

# Management Alert



## New Jersey Supreme Court Issues Long Awaited *Battaglia* Decision Clarifying Standard in Retaliation Lawsuits Under the NJLAD and CEPA and Evidentiary Standard for Emotional Distress Claims

In *Battaglia v. United Parcel Service Inc.* (A-86/87-11), the New Jersey Supreme Court effectively lowered the retaliation standard under the New Jersey Law Against Discrimination (“LAD”), holding that actual discrimination against an identifiable victim is not necessary to establish a retaliation claim. Rather, an employee need only demonstrate a good-faith belief that the complained of conduct violated LAD in addition to meeting the other prongs of a *prima facie* case of retaliation. However, the decision was not all bad news for employers. The supreme court also made it clear that “vague and conclusory complaints, complaints about trivial or minor matters, or generalized workplace unhappiness” are not protected as fraud-based claims brought under the Conscientious Employee Protection Act (“CEPA”). Finally, the court held that in order for employees to recover for future emotional distress damages, expert proof of permanency is required.

### Facts

Plaintiff alleged that his supervisor, on several occasions, made inappropriate sexual comments about female employees. These remarks were made only in the presence of Plaintiff and other male managerial employees. No gender-based comments were made to or in the presence of any female employees. Plaintiff also alleged that he heard a rumor and observed behavior which confirmed that his supervisor was engaged in a sexual affair with a female subordinate. Plaintiff also alleged that he told his supervisor that one or more managers were drinking alcohol during lunch and abusing the company credit card.

Plaintiff wrote an anonymous letter to Human Resources complaining about his supervisor. The letter stated that the “leaders of the district used langu[age] you wouldn’t use with your wors[t] nightmare[,]” which Plaintiff claimed referred to his supervisor’s gender-based comments. The letter also included a general statement about “so many examples [of] poor and unacceptable, unethical behavior[.]”

Human Resources found it difficult to investigate the letter’s complaints in detail because the allegations were generalized and vague. After completing the investigation, which resulted in no action being taken, a Human Resources Manager determined that Plaintiff wrote the anonymous letter. During this time, Plaintiff was also involved in a series of incidents, which included allegations of creating a hostile work environment for a female, inappropriate professional behavior during meetings, and leaking information relating to an internal security investigation. As a result, Plaintiff was demoted, however, he claims it was due to his complaints.

## The New Jersey Appellate Division Ruling

Plaintiff filed suit against UPS and his supervisor under LAD, alleging, among other things, that his demotion was in retaliation for his complaints about his supervisor's gender-based comments. In addition, Plaintiff brought a claim under CEPA, alleging that his demotion was also due to his complaints regarding the misuse of company credit cards. A jury found for Plaintiff on his LAD and CEPA retaliation claims and awarded him \$500,000 in economic damages and \$500,000 in emotional distress damages, which included future damages despite Plaintiff not introducing any expert testimony during the trial.

An appellate panel reversed the LAD jury verdict and entered judgment for UPS because there was no evidence that any gender-based comments were heard by women, nor any evidence of disparate treatment or a hostile work environment. Regarding Plaintiff's CEPA claim, the appellate panel found that there was sufficient evidence to for the jury to decide whether Plaintiff believed the alleged credit card use was fraudulent.

## The New Jersey Supreme Court Ruling

The New Jersey Supreme Court disagreed with the Appellate Division's understanding that LAD only protects complaints of discrimination against identifiable victims, holding that such a narrow application would dissuade the broad and over-arching remedial purpose of LAD. An employee need not prove that there is an identifiable victim of actual discrimination when he or she complains about behavior they believe is discriminatory. Rather, "as long as the complaint is made in a good faith belief that the conduct complained of violates the LAD, it suffices for purposes of pursuing a cause of action."

Additionally, the supreme court criticized Defendants' investigation of the anonymous letter. While noting that some of the letter's allegations were vague, the supreme court found that the reference to "langu[age] you wouldn't use with your wors[t] nightmare" was sufficient to alert human resource personnel to inappropriate behavior. The supreme court stated that human resources failed to determine if Plaintiff's supervisor or any other management personnel engaged in inappropriate behavior and conducted "only a limited investigation and relied on her pre-existing beliefs to discount the complaints."

Regarding Plaintiff's CEPA claim, the supreme court agreed with the appellate panel's decision to reverse the jury verdict, explaining that under a fraud-based CEPA retaliation claim, an employee must be specific about the complained of activity. Vague or generalized complaints, or complaints about minor matters, are insufficient to sustain a retaliation claim. Ultimately, to succeed on a fraud-based CEPA claim, an employee must have reasonably believed the activity complained of was occurring and was fraudulent. Under this reasoning, the supreme court found that neither Plaintiff's anonymous letter nor his alleged comment to his supervisor were sufficient.

Finally, while noting that "garden variety" emotional distress damages are available through trial absent expert testimony, the court held that recovery of damages for future emotional distress (post-trial) requires expert proof of permanency. Here, as there was no such expert proof, the court held that the trial court inappropriately allowed the jury to speculate regarding Plaintiff's future emotional damages by allowing it to consider Plaintiff's age and life expectancy in awarding future emotional distress damages.

## What This Means for New Jersey Employers

The *Battaglia* decision effectively lowers the retaliation standard under LAD. *Battaglia* makes clear that derogatory or vulgar language regarding protected classifications, regardless if such language is made to protected class members or creates an actionable disparate treatment or hostile work environment claim, is actionable and may lead to liability under LAD's anti-retaliation provision. In addition to the other elements of a *prima facie* retaliation claim, employees need only demonstrate a "good faith" belief that such comments were discriminatory to state a retaliation claim under LAD. Employers must be mindful of employee complaints that involve improper language or actions, whether or not directed to or observed by a protected class member, may create liability.

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Furthermore, the New Jersey Supreme Court's criticism of the investigation in *Battaglia* should increase an employer's attention to otherwise vague complaints of discrimination or retaliation, regardless of the complaints clarity or specificity. In addition, employers should be cautious of characterizing their investigations as limited or insufficient in light of the complaint.

However, the supreme court's pronouncement that an employee must reasonably believe both that the complained of activity occurred and was fraudulent to sustain a fraud-based CEPA claim is a welcome holding for employers in New Jersey who are increasingly having to defend themselves against "vague and conclusory" CEPA claims. Furthermore, the court's holding that expert proof of permanency is required in order for an employee to recover for future emotional distress damages should also be welcome news for employers facing retaliation claims. It is possible that this ruling may result in plaintiffs obtaining experts in all cases so as to preserve their ability to recover future emotional distress damages at trial.

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