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## Labor & Employment Client Advisory

### New Jersey Supreme Court Heightens the Standard of Proof for Plaintiffs to Establish a Retaliation Claim Under the LAD

On February 21, 2007, the New Jersey Supreme Court decided two issues that will assist employers in defending claims of retaliatory discharge. In *Carmona v. Resorts International, Inc.*, the Court found that: (1) an employee's complaint of retaliatory discharge under the New Jersey Law Against Discrimination (LAD) must be made in good faith and on a reasonable basis; and (2) an investigative report prepared by the employer supporting the reasons for the discharge can be used as evidence at trial.

This plaintiff was a front desk clerk at Resorts International Hotel, Inc., who was terminated for alleged theft. Only a few days prior to his termination, that same employee had lodged an internal complaint, claiming that he had been discriminated against on the basis of race with respect to medical leave, because he felt he as a Hispanic had received different treatment than Caucasian employees. However, in that same time frame, the plaintiff had been observed improperly upgrading rooms in exchange for tips. This followed two prior reprimands for upgrading rooms without management authorization. Resorts completed its investigation into the unauthorized upgrades and used this as the reason for firing the plaintiff. He then sued alleging that his termination was in retaliation for his race complaint to management only a few days earlier.

#### Retaliation Complaints Must be Reasonable and Made in Good Faith

By looking for guidance from New Jersey's well-known "whistleblower" law, the Conscientious Employee Protection Act (CEPA), the Court first held that in order to sustain a retaliatory discharge claim under the LAD, it is not enough that the employee lodge a complaint. Rather, in a significant pronouncement, the Court also added a requirement that the complaint be both reasonable and in "good faith." The Court reached this ruling despite acknowledging that the plain language of the LAD did not include this as a prerequisite for a claim; the Court relied upon the overall purpose of the LAD and parallel federal case law to add this requirement, in order to avoid abuse of the complaint procedure. In so ruling, the Court expressly referred to a growing problem: the employee

"who preemptively files a complaint solely in anticipation of an adverse employment action by the employer." Thus, unreasonable, frivolous, bad-faith, or unfounded complaints will not satisfy the statutory threshold needed to pursue a claim of retaliatory discharge under the LAD.

#### Internal Investigation Reports Are Not Inadmissible Hearsay

In addition, the Court also ruled on an important issue involving the use at trial of company investigation reports associated with the termination. That is, the trial court had refused to allow the jury to review Resorts' investigation report into the improper upgrading of rooms, citing the traditional "hearsay" rule which prohibits statements from being repeated at trial unless the speaker is actually present in court. But, on appeal, the Supreme Court disagreed and ruled that the jury should have been allowed to see at least portions of the report. The Court agreed with Resorts' argument that the investigation report was being offered not to prove each and every witness' statement was true. Instead, the evidence was offered to show Resorts' actual motivation for firing plaintiff, which may have been based upon incorrect evidence but critically (according to Resorts) was not retaliatory. The only limitations imposed by the Court were that: (1) the employer show that there is a causal connection between the report's conclusions and the discharge; and (2) the employer show that the interviewee's statements would have been admissible if they had appeared in court to testify, such that repeating statements of other witnesses is not generally permitted, but their own statements and observations are allowed.

This case provides employers with some comfort when facing the growing trend of employees lodging "11th hour" discrimination complaints when on the verge of discharge. Whereas the brief time lapse between the complaint and the discharge are normally problematic, this case allows employers to still go forward with legitimate terminations. Now, employees must initially show that any complaints were reasonable and in good faith before a retaliatory discharge claim can be pursued. In addition, this ruling also



allows an employer to defend against a retaliatory discharge claim by using the actual investigative report related to the employee's misconduct or poor performance, rather than having to separately call each interviewee to testify at trial. Although this doctrine is not new under the law, it is the Supreme Court's first pronouncement on this specific issue in the retaliatory discharge context.

*If you have any questions about this recent decision and the impact it may have on your business, please feel free to contact Archer & Greiner's Labor and Employment Department at 856-795-2121, or through our website at [www.archerlaw.com](http://www.archerlaw.com).*

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