

## CORPORATE LAW

# Corporations May Be Sued for Discrimination in Business Dealings

NJLAD extends coverage beyond the employer-employee relationship, protecting independent contractors and even corporations

By Wanda L. Ellert

A little-noted, but very broad subsection of the New Jersey Law Against Discrimination (LAD) has been used to extend the statute's coverage beyond the employer-employee relationship, affording protection from discrimination to independent contractors and even corporations. Employment attorneys and corporate counsel know that the LAD prohibits employers from discriminating against employees or applicants for employment based on a number of protected characteristics, including race, creed, color, age, ancestry, national origin, disability, sex, sexual orientation, marital status, domestic partnership status or liability for service in the Armed Forces. Many are unaware, however, that unlike Title VII of the Civil Rights Act or the discrimination laws of other states, the LAD may also protect independent contractors and companies from such discrimination.

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Specifically, the LAD contains a sweeping provision prohibiting discrimination in business dealings. It is unlawful for "any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person" because of a protected characteristic. N.J.S.A. 10:5-12.1 (Subsection (l)). A "person" is defined to include, among other entities, partnerships, corporations, associations and organizations. N.J.S.A. 10:5-5.a. Subsection (l) prohibits discrimination in dealing with such entities because of the protected characteristic of a partner, stockholder, director, officer, manager, agent, employee or other person connected to the business or organization.

Although this provision was enacted in 1977, there are few reported opinions mentioning it. Two cases in the early 1990s, however, indicated that this subsection could be applied to nonemployees to remedy discrimination in business dealings.

In *Estate of Behringer v. Princeton Medical Center*, 249 N.J. Super. 597, 643 (Law Div. 1991), a doctor diagnosed with AIDS sued a hospital for revoking his surgical privileges, alleging handicap

discrimination. The doctor admitted he was not an employee, but invoked Subsection (l). In dicta, the court agreed that the doctor's relationship with the hospital was within the scope of the LAD's protections. The court found no violation, however, because the doctor's condition "reasonably preclude[d]" him from performing surgery. *Id.* at 642 n.13. The court in *Horn v. Mazda Motor of America*, 265 N.J. Super. 47 (App. Div.), cert. denied, 134 N.J. 483 (1993), similarly concluded that Subsection (l) would preclude Mazda from rejecting the plaintiff's application for a franchise auto dealership because of his past cocaine addiction, which qualifies as a handicap within the meaning of the LAD. The court concluded, however, that Mazda had legitimate, nondiscriminatory reasons for refusing to enter into a franchise agreement with the plaintiff.

A decade later, the Appellate Division revisited Subsection (l) and held that it protected independent contractors from discriminatory termination. In *Rubin v. Chilton*, 359 N.J. Super. 105 (App. Div. 2003), plaintiff-physicians Roberta Rubin and Roger Adlersberg, ages 63 and 68, had a contract with Chilton Memorial Hospital to provide pathology services. When the hospital terminated their contract and replaced them with a younger doctor, the plaintiffs sued, alleging age discrimination under the LAD. The trial court dismissed their

claims, concluding that as independent contractors, they were not protected under the LAD.

The Appellate Division agreed that the doctors were independent contractors, but held, nonetheless, that they could proceed with their age discrimination claim under Subsection (l). While that provision prohibits a refusal to contract with someone for a discriminatory reason, the court found no reason to distinguish between that situation and the termination of a contract. Noting the lack of any analogous statutes in other states, the Appellate Division concluded that the plain language of the statute nevertheless compelled this conclusion, which was harmonious with the beneficial purposes of the LAD. Thus, the Appellate Division's opinion broke new ground in recognizing a cause of action under the LAD for discriminatory termination of the services of an independent contractor.

Most recently, in *Minasa Construction Co., Inc. v. PSE&G Co.*, No. A-4481-03T1 (App. Div. June 23, 2005), the unique and broad coverage of Subsection (l) was again demonstrated by its application to a discrimination action brought by a corporation. Plaintiff Minasa Construction Co. had a contract with PSE&G to install gas mains and perform related work. Minasa's president and majority shareholder was a female, and the company had been certified as a "woman-owned business." When PSE&G terminated Minasa's contract, the company brought a claim for gender discrimination under the LAD, asserting that PSE&G had terminated the contract because of the company's "woman-owned" status. In an unreported decision, the trial court decided that the LAD permits a corporation to assert a claim for gender discrimination. While recognizing that such a claim presented "an inherently awkward situation because of the corporate form," the trial court "found support for Minasa's claim in the language of [Subsection] (l) and the liberal construction to be accorded LAD as remedial social legislation...." Slip Op. at 5. As noted above, corporations and other business entities are considered "persons" under the LAD, and Subsection (l) prohibits a refusal to contract with any person because of the sex

of its officers or stockholders.

On PSE&G's motion for summary judgment, the trial court utilized the traditional burden-shifting analysis to assess the sufficiency of Minasa's discrimination claim. Although the trial court concluded that Minasa established a prima facie case of discrimination, the trial court held that PSE&G had articulated a legitimate, nondiscriminatory reason for terminating the contract with Minasa, i.e., unsatisfactory performance, which Minasa was unable to rebut with evidence of pretext. Thus, the trial court granted summary judgment in favor of PSE&G. On appeal, PSE&G did not challenge the ruling that a corporation could assert a discrimination claim under Subsection (l) and the Appellate Division found "no need" to address it. Summary judgment was affirmed.

There are limits, though, to the reach of Subsection (l). Because this provision only addresses refusals to do business on the basis of a protected characteristic, it apparently does not prohibit other forms of discrimination against nonemployees, such as harassment or a hostile environment. For instance, in *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998), the plaintiff, who gave private lessons at a skating rink, claimed that the rink owner terminated her after she refused his romantic overtures. The trial court dismissed her sexual harassment claim, concluding that she was an independent contractor and that the LAD afforded no protection against sexual harassment for nonemployees. The Appellate Division affirmed without mention of Subsection (l). In *Rubin*, however, the Appellate Division distinguished its holding in *Pukowsky*, explaining that sexual harassment is prohibited by the proscription against workplace discrimination contained in N.J.S.A. 10:5-12.a, which applies to employees only. Thus, the court did not view Subsection (l) as encompassing this form of discrimination.

In *Chrisanthis v. County of Atlantic*, 361 N.J. Super. 448 (App. Div. 2003), the Appellate Division similarly held that an employee of a contractor providing services to Atlantic County could not bring a claim against the county for alleged sexual harassment. The plaintiff nurse was employed by Correctional

Healthcare Solutions, Inc., which provided health-care services at county prisons. She asserted that a county supervisor at the prison where she worked had sexually harassed her. Although she argued that the county was a joint employer of her services, the trial court concluded that the evidence could not support the existence of a joint employment relationship. The trial court held that, because the plaintiff was not a county employee, she could not maintain a sexual harassment claim against the county. Citing its *Pukowsky* decision, the Appellate Division affirmed. There was no mention of Subsection (l) in that decision.

Independent contractors, however, may bring claims under the LAD for a discriminatory refusal to enter into or renew a contract, or a discriminatory termination of a contract. The LAD's protection of corporations against unlawful discrimination is far from well-settled, with only one decision from a trial court that, at a minimum, found such a claim "awkward" and noted the absence of any direct state or federal precedent. Nevertheless, companies need to be aware that their business decisions not to contract or do business with individuals, or even companies, may be challenged under the LAD.

Most companies assume that independent contractors and other entities with whom they do business are not protected by discrimination laws and, for that reason, may not give adequate scrutiny to contractor hiring and termination decisions. Businesses and other organizations operating in New Jersey should make sure that such decisions are made for legitimate business reasons and that there is adequate documentation to support those decisions in the event of litigation. Typically, businesses do not utilize performance evaluations, warnings, discipline, counseling or similar methods to demonstrate and document performance issues for independent contractors, nor should they, as such could be indicative of an employment relationship. Nevertheless, businesses will need to consider maintaining and preserving some form of documentary evidence to support their decisions concerning independent contractors, and possibly other contractors with whom they do business. ■