TOP TEN IN EMPLOYMENT LAW NJAJ BOARDWALK 2017

DANIEL T. SILVERMAN, COSTELLO & MAINS, LLC
Dsilverman@costellomains.com

ACEVEDO V. FORNARO, A-1295-14T2, APPROVED FOR PUBLICATION

- Employer not entitled to an offset for unemployment compensation against lost wages award.
- Shifting the benefit of unemployment compensation from the wronged employee to the discriminating employer does not serve the LAD's deterrent purpose.
- Third Circuit has also held that unemployment benefits may not be deducted from back pay awards under Title VII. Craig v. Y & Y Snacks

Noren v. Heartland Payment Systems, Inc., 2017 WL 476216

- Plaintiff brought suit against his former employer alleging breach of contract and a violation of CEPA. Pursuant to a jury-waiver provision in Noren's employment contract, the trial court denied his demand for a jury. Because the jury-waiver provision was not legally enforceable as to the CEPA claim, judgment and fee award was reversed and the matter remanded for a jury trial on the CEPA claim.
- "The jury-waiver provision here applied to "any suit, action or proceeding under, in connection with or to enforce this Agreement." (Emphasis added). It made no reference to statutory claims and did not define the scope of claims as including all claims relating to Noren's employment. This language was similar to the language in Garfinkel deemed too ambiguous because it failed to refer to statutory claims. And, by using "this Agreement" as the defining threshold for all suits, actions and proceedings, the provision limits the category of disputes for which a jury trial is waived. We therefore conclude the jury-waiver provision fails to clearly and unambiguously explain that the right to a jury trial is waived as to a CEPA claim and that a remand is necessary for a jury trial on this claim."

Capps v. Mondelez Global, LLC 847 F.3d 144 (3d Cir.)

- A request for intermittent leave can constitute a request for a reasonable accommodation under the Americans with Disabilities Act.
- "Where an employer provides evidence that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for discharge.

Carroll v. Delaware River Port Auth. 843 F.3d 129 (3d Cir.)

- Plaintiffs need not plead or prove that they are objectively qualified in order to meet their initial burden under USERRA; instead, employers may raise a plaintiff's lack of qualifications as a nondiscriminatory justification for declining to promote the plaintiff, notwithstanding his or her military service.
- The initial burden is a showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action.

Tisby v. Camden Cty.
2017 WL 192887 (App Div Jan 18, 2017)

- Plaintiff, a Muslim woman, sought an accommodation to the uniform requirements so that she could wear a khimar.
- Without discovery, the trial court found and the Appellate Division affirmed that the the defendants' concerns for the safety, security and neutrality of CCCF, were legitimate non-discriminatory reasons why allowing plaintiff an accommodation would cause an undue hardship on defendants.

Garmeaux v. DNV Concepts, Inc. 448 N.J. Super. 148 (App. Div)

- Plaintiff was successful on a fee-shifting CFA claim and defeating Counterclaims filed by the defendant.
- Plaintiff was entitled to fees for defending the counterclaim because it was "inextricably caught up with" the underlying CFA claim
- The trial court erroneously applied proportionality as a factor in determining the fee shift

Edries v. Quick Chek Food Stores 2017 WL 244100 (App. Div)

- Plaintiff alleged sexual harassment under the LAD and defendant asserted a policy-based defense in accordance with Aguas.
- Trial court granted summary judgment and App. Div. affirmed based upon its effective policy and prompt response to her report (ignoring her prior report to a supervisor to which nothing was done and for which the App. Div found reason to blame plaintiff and specifically note that she did not know what happened to her prior complaint).

Karlo v. Pittsburgh Glass Works 2017 WL 83385 (3d. Cir)

- Subgroups' disparate impact claims under the Age Discrimination in Employment Act are cognizable claims.
- "We conclude that the Supreme Court's analysis in O'Connor answers the question now before us. A specific facially neutral policy that significantly disfavors employees over 50 years old supports a claim of disparate impact...Although the employer's policy might favor younger members of the 40-and-over cohort, that is an 'utterly irrelevant factor' in evaluating whether a company's oldest employees were disproportionally affected because of their age."

Singh v. Uber Technologies, Inc. 2017 WL 396545 (D.N.J.)

- A proposed class of Uber drivers must arbitrate their claims that Uber misclassified them as independent contractors, failed to pay overtime compensation, and required drivers to pay business expenses purportedly incurred for Uber's benefit.
- Electronic employment agreements which incorporate hyperlinked agreements are enforceable, whether the employee actually reviews it or not.
- Uber's agreement with its drivers is not considered a contract involving "transportation employees," and therefore is not subject to the exemption provisions of the Federal Arbitration Act (FAA).

Cuevas v. Wentworth Group
226 N.J. 480

- Supreme Court upheld emotional pain and suffering awards of $600,000 and $800,00 where the plaintiffs neither treated nor presented medical evidence.
- Relying on Tarr for proposition that the LAD allows damages without limitation to severe emotional or physical ailments
- Will this decision impact discovery on "garden variety" claims