EMPLOYMENT ISSUES ARISING FROM WORKER'S COMPENSATION INJURIES

By: Alan H. Schorr

I. Retaliation for filing a worker's compensation claim.

A. Statutory Protection under Worker's Compensation law.

34:15-39.1. Unlawful discharge of, or discrimination against, employee claiming compensation benefits; penalty

It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer, or because he has testified, or is about to testify, in any proceeding under the chapter to which this act is a supplement. For any violation of this act, the employer or agent shall be punished by a fine of not less than $100.00 nor more than $1,000.00 or imprisonment for not more than 60 days or both. Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination; provided, if such employee shall cease to be qualified to perform the duties of his employment he shall not be entitled to such restoration and compensation.

(Unchanged since 1968)

34:15-39.2. Additional penalty; summary recovery

As an alternative to any other sanctions herein or otherwise provided by law, the Commissioner of Labor and Industry may impose a penalty not exceeding $1,000.00 for any violation of this act. He may proceed in a summary manner for the recovery of such penalty, for the use of the State in any court of competent jurisdiction.

(Unchanged since enactment in 1966)

B. Common law tort claims for Worker's Compensation retaliation

Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980)

We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient. Absent legislation, the judiciary must

define the cause of action in case-by-case determinations. An employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy. However, unless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.

Lally v. Copygraphics, 85 N.J. 668 (1981)

There exists a common law cause of action for civil redress for a retaliatory firing that is specifically declared unlawful under N.J.S.A. 34:15-39.1 and 39.2. The statutory declaration of the illegality of such a discharge underscores its wrongful and tortious character for which redress should be available. Such a cause of action is strongly founded in public policy which, in this case, is reflected in the statutory prohibitions themselves. See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66-73, 417 A.2d 505 (1980). Moreover, the penal and administrative remedies that are provided by N.J.S.A. 34:15-39.1 and 39.2 to rectify this form of illegal employment practice will clearly be augmented by recognition of an alternative or supplemental judicial right to secure civil redress. A common law action for wrongful discharge in this context will effectuate statutory objectives and complement the legislative and administrative policies which undergird the workers' compensation laws. The determination of the Appellate Division that the statutory treatment of this kind of retaliatory firing is not preemptive of a civil right of redress is sound. 173 N.J.Super. at 170-172, 179, 413 A.2d 960.

Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988)

Employee was is terminated for suffering a worker's compensation injury may bring Pierce claim, even when employer, and not employee, files claim with their insurance company.

Lepore v. National Tool and Mfg. Co. 224 N.J.Super. 463 N.J. Super. (App. Div. 1988)

(1) tort remedy exists for discharge of union employee in retaliation for reporting workplace safety violations to federal agency, and (2) state court litigation of retaliatory discharge was not preempted by either Labor Management Relations Act or Occupational Safety and Health Act. *See also,* Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988).

Brook v. April - 294 N.J. Super. 90 (App. Div. 1996)

It is not necessary to file a Tort Claim Notice prior to bringing a Pierce claim for retaliatory termination for filing a worker's compensation claim. "None of the immunities conferred in the Tort Claims Act apply to claims arising from the Workers' Compensation Law, including civil actions based upon retaliatory conduct prohibited by N.J.S.A. 34:15-39.1."

II. OTHER LAWS MAY BE IMPLICATED BY WORKER'S COMPENSATION INJURIES

A. Conscientious Employee Protection Act, NJSA 34:19-1, *et seq.*

N.J.S.A. 34:19-3

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any

governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

1. Key Differences Between CEPA claims and Pierce Claims

a. Statute of limitations - CEPA is one year. N.J.S.A. 34:19-5. Pierce claims are subject to a two year statute of limitations for tort claims and six years for contract claims.

> An employee who is wrongfully discharged may maintain a cause of action in contract or tort or both. An action in contract may be predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Pierce, 84 N.J. at 72.

b. Pierce claims only pertain to terminations. CEPA more broadly protects "any retaliatory action." N.J.S.A. 34:19-3.

c. Because Pierce claims are more congruous with the common law retaliation claims of other states, Pierce claims will be recognized in some situations involving interstate claims, whereas CEPA claims may not. *See e.g.* Ballinger v. Delaware River Port Authority, 172 N.J. 586 (2002).

d. Pierce claims have been recognized in situations where a termination is in violation of public policy, even where there is no complaint or refusal to participate in unlawful activities. *See e.g.:*

- Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988) - employee was is terminated for suffering a worker's compensation injury may bring Pierce claim, even when employer, and not employee, files claim with their insurance company.

- Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92, 93 (1992) - employee may state a Pierce claim if terminated for refusing a random drug test, where the employer

does not have a legitimate reason to require such a test.

- Velantzas v. Colgate-Palmolive - 109 N.J. 189 (1988) - employee states a Pierce claim when terminated for requesting to see personnel file for purpose of establishing discrimination.

- Epperson v. Walmart Stores, 373 N.J. Super. 522, 541 (App. Div. 2004) - employee may state Pierce claim where employee is wrongfully terminated and maliciously prosecuted.

1. Attorneys fees are available under CEPA (NJSA 34:19-5e), but are not available under Pierce.

B. New Jersey Law Against Discrimination

N.J.S.A. 10:5-4.1

All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment.

Reasonable Accommodations for workplace injuries are required under the LAD.

13:13-2.5 Reasonable accommodation

(a) All employers shall conduct their employment procedures in such a manner as to assure that all people with disabilities are given equal consideration with people who do not have disabilities for all aspects of employment including, but not limited to, hiring, promotion, tenure, training, assignment, transfers, and leaves on the basis of their qualifications and abilities. Each individual's ability to perform a particular job must be assessed on an individual basis.

(b) An employer must make a reasonable accommodation to the limitations of a employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. The determination as to whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis.

1. Under circumstances where such accommodation will not impose an undue hardship on the operation of an employer's business, examples of reasonable accommodation may include:

i. Making facilities used by employees readily accessible and usable by people with disabilities;

ii. Job restructuring, part-time or modified work schedules or leaves of absence;[1]

iii. Acquisition or modification of equipment or devices; and

iv. Job reassignment and other similar actions.

2. An employer shall consider the possibility of reasonable accommodation before firing, demoting or refusing to hire or promote a person with a disability on the grounds that his or her disability precludes job performance. 3. In determining whether an accommodation would impose undue hardship on the operation of an employer's business, factors to be considered include:

i. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;

ii. The type of the employer's operations, including the composition and structure of the employer's workforce;

iii. The nature and cost of the accommodation needed; and

iv. The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

– Federal law also provides protection for disabled employees, including reasonable accommodations, *See Americans with Disabilities Act,* 42 U.S.C. §§ 12132 to 12213. The protections under State law are much broader in terms of scope of protection, (N.J.S.A. 10:5-5 (q)), and requirements for employers to actively engage in an interactive process with the employees' medical providers to determine proper reasonable accommodation - *including an extension of a leave absence.* Tynan v. Vicinage 13 of the Superior Court, 351 N.J. Super 385, 397 (2002)

Raspa v. Office of the Sheriff, 191 N.J. 323, 339 (2007) :

" the LAD does not require an employer to create a permanent part-time position for a disabled employee if no suitable full-time position exists. Nor does the LAD require an employer to create a permanent light-duty position to replace a medium-duty one. Rather, an employer must simply make all reasonable accommodations to an employee returning from disability leave and allow the employee a reasonable time to recover from his injuries. "

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[1] This section of the reasonable accommodations regulation was amended in 2006 in response to Conoshenti v. Public Service Elec. & Gas Co., 364 F.3d 135, 151 (3rd Cir. 2004), which had interpreted that New Jersey's regulation held that an employer did not have the obligation to provide time off for a disability. The regulation now expressly states that requirement.

C. Family and Medical Leave Act, 29 U.S.C.A. § 2601 -54

Provides up to 12 weeks of unpaid leave for an employees' own illness or injury.

- Only applies to employers of over 50 employees within a 75 mile radius;
- Employee must have been employed for at least one year and must have worked at least 1250 hours during the previous in order to qualify.

Brown v. Dunbar Armored, Inc. , 2009 WL 4895237**,** 2009 U.S. Dist. LEXIS 115572 (D.N.J. (Simandle) 2009)

Under the NJ LAD, a temporary leave of absence can, under some circumstances, be a reasonable

accommodation. Whether a given accommodation is reasonable is a case-by-case inquiry. The fact that the leave would occur after the exhaustion of leave under the FMLA does not make it unreasonable. "Defendant concedes that Plaintiff was terminated because he did not return to work, and maintains that company policy required him not to return until he was no longer disabled. To hold that this termination was not because of his disability would eviscerate the statute."

III. INTERACTION WITH NEW UNEMPLOYMENT LAWS

Employees terminated after returning from work-related injuries often face an increasing difficult battle to secure unemployment compensation. Effective July 21, 2010, the Legislature added a new disqualification criteria of "severe misconduct", which carries a total disqualification. Governor Christie's Press Release, July 2, 2010, calculated that $150 - $175 million savings will result from the annual total denial of benefits to approximately 34,000 workers at an average of $389 per week for an average of 20 weeks. The result has been devastating to injured workers, who are being disqualified from unemployment for a variety of unfair reasons.

The new severe misconduct statute, NJSA 2A:43-21-5 (b):

For the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in this section, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and

deliberate but is not considered gross misconduct as defined in this section.

Unemployment after Return from Disability

N.J.A.C. 12:17-9.3(b):

(b) An individual who leaves a job due to a physical and/or mental condition or state of health which does not have a work-connected origin but is aggravated by working conditions will not be disqualified for benefits for voluntarily leaving work without good cause "attributable to such work," provided there was no other suitable work available which the individual could have performed within the limits of the disability. When a non-work connected physical and/or mental condition makes it necessary for an individual to leave work due to an inability to perform the job, the individual shall be disqualified for benefits for voluntarily leaving work.

(c) Notwithstanding (b) above, an individual who has been absent because of a personal illness or physical and/or mental condition shall not be subject to disqualification for voluntarily leaving work if the individual has made a reasonable effort to preserve his or her employment, but has still been terminated by the employer. A reasonable effort is evidenced by the employee's notification to the employer, requesting a leave of absence or having taken other steps to protect his or her employment.

DeLorenzo v. Board of Review, Div. of Employment Sec., 54 N.J. 361 (1969)

The Board now holds that when an employee becomes ill and does those things reasonably calculated to protect the employment and, notwithstanding that she is not reinstated, there is no voluntary leaving of work. In these matters involving separations from employment for health reasons, the Board now holds that the disqualification arises only upon a finding that the employee, in fact, decided to terminate the employment because the work duties are detrimental to an existing physical condition or state of health which did not have a work connected origin.'

DiPasquale v. Board of Review, 286 N.J. Super. 341, 346 (N.J Super. A.D., 1996).

If an employee returns after a disability to find his job unavailable, the employee is entitled to go back to the four quarters that were worked before the disability. “There is no principled difference between a scenario in which petitioner's employer replaces him before he can return to work, from one in which the employer terminates him from his position when he attempts to return because of his disability. In either instance, the work which petitioner had before his period of disability began “is no longer available” to him in the words and meaning of the statute. In ascertaining the right to unemployment compensation benefits, a court should not be concerned with the specifics of any one provision in the law, but, rather, with the internal sense of the whole act.”