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Employee's Verdict Wrongly Offset by Unemployment, Court Rules

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In a published ruling that sheds some light on collateral recoveries, the Appellate Division ruled that a plaintiff-employee's unemployment benefits were incorrectly credited against a verdict he obtained in a discrimination suit against his former employer.

"We hold that the collateral source statute, N.J.S.A. 2A:15-97, does not apply to [New Jersey Law Against Discrimination] cases, and we find no other basis on which to deduct unemployment compensation from back pay awarded under the LAD," Appellate Division Judge Susan Reisner wrote in *Fornaro v. Flightsafety International*.

"Implicitly acknowledging the weakness of its statutory argument, defendant subsequently modified its position, contending that unemployment benefits should be deducted from LAD back pay awards as a matter of policy, on a discretionary basis, to avoid giving a LAD plaintiff a double recovery," the court said. "We cannot agree."

According to the March 6 decision, Rex Fornaro was employed as a flight instructor with Flightsafety International Inc. before being terminated—which, he claimed, occurred as retaliation for his seeking an accommodation in connection with herniated discs in his back. The defendant contended that Fornaro was a difficult employee who preferred not to follow instructions or take on additional assignments.

Fornaro collected unemployment after his termination, for 11 months. An Essex County jury awarded \$83,000 in back pay, and Superior Court Judge Francine Schott reduced that award by \$14,000, an amount representing half the unemployment benefits the state paid him, the decision stated. She deemed that a fair adjustment since both an employer and employee pay into unemployment benefits, according to the decision.

Several issues were appealed, but the section of the opinion zeroing in on the collateral source issue was approved for publication.

Reisner, joined by Appellate Division Judges Ellen Koblitz and Thomas Sumners, said courts have allowed double recoveries in these contexts rather than allow a defendant-wrongdoer to benefit from misconduct and unfairly receive a credit, and the defendant "has

not cited any New Jersey precedent indicating that our court has departed, or would depart, from that rationale with respect to employment discrimination cases under the LAD."

In interpreting the collateral source statute, the panel relied on the state Supreme Court's 1994 decision in *Kiss v. Jacob*, where the court "recognized that the Legislature enacted the statute 'in an effort to control spiraling automobile-insurance costs[.]'" But there's no indication it was intended to apply to discrimination cases, the court said.

Imposing an offset on an LAD recovery "does not serve the LAD's deterrent purpose," Reisner added, noting that the LAD has never been amended to provide for such offsets, and the "model jury charge applicable to damages in LAD cases specifically provides that unemployment benefits are not deducted from back pay awards."

The panel also relied on federal jurisprudence, including the U.S. Supreme Court's 1951 decision in *NLRB v. Gullett Gin*, where the court held that the National Labor Relations Act mandates that unemployment benefits are not to be deducted from back pay awards.

The court affirmed other rulings that were on appeal, including dismissal of Fornaro's punitive damages claim and the dismissal of individual defendants. The defendant's cross-appeal contended that the verdict was against the weight of the evidence, and that Fornaro failed to make out a valid discrimination claim—both of which arguments failed.

Also at issue on appeal was the amount of fees awarded by a different Essex County judge, Edith Payne, who took over consideration of the fee application from Schott. Schott recused based on the plaintiff's allegation of bias. Payne awarded a total of about \$380,000 to two firms who represented Fornaro.

The panel upheld the award, noting that Payne "issued a thorough[ly] written opinion deciding the fee applications, and attached to her opinion copies of the firms' billing records with her notations as to the specific hours she had disallowed."

Steven Adler of Mandelbaum Salsburg in Roseland, for Flightsafety International, said, "Frankly we didn't have a strong opinion on the collateral source issue," but were asked to address it by the court.

"As to the balance of the case, my client continues to strongly believe that the jury's decision was really a miscarriage of justice," Adler said, though he said it's unlikely the client will seek to appeal.

Ty Hyderally of Hyderally & Associates in Montclair, for Fornaro, said evidence of Fornaro's unemployment benefits was not introduced until after the verdict.

"We were very happy to see that this case of first impression was [decided] ... consistent with case law," Hyderally said.

The National Employment Lawyers Association of New Jersey joined the case as amicus, supporting Fornaro's position on the collateral source issue.

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