

Winters v. North Hudson Regional Fire & Rescue: A New Definition of Collateral Estoppel or Just Bad Facts?

by Alan H. Schorr

The New Jersey Supreme Court's decision in *Winters v. North Regional Fire And Rescue*¹ can have far-ranging effects on public employment law for the next decade. In trying to fashion a remedy around bad facts, the Court stretched the law regarding collateral estoppel practically beyond recognition. The core issue is what constitutes a prior hearing on the merits for purposes of collateral estoppel. According to the majority, a public plaintiff appealing discipline who believes he or she has suffered retaliation may be collaterally estopped from bringing a retaliation lawsuit, even if the issue of retaliation was not litigated or actually decided in the disciplinary hearing. The factual and procedural history is almost as strange as the holding.

Plaintiff Steven J. Winters was the equivalent of a captain in the North Hudson Regional Fire and Rescue, which is a regional fire department. Throughout his 22 years with the regional department and its predecessor, Winters was a frequent and vocal critic and whistleblower. Regional terminated his employment after two disciplinary actions.² The first was for allegedly falsely whistleblowing, which, in itself, sounds like retaliation.³ The second, more serious infraction was for working for two other municipalities while out on disability and collecting full pay from his employer.⁴

There was discovery and a hearing before the Office of Administrative Law (OAL). Although the issue of retaliation was the elephant in the room, the issue was never addressed head on, and the administrative law judge refused to hear evidence of retaliation because he did not want to extend and multiply the administrative hearing. Ultimately, the administrative judge and the Civil Service Commission upheld the termination, finding that Winters had engaged in "egregious conduct."⁵

Winters appealed to the Appellate Division.

While the Appellate Division appeal was pending, Winters filed a complaint asserting violations of the Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (LAD) and the United States Constitution.

Regional moved for summary judgment on the basis of collateral estoppel.⁶ The trial court denied the motion because the administrative decision did not address the issue of retaliation. Regional filed an interlocutory appeal, which affirmed the decision of the trial court for the same reasons.⁷ Regional then appealed to the Supreme Court, which granted interlocutory review.⁸ The Supreme Court wrote a letter inviting *amicus* to submit briefs on the subject, to which National Employment Lawyers Association–NJ and the Employers Association of New Jersey responded. The New Jersey Supreme Court then reversed, holding that Winters blew his opportunity to argue retaliation at the OAL, and because he had the opportunity to argue retaliation but chose not to do so, he was collaterally estopped, even though the issue was never adjudicated.⁹

This is where the bad facts come into play. The Supreme Court acknowledged that there may have been mixed motives at issue here. In other words, North Hudson Regional may have been motivated by both legitimate and unlawful reasons to terminate Winters. In such a case, the lower courts had ruled that Winters should have a fair opportunity to argue, even though he may have engaged in wrongdoing, that misconduct was not the real reason for his termination, which was instead retaliation for his whistleblowing activities. The Supreme Court, however, found that Winters' actions were so egregious that it was unnecessary for the Court to undertake that analysis, given that he was collaterally estopped.¹⁰

Justice Barry Albin dissented, commenting that the decision by the majority ignores the traditional elements of collateral estoppel, three of which were not met in this case. Citing *Olivieri v. Y.M.F. Carpet, Inc.*,¹¹ Justice Albin wrote that the doctrine of collateral estoppel applies when: 1) the issue to be precluded is identical to the issue decided in the prior proceeding; 2) the issue was actually litigated in the prior proceeding; 3) the court in the prior proceeding issued a final judgment on the merits; 4) the determination of the issue was essential to the prior judgment; and 5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.¹² He pointed out that three of the essential elements were missing in this case. The retaliation was not a clearly identified issue in the prior proceeding, the issue was never actually litigated, and there was no final judgment on the merits.¹³ Justice Albin concluded that “collateral estoppel has been sacrificed on the altar of judicial economy.”¹⁴

While it is clear that this case will create great confusion regarding the contours of collateral estoppel, it is unclear that the end result will be judicial economy. In fact, it is likely that this decision will result in additional litigation. The end result of this decision is that public employees who believe discrimination or retaliation was partially or entirely responsible for the decision to discipline must argue those issues exclusively at the OAL, or must forfeit their disciplinary hearing and head straight to superior court.

The likely effect of the *Winters* case is that disciplinary hearings at the OAL will necessarily become much longer and more complicated, as all issues of motive must now be resolved along with the disciplinary issues. In addition, many more lawsuits will now be filed because every disciplinary action where a motivation of discrimination or retaliation is alleged will now have to be brought to superior court, or else the LAD, CEPA, or constitutional claims will be forever forfeited.

The outer contours of this decision will be litigated for the rest of this decade, and possibly beyond. This decision leaves many more questions unanswered. For example, what about union grievance hearings, union arbitrations, and other administrative hearings involving discipline? The Supreme Court had previously ruled in *Olivieri* that unemployment appeal tribunal hearings do not have preclusive effect on future employment actions, but the issue in *Olivieri* involved an appeal tribunal hearing, not a board of review or appellate decision. Will the perceived

egregiousness of Winters’ actions limit this case to its facts, or will the enhanced application of collateral estoppel change the face of litigation of all disciplinary matters?

The following excerpt from the case will no doubt be scrutinized. Prior to recounting the ‘egregious’ actions of Winters, the Court wrote:

The question at the heart of this matter is whether the issues in the two proceedings were aligned and were litigated as part of the final judgment in the administrative action. We hold that they essentially were. Winters cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it. Retaliation was a central theme of his argument and that he chose not to present there his comprehensive proof of that claim does not afford him a second bite at the apple in this matter.¹⁵

Counsel for both employees and employers will need to very carefully counsel their clients and rethink their strategies. Until there are more decisions regarding this opinion, it is difficult to know whether the law of collateral estoppel has actually been changed in New Jersey or whether courts will recognize that this is a case that should be limited to its unusual and bad facts. ■

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Endnotes

1. 212 N.J. 67 (2012).
2. *Id.* at 74.
3. *Id.* at 78.
4. *Id.* at 80.
5. *Id.* at 81.
6. *Id.* at 82.
7. *Id.* at 83.
8. *Id.* at 84.
9. *Id.* at 88-90.
10. *Id.* at 91.
11. 186 N.J. 511, 521-22 (2006).
12. *Id.* at 95-96 (quoting *Oliveri*, 186 N.J. at 521-22).
13. *Id.* at 96-97.
14. *Id.* at 98.
15. *Id.* at 88.