

# Employees win right to sue for employer post-employment conduct

**E**mployers that think their liability ends when a terminated employee walks out the door better think again. A recent New Jersey case expanded employees' rights to sue employers for post-termination nonemployment-related conduct.

In the wake of the decision, courts may construe common employers acts—such as opposing a former employee's application for unemployment benefits—as retaliation.

## LAFE lessons

Husband and wife Fernando and Liliana Roa were fired from LAFE Foods, a New Jersey food distribution company, in August 2003 and October 2003, respectively. The Roas alleged that a LAFE vice president harassed them for refusing to cover up extramarital affairs he had with the wives of two other LAFE employees. Fernando Roa said the VP asked him to tell the VP's wife that Fernando—not the VP—was the one having the affairs. Fernando refused and eventually told the VP's wife about the trusts.

The Roas contended that the harassment continued even after they were terminated. According to the Roas, LAFE retaliated against them by canceling their health insurance coverage. Fernando learned that the insurance had been canceled only after the insurer denied claims relating to surgery Liliana Roa had undergone. The resulting medical bills damaged the Roas' credit.

Additionally, the Roas claimed LAFE incorrectly told the Division of Unemployment Insurance that Liliana had been terminated for misconduct, preventing her from receiving unemployment benefits.

More than two years later, the Roas each filed suit claiming retaliation under the New Jersey Law Against Discrimination (NJLAD). LAFE countered that the NJLAD's two-year statute of limitations had expired. A district court dismissed both suits.

The Roas appealed to the Appellate Division, which ruled that Fernando's

case could move forward because the continuing damage from the unpaid medical bills constituted a continuing violation. Thus, the court ruled, Fernando had not exceeded the LAD's statute of limitations.

## Retaliation rules

To prove retaliation, an employee traditionally has had to demonstrate that he engaged in a protected activity under the NJLAD, the federal Title VII of the Civil Rights Act of 1964 or a similar law. The employee also had to show that the employer took an adverse employment action, such as a termination or suspension, as a result of the employee's protected conduct.

If the employee resigned or was fired, he could no longer argue the conduct was retaliatory, because the employer's actions were no longer linked to the employment relationship.

That is no longer the case.

In assessing the Roas' claims, the court explained that the analysis should not focus on "the continuing effect of a prior violation," but rather on "whether the alleged 'continuing violation' ... is conduct that could potentially violate LAD." Here, the court concluded that the defendant's actions "occurred in close proximity to their termination," allegedly "in retaliation for plaintiff's engaging in LAD-protected activity, and thus, were violative of LAD in and of themselves."

The court decided "the continuing violation doctrine could apply." The court's application of this doctrine is important because it extends the time employees have to file suit against the employer.

A landmark 2006 U.S. Supreme Court decision, *Burlington Northern & Santa Fe Railway Co. v. White*, (548 U.S. 53, 2006), paved the way for the Roa decision. In *Burlington*, the Supreme Court found that an employer's liability is "not limited to discriminatory actions that affect the terms and conditions of employment."

Instead, the *Burlington* case held that

a retaliation claim could include events that were unrelated to the workplace or the employment relationship.

## Tightening policies

Since employers can now be held liable for post-employment conduct, companies need to revisit their policies and review how they treat *former* employees.

- For example, management should ensure that departing employees are treated fairly and consistently with respect to payment of back wages, unused vacation time and other forms of compensation.
- Make sure statements concerning unemployment insurance eligibility are factual and well-documented.
- HR should develop standard form letters and procedures to ensure continuation of health insurance benefits and payment of premiums when appropriate.
- Companies should also have a policy in place to handle inquiries from prospective new employers. (To avoid liability, many employers take a "name, rank and serial number" approach, providing only the former employee's job title and employment dates.)

The circumstances surrounding a termination are often emotionally charged and uncomfortable for both parties.

Regardless of the reasons for the separation, the employer should be professional, give the individual whatever he or she is entitled to receive and bring the relationship to a close. Nothing can be gained from making a difficult situation worse—and it might even end up in an expensive lawsuit.

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