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April 29, 2004

M E M O R A N D U M

TO: Commissioners

FROM: Robert E. Anderson
General Counsel

SUBJECT: Supplemental Report on Developments in the Counsel's Office Since March 25, 2004

Commission Cases

The union has appealed the Commission's order restraining arbitration in Waldwick Bd. of Ed. and Waldwick Ed. Ass'n, P.E.R.C. No. 2004-61, __ NJPER ___ (¶___ 2004). The Commission held that N.J.S.A. 18A:30-6 precluded arbitration of a claim that a school board employee was contractually entitled to an extended sick leave. That statute requires a school board to exercise its discretion based on the facts of each employee's situation rather than by negotiated rule.

New Jersey Court Cases

In Llerna v. J.B Hanauer & Co., __ N.J. Super. ___, 2002 WL 32443100 (Law Div. 2002), Judge Graves held that a female plaintiff bringing a sex discrimination claim against a brokerage firm could compel disclosure of a confidential settlement agreement between the firm and a former worker settling her sexual harassment lawsuit. The Court concluded that the plaintiff's interest in being free from unlawful discrimination coupled with the public's interest in eradicating discrimination outweighed the company's interest in maintaining the confidentiality of the agreement. To protect the privacy of the employee who settled the lawsuit, the Court entered a protective order restricting access to the agreement to the plaintiff, her

attorney, and her experts and prohibiting them from making any further disclosure without a subsequent court order. The Court voided the provision of the settlement agreement requiring the employee to return the payments to her if she told anyone about the terms of the agreement.

In Kluczyk v. Tropicana Products, __ N.J. Super. ___ (App. Div. 2004), the Appellate Division upheld a jury verdict awarding compensatory and punitive damages to a plaintiff who was fired in retaliation for filing DCR complaints to protest same-sex harassment. The Court rejected an assertion that the plaintiff could not prevail on his retaliatory discharge claim when the termination occurred during the course of litigation in which plaintiff was claiming a constructive discharge; while these claims were inconsistent, the plaintiff relied only on the harassment and retaliation claims at this trial and the jury's finding of a retaliatory discharge was supported by sufficient evidence. The record specifically showed that plaintiff was treated differently from others who lied on their employment applications or committed serious violations of company policy, but who were not terminated. The Court also rejected an assertion that punitive damages can never be awarded when a discharge is premised on the advice of counsel; such advice is only one factor, not a per se basis, for assessing whether a termination was made in good faith.

In Mancini v. Teaneck Tp., __ N.J. __ (2004), the Supreme Court held that the Township waived its affirmative defense of laches against a plaintiff bringing a sexual harassment claim based on an alleged continuing violation. The Township asserted laches in its Answer, but did not build a record on that defense or mention it again until petitioning for certification. The Court's opinion lays out the standards for assessing claims of continuing violations and defenses of laches in that context.

In Shoremont v. APS Corp., 2004 N.J. Super. LEXIS 144 (App. Div. 2004), the Court held that the entire controversy doctrine barred defendants from asserting setoff claims in a court action after the plaintiff minority shareholder prevailed in arbitration. The Court recognized that the entire controversy doctrine is not to be imported wholesale into arbitration proceedings and should be applied cautiously to litigation involving limited-issue arbitration and only where necessary to achieve the purposes and policy of the doctrine. In this case, however, defendants had a fair and reasonable opportunity to raise all setoff claims in the arbitration.

In Hennessey v. Winslow Tp., 2004 N.J. Super. LEXIS 146 (App. Div. 2004), the Court held that a former employee was not collaterally estopped from filing a disability discrimination lawsuit under LAD because a Township hearing officer had ruled against her in a pre-termination proceeding. The hearing officer found that the Township could not reasonably accommodate her disability and had to terminate her. The Court concluded that this finding did not estop the plaintiff from litigating that question de novo in a lawsuit; the plaintiff could have done so if she had appealed her termination to the Merit System Board and she should have the same right to present her claim fully in a LAD lawsuit given the public policy against discrimination.

Federal Court Cases

In Aivaliotis v. Borough of North Plainfield, 2004 U.S. App. LEXIS 6790 (3d Cir. 2004), the Court of Appeals granted summary judgment to the employer on an overtime compensation claim brought by several police officers under the Fair Labor Standards Act. The officers claimed that "due to a quirk in the American calendar, every four years there are three days of work that have not been compensated for" and "every 11 years that winds up being a full [two-week] pay period." The Court agreed with the Borough that the parties' negotiated salary arrangement did not provide for additional, cumulative payouts to compensate for any calendar quirk.

In Ashton v. Whitman, 2004 U.S. App. LEXIS 7363 (3d Cir. 2004), the Court held that corrections officers received the due process required by Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985), before they were terminated. Each officer was offered two hearings and was provided a thorough explanation of the disciplinary charges as well as the supporting evidence. The officers asserted that they were also entitled to receive any exculpatory evidence in the employer's possession so they could evaluate the desirability of entering a settlement, but the Court rejected that extension of Loudermill rights since it "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

In Conoshenti v. Public Service Electric & Gas Co., 2004 U.S. App. LEXIS 7152 (3d Cir. 2004), the Court upheld summary judgment for the employer on a former employee's claim that his discharge violated New Jersey public policy, the New Jersey LAD, and the federal Family Medical Leave Act. The Court found that the employee would have been discharged even absent any consideration of his taking the 12 weeks of leave protected by the FMLA. However, the Court denied summary judgment on the plaintiff's claim that the employer interfered with his FMLA rights by not properly advising him of these rights so that he could make an informed decision about how to structure his leave and thus preserve his job.

In Antonelli v. State of New Jersey, 2004 U.S. Dist. LEXIS 5587 (D.N.J. 2004), Judge Walls held that the FMBA did not have standing to assert that the scoring of an examination used to hire firefighters violated its members' "right to safety and security" under the Fourteenth Amendment to the United States Constitution. The FMBA claimed that the exam was not job-related and that hiring unqualified firefighters would jeopardize the safety of other firefighters. The Court concluded, however, that the Constitution does not obligate a government employer to provide a safe working environment.

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