SEYFARTH SHAW

Management Alert

New Jersey Appellate Division Declines to Find Section 301 Pre-Emption of Discrimination and Retaliation Claims

By Christopher Lowe, Robert T. Szyba, and Kaitlyn F. Whiteside

Seyfarth Synopsis: *The New Jersey Appellate Division reinstated plaintiff's state law discrimination and retaliation claims, finding the claims were not pre-empted by Section 301 of the LMRA.*

In a published opinion issued on May 9, 2017, the three-judge panel of the New Jersey Appellate Division held that a union member's Law Against Discrimination ("LAD") and Workers' Compensation Law ("WCL") claims were not preempted by Section 301 of the Labor Management and Relations Act ("LMRA"), despite the presence of an applicable collective bargaining agreement ("CBA") and potential CBA-based defenses available to the employer.

The plaintiff was employed as a commercial truck driver, and was a member of Teamsters Local Union No. 813. Following a workplace injury, he was cleared for light duty work, so long as it did not involve commercial driving. The plaintiff then filed a workers' compensation claim with the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation.

Three months after filing the workers' compensation claim, the company asked plaintiff to leave work, and by letter to the union, indicated that plaintiff would need to be recertified for duty as required by Department of Transportation ("DOT") regulations before returning to work. The company scheduled an independent medical examination, but the plaintiff declined to undergo the exam, and therefore, was not returned to work.

The union filed a grievance challenging the company's failure to reinstate the plaintiff. The grievance proceeded to arbitration, and was denied by the arbitrator who concluded that reinstatement would require examination and recertification pursuant to the DOT regulations.

The plaintiff then sued in New Jersey Superior Court alleging unlawful discrimination under the LAD and retaliation under the WCL. Concluding that the claims were pre-empted, the trial judge dismissed the complaint for lack of subject matter jurisdiction. The plaintiff appealed.

The question before the Appellate Division was whether the trial judge correctly concluded that the LAD and WCL claims were pre-empted under Section 301 of the LMRA, which pre-empts claims that require an interpretation of a collective bargaining agreement.

The court first looked to the elements of the plaintiff's claim that the company retaliated against him based on his workers' compensation claim, which required showing that (i) he made, or attempted to make, a claim for workers' compensation, and (ii) he was discharged for making that claim.

According to the court, under U.S. Supreme Court precedent in *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), each of these is a "purely factual inquiry," and therefore, requires no interpretation of the CBA. Plus, plaintiff did not make any mention of any provision of the CBA in his complaint. So, his WCL claim was not pre-empted under Section 301.

The court then turned to the LAD claim, which proved to be a more difficult question. To establish a *prima facie* LAD claim, the plaintiff had to demonstrate (i) he was disabled; (ii) he was objectively qualified for his former position; (ii) he was terminated; and (iv) the company sought a replacement. Although the court determined that each of these also presented a "purely factual inquiry," the court recognized that the company may have a CBA-based defense based the CBA's requirement that employees promptly comply with DOT physicals. Further, whether the plaintiff was "objectively qualified" for the position potentially implicated the CBA.

Ultimately, however, the appellate court determined that neither the requirement that the plaintiff was objectively qualified nor the company's potential defenses required an interpretation of the CBA that would preempt the claim. As noted by the New Jersey Supreme Court in *Puglia v. Elk Pipeline, Inc.*, 226 N.J. 258, 279 (2016), "…a CBA-based defense is ordinarily insufficient to preempt an independent state-law action."

Further, the CBA was not the only source, or even the primary source of the plaintiff's duty to recertify. Instead, it was DOT regulations that set forth the requirement and "To the extent an interpretation of them is required, federal law [and not the CBA] must be applied."

Looking forward, unionized employers in New Jersey who are defending against claims under state law thus face additional hurdles stemming from decisions like *Hejda v. Bell Container Corporation*. For example, a Section 301 claim, which is a claim under a federal statute, could be removable to federal court. Without the Section 301 claim, a defendant thus loses a potential basis for removal. Additionally, where CBAs otherwise provide an administrative process that must be utilized before a Section 301 claim is filed, employers may lose the ability to enforce the administrative remedies provisions, or otherwise have a lawsuit dismissed if the administrative remedies were not exhausted. Last, unionized employees have a greater ability to circumvent Section 301's limitation to contract-based remedies, and instead seek the full panoply of tort-based remedies that the LAD affords plaintiffs. Accordingly, the dynamics for any employer with an organized workforce that is defending a claim under New Jersey state law have shifted further in the direction of state-law protections, and away from the uniformity and precedent of the LMRA.

Hejda v. Bell Container Corporation, while not a sea change in the law, is representative of the both the trend in New Jersey of courts declining to find Section 301 pre-emption, as well as the courts' interpretation of the LAD as a wide-reaching, liberally-construed source of employee protections.

If you would like additional information, please contact Christopher Lowe at clowe@seyfarth.com, Robert T. Szyba at rszyba@seyfarth.com, Kaitlyn F. Whiteside at kwhiteside@seyfarth.com, or any member of Seyfarth's New Jersey Practice Group.