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Prevailing Defendants May Receive Attorney Fees

Must show reckless disregard of facts and ability to pay

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The Appellate Division recently addressed under what circumstances a court may award attorneys' fees and costs to a prevailing defendant in an action brought under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. The panel held that, in making this determination, a court should consider whether the plaintiff demonstrated a "reckless disregard" or "purposeful obliviousness of the known facts." *Michael v. Robert Wood Johnson Hosp.*, Docket No. 2008 WL 123811 (App. Div. Jan. 15, 2008). The Court further directed the trial court to examine the extent to which plaintiff's pursuit of her case was driven by "her own views or desires" or whether plaintiff "relied, either exclusively or partially, upon the advice of counsel." Finally, the *Michael* court found that, in determining what constituted a "reasonable" fee award, the lower court should consider a plaintiff's ability to pay such an award.

In *Michael*, the plaintiff asserted claims against her employer for age discrimination, hostile work environment, retaliation, negligence and breach of con-

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tract. After receiving, "on several occasions," counsel fee awards due to "plaintiff's derelictions in discovery," defendants successfully moved for summary judgment dismissing the complaint. This decision was affirmed on appeal.

Defendants subsequently moved for fees and costs pursuant to the frivolous claims statute, N.J.S.A. 2A:15-59.1, and N.J.S.A. 10:5-27.1, the applicable provision of LAD. The lower court determined that plaintiff had brought her action in bad faith. Accordingly, it awarded defendant \$129,692.79 in counsel fees and costs, a determination that plaintiff appealed.

During oral argument in the lower court, defendants withdrew their application under N.J.S.A. 2A:15-59.1. The panel therefore agreed "[that] there was no basis for the trial court to sua sponte resuscitate" defendants' claim under the frivolous claims statute.

The greater importance of the *Michael*'s court's analysis is that a party who has successfully defended a LAD case may be awarded attorneys fees and costs. The applicable statute provides that the prevailing party in a LAD case "may be awarded a reasonable attorney's fee ..." N.J.S.A. 10:5-27.1. However, prior to awarding fees to a responding party, a tribunal must determine that the case was brought in "bad faith." The statute does not

specify the meaning of bad faith. Similarly, it does not address whether the nonprevailing party's "financial ability" should be considered.

In reversing the lower court, the Appellate Division first rejected that court's definition of bad faith. The trial court had defined "bad faith" as "the conscious doing of a wrong because of dishonest purpose or moral obliquity." The *Michael* court rejected such a "formulation of bad faith," which seemed to require the demonstration of "purposeful wrongdoing." The Court noted that, in contrast to the frivolous claims statute, which narrowly defines bad faith to be "solely for the purpose of harassment, delay or malicious injury," N.J.S.A. 2A:15-59.1(b)(1), N.J.S.A. 10:5-27.1

Instead, in reliance on prior Supreme Court precedent, the *Michael* court defined bad faith as "a reckless disregard or purposeful obliviousness of the known facts." Quoting *New Jersey Title Ins. Co. v. Caputo*, 163 N.J. 143, 155 (2000)). The panel found that the "*Caputo* formulation" more accurately reflected "the legislative objective of 'eliminat[ing] the possible chilling effect on civil rights plaintiffs, who may decide not to pursue a meritorious suit for fear of suffering a fee award, and the goal of deterring plaintiffs from filing frivolous claims."

In determining whether a plaintiff had exhibited bad faith, the *Michael* court

rejected two of the three factors relied upon by the trial court. Specifically, the panel did not agree with the lower court that the dismissal of her case prior to trial or even a plaintiff's failure to establish a prima facie case supported a finding of bad faith. However, the panel did agree that "whether a plaintiff had already achieved full satisfaction of all her claims before suit was instituted" was a relevant factor that may be considered.

With regard to what constitutes "a reasonable attorney's fee" award, N.J.S.A. 10:5-27.1, the panel held that "the ability of a party to pay an award of counsel fees is inherent in the concept of analyzing what is a reasonable fee." The Court noted that N.J.S.A. 10:5-27.1 did not explicitly require that the prevailing party "be made whole"; rather, "[t]he statute refer [red] to an award of a 'reasonable' attorney's fee"

Finally, the *Michael* court held that another relevant factor in determining a "reasonable" fee award was the extent to which plaintiff's pursuit of her case was driven by "her own views or desires" or whether plaintiff "relied, either exclusively or partially, upon the advice of counsel." Due to the extent to which it may implicate the attorney-client privilege, this single sentence may prove to be the most controversial aspect of the *Michael* opinion. ■