

LAD Retaliation Claimants Must Prove Good Faith: Key Decision Makes It More Difficult to Prove LAD Claims in New Jersey and Easier for Employers to Defend

By: Kelly A. Lavelle, Esq. and Thomas Paschos, Esq.

Thomas Paschos & Associates, P.C.

30 North Haddon Avenue, Suite 200
Haddonfield, New Jersey (NJ) 08033

856.354.1900 phone

215.636.0555 phone

856.354.6040 fax

KLavelle@paschoslaw.com

TPaschos@paschoslaw.com

www.paschoslaw.com

The Supreme Court of New Jersey recently ruled, on February 21, 2007, that a complaint filed by an employee that allegedly triggers a retaliation claim under New Jersey's Law Against Discrimination ("LAD") must be made in good faith and on a reasonable basis. The Court further ruled that investigative reports prepared by an employer that provide an independent basis for an employee's discharge are admissible non-hearsay evidence. These rulings make it more difficult for employees to bring LAD retaliation claims. In turn, the rulings have made it easier for employers to defend such actions brought under the LAD.

In *Carmona v. Resorts International Hotel, Inc.*, ___ A.2d ___, 2007 WL 517104 (N.J.), Plaintiff, Reinaldo Carmona, ("Carmona") brought an action against his employer, Resorts International Hotel ("Resorts"), alleging that, after he complained about claimed unfair treatment, he was retaliated against in violation of the Law Against Discrimination.

In 1999, Carmona was hired as a front desk agent by Resorts. As a front desk agent, Carmona was responsible for checking guests into and out of Resorts. Carmona was employed by Resorts until November 9, 2001, when he was

fired. The parties disputed the reason for that termination. Carmona asserted retaliation for an internal claim of discriminatory or disparate treatment, filed just three days prior to his being fired. Resorts claimed that Carmona was terminated for stealing.

Carmona's complaint with the hotel's equal employment opportunity ("EEO") office, alleged he had been treated differently with regard to medical leave because he is Hispanic. Resorts asserted the termination was for theft and that an investigation into whether plaintiff was improperly upgrading rooms for hotel guests in exchange for money began on November 5, 2001, the day before Carmona went to the EEO.

This appeal addressed two separate issues: (1) whether the employee's complaint that allegedly triggers a retaliation claim must be made in good faith and on a reasonable basis, and (2) whether an investigative report prepared by an employer, which the employer claims provided an independent basis for the employee's discharge, should have been admitted into evidence.



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Both the trial court and the Appellate Division held that the LAD contains no independent requirement that a plaintiff in a LAD-retaliation case also prove that the complaint predicate to a retaliation claim must have a reasonable, good-faith basis, and that it was not an abuse of discretion to exclude from evidence the investigative report prepared by the employer.

In reaching its holding, the New Jersey Supreme Court noted that, in fact, the plain language of the LAD retaliation provision does not include the requirement that a plaintiff also prove, in addition to the standard elements of a LAD cause of action, that he or she had a good-faith, reasonable belief that he or she was engaged in protected activity. However, the Court stated that “a requirement that a LAD retaliation plaintiff demonstrate that his underlying complaint was reasonable and in good faith is entirely consonant with the purpose of the LAD.” The Court reasoned that the absence of such required proofs “may well lead to abuse.” Therefore, the Court held that:

[I]n a case in which a plaintiff alleges retaliation under the LAD, N.J.S.A. 10:5-12d, the plaintiff bears the burden of proving that his or her original complaint - the one that allegedly triggered his or her employer's retaliation - was made reasonably and in good faith. The obverse also holds true: an unreasonable, frivolous, bad-faith, or unfounded complaint cannot satisfy the statutory prerequisite necessary to establish liability for retaliation under the LAD.

Carmona, 2007 WL 517104 at *10. In holding that an employee bears the burden of proving that his or her original complaint - the one that allegedly triggered his or her employer's retaliation - was made reasonably and in good faith, the New Jersey Supreme Court followed parallel federal precedents where federal courts apply the good faith and reasonableness standard to actions brought under Title VII. “New Jersey courts frequently look to case law under Title VII for guidance in developing standards to govern the resolution of LAD claims.” *Carmona*, 2007 WL 517104 at *8 (citations omitted).

Regarding the admission of its investigative reports, Resorts submitted that it offered the investigative report as evidence of Resorts' investigation of plaintiff's misconduct

and Resorts' actual motivation for terminating plaintiff's employment, which was the central issue in the case. On this issue the Supreme Court held that:

when an employer defends against a claim that an employee's discharge was the product of retaliation, an investigative report prepared by the employer that purports to demonstrate a non-retaliatory reason for the employee's termination is a non-hearsay statement. Finally, we hold that the admissibility of an investigative report in these circumstances is subject not only to all other relevant evidentiary limitations, but also to proof that a decision maker relied on that report in deciding to discharge the employee from employment.

Carmona, 2007 WL 517104 at *1. These holdings make it easier for employers to defend against retaliation actions brought under the LAD.

It should be noted that while the rulings in *Carmona* limit an employee's ability to perfect a retaliation claim under the LAD, a recent United States Supreme Court ruling broadened the protection an employee receives from anti-retaliation provisions under Title VII. In *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (U.S. 2006), Sheila White, an employee of Burlington Northern & Santa Fe Railway Co., brought a Title VII action against the railroad, alleging sex discrimination and retaliation. White alleged that as a result of complaints of sexual harassment against her supervisor she was reassigned from forklift duty to standard track laborer tasks and then suspended for 37 days without pay. White was later reinstated with back pay.

The United States Supreme Court was called upon to decide whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace and to characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.

The United States Supreme Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.” This holding affords employees broader protection from retaliation. However, contrary to the holding in *Carmona*, “this standard does not require a reviewing court or jury to consider ‘the nature of the discrimination that led to the filing of the charge.’”



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Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.” *Burlington Northern*, 126 S. Ct. at 2416 (citations omitted). The Court held:

By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Id.

Applying the standard to the facts of the case, the Court held there was a sufficient evidentiary basis to support the jury’s verdict on White’s retaliation claim. The Court stated, “[c]ontrary to Burlington’s claim, a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job

description.” Furthermore, the Court held that the jury’s conclusion that the suspension was materially adverse was reasonable. Burlington had argued that the 37-day suspension without pay lacked statutory significance because White was reinstated with back pay. However, the Court found that “[a]n indefinite suspension without pay could well act as a deterrent to the filing of a discrimination complaint, even if the suspended employee eventually receives back pay.”

Regardless of the Supreme Court’s holding in *Burlington Northern & Santa Fe Railway Co. v. White*, supra, the state of New Jersey focuses on the underlying conduct that forms the basis of the original complaint. As a result, employee’s ability to make a retaliation claim under the LAD is limited and easier for an employer to defend.