Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ High Court Lowers Bar For Bias Retaliation In UPS Ruling

By **Martin Bricketto**

Law360, New York (July 17, 2013, 9:13 PM ET) -- New Jersey employers may face more liability under the state's powerful anti-discrimination law following a state Supreme Court decision Wednesday that an employee doesn't have to identify an actual victim of bias to claim retaliation under the statute for voicing complaints, attorneys say.

The ruling came in the case of a UPS Inc. supervisor who sued the shipping giant under the state's Law Against Discrimination and Conscientious Employee Protection Act, claiming he was demoted for protesting his manager's offensive sexual comments about female employees and abusive credit card and lunch practices. There was no evidence of actual discrimination or a hostile work environment against women, or that female workers heard the remarks.

Breaking with the state's Appellate Division, the high court struck down a CEPA verdict for Battaglia but reinstated his LAD win against UPS.

“However unprofessional a supervisor's language might be, as long as it was not directed at the protected class of individuals and there were no actions directed at that class, there was no liability,” Archer & Greiner PC partner John P. Quirke said. “Here, the court has definitively said that merely saying derogatory things about a protected class of individuals is in and of itself enough to trigger the Law Against Discrimination, and I definitely think that's lowering the threshold.”

Justice Helen E. Hoens said in her opinion for the court that the Appellate Division took an overly narrow view of the LAD when it found that Battaglia's conduct wasn't protected. The law does more than just shield workers who complain about “directly demonstrable acts of discrimination,” according to the opinion.

“On the contrary, as this case makes plain, the broad purposes of the LAD would not be advanced were we to apply so narrow a focus,” the opinion said.

The case didn't concern the occasional words of a low-level employee, but comments about numerous women that a supervisor repeatedly made in front of managerial employees, according to the opinion. A complaint made in “a good faith belief” that conduct violates the LAD can support a cause of action, the opinion said, stressing the statute's ultimate goal of encouraging a discrimination-free workplace.

“We would ill serve those important purposes were we to demand that one who voices complaints as did plaintiff in this matter, and who suffers retaliation as a consequence, also prove that there is a separate, identifiable victim of actual discrimination,” the opinion said.

The court said it doesn't believe that the LAD should amount to a civility code for the workplace, but the opinion's emphasis on employee perception seems to push the standard in that direction, according to Salvador P. Simao, a partner with Ford Harrison LLP.

“What they created was this kind of sliding scale, and plaintiffs attorneys are going to seize on that and say it's just a good faith belief of the employee and it doesn't matter if there's discrimination or not,” Simao said.

However, Maureen S. Binetti, a Wilentz Goldman & Spitzer PA shareholder who represents Battaglia, said the court's opinion doesn't expand the reach of the LAD but instead makes clear the kind of conduct that the law's retaliation provisions are supposed to prevent. The decision is a win for people who try to do the right thing and prevent the discrimination and harassment of others, she said.

“If I don't belong to a particular protected class and something is being said that is disgusting, then we're all in a position to do something about it, and if we do, we're protected,” Binetti said.

For now, the decision leaves Battaglia with at least a $500,000 jury award for economic damages. He also won emotional distress damages, but the state Supreme Court backed the Appellate Division's call for remand on that issue because the jury was allowed to consider future damages without necessary evidence.

UPS said in a statement that it will comply with the decision and follow the procedural steps in the order, declining further comment.

On the LAD claim, the court seemed troubled by a standard that would allow the kind of vulgar comments at issue to go unchecked, possibly based on concerns that they could bubble over into actual discrimination, according to Thomas A. Linthorst, a partner with Morgan Lewis & Bockius LLP. However, the court drew a line by rejecting the notion of a civility code, he added.

“Those are kind of the two poles that we know the line is in between, and I think going forward parties and courts undoubtedly will be grappling with which side of the line the facts of their cases fall,” Linthorst said.

Battaglia claimed he confronted the manager about the remarks and also sent an anonymous letter to human resources personnel that referenced “langu[age] you wouldn’t use [in] your wors[t] nightmare.”

That phrasing was vague but it was enough to put the company on notice, according to the opinion. Rather than probe for violations, a human resources manager conducted a limited investigation and discounted the complaints based on pre-existing beliefs, the opinion said.

Criticism of the investigation should serve as a red flag for employers, according to Linthorst.

“Companies are going to need to take heed of where the court found deficiencies and make sure it can't be portrayed that their own investigation was insufficient to root out the underlying allegation, even when the initial report is vague, and make sure that the investigation cannot be seen as essentially turning the table on the individual relating the complaint,” he said.

Upending Battaglia's CEPA claim, the court said an employee must have a reasonable belief that the complained-of activity was fraudulent and that he or she reported it for that reason.

“Vague and conclusory complaints, complaints about trivial or minor matters, or generalized workplace unhappiness are not the sort of things that the Legislature intended to be protected by CEPA,” the opinion said.

Ultimately, the CEPA claim in this case hinged on a single oral comment from Battaglia to his manager that, at most, mentioned “liquid lunches” and the abuse of a company credit card by employees in a division that Battaglia formerly oversaw, according to the opinion. That was too vague for the court, which added that Battaglia didn't suggest or believe the conduct was fraudulent.

Additionally, complaints about employees taking too long at lunch or drinking during that time wouldn't rise to the level of CEPA-protected conduct, the opinion said. The court also expressed doubt that, even if proven, violations of company credit card policies would pass muster.

While the “reasonable belief” standard for CEPA remains a subjective one, employers can take some comfort from the specificity that the court provided, according to Simao.

“They're saying you can't just make broad allegations, you really need to come up with specific and precise complaints. Complaining about minor policy violations isn't going to rise to the level of CEPA,” he said.

The court added Wednesday that a jury charge that the CEPA claim “dealt with credit cards, dealt with meal practices and other things” would itself require a reversal.

“It is incumbent upon the court to identify the protected activity precisely, that is, to articulate the complaint that plaintiff made that constitutes whistle-blowing,” the opinion said. “By using this broad and open-ended description in the jury charge, however, the trial court failed to give an adequate explanation of the alleged wrongful activity that could support a verdict in plaintiff’s favor on his CEPA claim.”

UPS is represented by Michael T. Bissinger of Day Pitney LLP.

Battaglia is represented by Maureen S. Binetti of Wilentz Goldman & Spitzer PA.

The case is Battaglia v. United Parcel Service Inc., case numbers A-86/87-11, before the New Jersey Supreme Court.

--Editing by John Quinn and Richard McVay.