

**Appellate Division Recognizes that the
Law Against Discrimination Protects Independent Contractors**
by Steven Siegler¹

The New Jersey Superior Court, Appellate Division, has recently ruled that independent contractors are protected against discrimination in the formation and termination of their employment contracts. This decision recognizes that the generous protections of the New Jersey Law Against Discrimination (“LAD”),² which traditionally have been viewed as benefitting employees only, apply to this large and equally important segment of the workforce.

The case of *Rubin v. Forest S. Chilton Memorial Hospital*, 359 N.J. Super. 105 (App. Div. 2003) involved two pathologists who, together with a third doctor, provided pathology services to Chilton Memorial Hospital for almost thirty years. The pathologists worked at the hospital pursuant to a series of written contracts which specified that they were independent contractors, not employees. The last contract between the parties was terminable at will upon ninety days written notice. In June 1997, the hospital notified the pathologists that it was exercising its right to terminate the contract. At the time of this notice, the two pathologists were 63 and 68 years of age.

The plaintiffs brought a complaint in the Superior Court of New Jersey alleging age discrimination under two distinct theories of liability. Plaintiffs’ primary LAD claim asserted a violation of N.J.S.A. 10:5-12(l).³ In this claim, plaintiffs alleged they were independent contractors whose contract was terminated for age-related reasons. Plaintiffs’ secondary claim asserted a violation of N.J.S.A. 10:5-12(a).⁴ In this claim, Plaintiffs alleged that they were employees of the hospital under the applicable tests, as opposed to independent contractors. Plaintiffs alleged that a violation of N.J.S.A. 10:5-12(a) occurred when the hospital terminated their employment.

The matter came before the trial court on the hospital’s Motion for Summary Judgment. The court ruled that the plaintiffs were independent contractors, not employees. Therefore, the protection of N.J.S.A. 10:5-12(a), which is reserved solely for employees, did not apply. The trial court also dismissed plaintiffs’ claim under N.J.S.A. 10:5-12(l), finding that independent contractors are not protected by the LAD. In support of this decision, the trial court relied on the Appellate Division decision in *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998), in which an independent contractor in a sexual harassment case was barred from maintaining an action under N.J.S.A. 10:5-12a.

The Appellate Division reversed the trial court with respect to Plaintiffs’ N.J.S.A. 10:5-12(l) claim.⁵ The Court recognized the difference between the two subsections of the LAD:

In contrast to N.J.S.A. 10:5-12(a) which protects against discrimination with respect to hiring, discharging and the terms and conditions of employment, N.J.S.A. 10:5-12(l) is directed at refusals to do business with persons because of a protected characteristic. In simpler terms, N.J.S.A. 10:5-12(a) deals with workplace discrimination, N.J.S.A. 10:5-12(l) addresses refusal to deal.

Rubin v. Forest S. Chilton Memorial Hospital, 359 N.J. Super. 105, at 110 (App. Div. 2003). Because the hospital “refused to deal” with the plaintiffs, allegedly for age-discriminatory reasons, the plaintiffs asserted a cause of action under N.J.S.A. 10:5-12(l) and summary judgment was improvidently granted.

The Court disagreed with the hospital’s argument that N.J.S.A. 10:5-12(l) should only apply in a refusal to contract case, as opposed to a case where an existing contract is terminated. Such a reading of the statute would “mock the beneficial goals of the LAD,” which is remedial legislation and must be liberally construed. The Court also disagreed that the *Pukowsky* decision was controlling precedent and dispositive of the controversy in *Rubin*. The *Pukowsky* case did not concern the “refusal to deal” provision of the LAD, i.e., N.J.S.A. 10:5-12(l), reasoned the Court; therefore, it was inapplicable.

A fair reading of *Rubin* therefore suggests that independent contractors are protected not only during the formation of their employment contracts with businesses, but in the performance and termination of such contracts as well. It remains to be seen whether this doctrine will be expanded upon to include hostile work environment or constructive discharge cases brought by independent contractors; clearly, however, a good faith argument may be made by independent contractor plaintiffs to that effect.

According to the U.S. Bureau of Labor Statistics, independent contractors are presently 6.4% of the workforce nationally – over 8.6 million people.⁶ Using the national average, New Jersey’s share of the independent contractor workforce can be estimated at 280,000 people.⁷ The *Rubin* decision recognizes the New Jersey state legislature’s intent to protect this important segment of today’s workforce. Independent contractors may now demand the same rights that employees in New Jersey have had for half a century in the formation and termination of their employment relationships, namely, freedom from discrimination on the basis of age, race, religion, gender, disability or other protected status.

1. Originally published in 12 N.J.L. 1359 (July 21, 2003).

2. N.J.S.A. 10:5-1, et seq.

3. N.J.S.A.10:5-12(l) provides, in pertinent part:

[i]t shall be . . . an unlawful discrimination . . . [f]or any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the . . . age . . . of such other person or of such other person’s . . . partners [or] business associates.

4. N.J.S.A. 10:5-12(a) provides, in pertinent part:

[i]t shall be . . . an unlawful discrimination . . . for an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment

5. The dismissal of Plaintiffs' claim under N.J.S.A. 10:5-12a was affirmed.
6. U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements, February 2001*, May 24, 2001.
7. U.S. Bureau of Labor Statistics, *Regional and State Employment and Unemployment: January 2003*, March 10, 2003.