did not include an adverse employment action as an element of a failure to accommodate claim: "[t]o establish a failure-to-accommodate claim under the LAD, a plaintiff must demonstrate that he or she (1) qualifies as an individual with a disability…; (2) is qualified to perform the essential functions of the job…; and (3) that defendant failed to reasonably accommodate [his or her] disabilities." (internal quotation marks and citation omitted).
61. *Id.* at 421.
62. 906 F.3d at 918.
63. 620 Fed. Appx. 103 (3d Cir. 2015).
64. *Id.* at 103.

Common Interactive Process Mistakes

by Neha Patel

Under the Americans with Disabilities Act and its amendments[1] and the New Jersey Law Against Discrimination,[2] employers are required to provide reasonable accommodations to applicants and employees with disabilities, absent a showing of undue hardship.[3] Reasonable accommodations are modifications or adjustments that enable disabled individuals to be considered for employment, to perform the essential functions of their position, and/or to enjoy equal benefits and privileges of employment.[4]

In order to identify suitable accommodations, employers and employees must engage in an interactive process.[5] The interactive process involves gathering information about an employee's disability and associated functional limitations; establishing the essential functions of the employee's position; identifying potential accommodations; evaluating whether the accommodations identified will enable the employee to perform essential functions; assessing the operational impact of the accommodations identified; and determining whether the accommodations identified would pose undue hardship on the employer. This requires input from employees, healthcare providers, managers and directors, human resources personnel, and, at times, legal counsel.

Given the various components, the interactive process can be complicated for employers to navigate and missteps along the way can prove to be costly. However, employers can limit exposure by avoiding these common mistakes:

1. **Failing to engage in the process**
   Saying "no" to a request for accommodation does not satisfy the obligation to engage. The interactive process is a two-way dialogue. Both employers and employees must participate in good faith. If an accommodation is denied based on a determination of undue hardship, an employer must make good faith efforts to identify alternative accommodations that will not pose undue hardship.
2. **Abandoning the process without resolution**
   Depending on the nature of the accommodation at issue, the interactive process can be prolonged and lead to frustration. Although it may be tempting to stop communicating, the process must be carried out until a determination can be made as to the grant or denial of an accommodation. Throughout the process, timely communication is required.
3. **Failing to obtain medical information necessary to evaluate the request for accommodation**
   All too often, employers delve into the interactive process, and even go on to grant accommodations, without having requested relevant medical information. Employers are entitled to confirm the existence of a disability requiring accommodation; the associated functional limitations; and the nature, scope, duration, and medical necessity of the accommodation being requested. These facts inform the process and assist with identifying potential accommodations and, thus, should be requested at the outset. Notably, however, medical inquiries must be limited, reasonable, and tailored to the condition for which an accommodation is being requested; be directed to the employee in the absence of a HIPAA authorization permitting direct communication with the employee's healthcare provider; and be accompanied by a Genetic Information Nondiscrimination Act (GINA) disclaimer.
4. **Failing to understand that provision of leave may be required beyond Family and Medical Leave Act (FMLA) leave**
   Employers must consider provision of paid and/or unpaid job protected leave as reasonable accommodation. This includes the provision of additional leave *after* an employee's exhaustion of 12 weeks of FMLA leave. Accordingly, when an employee takes FMLA leave for a serious health condition, the employer should anticipate having to address a request for extended leave by way of the interactive process.

5. **Following a bright-line cut-off for leaves of absence**
   It is clear that provision of indefinite leave—when an employee is unable to say if or when he or she will return to work—is not required. However, there is no bright-line rule for the length of leave or the number of leave extensions that should be provided as a reasonable accommodation. The relevant inquiry is always whether provision of leave or extended leave will pose an undue hardship.
6. **Requiring employees to return to work 'full duty' or with 'no restrictions'**
   The Equal Employment Opportunity Commission has made it abundantly clear that it is unlawful to require employees to return to work completely healed. An employer must consider accommodating an employee's restrictions, so long as the employee can safely perform the essential functions of the position and the accommodation poses no undue hardship.
7. **Accepting a managerial determination of undue hardship without probing further**
   A manager saying an accommodation constitutes an undue hardship does not make it one, nor does the fact that coworkers will be disgruntled or inconvenienced by the accommodation. Employers must delve deeper. Undue hardship means "significant difficulty or expense" will result from provision of the accommodation.[6] Factors to be considered include the nature and net cost of the accommodation; the resources, size, and operations of the facility and covered entity; and the operational impact of the accommodation (*e.g.*, impact on coworkers' ability to work, on the health and safety of others, on the continuity of the employer's services).[7] Before a request for accommodation is denied, an employer must be able to concretely demonstrate why it constitutes an undue hardship.
8. **Failing to document the outcome**
   Regardless of the outcome, it must be documented. If an accommodation is granted, documenting the scope and parameters of the accommodation will set clear expectations for the parties. To the extent an accommodation is denied by the employer or declined by the employee, documenting the efforts undertaken and the basis for the denial or declination will assist in defending against claims. ■

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Endnotes

1. 42 U.S.C. § 12102, *et seq.* and 29 C.F.R. § 1630.1, *et seq.*
2. N.J.S.A. 10:5-1, *et seq.* and N.J.A.C. 13:13-1, *et seq.*
3. 42 U.S.C.A. 12112; 29 C.F.R. 1630.2; N.J.A.C. 13:13-2.5.
4. *Id.*
5. *Id.*
6. 42 U.S.C.A. § 12111; N.J.A.C. 13:13–2.5.
7. *Id.*