



EMPLOYMENT LAW
Update

Fall 2004

New Jersey Supreme Court Sets Low Evidentiary Threshold for Recovery of Damages for Emotional Distress and Harassment Cases

Carol Tarr began to work as a finance and insurance manager for the Mack Auto Mall in July 1994. Her immediate supervisor, Kelly Bragg, reported to Mack's General Manager.

Tarr left Mack in July 1995. According to Tarr, she was unable to endure sexual harassment by co-employees who, she alleged, referred to women in demeaning terms, left pornographic material on her desk, drew sexually explicit pictures on deal envelopes, opened their legs and described their sexual organs, and discussed their sexual exploits. One employee regularly claimed he wished to have sexual relations with Tarr in a "broom closet." Another made sexually offensive comments to her in the presence of strangers.

Notwithstanding the conduct of co-employees which led to her departure in July 1995, Tarr returned a short time later because she needed the job and because Bragg, who had also been subject to sexual harassment, assured her that things would be better. They weren't. Tarr said her work environment got so bad that she would

regularly cry on her way home from work. In April 1996, she left for good.

Tarr sued for sexual harassment, claiming damages for, among other things, her emotional distress. Among those Tarr sued was Bob Ciasulli, the owner of Mack Auto Mall.

At trial, the judge dismissed Tarr's emotional distress claim, finding that she was only temporarily upset, a condition insufficient to establish her claim. The court also dismissed her complaint against Ciasulli. The jury then found that Tarr was the victim of sexual harassment at the hands of Mack Auto Mall, her employer, but that she had suffered no economic loss.

An intermediate appellate court reversed the dismissal of Tarr's emotional distress claim and reinstated her complaint against Ciasulli. The Supreme Court, in a much anticipated decision, *Tarr v. Ciasulli*,¹ addressed both Tarr's emotional distress damages claim and supervisor liability under New Jersey's Law Against Discrimination ("LAD").²

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Employer Liable for Failure to Advise of FMLA Rights Prior to Employee's Leave

Richard Conoshenti had worked for Public Service Gas & Electric Company (PSE&G) as a mechanic since 1972. In April or May 1999, PSE&G decided to discharge Conoshenti for keeping inaccurate time records and leaving his shift early to shower. Conoshenti claimed that his timekeeping was accurate and that a shower was necessary because he worked with chemicals that irritated his skin.

With the assistance of his union and because he was willing to accept blame, PSE&G reinstated Conoshenti, but only after he had signed a "Last Chance Agreement" in August 1999, containing certain conditions, such as maintaining satisfactory performance and reporting to work every day. If Conoshenti failed to meet any one of the conditions, such failure would constitute cause for automatic discharge.

On December 4, 1999, Conoshenti was involved in a serious automobile accident and informed his boss that his physician had recommended that he stay out of work for two weeks. PSE&G did not then, or at any other time, advise Conoshenti of his rights under the Family and Medical Leave Act of 1993.¹ Later, Conoshenti met with a surgeon, who recommended immediate surgery, which was scheduled for

early January 2000. Conoshenti notified PSE&G of his plan to undergo surgery and was told to take time to recuperate. On December 17, 1999, Conoshenti sent PSE&G a form, completed by the surgeon, indicating that he would need until April 2000 to recover.

Although PSE&G, on December 20, 1999, commenced administrative steps to end Conoshenti's employment for violating the Last Chance Agreement, the company did not advise Conoshenti. On leave, he was unaware of PSE&G's intentions.

Meanwhile, Conoshenti had become insecure about his job. He contacted his union, which advised him to notify PSE&G that he desired to have his leave counted as FMLA leave, which Conoshenti did. As a result, PSE&G decided to delay discharging Conoshenti until he returned from his leave.

On April 12, 2000, Conoshenti took and passed a physical examination required by PSE&G. On the same day, PSE&G once again initiated administrative steps to end Conoshenti's employment for violation of the Last Chance Agreement.

Within an hour of Conoshenti's reporting for work on April 17, he was summoned to his supervisor's office and told he was being

terminated for violating the terms of his August 1999 reinstatement. In a termination letter, PSE&G noted that, on December 6, 1999, Conoshenti was unable to report as a result of an automobile accident. Subsequently, because he was out of work for 92 days, he had failed to comply with the conditions of the Last Chance Agreement.

There was no question that Conoshenti's absence exceeded the 12 weeks of leave protected by the FMLA. If that leave had begun on December 6, 1999, the 12-week period would have expired on March 1, 2000, more than 45 days before his actual return to work.

Conoshenti sued, claiming PSE&G had violated the FMLA in two ways: 1) by considering his leave a negative factor when deciding to discharge him; and 2) by failing to advise him of his FMLA rights. Because PSE&G planned to discharge Conoshenti without regard to his leave, his first contention was not viable. The second was.

To bolster his failure to advise argument, Conoshenti claimed that his recovery was divisible into two parts: the initial recovery from the automobile accident; and the later recovery from shoulder surgery. Had Conoshenti known that he could take no more than 12 weeks of

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leave, he claimed he would have postponed the surgery to a subsequent FMLA leave period.

In *Conoshenti v. Public Serv. Elec. & Gas Co.*,² the Court agreed that Conoshenti could show that PSE&G had injured him by failing to advise him of his FMLA rights because of the peculiar circumstances of his physical condition and leave. Had PSE&G given Conoshenti the advice it was required to provide once it had notice of his serious health condition, he would have been in a position to make an informed decision about structuring his leave to take advantage of the job protection offered by the FMLA.

The Court's decision points up yet again the employer's responsibility to provide individualized notice to employees of their FMLA rights. They may do so through a handbook which incorporates information on FMLA rights and responsibilities and the employer's policies under the FMLA,³ or through information provided directly to the employee upon a request for a leave.⁴

Furthermore, each time an employee requests leave, the employer must within a reasonable time—one or two business days if feasible—provide the employee with a written notice which details specific expecta-

tions and obligations of the employee and explains the consequence of a failure to meet these obligations.⁵ An employer whose notice does not include the requirements enumerated in the FMLA and its regulations acts at its peril, as PSE&G discovered when it failed to advise Conoshenti of his rights. ■

¹ 29 U.S.C. §2601 *et seq.*

² 364 E.3d 135 (3d Cir. 2004).

³ 29 C.F.R. §825.301(a)(1).

⁴ 29 C.F.R. §825.301(e)(2).

⁵ 29 C.F.R. §825.301(b)(1), -(c).

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The Supreme Court held that, while New Jersey common law has long recognized a cause of action for intentional infliction of emotional distress, the LAD specifically authorizes emotional distress damages and does not require as proof of such damages either expert testimony or independent corroborative evidence. In other words, according to the Court, a plaintiff's testimony about her physical and emotional stress, anguish, and humiliation is sufficient to support an award for damages.

Furthermore, because one legislative purpose of the LAD is the eradication of workplace discrimination, the jury should

consider not only the plaintiff's injury, it should focus on the severity and pervasiveness of the harassment. Therefore, the damages a victim of sexual discrimination suffers on account of a hostile workplace are also measured by the character of the harassment—its severity, duration and public nature.

The Supreme Court thus underscored yet another reason to ensure the workplace is harassment free: the law requires a far less stringent standard of proof of emotional distress than is applicable to tort-based causes of action.

As for the personal liability of a supervisor, the Court ruled that a plaintiff must show that

the party whom the supervisor aids has performed a wrongful act, which might take the form of inaction, that causes injury; that the supervisor is generally aware of his role as part of the activity at the time he provides assistance; and that the supervisor must knowingly and substantially assist in the violation. Applying these factors, the Court found that while Ciasulli, Mack's owner, was guilty of negligent supervision, his assistance to the actual harassers was insubstantial and therefore could not be the basis for his individual liability under the LAD. ■

¹ *Tarr v. Ciasulli*, 181 N.J. 70 (2004).

² N.J.S.A. 10:5-1 *et seq.*

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