

EMPLOYMENT LAW

Sovereign Immunity and Claims Against the State Under LAD

By Emily Kornfeld
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Employees who sue the State of New Jersey or its agencies in U.S. District Court frequently include within their complaints supplemental state statutory claims. In the recently published case of *Maliandi v. Montclair State*, 845 F.3d 77 (3d Cir. 2016), the Third Circuit Court of Appeals concluded its opinion with dicta in which it declined to address whether New Jersey has waived its Eleventh Amendment immunity from suit in federal court for claims under the New Jersey Law Against Discrimination (NJLAD). The weight of current federal authority suggests that the State of New Jersey has not waived its sovereign immunity from suit in federal court for NJLAD claims.

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In *Maliandi*, a former employee of Montclair State University (MSU) filed suit against MSU for wrongful termination, seeking relief under the Family Medical Leave Act and NJLAD. In a lengthy analysis the Third Circuit found

that MSU is an arm of the State of New Jersey, rendering it immune from Maliandi's FMLA claim in federal court pursuant to the Eleventh Amendment. It remanded the NJLAD claim to the district court for a determination of whether the State has waived sovereign immunity for claims under the NJLAD.

Sovereign Immunity Under the Eleventh Amendment

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be



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construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. XI. The Eleventh Amendment has been interpreted to bar suits against any state in federal court by that state's own citizens as well as suits by citizens of other states. See *Edelman v. Jordan*, 415 U.S. 651 (1874).

Sovereign immunity extends to agencies, departments and officials of the state when the state is

the real party in interest. *Alabama v. Pugh*, 438 U.S. 781, 781 (1978). There are three primary exceptions to Eleventh Amendment immunity, whereby a state is divested of its immunity and can be hailed into federal court: (1) congressional abrogation; (2) waiver by the state; and (3) suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law. See *Garden State Elec. Inspection Servs. v. Levin*, 144 F.App'x 247, 252 (3d Cir. 2005).

As to state waiver, the law does not recognize implied waiver in this context; a state's waiver must be "unequivocally expressed." *Pennhurst*, 465 U.S. at 99. A court will give effect to a state's waiver of Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Atascadero State Hospital*, 473 U.S. 234, 239-40 (1985).

'Rudolph v. Adamar of N.J.'

In support of the *Maliandi* court's comment that it is unsettled whether New Jersey has waived its Eleventh Amendment immunity from suit in federal court with regard to NJLAD claims, the Third Circuit cited to *Rudolph v. Adamar of N.J.*, 153 F.Supp.2d 528 (D.N.J. 2001). In *Rudolph*, a non-employment case, U.S. District Judge Orlofsky

held in dicta that while the State of New Jersey enjoys Eleventh Amendment immunity against suit in federal court under the NJLAD when the State is sued in its legislative and executive capacities, the State has waived its sovereign immunity from suit under the NJLAD when it acts in the capacity of employer. 153 F.Supp.2d at 542.

The *Rudolph* court found that suits brought against the State as an employer are within the scope of the "explicit waiver" of sovereign immunity contained in N.J.S.A. §10:5-5(e); §§10:5-12(a), (c). The court also cited three cases in which federal courts adjudicated an employee's NJLAD claims against state agencies. See *Motley v. New Jersey State Police*, 196 F.3d 160 (3d Cir. 1996) (former state trooper alleged that his employer, the New Jersey State Police, failed to promote him due to a physical handicap in violation of the NJLAD); *Lanni v. State of New Jersey*, 177 F.R.D. 295 (D.N.J. 1998) (state employee brought a disability discrimination lawsuit under NJLAD against his employer, the New Jersey Department of Environmental Protection); *Floyd v. State of New Jersey*, 1991 WL 274239 (D.N.J. Dec. 2, 1991) (state employee brought suit against his employer, the New Jersey Department of Human Services, for discrimination on the basis of race and gender).

Subsequent to 'Rudolph'

Subsequent to *Rudolph*, several cases followed *Rudolph*'s holding that New Jersey has waived its immunity from suits under the NJLAD when the State acts in its capacity as an employer. See *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (citing *Rudolph* to note that New Jersey may be liable under its own LAD, as, under NJLAD, employers are liable under traditional agency principles); *Campbell v. Supreme Court of New Jersey*, 2012 WL 1033308 (D.N.J. Mar. 27, 2012) (holding that the State of New Jersey has waived its sovereign immunity to be sued as an employer under the NJLAD).

On the other hand, other courts have not followed *Rudolph*'s holding, finding that New Jersey has not waived its immunity from NJLAD suits in federal court, even when the State acted in its capacity as an employer. See *Rich v. New Jersey*, 2015 WL 2226029 (D.N.J. May 12, 2015) (finding that the State of New Jersey retains its Eleventh Amendment immunity for NJLAD claims against State defendants); *Brown v. Michaelowski*, 2014 WL 3731336 (D.N.J. 2014) (there has been no waiver of Eleventh Amendment immunity for claims brought in federal court pursuant to the NJLAD); *Acevedo v. New Jersey*, 2013 WL 4068041 (D.N.J. Aug. 12, 2013) (there is little evidence which expressly supports the notion that the New Jersey

Legislature specifically intended NJLAD claims to ever be litigated outside of the state courts); *Pena v. Division of Child & Family Services*, 2010 WL 3982321 (D.N.J. Oct. 8, 2010) (neither the New Jersey legislature nor DCFS has explicitly waived sovereign immunity for claims brought pursuant to the NJLAD); *Atkinson v. North Jersey Developmental Center*, 2009 WL 1546064 (D.N.J. June 2, 2009) (a New Jersey State entity has not consented to NJLAD suit in federal court); *McCann v. NJ Dept of Personnel*, 2009 WL 4125372 (D.N.J. Nov. 17, 2009) (the NJLAD does not contain the express language required to waive the State's immunity from suit in federal court); *Figueroa v. City of Camden*, 580 F.Supp.2d 390 (D.N.J. 2008) (the NJLAD does not contain the express language required to waive the State's immunity from suit in federal court); *Williams v. New Jersey Trenton Psychiatric Hospital*, 2007 WL 2893378 (D.N.J. Sep. 28, 2007) (the text of NJLAD does not contain language that conveys a waiving of the State's Eleventh Amendment immunity in Federal Court); *Bennett v. City of Atlantic City*, 288 F.Supp.2d 675 (D.N.J. 2003) (the State has not explicitly waived Eleventh Amendment

immunity for claims brought in federal court under NJLAD).

'Garcia v. Richard Stockton College of New Jersey'

Judge Orlofsky essentially overruled the dicta of his own decision in *Rudolph* approximately one year later when he issued a published opinion in *Garcia v. Richard Stockton College of New Jersey*, 210 F.Supp.2d 545, 550 (D.N.J. 2002), holding that a plaintiff may *not* sue the State of New Jersey, or its alter egos, under the NJLAD in federal court, even when the State acted in its capacity as an employer. Judge Orlofsky acknowledged in a footnote that certain dicta in *Rudolph* could be read to support a contrary position. *Id.* at 552, n.4. As *Rudolph* did not involve a claim against the State in its capacity as an employer, however, the observation of waiver for employment-related claims was dicta.

In *Garcia*, Judge Orlofsky held that although the NJLAD clearly identifies the State as a potential defendant and authorizes private suits in Superior Court, it makes no mention of federal court. *Id.* at 550. Therefore, the court concluded, New Jersey has not stated "by the most express language" that it is open

to private suits under the NJLAD in federal court. *Id.*

While Judge Orlofsky did not address in *Garcia* the cases he cited in *Rudolph*, which demonstrated federal courts' past willingness to adjudicate employees' NJLAD claims against State agencies as employers, it does not appear from those three decisions that the State actively raised sovereign immunity as a jurisdictional defense in any of them. As such, the weight of current authority at the district court level suggests that sovereign immunity continues to insulate the State and its agencies from LAD claims in federal court. Perhaps a determination of this issue by the district court in *Maliandi* will culminate in an appeal and an opportunity for the Third Circuit to resolve the conflict among prior district court decisions. ■

