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IN PRACTICE

# EMPLOYMENT LAW

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# Thou Shall Not Lie

## Using evidence of an untruthful plaintiff when defending wrongful discharge claims

"No one in the office believes her," "he stole from the company," "she may have called in sick, but she really went away for a long weekend," "he lied on his employment application," "he submitted false expense reports" — examples of remarks made by the coworkers or managers of a former employee who has filed a lawsuit alleging wrongful discharge. But what is the significance of this information? Which pieces of information can be used to defend against claims of harassment or discrimination and how can it be used?

The remedial statutes for addressing workplace discrimination — e.g., the New Jersey Law Against Discrimination (NJLAD) and its federal counterpart, Title VII — provide that a successful plaintiff may be awarded, among other things, damages in the form of reinstatement, back pay and front pay. These are generally referred to as equitable or economic damages because they are designed to place the plaintiff in the same economic position as she would have been had the discrimination or harassment not occurred. Thus, for example, if an employee was terminated for discriminatory reasons and thereafter accepted a position paying $10,000 less per year and the case proceeded to trial three years later, then a jury could award the plaintiff three years of back pay ($30,000) and front pay for a reasonable period of time for the plaintiff to re-establish her rightful place in the job market — hypothetically, an additional two years ($20,000) — for a total of $50,000. These equitable damages may be significantly reduced by the company's discovery of the employee's wrongful conduct while she was still working for the company. The post-litigation discovery of information concerning a former employee's on-the-job misconduct is called after-acquired evidence.

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The United States Supreme Court has explained that:

> In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern for the relative moral worth of the parties, but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (citations omitted).

Put another way, in assessing what would have happened to the plaintiff at work had discrimination never occurred, the employer should be permitted to show that it would have terminated the employee because of the employee's misconduct. Given these equities, the Supreme Court in *McKennon* announced that the remedies available to employees who bring lawsuits and who have also engaged in on-the-job misconduct must be limited:

> [A]s a general rule, [in cases of employee misconduct], neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event upon lawful grounds.

With respect to back pay, the Supreme Court ruled that it is calculated "[f]rom the date of the unlawful discharge to the date the new information was discovered."

A subsequent New Jersey Appellate Division decision, *Taylor v. International Maytex Tank Terminal Corp.*, 355 N.J. Super. 482 (App. Div. 2002), significantly narrowed the potential economic damages available to employees who engage in misconduct from the date the employer "learns of the wrongdoing" to the date the employer "should have learned of the wrongdoing." The facts addressed in *Taylor* illustrate the significance of this distinction.

The defendant-employer in *Taylor* operated a liquid bulk storage facility that contains storage tanks, some of which are hazardous. During the course of discovery of Taylor's wrongful discharge suit, the defendant-employer learned that Taylor had been involved in a cover-up of a jobsite chemical spill. Had the employer known of the spill and Taylor's involvement, he would have been fired. In light of this admission, the defendant employer argued that all economic damages available to Taylor should be barred and not just cut off as of the date of his admission during discovery because any ruling to the contrary would improperly reward Taylor's improper behavior of lying. The Appellate Division agreed. Importantly, had the Appellate Division followed the rule announced in *McKennon*, it would have limited Taylor's economic damages to the date the defendant employer learned of the misconduct (at deposition on Dec. 22, 1999) rather than the date, two years earlier, when the defendant employer should have learned of the misconduct when Taylor covered up his involvement in the chemical spill (March 14, 1997).

The facts in *Taylor* are obviously extreme, but evidence of employee misconduct need not rise to this level to invoke the doctrine of after-acquired evidence and thereby limit economic damages. For example, if a company learns that a plaintiff engaged in conduct which would have resulted in the plaintiff's immediate termination had the company known of the misconduct (such as lying on a job application, stealing or submitting false information on expense reports), then the employer has a strong argument to limit the economic damages in the event of a finding of unlawful discrimination. While the issue of when damages are cut off by this evidence is subject to debate and in need of further clarification from the courts, practitioners should seek to elicit such information in discovery as early in a lawsuit as possible. By doing so, an employer may bolster the argument that it "should have learned" of the wrongful information on the date when the discovery responses were due or the questions were posed at deposition.

While smoking-gun evidence of a plaintiff's untruthfulness that, if known, would have resulted in the plaintiff's termination is usually difficult to come by, statements by co-workers recounting specific instances of the plaintiff's misconduct, providing opinions about the plaintiff's truthfulness or advising of the plaintiff's reputation within the company, are more common. The use of such evidence at trial is governed by the rules of evidence pertaining to character, which was recently analyzed by the New Jersey Supreme Court in *Fitzgerald v. Stanley Roberts, Inc.*, decided April 20.

There, Fitzgerald filed a complaint against her former employer and its president alleging violations of the NJLAD, intentional infliction of emotional distress, assault and battery. Specifically, Fitzgerald claimed that her former employer carried out a campaign of sexual harassment against her and that when she reported an incident of harassment to a high ranking company official, her employment was terminated less than two weeks later.

Before trial, Fitzgerald filed a motion to prevent defendants from offering testimony regarding specific instances of her lying and to bar character evidence based on those incidents. Defendants responded that the witnesses had interacted with plaintiff for over two years at work and had sufficient information to form a reliable opinion and that they could further testify regarding her workplace reputation for being untruthful. The trial judge prohibited defense counsel from offering such evidence even without inquiring into specific instances.

The jury returned a verdict in Fitzgerald's favor and awarded damages totaling $150,000. Defendants appealed, the Appellate Division affirmed and the Supreme Court reversed and remanded for a new trial.

After reviewing the rules of evidence governing the use of character evidence in the form of opinion and reputation testimony, the Supreme Court identified the errors made by the lower court. First, "the parties and the judge appeared to conflate opinion and reputation testimony," which are governed by entirely separate rules of evidence. Second, the trial judge "mistakenly issued a blanket order barring defendants' character witnesses because she believed that their testimony would be based on specific instances of conduct, despite defense counsel's promise that he would not elicit testimony regarding such specific instances." In reaching this conclusion, the Supreme Court noted that "both opinion evidence and reputation evidence are based on individual instances of conduct observed either by the character witness or the community. It is those instances of conduct, sometimes major and sometimes minor, from which the character witness or the community distills an opinion over time." The Supreme Court summed up the issue in the following fashion:

> To be sure, evidence regarding specific instances of conduct may not be used to prove a trait or character under either N.J.R.E. 405 or 608. What is not barred is the distillate: the opinion and reputation derived from consideration of the specific instances.

Because the Court believed that "credibility was critical" in the trial of this employment discrimination and harassment case, the Court held that the trial court's error of applying a blanket prohibition on the introduction of opinion and reputation evidence regarding Fitzgerald's character could not be considered harmless.

Information concerning a plaintiff's untruthfulness can sometimes limit the potential damages that would otherwise be available to a successful plaintiff and be presented in the form of opinion and reputation evidence at a trial to challenge the plaintiff's character. An understanding of the significance of after-acquired evidence and the rules governing the use of character evidence is essential to make the most of this critical information. ■