DISCOVERY OF DEFENDANT'S INVESTIGATION OF PLAINTIFF'S COMPLAINTS AND OTHER ACTS OF DISCRIMINATION

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The law pertaining to the discovery in sexual harassment and other discrimination cases has recently expanded the scope of discovery that can be sought and discovered. Three key recent cases expanding the scope are Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996); Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997); and Connolly v. Burger King, 306 N.J. Super. 344 (App. Div. 1997). All three cases are appended to the outline.

These cases have ruled that discovery of employers' internal investigations of complaints of discrimination are discoverable because they are necessary to determine whether or not the employer's practice and policies provide effective remedial measures to prevent future discrimination and to protect employees from further discrimination, harassment and retaliation. Although the rulings appear to be new law, they are grounded in well-established law that has been evolving throughout the 1990's. Set forth below are the categories of legal reasoning upon which the expanded discovery has been granted:

SCOPE OF DISCOVERY

The scope of discovery as set forth in the New Jersey Court Rules must be "construed liberally, for the search for truth in aid of justice is paramount." Myers v. St. Francis Hospital, 91 N.J. Super. 377, 385 (App. Div. 1966). R.4:10-2(a), in pertinent part, provides as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

New Jersey courts have consistently held that pretrial discovery should be accorded the broadest possible latitude. Jenkins v. Rainner, 69 N.J. 50, 56 (1976); In re Selse , 15 N.J. 393, 405 (1954); Blumberg v. Dornbusch,139 N.J. Super. 433, 437 (App. Div. 1976); Rogotzki v. Schept, 91 N.J. Super. 135, 146 (App. Div. 1966); Interchemical Corp. v. Uncas Printing & Finishing Co., Inc., 39 N.J. Super. 318, 325 (App. Div. 1956); Martin v. Educational Testing Serv., Inc., 179 N.J. Super. 317, 327 (Ch. Div. 1981).

New Jersey's discovery rules are to be construed liberally in favor of broad pre-trial discovery. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997); Jenkins v. Rainner, 69 N.J. 50, 56 (1976) ("Our Court system has long been committed to the

view that essential justice is better achieved when there has been full disclosure so that parties are conversant with all the available facts."); Catalpa Investment Grow, Inc. v. Zoning Bd. Of Adjustment, 254 N.J. Super 270, 273 (Law Div. 1991); Martin v. Educ. Testing Serv., Inc., 179 N.J. Super 317, 327 (Ch. Div. 1981).

Under New Jersey Court Rules, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. R.4:10-2(a). "Relevant evidence," although not defined in the discovery rules, is defined in the Rules of Evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Payton v. New Jersey Turnpike Authority, supra, at 535; N.J.R.E. 401.

EFFECTIVE REMEDIAL MEASURES

The efficacy of an employer's remedial program is highly relevant to both the employee's claim against the employer and against the employer's defense to liability. Effective remedial measures include the process by which the employer arrives at the sanctions that it imposes on alleged harassers. Payton v. New Jersey Turnpike Authority, Supra. In Payton, the Supreme Court stated:

In short, a remedial scheme that reaches the correct result through a process that is unduly prolonged or that unnecessarily and unreasonably leaves the employee exposed to continued hostility in the workplace is an ineffective remedial scheme. Such a process, in reality, indirectly punishes employees with the temerity to complain about sexual harassment and cannot constitute "effective" remediation. Indeed, such a scheme can be viewed only as an attempt by the employer to discourage employees from coming forward and utilizing the employer's remedial process in the first place. Payton v. New Jersey Turnpike Author , Id. at 538-39.

The Appellate Division, in Connolly v. Burger King Corp., Supra, clarified the scope of discovery permitted under Payton , reasoning that:

Moreover, the absence of effective responses to sexual harassment claims in general may foster an atmosphere of tolerance thereby contributing to a sexually hostile atmosphere and may constitute the willful indifference which is a predicate for the award of punitive damages. . . Finally, we note that the discovery may provide evidence that the employment of other complainants had been terminated, which may lead to probative evidence regarding plaintiff s contention that she was the victim of retaliatory discharge. Connolly v. Burger King, supra, at 349.

EMPLOYER'S LIABILITY

An employer's liability for sexual harassment flows from Agency law, particularly Restatement (Second) of Agency §219. Section 219 of the Restatement (Second) of Agency outlines the liability of a master for the torts of a servant. Lehmann v. Toys 'R' Us, 132 N.J. 587, 619 (1993). Section 219 states:

1. A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
2. A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
    a. the master intended the conduct or consequences, or
    b. the master was negligent or reckless, or
    c. the conduct violated a non-delegable duty of the master, or
    d. the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The Supreme Court held in Lehmann, supra, that an employer can be vicariously liable even when the employee is not acting within the scope of his employment. Lehmann, at 623. The Supreme Court stated in Lehmann, supra, that: An employer may also be held vicariously liable for compensatory damages for supervisory sexual harassment that occurs outside the scope of the supervisor's authority, if the employer had actual or constructive notice of the harassment, or even if the employer did not have actual or constructive notice, if the employer negligently or recklessly failed to have an explicit policy that bans sexual harassment and that provides an effective procedure for the prompt investigation and remediation of such claims. Lehmann v. Toys 'R' Us, 132 N.J. at 624.

FEDERAL LAW

In the field of employment discrimination, New Jersey Courts have traditionally looked to Federal law for guidance. Spragg v. Shore Care, 293 N.J. Super. 33, 49 (App. Div. 1996); Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990); Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429-430 (App. Div. 1995). Federal jurisprudence in the area of discrimination is particularly relevant because the LAD draws significantly from federal antidiscrimination law. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 538; Lehmann v. Toys 'R' Us, 132 N.J. 5 87, 617-19.

In looking to Federal law for guidance on the issues before the Court, Federal Courts have consistently held that evidence of discrimination and discrimination against other employees is relevant, admissible, and discoverable. Hurley v. The Atlantic City Police Department, 933 F. Supp. 396, 412, fn. 11 (D.N.J. 1996).

Citing Lehmann v. Toys 'R' Us, 132 N.J. 587, 611 (1993), the New Jersey District Court held that the Plaintiff may use evidence that other women in the workplace were sexually harassed because the plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. Hurley v. The Atlantic City Police Department, supra, at 412. The Court ruled that such evidence is admissible, among other bases, under Fed. R. Evid. 404 to prove that a defendant harbors discriminatory intent towards a particular group. See also Garvey v. Dickenson College, 763 F. Supp. 799 (M.D. Pa. 1991); West v. Philadelphia Elec. Co., 45 F. 3d 744, 757 (3d Cir. 1995) ("evidence of harassment of others will support a finding of discriminatory intent with

regard to a later incident.") Federal Courts have held that the fact-finder is entitled to consider all of the evidence of a hostile environment to determine the reasons for the employer's actions. Aman v. Cort Furniture Rental Corp., 85 F.3d (3d Cir. 1996); Glass v. Philadelphia Elec. Co., 34 F.3d 188, 194 (3d Cir. 1994). Evidence of prior acts of discrimination is relevant to an employer's motive even where the evidence is not extensive enough to establish discriminatory animus itself. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir. 1988); Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1995); EEOC v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1994).

Like New Jersey State Courts, Federal Courts have ruled that an employer's liability is governed by the principles of agency law. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Bouton v. BMW of North America, Inc., 29 F. 3d 103, 106 (3d Cir. 1994); Harding v. Dana Transport, Inc., 914 F. Supp. 1084, 1094 (D.N.J. 1996). According to agency principles, liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action. Andrews v. City of Philadelphia , 895 F.2d 1469, 1486; Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989).

Further, following the Federal interpretation of agency principles applied to hostile working environments, if a Plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be held liable. Upjohn Co. v. United States, 449 U.S. 383, 391 (1980).

NEGLIGENCE

The New Jersey Supreme Court has expressly recognized a cause of action for negligent hiring or retention. The Supreme Court in Di Cosala v. Kay, 91 N.J. 159 (1982) stated:

We now expressly recognize the tort of negligent hiring or retention of an incompetent, unfit or dangerous employee and hold that one may be liable for injuries to third persons proximately caused by such negligence. Id. at 174.

The Court set forth two elements of the cause of action: (1) the knowledge of the employer and foreseeability of harm to third persons; and (2) that through the negligence of the employer in hiring or retaining the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury. Id. at 173-174. The Court also expressly ruled that the Defendants owed a duty to exercise reasonable care in the hiring and retention of employees. Id. at 177. In the context of a sexual harasser, negligence on the part of an employee may be determined based upon the employer's failure to have effective remedial measures to protect against future harassment. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 536; Lehmann v. Toys 'R' Us, 132 N.J. 587, 624-25. If the employer acts unreasonably or if it delays the action it does take, it is not reasonably likely to prevent the misconduct from recurring, or from occurring to someone else. See Guess v. Bethlehem Steel Corp., 913 F. 2d 463, 465 (7th Cir. 1990).

PUNITIVE DAMAGES

It is well settled law in New Jersey that punitive damages may be awarded under the NJLAD. Johnson v. Ryder Truck Rentals, 256 N.J. Super 312, 313 (Law Div. 1993). Discrimination is, in and of itself, outrageous conduct and an expression of malice, and "is particularly repugnant in a society that prides itself in judging each individual by his or her own merits." Levitson v. Hall Inc., 868 F.2d 558, 562, (3d Cir. 1981)(interpreting a NJLAD Case). With regard to sexual harassment claims, a Plaintiff must show more than mere negligence in order to establish a claim for punitive damages. Lehmann v. Toys 'R' Us, 132 N.J. 587, 624 (1993). Hence, the employer should be liable for punitive damages only in the event of participation by upper management or willful indifference. Id. at 625. Evidence of other claims of sexual harassment are discoverable in order to determine if punitive damages are appropriate, and to determine whether others were retaliated against. Connolly v. Burger King Corp., supra, at 349.

The Third Circuit eloquently explained the importance of punitive damages in discrimination cases:

Indeed by its very nature, discriminatory conduct "embodies ideas of intent and wrongdoing that seem to fit the ordinary definition of wanton or malicious conduct." See Weiss [Weiss v. Parker Hannaifan, Corp., 747 F.Supp. 1118 (D.N.J. 1990)], supra, 747 F. Supp. at 1136. Thus logic would dictate that conduct which rises to the level of unlawful discrimination is precisely the type of "evil-minded act" that could support an award of punitive damages. It would not be unreasonable for a finder of fact to conclude that such conduct is outrageous and deserving of punitive damages. Moreover, such punitive damage awards will serve to deter and punish wrongdoers, and further the Legislature's goals of alleviating the personal hardships suffered by victims of discrimination." Johnson v. Ryder Truck Rentals, Inc., supra, at 317.

RETALIATION

Any remedial measure that leaves the complainant worse off is ineffective per se. See Guess v. Bethlehem Steel Corp., 913 F. 2d 463, 465 (7th Cir. 1990). Although New Jersey Courts have not stated the law in precisely those words, the conclusion is logically compelled by the case law in this State. The New Jersey Supreme Court has defined "effective remedial measures" as those measures reasonably calculated to end the harassment. Lehmann v. Toys 'R' Us, Inc. 132 N.J. 587, 623 (1993). The purpose is not simply to end the harassment, but specifically "to stop the harassment by the person who engaged in harassment." Lehmann, Id.

The Supreme Court in Payton v. New Jersey Turnpike Authority, supra, clarified any possible misunderstanding of the effective remedial measures standard by repeating the Lehmann language and stating, "Thus we determined that an employer that failed to take effective remedial measures against a harassing employee was, in essence, liable for its own conduct." (emphasis added). Payton , 148 N.J. at 536. New Jersey is not the only jurisdiction which has demanded that effective remedial measures be directed at the

harasser rather than at the complaining victim. The Seventh Circuit has adopted and followed an identical standard, and has enunciated it clearly. In the Seventh Circuit case of Guess v. Bethlehem Steel, 913 F.2d 463(7th Cir.1990),the Circuit Court addressed a claim where the Plaintiff claimed that she was transferred because she complained of sexual harassment. The Court stated:

Guess argues that one of the corrective steps that Bethlehem took, even if effective, was improper: to transfer her rather than the foreman out of the department in which the incident occurred, in order to reduce the chances of a recurrence. She relies on a simple syllogism, which while we cannot find it in any previous case seems to state the law correctly: A remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim's wage or other remuneration, increases the disamenities of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.

Guess v. Bethlehem Steel Corp., Id. at 465.