

Appellate Division Upholds Statute Protecting Unemployed Job Applicants

By: Ty Hyderally, Esq. & Alex D'Amico, Esq.

February 2014 Newsletter

On January 7, 2014, the New Jersey Superior Court Appellate Division issued an important ruling for unemployed persons seeking employment. In *New Jersey Department of Labor and Workforce Development v. Crest Ultrasonics*, 2014 WL 43989, the Appellate Division upheld N.J.S.A. 34:8B-1 (the "Statute") after applying intermediate scrutiny pursuant to Crest Ultrasonics' constitutional challenge.

Enacted in March 2011, the Statute generally prohibits employers from purposefully or knowingly publishing advertisements stating that a job applicant must be currently employed in order for the employer to accept, consider, or review that individual's application. The Statute does not give potential applicants a civil right of action against the violating employer. Instead, the Statute empowers the Department of Labor and Workforce Development (the "Department") to fine violating employers.

In August 2011, the defendant employer, Crest Ultrasonics ("Crest" or "Defendant"), published a newspaper advertisement containing language prohibited under the Statute. The Department levied a \$1,000 fine for the violation. Crest contested the fine, asserting that the Statute infringes upon its free speech rights in violation of the First Amendment of the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution.

The Appellate Division evaluated the constitutionality of the Statute by applying the intermediate scrutiny test for commercial speech established by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980). The *Central Hudson* Court characterized

commercial speech as speech related solely to the economic interests of the speaker and its audience. The Court determined that commercial speech warranted less stringent constitutional protection than other types of speech such as political speech and outlined a four-element test for whether commercial speech is protected under the First Amendment: 1) whether the commercial speech concerns lawful activity and is not misleading; 2) whether the asserted governmental interest for the speech restriction is substantial; 3) whether the regulation directly advances the asserted governmental interest; and 4) whether it is more extensive than is necessary to serve that interest. This four-part test constitutes an "intermediate" level of constitutional scrutiny.

The Appellate Division evaluated the Statute in terms of each of the *Central Hudson* elements. First, the stated desire for applicants to be employed is not inherently unlawful or misleading, though this is not dispositive of an unconstitutional regulation. Second, the Appellate Division accepted as a substantial government interest the Statute's goal to "maximize the ability of jobless persons to simply present their qualifications to potential employers." Third, the Statute directly serves the purpose of helping jobless persons present their qualifications to potential employers by increasing the number of opportunities for which unemployed workers can apply. Finally, the Appellate Division determined that the Statute is "no more extensive than necessary" to serve the government's interest.

This was a case of first impression regarding the Statute, and the Appellate Division's decision constitutes an important development in the movement to improve the opportunities for unemployed persons to find work. Though the

Statute withstood constitutional muster, the Appellate Division did remand the part of the Department's decision levying the \$1,000 fine. Since the Statute provides for a fine "not to exceed \$1,000 for the first violation," and this is a case of first impression regarding the Statute, it is unclear whether the \$1,000 fine was appropriate or if

certain extenuating circumstances made a lesser fine more appropriate.

Nevertheless, the Appellate Division's affirmation of Crest's violation of the Statute is a substantial victory for the Department and the State of New Jersey in their efforts to help unemployed persons find their way back to employment.

Appellate Division Bolsters New Jersey's Statutory Protection Against Age Discrimination

By: Ty Hyderally, Esq. & Alex D'Amico, Esq.

On December 30, 2013, the New Jersey Superior Court Appellate Division issued its opinion in *Cohen v. University of Medicine and Dentistry of New Jersey*, 2013 WL 6839509, rejecting the trial judge's "too mechanical" analysis of the plaintiff's *prima facie* case for age discrimination.

Plaintiff Marion Cohen ("Cohen") worked for Defendant University of Medicine and Dentistry of New Jersey ("UMDNJ" or "Defendant") as an associate professor. In November 2008, the interim dean of UMDNJ informed the faculty that all contract employees should be considered non-renewed going forward unless there was "sufficient justification" otherwise. In February 2008, Defendant informed Cohen, who was sixty-nine years of age, that her contract would not be renewed and that she would be terminated as of June 30, 2009. In June 2009, Cohen filed an age discrimination lawsuit against UMDNJ under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, *et seq.*

Under the *McDonnell Douglas* framework, a plaintiff with a discrimination claim first faces the burden of presenting a *prima facie* case consisting of four elements: 1) plaintiff was a member of a protected group; 2) plaintiff's job performance met the employer's legitimate expectations; 3) plaintiff was terminated or not renewed; and 4) the employer

replaced plaintiff or sought a replacement. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). After plaintiff establishes her *prima facie* case, the burden shifts to the defendant employer to provide a legitimate, non-discriminatory reason for its actions. If the employer satisfactorily does so, the burden shifts back to the plaintiff to demonstrate that the employer's articulated reason is merely a pretext for discrimination. *See Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 447 (2005).

The trial judge dismissed Cohen's discrimination claim because she found that Cohen failed to present evidence that the defendant employer sought to or actually replaced plaintiff with someone younger or disproportionately chose to not renew the contracts of older employees.

The Appellate Division noted that the Supreme Court has rejected the "mechanistic application" of the ages of the relevant players in an age discrimination case because it is the rare case when a seventy-year-old employee is replaced by a thirty-year-old employee. Instead, for example, an employer may replace a sixty-year-old with a fifty-five-year-old, who then is succeeded by a person who is forty years of age, who then will be replaced by someone younger.

The Appellate Division stated that even applying a mechanistic approach, the trial judge

should have found the fourth element satisfied due to an age difference of between seven and twenty-two years between Cohen and the younger professors who replaced her. Beyond that, the court observed that the fourth element is “flexible” and that a rigid test for an age difference of substantial length between plaintiff and her replacement is not the appropriate way to evaluate this element. The court reversed and remanded Cohen’s case to the

trial court to evaluate the other *McDonnell Douglas* elements of her discrimination claim.

The *Cohen* decision stands for the important principle that as a protected class under the LAD, age receives not only mechanistic protection based on a comparison of the ages of the plaintiff and her replacement, but also much broader and more flexible protection against age discrimination in other less conspicuous forms.

U.S. Supreme Court Considering Petition for Certiorari in Pregnancy Discrimination Case

By: Ty Hyderally, Esq. & Alex D’Amico, Esq.

In January 2014, New Jersey Governor Chris Christie signed into law the “Pregnancy Bill,” amending New Jersey’s Law Against Discrimination, N.J.S.A. 10:5-12 (“LAD”), to provide express protections for pregnant employees.

On the federal scene, however, Congress has not expressly taken this step to guarantee a pregnant woman’s right to reasonable accommodations such as extra bathroom breaks or a chair in which to sit. Nationally, the Pregnancy Discrimination Act (“PDA”) is still the statutory authority on this subject. Enacted in 1978, the PDA provides that employers must treat pregnant employees the same as other persons not so affected but similar in their ability or inability to work. *See* 42 U.S.C. § 2000e(k).

The question presented to the Court in *Young v. United Parcel Service, Inc.* is “[w]hether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are “similar in their ability or inability to work.” The Court may choose not to hear the case, in which case employer refusal to provide reasonable accommodations to pregnant employees in states without a pregnancy protection statute may persist. Should the Court grant certiorari, however, the United States could be one step closer to a nationally guaranteed right for pregnant employees to receive reasonable accommodations in the workplace.

These articles are for informational purposes only. They do not constitute legal advice, and may not reasonably be relied upon as such. If you face a legal issue, you should consult a qualified attorney for independent legal advice with regard to your particular set of facts. This newsletter may constitute attorney advertising. This newsletter is not intended to communicate with anyone in a state or other jurisdiction where such a newsletter may fail to comply with all laws and ethical rules of that state or jurisdiction.

Ty Hyderally is the Owner of Hyderally & Associates, P.C. located in Montclair, NJ and New York, NY.



33 Plymouth Street, Suite 202
Montclair, New Jersey 07042
Phone: (973) 509-8500
Fax: (973) 509-8501