

Deaf worker can claim exploitation under LAD

By Robert G. Seidenstein

A worker who can neither hear nor speak may sue her former employer under the state's Law Against Discrimination on grounds her vulnerability as a handicapped person gave the employer the means to require her to work overtime without pay.

In *Mosley v. Femina Fashions, Inc.*, the Appellate Division also ruled she could sue under the New Jersey Wage and Hour Law, saying her damages for alleged years of unpaid overtime were not too speculative to reach a jury.

Writing for the court, Judge John E. Wallace Jr. noted the worker, Gladys Mosley, "expressed fear of losing her job if she failed to comply" with working extra hours "as well as the difficulty she

would have in trying to obtain other employment as a result of her handicap."

He said a jury could reasonably find that her employer, Femina Fashions, "took advantage of and exploited



A full text of *Mosley*, Order No. 90886, is available from the NJL Facts-on-Call Service, 800-670-3370.

plaintiff, knowing that plaintiff would not protest due to her handicap."

"It was her vulnerability as a handicapped person that enabled defendant to continuously require plaintiff to work extra hours without pay," the judge wrote.

Wallace noted the Law Against Discrimination (LAD) applies not just to hiring and firing decisions, but to terms and conditions of employment as well.

He said it should be up to a jury whether Mosley established a connection between her handicap and "the adverse employment action, i.e. having to work without pay."

A Superior Court judge in Hudson County had dismissed her LAD and wage claims after a jury heard the evidence but before it started deliberating. The judge also dismissed a whistleblower claim under the Conscientious Employee Protection Act (CEPA).

The appeals court, while reinstating the LAD and Wage and Hour Law claims, affirmed the dismissal of the CEPA claim. Wallace said Mosley wasn't fired and was encouraged to return. Instead, she simply stopped working after a supervisor allegedly altered her time card to make it appear she clocked out early.

That alleged incident took place in 1998. Mosley claims she had been required to work extra without pay starting in 1988.



Judge John E. Wallace Jr.

In his decision, Wallace noted the test used to establish a *prima facie* LAD employment case under the 1988 New Jersey Supreme Court case *Jansen v. Food Circus Supermarkets, Inc.* involved a worker being terminated. But, he said, the *Jansen* standard, in light of the circumstances, could be modified to cover an adverse action regarding the terms and conditions of employment.

On the issue of the Wage and Hour Law, he said damages do not have to be proved with absolute certainty if that is impractical. He said there was sufficient evidence for the jury to make a reasonable estimate of the damages if it finds in Mosley's favor.

Wallace was joined by Judges Sylvia B. Pressler and Francine I. Axelrad.

Alan L. Krümholz of Jersey City represented Mosley and John A. Craner of Scotch Plains represented Femina Fashions.

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