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NEW JERSEY EMPLOYMENT LAW AFFIRMED!

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Carianne P. Torrissi

Plaintiff Tom Finn was initially hired as a driver by J.B. Hunt Transport, Inc. in December 1992 at the age of 48. Shortly thereafter, he was transferred to an office position, and he was subsequently promoted to Safety Manager, a position he held until 1999. In 1999, Finn was promoted to Operations Manager, and another promotion followed in 2000 when he became a Fleet Manager. In February 2003, Finn was injured and took a leave of absence from work. When he returned to work approximately three months later, he was placed in the position of Area Service Manager in J.B. Hunt's Elizabeth, New Jersey facility under the supervision of a younger female.

In September 2003, Finn had a 90-day performance review, wherein his supervisor stated that he was not meeting her expectations. The review identified three broad areas of deficient performance on which Finn needed to focus and improve. In October 2003, Finn's supervisor issued a Job Performance Document highlighting the areas in which he had yet to improve. As a result of the failure to improve, Finn was given a one-day suspension and was warned that continued failure to improve his job performance could result in termination.

In March 2004, Finn's supervisor again issued a Job Performance Document outlining areas that still required his attention and improvement. In his annual performance review in May 2004, Finn received 11 "Needs Improvement" ratings and several

“Unacceptable” ratings, the lowest two rating levels on J.B. Hunt’s four-tiered rating system for job performance.

In October 2004, Finn was demoted to the position of Fleet Manager, but remained under the supervision of the same younger female. In his annual performance review in May 2005, Finn received an overall rating of “Needs Improvement.” In July 2005, Finn’s supervisor issued a Job Performance Document stating that it served as a written warning regarding his lack of professionalism and attitude at work. Despite the sub-par annual performance review and the Job Performance Document warning, Finn received a bonus at the end of 2005 and a pay raise at the beginning of 2006.

In his annual performance review in April 2006, Finn again received ratings of “Needs Improvement” in 11 categories. As his supervisor did not believe he was improving his performance adequately, Finn’s employment was terminated in November 2006. He was 62 years old at the time of his termination.

Finn filed suit against J.B. Hunt Transport, Inc. on August 2, 2007 in the Superior Court of New Jersey in Somerset County, alleging that J.B. Hunt violated the New Jersey Law Against Discrimination by discriminating against him based

on his age. Specifically, Finn alleged that he was given unmanageable duties to set him up for failure, that his performance was judged more harshly than that of his younger counterparts, and that his termination was part of a broader plan by J.B. Hunt to replace the older portion of its workforce with employees who were substantially younger. Finn also asserted claims for intentional infliction of emotional distress and breach of contract. We removed the case to the U.S. District Court for the District of New Jersey in Newark.

After the completion of discovery, we filed a Motion for Summary Judgment with the District Court, asserting that Finn was unable to establish a *prima facie* case of discrimination under the New Jersey Law Against Discrimination because he could not prove by a preponderance of the evidence that he was qualified for his position, and that J.B. Hunt had met its burden of proof by producing evidence of a legitimate non-discriminatory reason for his termination. We also sought dismissal of the intentional infliction of emotional distress claim, arguing that Finn’s complaints did not constitute the level of severity required to establish such a claim under the standard enunciated by the New Jersey courts. In addition, we sought dismissal of the breach of contract claim, arguing that J.B. Hunt does not maintain an employee manual which applies to non-driver employees, and therefore there was no employee manual governing Finn which

could create a contract of employment. Finn filed opposition to our Motion for Summary Judgment, alleging that J.B. Hunt's proffered reason for terminating his employment was not credible as he produced evidence of satisfactory job performance evaluations conducted by his prior supervisors. Finn further alleged that the fact he remained employed by J.B. Hunt for a period of 14 years implied that he was performing his job duties at an acceptable level. Finally, Finn alleged that another "older" employee resigned while working under the same supervisor due to her discriminatory conduct.

After reviewing the Motion and opposition thereto, the U.S. District Court for the District of New Jersey granted our Motion for Summary Judgment, ruling that J.B. Hunt proved that it had a legitimate, non-discriminatory basis for terminating Finn's employment (i.e., he repeatedly failed to make the necessary improvements after being cautioned that continued failure to do so could result in termination). Furthermore, the District Court noted that Finn failed to provide evidence that discriminatory reasons were more likely than not a motivating factor in the decision to terminate his employment. Finally, the Court held that Finn failed to provide evidence of any actions on the part of J.B. Hunt which were so outrageous, extreme, or utterly intolerable in order to warrant relief for intentional infliction of emotional distress, and that Finn's claim for breach

of contract was preempted by the New Jersey Law Against Discrimination. As such, Finn's Complaint was dismissed in its entirety.

Finn filed an appeal with the U.S. Court of Appeals for the Third Circuit, arguing that the District Court had erred in its grant of summary judgment. Specifically, Finn argued that he presented evidence of many inconsistencies, inaccuracies, and deficiencies in J.B. Hunt's proffered reason for terminating his employment, and that his age was a factor in the termination decision. We filed opposition thereto, asserting that the District Court's grant of summary judgment was proper and should therefore be affirmed. On January 11, 2011, oral argument was presented to the Third Circuit before a panel consisting of Chief Judge Theodore McKee, Circuit Judge Thomas Ambro and Circuit Judge Michael Chagares. On July 14, 2011, the Third Circuit issued its Opinion, authored by Judge Chagares, finding in our favor and affirming the decision of the District Court.

In its Opinion, the Third Circuit noted that the evidence presented portrayed a long period of sub-par job performance that was adequately documented by J.B. Hunt. The Third Circuit stated that to reach a conclusion that a discriminatory animus existed based on the fact that Finn had worked for J.B. Hunt for a period of 14 years and that another "older" employee had

resigned while working under the same supervisor would require “rampant speculation in which this Court is unwilling to engage.” Furthermore, the Third Circuit stated that while Finn produced evidence that his supervisor at the time of his

termination had higher expectations of him than that of his previous supervisors, he provided no evidence that those expectations were motivated by his age or that his termination was motivated by discrimination.

Carianne P. Torrissi is a member of the Firm’s Employment Law Group as well as the Commercial Motor Vehicle group. Carianne received her Bachelor of Science degree from Pennsylvania State University in 1999 and a Juris Doctorate from Rutgers University School of Law in 2003.

She practices in the state courts of Pennsylvania and New Jersey as well as the U.S. District Court for the District of New Jersey, the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit.

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ARKANSAS TRUCKING SEMINAR



Jeffrey A. Segal

Jeffrey A. Segal and **James A. Wescoe** spoke at the Arkansas Trucking Seminar on September 15, 2011 at the Holiday Inn Convention Center in Springdale, Arkansas. Jeff Segal was a co-presenter in a Science & Technology program on “*Capturing Electronic Data from Claimant Vehicles & Other Devices.*” Jim Wescoe presented a Cargo & Brokerage program on “*Cargo Law: Developments & Trends in Cargo Litigation, Broker-Carrier Disputes & Freight Charge Claims.*”



James A. Wescoe

Jeff is a partner in the Commercial Motor Vehicle Section in the firm’s New Jersey office, and Jim is a partner in the Commercial Motor Vehicle Section in the firm’s Philadelphia office.

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