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Court Tosses Malpractice Suit Against Civil Rights Agency

By Henry Gottlieb

An appeals court says the state Division on Civil Rights can't be sued for legal malpractice when it bungles a case. But the lawyer who brought the suit should be consoled: The division's director, Rolando Torres Jr., says the litigation stimulated reforms at the agency.

Glenn Bergenfield, a Princeton solo practitioner, sought a jury trial for two warehouse workers whose discrimination claim against their employer was dismissed because it took eight years for state investigators to find probable cause.

Bergenfield argued that the division had the same professional responsibility to the workers that a private lawyer would have owed.

A unanimous three-judge court ruled last Tuesday in *Reaves and Lee v. State of New Jersey*, A-2125-96T3, that the Tort Claims Act immunizes the division — as it does police departments and other investigatory agencies — from suits alleging failure to enforce a law.

Adopting the argument of Deputy Attorney General Patricia Schiripo, the court based its ruling on *Bombace v. City of Newark,* 125 N.J. 361 (1991). In that case, housing and fire inspectors were found to be immunized from suits alleging that their negligent failure to enforce safety laws in an apartment caused the deaths of four children.

Even if Bergenfield had crossed the immunity threshold, he would have tripped anyway, according to the opinion.

In a footnote, the court trashed his analogy between the division and a malpracticing private attorney. When the division investigates a complaint and determines whether there is probable cause, it does not enter an attorney-client relationship with the complainant, Judge Stephen Skillman said in the opinion joined by Judges Virginia Long and Mary Cuff.

PHOTO BY CARMEN NATALE

SILVER LINING: Glenn Bergenfield, above, lost his appeals bid to sue the Division on Civil Rights, but his litigation led to improvements for claimants.

Reeves and Lee went to the division in 1984 with a complaint that they had been passed over for promotion at Goodyear Tire and Rubber Company in North Brunswick because they were black. Investigators moved so slowly, however, it wasn't until 1990 that the agency started determining whether there was probable cause to charge Goodyear. That decision wasn't made until 1993.

Goodyear denied the allegations, but it didn't have to defend itself on the merits; the case was dismissed by the Office of Administrative Law in 1994 on grounds that the delay had prejudiced the company's ability to defend itself.

Bergenfield argued in a complaint filed in March 1996 that the division, as a champion of people who seek its legal help, enters into the same attorney-client relationship as a claimant and a private attorney. The division must therefore be held to the same standards of professional responsibility as a private attorney, Bergenfield argued.

The state countered that the division's mission to enforce civil rights laws makes it different from a private lawyer. But in the end, arguments on the malpractice question didn't matter much. Immunity settled the issue.

In the months it has been defending itself, the Civil Rights Division has never tried to justify the delay in the Reaves and Lee cases, which appeared to be caused by sheer neglect, according to an internal investigation made public when the case against Goodyear was thrown out by the OAL.

Director Torres said in a telephone interview last Thursday that budget austerity in the late 1980s and early 1990s contributed to the problem.

Efforts to speed investigations were under way before Bergenfield filed his complaint, Torres says, but he adds:

"What the case did was continue to keep us aware of the fact that we have to process these cases in an expeditious fashion."

Suit Prompts Division Pamphlet

One specific improvement was prompted by Bergenfield's case, Torres says. The agency is more conscious of the need to counsel claimants about how the statute of limitations may affect their claims, especially if the claimant is not represented by a private lawyer.

All claimants are now given a pamphlet that reminds them that they have the option of filing a complaint in Superior Court, but that the statute of limitations for such complaints is two years. Reaves and Lee had claimed that the division had failed to inform them of alternative paths of litigation.

The pamphlet also includes a reminder that a complainant can require the division to bring the matter before the Office of Administrative Law after 180 days of investigation.

"We want the process to have credibility," Torres says.

Last year, the division's docket of pending cases declined for the first time since 1990, and Torres says that the budget for the fiscal year that began on July 1 will permit the agency to increase the number of investigators from six to 13.

A lawyer who represents workers with discrimination claims, Patricia Talbert, of counsel to Roseland's Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, says the investigations still take too long at the division.

She says, however, that a backlog reduction program has helped speed older cases through the system and that the division serves an important purpose: tackling complaints that aren't conducive to Superior Court suits.

If the damages are minimal or the client can't afford to combat a huge corporation singlehandedly or if there is a pattern of discrimination that the state can attack on a broad front, "the Civil Rights Division is the appropriate place to be," Talbert says.

She adds: "If the state isn't going to fund it, they should get rid of it. Otherwise it's a disservice."

Bergenfield says he is considering a certification petition to the state Supreme Court.

He has conceded from the outset of the litigation that the Tort Claims Act would be a difficult hurdle, though he was able to persuade Superior Court Judge June Strelecki last August that the Act didn't apply.

By Strelecki's reasoning, the Civil Rights Division — by accepting a responsibility to investigate — can't avoid its responsibility when it fails.

Bergenfield says the appeals court should have carved out an exception to tort claims immunity in his case because the work of the Division on Civil Rights — unlike other investigatory agencies — mirrors the work of a private attorney.

"Private attorneys make investigations too, but once they start giving advice — even advice that there may not be much of a case — they take on a professional responsibility," Bergenfield says.

He also takes exception to the judges' reliance on language in the Tort Claims Act that pays homage to the principle that competition for resources is a sad fact of governmental life that might cause slow investigations.

"Everybody has limited resources," Bergenfield says. "If you're going to have an agency that enforces civil rights laws it should be required to do the work properly."■