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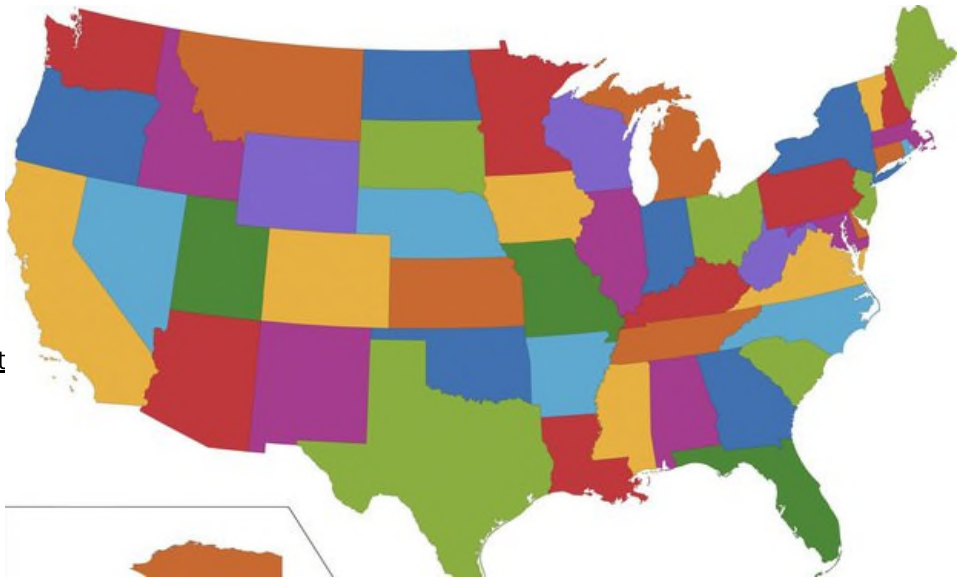
Analysis (/njlawjournal/analysis/)

The Extraterritorial Reach of the NJLAD

Does New Jersey's Law Against Discrimination apply to a workplace in Illinois? We all know the answer: It depends

By **Michael H. Reed** | July 31, 2019 at 03:15 PM



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New Jersey's Law Against Discrimination (NJLAD) applies to workplaces in Sussex County, Cape May County, and everywhere in between. Does it also apply to a workplace in Illinois? The Appellate Division confronted this question in, *Calabotta v. Phibro Animal Health Corp.*, Docket No. A-1576-17T3. As is typical in choice-of-law cases, the court's answer was: It depends.

Calabotta is notable for two reasons. First, it leaves open the possibility that different claims against the same employer will be governed by the laws of different states. Second, it counsels employers to enter into employment agreements containing choice of law clauses, which promise to "resolve uncertainty."

Non-Promotion and Termination

Plaintiff David Calabotta worked in Illinois as the vice president of marketing for a company called Prince Agri. Prince Agri is a subsidiary of Phibro Animal Health Corporation, which is headquartered in New Jersey.

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Calabotta's wife, Beth, received a breast cancer diagnosis in 2008. Beth went into remission, but the cancer returned in 2014. Between 2014 and 2016, Calabotta discussed Beth's condition with his New Jersey-based supervisor, Dean Warras.

In 2016, Warras told Calabotta that Phibro was reorganizing and that Calabotta's role would be diminished. Part of the reorganization involved the creation of a new senior marketing position in New Jersey. Warras said he didn't believe Calabotta would be interested because Calabotta lived in Illinois and because Calabotta's wife was suffering from cancer. Calabotta was passed over for the job.

In August 2016, Calabotta was suspended and then terminated following a "serious problem" at a national meeting.

Calabotta alleged that the deliberations leading to his non-promotion and termination took place in New Jersey.

Calabotta's Claims Are Dismissed

Calabotta claimed that he was discriminated against "on account of his association with a person with a disability," namely his wife. He filed suit against Phibro asserting NJLAD claims for non-promotion and wrongful discharge.

It is not difficult to understand why Calabotta brought claims under New Jersey law.

In 1998, the Appellate Division held that "where the plaintiff is wrongfully discharged for associating with a member of a protected group [under the NJLAD], that is the functional equivalent of being a member of the protected group." Illinois, on the other hand, "has yet to recognize a cause of action for associational discrimination."

Calabotta lost in the Law Division, where the judge found that the NJLAD "does not apply to employees whose employment is based outside of New Jersey."

The Appellate Division reversed and remanded. It held that the NJLAD could apply to non-residents like Calabotta. It then held that the NJLAD applied to Calabotta's non-promotion claim. Rather than decide which law applied to the wrongful discharge claim, the court remanded for additional fact finding.

The NJLAD Can Apply to Non-Residents

Calabotta offered the following framework for determining whether statutes like the NJLAD apply in an interstate context.

First, courts ask how broadly the legislature intended for the New Jersey statute to apply. The NJLAD is a remedial statute, "liberally construed in order to advance its beneficial purposes." The *Calabotta* court found that the NJLAD's "broad and strong language provides ample support" for the view that the law can apply to non-residents.

Second, courts ask whether the legislature intended for the New Jersey statute to necessarily displace other state laws. The *Calabotta* court held that the NJLAD does not "bulldoze over the conflicting laws of other states that have a nexus to the case." Because of that, a choice-of-law analysis was required to determine whether the NJLAD governed Calabotta's claims.

Calabotta's Failure to Promote Claim Is Governed by NJ Law

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New Jersey's choice-of-law jurisprudence looks to the Restatement (Second) of Conflict of Laws (the "Second Restatement"). In Calabotta's case, the court looked specifically to Restatement Sections 6, 145 and 146. Based on those sections, the court held that Calabotta's non-promotion claim was governed by the NJLAD.

The court began with Section 6. It explained that Section 6(2)(a), "the needs of the interstate ... systems," favored the application of New Jersey law because those needs "are generally best served by applying the law of the state where a job opening will be filled." Section 6(2)(f), "certainty, predictability, and uniformity of result," also favored the application of New Jersey law. These "values," the court reasoned, "are logically advanced by having New Jersey antidiscrimination laws apply to each applicant for a job located in New Jersey."

Other Section 6 factors supported the application of New Jersey law because someone who submitted an application for a job in New Jersey would, the Appellate Division reasoned, expect New Jersey law to govern claims related to the application. Also, the court explained, "[t]here is little reason to think other jurisdictions would want their laws extended to hiring decisions made [in New Jersey]."

The court then turned to Section 145, the general rule for torts, and Section 146, the rule for personal injury claims. Essentially, these sections aim to identify the state with the most significant relationship to the occurrence and the parties, based on the considerations in Section 6. The Appellate Division held that New Jersey "plainly has the most significant relationship to the failure-to-promote claim."

In so holding, the Appellate Division reaffirmed its decision in *Buccilli v. Timby, Brown & Timby*, 28 N.J. Super 6 (App. Div. 1995). There, a New Jersey resident working in Pennsylvania brought an NJLAD claim for wrongful discharge. While the plaintiff's residence was New Jersey, she "worked exclusively in [Pennsylvania] and the conduct which she allege[d] was unlawful occurred there." *Id.* at 10. Accordingly, Pennsylvania law applied.

Calabotta lived and worked in Illinois. The Appellate Division explained that it would be consistent to apply New Jersey law to Calabotta's non-promotion claim because *Buccilli* did not "impose a bright-line choice of law principle that all employment discrimination claims must be governed by the law of the state where a plaintiff exclusively or principally worked."

Calabotta's Wrongful Discharge Claims Might Be Governed by NJ Law

Calabotta's wrongful discharge claim was a different story. Because New Jersey considers choice of law questions on an issue-by-issue basis, the applicable law for Calabotta's wrongful discharge claim was not necessarily the applicable law for his failure to promote claim.

Calabotta cautioned that no one factor will be dispositive in every wrongful discharge analysis. It explained that, "the state where the [termination] decision was made ... is simply one of the many factors in the overall mix."

On the facts before it, the *Calabotta* court was unable to complete the choice of law analysis for the wrongful discharge claim. It remanded for further factual development.

Conclusion

The *Calabotta* court found itself in an uncomfortable position. It left open the possibility that Calabotta's wrongful discharge claim will be governed by Illinois law even as his non-promotion claim is governed by New Jersey law. To avoid that result in the future, the court went out of its way to advocate for choice of law clauses in employment agreements. It believed these clauses would add certainty to an otherwise uncertain analysis.

Still, for cases without a choice of law clause, *Calabotta* could have provided more certainty than it did.

Calabotta's non-promotion discussion was structured around the idea that it made sense to apply New Jersey law because New Jersey is where the new job would be. That unifying idea did not mandate the application of New Jersey law, but it influenced how the court viewed the various Restatement factors.

The Appellate Division's wrongful discharge discussion was not similarly built around a unifying idea. The court could have said, consistent with *Buccilli*, that in the wrongful discharge arena it makes sense to apply the law of the place where the employee worked. Otherwise, for example, employees working in America for foreign-based employers would lose employment rights conferred by state law.

As in the non-promotion example, a unifying idea would not replace the Restatement factors with a bright-line rule for wrongful discharge cases. But it would help orient the Restatement analysis in a more predictable way.

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