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Suing the State for Malpractice

By Henry Gottlieb

The New Jersey Division on Civil Rights is losing some early rounds in an unprecedented and intriguing suit that attempts to hold the agency to the same malpractice standards as private attorneys who botch a case.

Essex County Superior Court Judge June Strelecki ruled in August that nothing in the Tort Claims Act immunizes the division or its top officers from a malpractice complaint by two workers who lost a discrimination case.

On Oct. 11, the judge refused to stop discovery while the state appeals.

Immunity is a hot issue. Even hotter is the question at the soul of the litigation: Do the Civil Rights Division and its officials have professional duties to discrimination victims who ask the agency to be their champion?

If the answer is yes, and juries begin second-guessing division officials as they now second-guess private attorneys accused of malpractice, changes in the division's practices will be required.

Indeed, the threat of costly malpractice suits could raise doubts about whether the state should even be in the business of helping discrimination victims.

"I hate to use the term - but it's going to be floodgates," Deputy Attorney General Patricia Schiripo told Judge Strelecki at a hearing on July 26. "I mean, we have a situation here where what the plaintiffs are alleging is that any time a state investigatory agency takes on a claim to investigate - if the complainant doesn't like the result - that we can be charged with legal malpractice."

Exactly, counters the plaintiffs' lawyer Glenn Bergenfield, a Princeton solo practitioner. Civil rights complainants rely on the division for legal advice and legal work, and the division should be held as accountable as private practitioners who mess up, he says.

In this case, there's no dispute that the division messed up.

In October 1984, four black workers at a Goodyear Tire & Rubber Co. warehouse in North Brunswick filed complaints with the division, alleging they were the victims of race-based promotion policies.

The division docketed the complaints and investigated. And investigated. And investigated.

Stuart Sherman, chief of enforcement for the agency, said in a 1994 certification that the investigation went on throughout the 1980s. The agency didn't begin determining whether there was probable cause to charge Goodyear until 1990. Eventually, two cases were dropped, but on Feb. 22, 1993, probable cause was found in two cases. Goodyear has denied the allegations.

Laches Found To Bar Complaints

By May 1994, when the case went to the Office of Administrative Law for adjudication, the warehousemen's suit was ready for the warehouse.

Before even getting to the merits, the OAL ruled that so much time had passed, Goodyear couldn't defend itself adequately, and the division had to agree. On July 6, 1995, Acting Director Jeffrey Burstein upheld the OAL's ruling that the doctrine of laches applied, and he dismissed the complaints his own agency had found to have merit.

Burstein blamed the "unreasonably long delay by the division," which he found "unexplained and inexcusable," language that plaintiff's attorney Bergenfield cited in his March 19 malpractice complaint for the two workers, Joseph Lee of Newark and Nolan Reaves of Trenton, who still work for Goodyear.

"The work done by the DCR, under the authority of the Attorney General, is fundamentally legal work," Bergenfield argues. He says his clients gave the division confidential information, and the agency started an investigation and took legal positions on behalf of Reaves and Lee.

At the top of the agency at the time of the alleged malpractice was C. Gregory Stewart, a lawyer. He was named as a defendant, along with enforcement chief Sherman and other staff members.

Stewart, who is now general counsel to the U.S. Equal Employment Opportunity Commission, did not respond to a request for comment on Thursday.

Analogy to Public Defender

By Bergenfield's reckoning, the division's work is analogous to what a public defender does for a criminal defendant. He notes that public defenders have been held to the same malpractice standards as private attorneys.

The counterargument, raised by the state at the trial level, is that the Tort Claims Act, particularly N.J.S.A. 59:2-4 and 3-5, immunizes the state against liability for injuries caused by failure to enforce a law. That's what happened in this case, Schiripo argued in trying unsuccessfully to win a summary dismissal. If indeed the Civil Rights Division delay in the case against Goodyear represented a failure to enforce the Law Against Discrimination, the state is immune, she urged.

At the July 26 hearing, Judge Strelecki cast doubt on that reasoning. The Tort Claims Act sections cited by the state may apply to a government agency that says to a citizen with a complaint, "Hey, you know, not our problem, we're not going to deal with it at all," but not to an

agency that decides it will accept a responsibility and then fails, Strelecki suggested.

Argument also raged around exactly whom the division represents: claimants or the state itself. To analyze that, it helps to know how the division handles the typical complaint.

People who think they are victims of discrimination ask the division to investigate. If the division believes there is probable cause for a complaint, a deputy attorney general prosecutes the alleged discriminator in the OAL.

If an administrative law judge finds there was discrimination and levies an award to the victim, the case goes before the director for a final determination, which can be appealed to the Appellate Division.

At any point in the process, complainants are free to stop relying on the Civil Rights Division and bring a complaint in Superior Court, and they can also retain a private attorney to represent their interests in the Civil Rights Division.

Complainants must always remember the two-year statute of limitations on discrimination claims filed in Superior Court. If a complainant is using the Division on Civil Rights as the vehicle for redress and the two years pass, the complainant is committed irrevocably to the division's process.

Until recently, however, the statute of limitations was six years, which means Reaves and Lee weren't barred from going to Superior Court until 1990.

No Privity of Contract

Schiripo argued that the division is an investigative body representing the state, without discretion to pick and choose its fights as a private attorney can. There's no consensual agreement between parties, the hallmark of an attorney-client relationship, she said. There's no fiduciary relationship either.

Discrimination is a public wrong, not just a private grievance, Schiripo said. "We are representing the state," she said, rejecting Bergenfield's analogy that the division is like a public defender, whose principal responsibility is to serve the interests of the client. A public defender has no duty to the public at large, Schiripo told the judge. "And that's absolutely not true in this case, your honor."

"In its quest, the DCR does not advance the complainants' interest to the exclusion of the alleged discriminator, as would an attorney representing a client, rather the DCR serves a judicial- like function and searches for the truth," Schiripo said in her brief.

And she noted at the hearing that complainants are always free to turn to private attorneys for a Superior Court suit.

Bergenfield argued, though, that what the agency did in his clients' cases was more like lawyering than investigating. To his clients, the division was saying, "We're going to send out subpoenas and we're going to interview witnesses and we're going to compel testimony and we're going to file a complaint on your behalf and then Goodyear goes out and says, 'Well, we're going to get our law firm to fight you and the lawsuit.' "

And when the judge says, "I'm tossing it because it's too late and it's not fair to Goodyear, that's legal malpractice," Bergenfield concluded. "That's not a problem of an investigative agency."

When Does the Lawyering Begin?

One of the complications in Bergenfield's case is his clients' use of a private attorney, Woodbridge solo practitioner Ronald Spevack, to argue their case in the OAL against Goodyear's laches argument.

That means the only malpractice that the division could have committed was during the period up to the point of Spevack's entry into the case.

In a telephone interview Thursday, Deputy Attorney General Charles Cohen, assistant chief of the civil rights section, repeated Schiripo's argument that the division is only an investigatory agency because its job is to decide if there is probably cause to bring a complaint.

The lawyering begins only when a deputy attorney general brings the case in the OAL. Cohen conceded there is a possibility that a deputy attorney general has a professional duty to a complainant after probable cause has been found. "It's a tricky situation," he said, calling the relationship between a deputy's duty to the state and to the complainant, "a fluid one."

But he said it's not murky in Bergenfield's case because the alleged malpractice was the delay in the investigation, before the division had made up its mind to bring a complaint and actually represent the complainants.

The State as Legal Service Provider

That may be so, but Strelecki's rulings give Bergenfield a chance to prove there was a professional responsibility to his clients, unless the appeals court stops him.

"The government is the biggest provider of legal services, and they have to comply with minimal standards of justice and competence or they should get out of the business," Bergenfield says.

"To take nine years to investigate and then have the case dismissed is unconscionable," he says. "In the same nine-year period, I bought three houses and six cars, had three kids and handled hundreds of cases. That's plenty of time to investigate one case."

Among the issues likely to be examined in discovery are the procedures the agency uses to inform complainants about their right to private counsel and the tolling of the statute of limitations.

Reaves said Thursday he doesn't remember any mention of such issues by division staff members, and Cohen says he doesn't know of any such advice in writing to complainants.

Bergenfield may not win, but his case is sure to focus attention on the efficiency of the division, which has a reputation among plaintiffs' lawyers as a slow-moving, bureaucracy to which plaintiffs should resort only if their cases aren't strong enough to attract a private attorney, or they can't afford one.

"This is an interesting case," says a lawyer who has clients whose cases are being handled by the division, Stuart Ball, of Newark's Ball, Livingston & Tykulsker. "It deserves attention because of the brutal victimization of the plaintiffs in this case."

In a telephone interview Wednesday, the director of the division, Rolando Torres Jr., says he knows the division has a reputation for being slow, but he says things are getting better.

There certainly aren't any cases still awaiting probable cause determinations

seven years after they were filed, he says. The oldest ones now have been around for four years, but there are few of them and they are being watched closely.

He received a supplemental appropriation of $164,000 last year just for a backlog reduction program that is working, he says, pointing to departmental statistics that show a faster rate of case clearance. For the first time since 1990, the number of unresolved cases is going down.

Central to the backlog reduction is an attack on all cases that are more than 18 months old, Torres says.

Meanwhile, budgets are getting smaller - the division's is down to $3.5 million this year from $4 million in 1989 - and the number of docketed complaints aren't, holding at about 2,000 a year.

Torres says he has asked the attorney general's office, which is over his department, to seek an increase in fines against companies that discriminate. He wants the fines raised to $10,000 from $2,000 for first offenses and to $20,000 from $5,000 for subsequent offenses.

Torres is in the interesting position of defending his agency's ability to root out discrimination on behalf of the downtrodden, without contradicting the state's legal posture that the Civil Rights Division represents state interests, not any particular individual.

He says, for example, "We are an administrative agency representing the state's interests." He also says, though, that he is proud of the agency's record of winning $2.5 million in awards for complainants last year.

Torres says he thinks there may be an attorney-client relationship between complainants and the deputy attorneys general who bring discrimination complaints in the Office of Administrative Law, but like Deputy Attorney General Cohen, he says he's sure there's no such relationship before the probable cause determination. ■