No. 107,133
Supreme Court of Kansas.

Pfeifer v. Fed. Express Corp.

297 Kan. 547 (Kan. 2013) · 304 P.3d 1226
Decided Jun 7, 2013

No. 107,133.

2013-06-7

Cynthia PFEIFER, Plaintiff, v. FEDERAL EXPRESS CORPORATION, Defendant.

George A. Barton, of Law Offices of George A. Barton, P.C., of Kansas City, Missouri, argued the cause, and Robert G. Harken, of the same firm, was on the brief for plaintiff. Terrence O. Reed, of Memphis, Tennessee, argued the cause, and Richard A. Olmstead, of Kutak Rock LLP, of Wichita, was on the brief for defendant.

The opinion of the court was delivered by BILES

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547 *547 *Syllabus by the Court*

1. The Uniform Certification of Questions of Law Act, K.S.A. 60–3201 *et seq.* , authorizes the Kansas Supreme Court to answer questions from courts of other jurisdictions when a response may be determinative of a case pending in that jurisdiction and there is no controlling Kansas precedent.

2. Kansas has long adhered to the employment-at-will doctrine, which means employment is terminable at the will of either the employer or the employee. But there are exceptions to that doctrine when an employee is terminated in violation of 1228public policy.*1228

3. One exception to the employment-at-will doctrine exists when an employer retaliates against an injured worker for exercising the employee's rights under the Kansas Workers Compensation Act, K.S.A. 44–501 *et seq.* In such cases, a common-law tort for retaliatory discharge is recognized to protect the employee's exercise of those statutory rights and the public policy underlying them.

4. The 2–year statute of limitations stated in K.S.A. 60–513(a)(4) applies to a common-law retaliatory discharge claim.

5. A contractual provision in an employment agreement that shortens the 2–year statute of limitations for filing a common-law retaliatory discharge claim based on the employee's exercise of statutory rights under the Workers Compensation Act is void as against public policy.
George A. Barton, of Law Offices of George A. Barton, P.C., of Kansas City, Missouri, argued the cause, and Robert G. Harken, of the same firm, was on the brief for plaintiff. Terrence O. Reed, of Memphis, Tennessee, argued the cause, and Richard A. Olmstead, of Kutak Rock LLP, of Wichita, was on the brief for defendant.

The opinion of the court was delivered by BILES, J.:

548 *548 The issue presented is lodged squarely between two long-standing public policy interests that are at odds in this case. One concerns the protections afforded injured workers against retaliatory discharge when exercising statutory workers compensation rights. The other is the freedom to contract. This controversy comes to us

from the United States Court of Appeals for the Tenth Circuit under the Uniform Certification of Questions of Law Act, K.S.A. 60–3201 *et seq.* , which authorizes this court to answer questions from other courts when that response may be determinative of a pending case and there is no controlling Kansas precedent.

The Tenth Circuit is considering a retaliatory discharge claim brought by Cynthia Pfeifer against her former employer, Federal Express Corporation (FedEx). She filed her lawsuit 15 months after she was fired, alleging she was terminated for exercising her rights as an injured worker under the Kansas Workers Compensation Act, K.S.A. 44–501 *et seq.* Kansas law provides a 2–year statute of limitations for such claims. K.S.A. 60–513(a)(4) (action for injury to rights of another); *Burnett v. Southwestern Bell Telephone,* 283 Kan. 134, 144, 151 P.3d 837 (2007) (recognizing a 2–year limitations period for retaliatory discharge).

But FedEx argues Pfeifer's employment contract required her to file suit within 6 months of her termination. The federal district court agreed with FedEx and granted summary judgment. *Pfeifer v. Federal Exp. Corp.,* 818 F.Supp.2d 1287 (D.Kan.2011). Pfeifer appealed. The certified questions and our responses are:

1. Does Kansas law, specifically K.S.A. 60–501 and/or public policy, prohibit private parties from contractually shortening the generally applicable statute of limitations for an action?

Our answer: K.S.A. 60–501 contains no express or implied prohibition against contractual agreements limiting the time in which to sue. But the public policy recognizing that injured workers should be protected from retaliation when exercising rights under the Workers Compensation Act, K.S.A. 44–501 *et seq.* , *549 invalidates the contractual provision at issue because it impairs enforcement of that protection.

2. If no such prohibition exists, is the 6–month limitations period agreed to by the private parties in this action unreasonable?

Our answer: Because we hold the contract provision at issue is void, it is unnecessary to consider whether its 6–month term is reasonable.

Factual and Procedural Background

The facts are set forth in the Tenth Circuit's certification order:

"Plaintiff Cynthia Pfeifer filed this diversity action against Defendant Federal Express Corporation in the District of Kansas. Plaintiff alleged that Defendant retaliated against her for receiving *1229 workers compensation benefits by terminating her employment. Plaintiff's employment agreement contained a provision requiring all claims against Defendant to be brought within 'the time prescribed by law or 6 months from the date of the event forming the basis of [Plaintiff's] lawsuit, whichever expires first.' Defendant terminated Plaintiff's employment on May 2, 2008. Plaintiff filed this suit 15 months later, within the applicable statutory statute of limitations of 24 months, but outside her employment agreement's six month limitation."

Notably, Pfeifer does not allege the contractual provision at issue is unconscionable, the product of unequal bargaining power, or that the agreement was an adhesion contract. We do not address what impact, if any, such allegations might play in another case of this type.

Discussion

We are asked to determine whether Kansas law prohibits private parties from contractually shortening the statute of limitations for retaliatory discharge when the employee claims she was fired for exercising her rights under the Kansas Workers Compensation Act. This question requires interpretation of the parties' contract, as well as interpretation of the statutory language in K.S.A. 60–501. Both issues are subject to unlimited

review by this court. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009) (interpretation and legal effect of a written contract are matters of law over which an
550 appellate court has unlimited review); *550 *Unruh v. Purina Mills,* 289 Kan. 1185, 1193, 221 P.3d 1130 (2009) (Statutory interpretation is a question of law over which this court has unlimited review.). We begin with the language used in Pfeifer's employment contract, assigning the words used their plain and ordinary meaning. See *First Financial Ins. Co. v. Bugg,* 265 Kan. 690, 694, 962 P.2d 515 (1998) (contract considered in the sense and meaning of the terms used).

The relevant portion of Pfeifer's contract states that "to the extent law allows an employee to bring legal action against Federal Express, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, *whichever expires first.*" (Emphasis added.) There is no dispute the plain language of this provision obligated Pfeifer to bring her lawsuit for retaliatory discharge within 6 months of her termination—the shorter period between the 2–year statute of limitations allowed by K.S.A. 60–513(a)(4) and the contract.

We are certainly not the first forum to consider disputes regarding the FedEx 6–month limitation in its employment contracts. And there is a split of authority on whether to uphold the provision. See, *e.g., Boaz v. Federal Exp. Corp.,* 742 F.Supp.2d 925, 932–33 (W.D.Tenn.2010) (Fair Labor Standards Act can be abridged by contractual limitations; 6–month limitation reasonable); *Ray v. FedEx Corporate Services, Inc.,* 668 F.Supp.2d 1063, 1067–68 (W.D.Tenn.2009) (statutes of limitations are procedural, and nothing in the Older Workers Benefit Protection Act applies to preclude procedural contractual modifications to the limitations period); *Grosso v. Federal Exp. Corp.,* 467 F.Supp.2d 449, 455–57 (E.D.Pa.2006) (6–month contractual agreement unreasonable and unenforceable with regard to FMLA retaliation claims); *Badgett v. Federal Express Corp.,* 378 F.Supp.2d 613, 622–26 (M.D.N.C.2005) (retaliation for exercising FMLA rights claim barred under contractually shortened limitations period of 6 months); *Reynolds v. Federal Exp. Corp.,* No. 09–2692–STA–cgc, 2012 WL 1107834, at *12 (W.D.Tenn.2012) (unpublished opinion) (agreement "smacks of oppression," but because plaintiff failed to establish it was an adhesion contract, court held it was not one and
551 that its limitations period was reasonable); *551 *Plitsas v. Federal Exp., Inc.,* No. 07–5439, 2010 WL 1644056, at *3–6 (D.N.J.2010) (unpublished opinion) (Family and Medical Leave Act [FMLA] regulations prevent employers from interfering with employees' rights; contractual limitation is restraint on access to employees' rights); *Allen v. Federal Express Corp.,* No. 1:09 cv 17, 2009 WL 3234699, at *4–5 (M.D.N.C.2009) (unpublished opinion) (6–month contractual modification to the
1230 limitations *1230 period did not violate state or federal law and was reasonable).

Pfeifer argues she should not be held to the shorter 6–month contractual period because it violates public policy. This is an issue of first impression in Kansas implicating both the statute setting the ground rules for statutes of limitations, as well as the public policy underlying our caselaw recognizing a common-law cause of action for retaliatory discharge when exercising workers compensation rights. It also rests temptingly alongside our caselaw extolling the paramount importance of the freedom to contract—a freedom not to be interfered with lightly. *Idbeis v. Wichita Surgical Specialists, P.A.,* 279 Kan. 755, 770, 112 P.3d 81 (2005). We address the statute first.

K.S.A. 60–501

K.S.A. 60–501 states: "The provisions of this article govern the limitation of time for commencing civil actions, *except where a different limitation is specifically provided by statute.*" (Emphasis added.) The remainder of Article 5 sets various statutes of limitations for actions brought under Chapter 60. See, *e.g.,* K.S.A. 60–506

(actions for forcible entry and detention limited to 2 years from date action occurred), K.S.A. 60–511 (certain actions must be brought within 5 years), K.S.A. 60–512 (certain actions must be brought within 3 years). The parties argue different outcomes based on the language in K.S.A. 60–501, but some historical background is instructive at the outset.

In 1868, K.S.A. 60–501's predecessor was substantially similar in form to the current version of the statute. See G.S. 1868, ch. 80, sec. 15, which provided: "Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall
552 be governed by *552 such limitation." During the time this provision was in effect, this court regularly upheld private insurance contracts shortening the statutory time period for filing claims. See, *e.g., McElroy v. Insurance Co.,* 48 Kan. 200, 205, 29 P. 478 (1892) (insurance contract provision requiring action for fire damage to be brought within a shorter period than provided by statute held valid); *Insurance Co. v. Stoffels,* 48 Kan. 205, 209, 29 P. 479 (1892) (6–month limitation in insurance policy on causes of action binding on parties and eliminates all statutes of limitations); *Insurance Co. v. Bullene,* 51 Kan. 764, 773, 33 P. 467 (1893) (insurance policy provision requiring suit to be brought within 6 months sustained). The 1868 language stayed substantially intact until 1963, when the legislature codified the Code of Civil Procedure and created K.S.A. 60–501 as it appears today.

In 1897, the legislature enacted a separate statute, which provided that "[a]ny agreement for a different time for the commencement of actions from the times in this act provided *shall be null and void as to such agreement.*" (Emphasis added.) L. 1897, ch. 91, sec. 1, *7th;* G.S. 1899, ch. 80, art. 3, sec. 4262, *7th.* This court relied on the newly enacted restrictive language in L. 1897, ch. 91, sec. 1, *7th* to prohibit contracts shortening a statutory limitations period. See, *e.g., Erickson v. Commercial Travelers,* 103 Kan. 831, 834, 176 P. 989 (1918) (accident insurance contract requiring suit within 6 months of baseball injury invalid when statute provided for longer period); *Fair Association v. Casualty Co.,* 107 Kan. 109, 113, 190 P. 592 (1920) (stipulation in casualty insurance contract that action could only be brought within 90 days after date of judgment for loss contrary to statute and invalid). G.S. 1899, ch. 80, art. 3, sec. 4262 eventually became G.S.1949, K.S.A. 60–306. And in 1963, it was repealed. L. 1963, ch. 303.

FedEx argues that since G.S.1949, K.S.A. 60–306's repeal nothing precludes contracting parties from reducing the limitations period. Pfeifer, on the other hand, argues K.S.A. 60–501 plainly and unambiguously ties any exceptions to those " *specifically provided by statute.*" (Emphasis added.) K.S.A. 60–501. Pfeifer argues that since a contract is not a statute, a contract cannot create an exception to the time limitations established by
553 statute. She relies on *553 *Gifford v. Saunders,* 207 Kan. 360, 485 P.2d 195 (1971), which contains a general statement consistent with her argument, specifically: "It is readily seen that the limitation
1231 of time for commencing civil actions*1231 is exclusively governed by the provisions of Article 5, except where a different limitation is specifically provided by a statute." 207 Kan. at 362, 485 P.2d 195.

But *Gifford* did not address whether a contract may impact the statute of limitations period when there is no statutory prohibition against such agreements. Instead, the question centered on whether a plaintiff's marriage after a cause of action arose—and prior to plaintiff attaining the age of 21—affected the running of the statute of limitations and required plaintiff to bring suit within 1 year of marriage. The court held that the tolling provisions in K.S.A. 1970 Supp. 60–515, which provided a 1–year grace period to file suit after attaining the age of 21, controlled. And it declined to follow K.S.A. 1970 Supp. 38–101,

which defined the period of minority and the effect of marriage of persons between the ages of 18 and 20 on the rights to sue or be sued, contract, or hold property. The court continued after the general statement quoted above, stating: "By no stretch of the imagination can 38–101 be considered a statute specifically providing for a different limitation." 207 Kan. at 362, 485 P.2d 195.*Gifford* affords us no guidance to resolve the textual argument Pfeifer advances.

The plain language of K.S.A. 60–501, however, does not preclude parties from entering into contracts shortening the statute of limitations period set out in statute. And nothing implicitly supplies that prohibition. The statute simply recognizes that instead of the more general limitations periods in Article 5, there are other statutes that create rights of action with their own statutory limitations periods that will be effective. See, *e.g.,* K.S.A. 44–1005(i) (6–month statute of limitation under the Kansas Acts Against Discrimination); K.S.A. 59–2239 (4–month statute of limitation in probate code); K.S.A. 40–2203(A)(7) (90–day limitations period to provide proof of loss to insurer). In addition, our caselaw following the enactment of the similar 1868 statute, as well as the legislature's 1963 repeal of the 1897 statute
554 expressly prohibiting contractual *554 provisions restricting the statutes of limitations set out in law, persuasively favor FedEx's position as to this point.

As noted above, K.S.A. 60–501 as originally enacted in G.S. 1868, ch. 80, sec. 15 provided that causes of action could only be commenced within the periods prescribed except "where, in special cases, a different limitation *is prescribed by statute,* the action shall be governed by such limitation." (Emphasis added.) This statutory language was not read to prohibit contracts shortening a statute of limitations, and our court consistently held that contracting parties to insurance agreements could agree to shorten a limitations period, going so far as to declare that such a contract "eliminates all statutes of limitation." *Stoffels,* 48 Kan. at 208, 29 P. 479. This, of course, changed with the 1897 statute expressly prohibiting such contract provisions. See *Coates v. Metropolitan Life Ins. Co.,* 515 F.Supp. 647, 650 (D.Kan.1981) (citing cases upholding insurance policy provisions limiting the time to sue in part because of early Kansas caselaw declaring them valid).

We see no support for Pfeifer's argument that K.S.A. 60–501 may be read to prohibit the contract provision at issue. We turn next to her public policy claim in which a different set of considerations arise.

Public Policy Underlying Retaliatory Discharge Claims

Kansas adheres to the employment-at-will doctrine, which holds that employees and employers may terminate an employment relationship at any time and for any reason unless there is an implied contract governing the employment's duration. *Campbell v. Husky Hogs,* 292 Kan. 225, 227, 255 P.3d 1 (2011). But there are exceptions. Some are statutory, such as when adverse job actions are based on race, gender, or disability. See K.S.A. 44–1009 (unlawful employment practices). Others are recognized through the common law. 292 Kan. at 227, 255 P.3d 1.

Pfeifer focuses on our caselaw recognizing a public policy of protecting injured workers from retaliation for exercising their statutory rights under the Workers Compensation Act, K.S.A. 44–
555 501 *et seq.* See *1232 *555 *Hysten v. Burlington Northern Santa Fe Ry. Co.,* 277 Kan. 551, 561, 108 P.3d 437 (2004) (noting Kansas has a " 'thoroughly established' " public policy supporting injured workers' rights to pursue remedies for their on-the-job injuries and opposing retaliation against them for exercising their rights); see also *Coleman v. Safeway Stores, Inc.,* 242 Kan. 804, 816, 752 P.2d 645 (1988) (employer prohibited from terminating employee because of absence caused by work-related injury and

potential workers compensation claim), *overruled in part on other grounds by Gonzalez–Centeno v. North Central Kansas Regional Juvenile Detention Facility,* 278 Kan. 427, 101 P.3d 1170 (2004); *Cox v. United Technologies,* 240 Kan. 95, 99, 727 P.2d 456 (1986) (recognizing tort of retaliatory discharge for filing a workers compensation claim but declining to apply it under specific facts of case). Indeed, protection from employer reprisal in workers compensation cases was the first common-law retaliatory discharge tort recognized in Kansas. *Murphy v. City of Topeka–Shawnee Cnty. Dept. of Labor Servs.,* 6 Kan.App.2d 488, 630 P.2d 186 (1981). The *Murphy* court's logic was succinctly stated:

"The Workmen's Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer's negligence. *To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act.*" (Emphasis added.) 6 Kan.App.2d at 495–96, 630 P.2d 186.

Similar causes of action have been endorsed in other retaliatory discharge cases. See *Campbell,* 292 Kan. 225, Syl. ¶ 1, 255 P.3d 1 (filing wage claim under the Kansas Wage Payment Act); *Hysten,* 277 Kan. at 561, 108 P.3d 437 (filing claim under Federal Employers Liability Act); *Flenker v. Willamette Industries, Inc.,* 266 Kan. 198, 204, 967 P.2d 295 (1998) (whistleblowing claim based on good-faith reporting of federal Occupational Safety and Health Act violations approved); *Larson v. Ruskowitz,* 252 Kan. 963, 974–75, 850 P.2d 253 (1993) (retaliatory discharge claim when a public employee terminated for exercising First Amendment rights on an issue of public concern); *Palmer v. Brown,* 242 Kan. 893, 900, 752 P.2d 685 (1988) (whistleblowing based on good-faith reporting of coworkers' or employers' infractions pertaining to public health
556 and safety); see also *556 *Kistler v. Life Care Centers of America, Inc.,* 620 F.Supp. 1268 (D.Kan.1985) (retaliatory discharge action by employee fired after testifying against employer at unemployment compensation hearing).

The necessity for recognizing a retaliatory discharge tort in each of these circumstances has rested on a principle of deterrence against employer reprisal for an employee's exercise of a legal right. And in those instances in which an employee is exercising a statutory right created by the legislature, we have noted that such deterrence serves not only the employee's interests but also those of the state and its people. This is because statutory rights exist only because of the legislature's determination that such a right is in the public interest. See *Campbell,* 292 Kan. at 235–36, 255 P.3d 1;*Hysten,* 277 Kan. at 561, 108 P.3d 437;*Flenker,* 266 Kan. at 202, 204, 967 P.2d 295.

Accordingly, the question presented has dual components. It is not simply whether an employee should be able to contract with an employer for a shorter period of time to file a lawsuit. If it were, FedEx's arguments embracing freedom of contract principles would carry greater weight. But in cases such as this—involving a retaliatory discharge claim based on an employee's exercise of statutory workers compensation rights—we must consider the impact such agreements would have on the deterrent effect underlying that cause of action. And as to this, we disagree with FedEx that our retaliatory discharge caselaw is immaterial.

In its decision granting FedEx summary judgment, the federal district court found authority for upholding the contract provision in *Coates* and three other Kansas federal court decisions, which the court characterized as "the *Coates'* line of cases." *Pfeifer,* 818 F.Supp.2d at 1291. But *Coates* was an insurance claim case and did not address any public policy concerns triggering retaliatory
1233 *1233 discharge cases based on the violation of a statutory right. *Coates,* 515 F.Supp. at 648. Two of the other decisions similarly dealt with insurance-

related claims and are unpersuasive for the same reason. See *Columbian Fin. Corp. v. Businessmen's Assur. Co.,* 743 F.Supp. 772, 775 (D.Kan.1990) (interpretation of stop loss medical insurance policy limitations provision), *rev'd on other grounds*1992 WL 19867 (10th Cir.1992) (unpublished opinion); *557 *Hahner, Foreman & Harness, Inc. v. AMCA Intern. Corp.,* No. 94–1170–PFK, 1995 WL 643814, at *2 (D.Kan.1995) (unpublished opinion) (terms of payment on construction performance bond). The fourth case was a class action for unpaid commissions that did not allege retaliatory discharge. *Sibley v. Sprint Nextel Corp.,* No. 08–2063–KHV, 2008 WL 2949564, at *5 (D.Kan.2008) (unpublished opinion). That case adds nothing to the analysis either.

As to public policy concerns, the *Pfeifer* federal district court simply found none. It determined this court's cases addressing retaliatory discharge "do nothing in the way of establishing a public policy against setting limits on when such claims must be brought." *Pfeifer,* 818 F.Supp.2d at 1291. Instead, the district court looked to other jurisdictions that have upheld these contractual limitation provisions in the context of employment discrimination. It also looked to laws in other states setting similarly short statute of limitations periods. This led the court to detect what it described as "a strong preference for quick resolution of claims that an employer acted wrongly." 818 F.Supp.2d at 1292. But this is not the only view.

Missing from the federal court's analysis, although identified in a footnote, is this court's decision in *Hunter v. American Rentals,* 189 Kan. 615, 371 P.2d 131 (1962). In that case, we considered the validity of a contract between a trailer rental company and its customer after the customer was injured when a faulty hitch connecting the company's trailer caused the customer's car to overturn. The company defended based on its rental agreement that provided it would not be liable for any accident resulting from the use of its equipment and disclaimed any warranty of fitness or usage regarding the equipment. In rejecting that defense, this court held that the rental contract was void as against public policy because the company owed a duty to both its customer and the general public to provide safe hitches. We held the company could not defeat its legal duty through its contract. In so holding, we determined the contract provision would reverse the legislative purpose in passing the statute that required it to provide safe equipment. 189 Kan. at 617–18, 371 P.2d 131.

Hunter serves as persuasive authority that we must consider the impact of the contract at issue to 558 ensure that it does not subvert *558 the public policy underlying the Workers Compensation Act. FedEx argues *Hunter* is inapposite because it involved a full waiver of liability rather than FedEx's 6–month limitation on the employee's time to enforce legal rights. And in support, FedEx cites *Achen v. Railway Co.,* 103 Kan. 668, 175 P. 980 (1918), and *Abell v. Railway Co.,* 100 Kan. 238, 164 P. 269 (1917), to argue that judicial voiding of contract provisions waiving negligence does not negate contract provisions specifying the time within which claims must be made. But these cases involved interstate livestock shipping contracts and do not relate to the public interest concerns involving retaliatory discharge. They are easily distinguishable.

Statutes of limitations are creatures of the legislature and themselves an expression of public policy on the rights to litigate. They find their justification in necessity and convenience and serve the practical purpose of sparing courts from litigating stale claims and people from being put to the defense of claims after memories fade and witnesses disappear. See *KPERS v. Reimer & Koger, Assocs., Inc.,* 262 Kan. 635, 676, 941 P.2d 1321 (1997) (citing *Harding v. K.C. Wall Products, Inc.,* 250 Kan. 655, 831 P.2d 958 [1992]). But as creatures of the legislature, statutes of limitations also reflect legislative determinations that necessarily balance these various interests. FedEx asks the court to inject its own public

policy views into this give-and-take under a freedom-to-contract rationale when our legislature has provided 2 years to bring a cause of action that 1234 protects *1234 the exercise of statutory rights under the Workers Compensation Act. We decline to do that.

There is little question that restricting an employee's time to bring a retaliatory discharge claim for a job termination suffered following that employee's exercise of a statutory right necessarily impedes the enforcement of that right and the public policy underlying it. And while Pfeifer's contract shortened her time in which to seek recovery rather than outright prohibiting it, such as in *Hunter,* FedEx effectively weakened her right to pursue a cause of action and potentially subverts the public interest in deterring employer misconduct. In that respect, it impermissibly infringes on Pfeifer's ability to enforce her statutory rights by derogating her access to the courts.

559 *559 We hold that the private contract entered into between FedEx and Pfeifer violates public policy and is invalid to the extent it limits the applicable 2–year statute of limitations under K.S.A. 60–513(a)(4) for filing a retaliatory discharge claim based on her exercise of rights under the workers compensation laws. This holding is limited to the circumstances in which there is a strongly held public policy interest at issue.

Having established that the parties were precluded from shortening the 2–year retaliatory discharge statute of limitations by contract in this circumstance, we decline to address the second certified question regarding the reasonableness of the 6–month term.

EXHIBIT 12

Supreme Court of New Jersey.

Rodriguez v. Raymours Furniture Co.

225 N.J. 343 (N.J. 2016) · 138 A.3d 528 · 32 A.D. Cas. 1598
Decided Jun 15, 2016

06-15-2016

Sergio RODRIGUEZ, Plaintiff–Appellant, v. RAYMOURS FURNITURE COMPANY, INC., a corporation, t/a Raymour & Flanigan, Defendant–Respondent.

Alan L. Krumholz, Jersey City, argued the cause for appellant (Krumholz Dillon, attorneys). Patricia A. Smith argued the cause for respondent (Ballard Spahr, attorneys; Ms. Smith, Edward T. Groh, and Amy L. Bashore, Cherry Hill, on the briefs). Bennet D. Zurofsky, Newark, argued the cause for amicus curiae National Employment Lawyers Association–New Jersey (Mr. Zurofsky, Schall & Barasch, and Sarah Fern Meil, Milford, attorneys; Mr. Zurofsky, Ms. Meil, and Richard M. Schall, Moorestown, on the brief). John E. Keefe, Jr., Red Bank, argued the cause for amicus curiae New Jersey State Bar Association (Miles S. Winder III, President, attorney; Paris P. Eliades, Sparta, of counsel; Mr. Keefe, Mr. Eliades, Stephen T. Sullivan, Jr., Red Bank, Liana M. Nobile, and Javier J. Diaz, on the brief). Nancy Erika Smith, Montclair, argued the cause for amicus curiae New Jersey Association for Justice (Smith Mullin, attorneys; Ms. Smith and Neil Mullin, of counsel; Ms. Smith, Mr. Mullin, and Virginia A. Pallotto, on the brief). Ronald K. Chen, Trenton, argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Rutgers Constitutional Rights Clinic Center for Law & Justice, attorneys; Mr. Chen, Edward L. Barocas, Jeanne M. LoCicero, and Alexander R. Shalom, of counsel and on the brief). Martin W. Aron argued the cause for amicus curiae Academy of New Jersey Management Attorneys (Jackson Lewis, attorneys; Mr. Aron and Maggie L. Gousman, Morristown, of counsel and on the brief).

Justice LaVECCHIA delivered the opinion of the Court.

529 *529

Alan L. Krumholz, Jersey City, argued the cause for appellant (Krumholz Dillon, attorneys).

Patricia A. Smith argued the cause for respondent (Ballard Spahr, attorneys; Ms. Smith, Edward T. Groh, and Amy L. Bashore, Cherry Hill, on the briefs).

Bennet D. Zurofsky, Newark, argued the cause for amicus curiae National Employment Lawyers Association–New Jersey (Mr. Zurofsky, Schall & Barasch, and Sarah Fern Meil, Milford, attorneys; Mr. Zurofsky, Ms. Meil, and Richard M. Schall, Moorestown, on the brief).

John E. Keefe, Jr., Red Bank, argued the cause for amicus curiae New Jersey State Bar Association (Miles S. Winder III, President, attorney; Paris P. Eliades, Sparta, of counsel; Mr. Keefe, Mr. Eliades, Stephen T. Sullivan, Jr., Red Bank, Liana M. Nobile, and Javier J. Diaz, on the brief).

Nancy Erika Smith, Montclair, argued the cause for amicus curiae New Jersey Association for Justice (Smith Mullin, attorneys; Ms. Smith and Neil Mullin, of counsel; Ms. Smith, Mr. Mullin, and Virginia A. Pallotto, on the brief).

Ronald K. Chen, Trenton, argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Rutgers Constitutional Rights Clinic Center for Law & Justice, attorneys; Mr. Chen, Edward L. Barocas, Jeanne M. LoCicero, and Alexander R. Shalom, of counsel and on the brief).

Martin W. Aron argued the cause for amicus curiae Academy of New Jersey Management Attorneys (Jackson Lewis, attorneys; Mr. Aron and Maggie L. Gousman, Morristown, of counsel and on the brief).

Opinion

Justice LaVECCHIA delivered the opinion of the
346 Court.*346 In this appeal we address whether the Law Against Discrimination (LAD), N.J.S.A. 10:5–1 to –49—a law established to fulfill a public-interest purpose—can be contravened by private agreement.

Here an employment application contained a provision requiring the applicant, if hired, to agree to bring any employment-related cause of action against the employer within six months of the
530 challenged *530 employment action and waive any statute of limitations to the contrary. After being hired and employed for a period of time, plaintiff filed a complaint in Superior Court against his former employer, claiming among other things an LAD violation premised on disability discrimination. The trial court dismissed the action, enforcing the six-month limitations period for filing that employment-related claim, and the Appellate Division affirmed.

We reverse. The challenged provision cannot be viewed as a private contractual agreement by which private parties contract to limit private claims by shortening the generally applicable statute of limitations for such actions. The cause of action that plaintiff brings is factually premised on his employment relationship, but it is not a simple private claim. Plaintiff alleges an LAD violation—a law designed for equal parts public and private purposes.*347 The LAD plays a
347 uniquely important role in fulfilling the public imperative of eradicating discrimination. One searches in vain to find another New Jersey enactment having an equivalently powerful legislative statement of purpose, along with operative provisions that arm individuals and entities with formidable tools to combat discrimination not only through their use but also by the threat of their use. There is a huge incentive for employers to thoroughly investigate and respond effectively to internal complaints in order to limit or avoid liability for workplace discrimination. Responsible employers are partners in the public interest work of eradicating discrimination, but such responsible behavior takes time. A shortened time frame for instituting legal action or losing that ability hampers enforcement of the public interest.

Presently, a dual-enforcement scheme allows litigants to bring direct suit or utilize the resources of the Division on Civil Rights (DCR). Although the LAD has private and administrative remedies, election of either statutorily created course of action furthers the public and private purpose of the LAD—preventing and eliminating discrimination. *See Fuchilla v. Layman,* 109 *N.J.* 319, 334, 537 *A.* 2d 652 (stating that LAD seeks "nothing less than the eradication of the cancer of discrimination" (quotation marks and citations omitted), *cert. denied,* 488 *U.S.* 826, 109 *S.Ct.* 75, 102 *L.Ed.* 2d 51 (1988)). Restricting the ability of citizens to bring LAD claims is antithetical to that societal aspiration and defeats the public policy goal.

We hold that a private agreement that frustrates the LAD's public-purpose imperative by shortening the two-year limitations period for private LAD claims cannot be enforced.

I.

In August 2007, plaintiff Sergio Rodriguez, recently laid off from his previous job, sought to apply for the position of Helper with defendant, Raymours Furniture Company, Inc., t/a Raymour

& Flanigan. He went to defendant's Customer Service Center in Monmouth Junction and
348 obtained a job application, which was *348 written in English. Plaintiff, a native of Argentina who was not proficient in the English language, brought the application home. A friend assisted plaintiff in filling out the application, translating sections in which plaintiff had to provide information.

The bottom of the second (and last) page of the application contained a section titled, "Applicant's Statement—READ CAREFULLY BEFORE SIGNING—IF YOU ARE HIRED, THE FOLLOWING BECOMES PART OF YOUR OFFICIAL EMPLOYMENT RECORD AND PERSONNEL FILE." That section contained the following paragraphs:

531 *531

I understand this employment application is not a promise of an offer of employment. I further understand that should I receive and accept an offer of employment, my employment does not constitute any form of contract, implied or expressed, and such employment will be terminable at will either by myself or Raymour & Flanigan upon notice of one party to the other. My continued employment would be dependent on satisfactory performance and continued need for my services as determined by Raymour & Flanigan.

I authorize investigation of all statements contained in this application. I understand that misrepresentation or omission of facts called for are grounds for a refusal to offer employment or a cause of dismissal if hired.

I AGREE THAT ANY CLAIM OR LAWSUIT RELATING TO MY SERVICE WITH RAYMOUR & FLANIGAN MUST BE FILED NO MORE THAN SIX (6) MONTHS AFTER THE DATE OF THE EMPLOYMENT ACTION THAT IS THE SUBJECT OF THE CLAIM OR LAWSUIT. I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

I WAIVE TRIAL BY JURY IN ANY LITIGATION ARISING OUT OF, OR RELATING TO, MY EMPLOYMENT WITH RAYMOUR & FLANIGAN, INCLUDING CLAIMS OF WRONGFUL OR RETALIATORY DISCIPLINE OR DISCHARGE; CLAIMS OF AGE, SEXUAL, SEXUAL ORIENTATION, RELIGIOUS, PREGNANCY OR RACIAL DISCRIMINATION, CLAIMS UNDER

TITLE VII OF THE CIVIL RIGHTS ACT, TITLE IX, AMERICANS WITH DISABILITIES ACT, AGE DISCRIMINATION IN EMPLOYMENT ACT, EMPLOYEE RETIREMENT INCOME SECURITY ACT, FAIR LABOR STANDARDS ACT, AND ALL OTHER APPLICABLE NON–DISCRIMINATION, EMPLOYMENT OR WAGE AND HOUR STATUTES.

Plaintiff returned the signed application to the Customer Service Center the next day. When asked by the manager on duty if he had any questions about the application, plaintiff responded in the negative. Plaintiff later certified in this action that he "ha[d] no understanding of the term Statute of Limitations," that he "d[id] not know what the word 'waive' mean[t]," and that he
349 "did *349 not understand that [his] rights would be limited in case the company treated [him] illegally or unfairly."

In mid-September 2007, plaintiff was hired by defendant as a Helper. There is no dispute that his position with the company was at-will. He worked at the Monmouth Junction location, until November 2008, when he transferred to a Customer Service Center in Randolph.

At some point after transferring to the Randolph location, plaintiff was promoted to Driver.[1] For his new position, plaintiff was required to fill out an additional employment application. That second application did not contain the same provision—limiting the applicant's time for filing any potential employment-related claims—that the first application did.

[1] It is unclear precisely when plaintiff was promoted. The record as it stands contains conflicting information.

Early in April 2010, plaintiff injured his knee in a work-related accident during a furniture delivery. Plaintiff ceased working shortly after his injury. Defendant reported the accident to its third-party workers' compensation benefits administrator.
532 *532 The injury was determined to be compensable and payments were made for plaintiff's medical treatments.

During the summer of 2010, plaintiff underwent surgery and physical therapy for his knee injury. He was cleared to return to light-duty work effective September 14, 2010, for a period of two weeks. On October 1, 2010, two days after resuming full-duty work, plaintiff was terminated. His supervisor informed him that business was slow. Defendant maintains that it laid plaintiff off as part of a company-wide reduction in force (RIF). Plaintiff disputes that a RIF was the reason for his termination when others with less seniority or distinguishing features were retained for service. Plaintiff filed a Claim Petition with the Division of Workers' Compensation on June 9,
350 2011.*350 Thereafter, on July 5, 2011, nearly seven months after being terminated, plaintiff filed a complaint against defendant in Superior Court, which action gives rise to this appeal. His complaint alleges illegal employment discrimination based on an actual or perceived disability, in violation of the LAD, and retaliation for obtaining workers' compensation benefits, in violation of the Workers' Compensation Act.

Defendant filed a motion for summary judgment, arguing that plaintiff had agreed, pursuant to the waiver provision in defendant's employment application, to limit to six months the statute of limitations for any employment-related claims against defendant. Plaintiff responded that the provision was unconscionable and unenforceable and, alternatively, that his second application for the Driver position, which did not contain a similar limiting provision, constituted a novation. The trial court rejected plaintiff's arguments and granted summary judgment to defendant. According to the trial court, the provision was

clear and unambiguous, citing particularly its capital letters and bold print, which commanded the attention of the reader. The trial court also concluded that the contractual shortening of the statute of limitations was neither unreasonable nor against public policy.

Plaintiff appealed, again arguing that the provision was unconscionable and void as against public policy and that the second Driver application constituted a novation. The Appellate Division judgment affirmed the trial court's grant of summary judgment. *Rodriguez v. Raymours Furniture Co.,* 436 *N.J.Super.* 305, 311–12, 93 *A.* 3d 760 (App.Div.2014).

The appellate panel recognized that plaintiff's employment application amounted to a contract of adhesion but found it nonetheless enforceable, pointing to the clear, unambiguous language of the application and the fact that plaintiff had ample time to review the application when he took it home. *Id.* at 323–24, 93 *A* .3d 760.

The panel also rejected plaintiff's argument that, because a two-year statute of limitations applies to LAD claims, the time frame for bringing such actions could not be modified by private contract.
351 *351 *Id.* at 319, 93 *A* .3d 760. The panel held that, absent a controlling prohibitory statute, parties may modify a statute of limitations so long as the shortened time period is reasonable. The Appellate Division relied on *Eagle Fire Protection Corp. v. First Indemnity of America Insurance Co.,* 145 *N.J.* 345, 678 *A.* 2d 699 (1996), and *Mirra v. Holland America Line,* 331 *N.J.Super.* 86, 751 *A.* 2d 138 (App.Div.2000), for support in concluding that generally parties can shorten a statute of limitations so long as the shortened period is reasonable and does not violate public policy. *Id.* at 319–20, 93 *A.* 3d 760.

The panel held that both of those conditions were
533 satisfied here. There was no *533 express prohibitory statute, and the panel determined that the six-month period was reasonable in length. The panel noted that the statute of limitations for bringing an LAD claim by means of the administrative process offered through the DCR, as opposed to filing a complaint in Superior Court, also was six months. *Id.* at 320, 93 *A.* 3d 760. According to the panel, therefore, contractually shortening the statute of limitations to six months did not preclude plaintiff from pursuing any remedy offered under the LAD. *Id.* at 322, 93 *A.* 3d 760.

Finally, plaintiff's novation argument was summarily rejected on appeal. *Id.* at 329, 93 *A.* 3d 760.

We granted plaintiff's petition for certification. 220 *N.J.* 100, 103 *A.* 3d 267 (2014). We also granted amicus curiae status to the New Jersey State Bar Association, the New Jersey Association for Justice, the American Civil Liberties Union of New Jersey, the National Employment Lawyers Association, and the Academy of New Jersey Management Attorneys.

II.

A.

Plaintiff's first line of argument rests on principles of contract unenforceability based on unconscionability. He contends that a job application with a provision shortening the statute
352 of limitations *352 for any future employment-related claims is a contract of adhesion, and that in this instance that contract of adhesion is both procedurally and substantively unconscionable and unenforceable.

Procedurally, plaintiff emphasizes that, unlike commercial contracts negotiated between sophisticated parties, an employment application consists of an inherent imbalance of power: Applicants have varying degrees of financial security and education levels, which may influence their understanding of the contract and prevent them from asking questions of potential employers for fear of not being hired.

Substantively, plaintiff argues that the provision frustrates public policy. Plaintiff argues that the LAD was enacted to protect employees, and that allowing private companies to create their own periods of limitation overrides the legislative policy of encouraging discrimination-free workplaces. Plaintiff points out that this Court in *Montells v. Haynes,* 133 *N.J.* 282, 627 *A.* 2d 654 (1993), interpreted the LAD to have a two-year statute of limitations and the Legislature has given that interpretation its imprimatur based on more than twenty years of silence in the wake of *Montells.* Plaintiff highlights the LAD's administrative recourse through the DCR. Allowing such a constricted contractual limitations period, plaintiff says, frustrates the LAD remedial scheme overall and limits the option to pursue a claim through the DCR. In other words, the shortened time frame precludes plaintiff from exercising both options that the LAD otherwise makes available within the two-year time frame for filing an LAD claim in Superior Court.

In the event that the Court were to conclude that the limitations period is enforceable, plaintiff's remaining argument focuses on whether the trial court was correct in determining that his second employment application (for the position of Driver) did not constitute a novation. Plaintiff maintains that the question should have been presented to the jury and not dismissed on
353 summary judgment.*353 B.

Defendant asserts that the employment application is neither unconscionable nor unenforceable.
534 Relying on *Eagle Fire* and *534 *Mirra,* defendant argues that it is well settled in New Jersey that parties can privately contract to shorten statutes of limitations, and notes further a New York appellate determination to enforce the same provision at issue here. Just as the trial and appellate courts found, defendant contends that the waiver was clear and unambiguous, rendering it easy to read and understand.

Because no statute to the contrary prohibits a contractual provision from shortening the time for suit to six months, defendant argues that parties can freely contract to modify statutory rights. Defendant asserts that the provision does not interfere with the DCR's role in investigating and settling LAD claims because, unlike the federal scheme, New Jersey does not have an administrative exhaustion requirement that in itself could take six months to pursue. According to defendant, plaintiffs are free either to pursue the administrative remedy or to file suit in Superior Court, so long as they act within six months.

C.

Amici New Jersey State Bar Association, the New Jersey Association for Justice, the American Civil Liberties Union of New Jersey, and the National Employment Lawyers Association all support plaintiff's arguments and express concern about allowing a private agreement to modify a public law by constricting the otherwise applicable limitations period to pursue that statutory claim. Their arguments focus on public policy and the singular public-interest importance of the LAD.

Amicus curiae Academy of New Jersey Management Attorneys argues that shortening the two-year statute of limitations for LAD claims is not against public policy and is within private parties' right to contract. Decisions are cited from other jurisdictions finding shortened limitations
354 periods reasonable and enforceable. *354 Finally, the Academy argues that shortening the time for filing suit encourages employees' quick pursuit of claims, which benefits employers, employees, and the public.

III.

Referencing the general principle that a broad private right to contract exists, the appellate panel in this matter found that principle to govern—essentially because it could find no "controlling statute to the contrary" within the LAD that prohibited a shortened limitations period.

Rodriguez, supra, 436 *N.J.Super.* at 319, 93 *A.* 3d 760 (quoting *Order of United Commercial Travelers of Am. v. Wolfe,* 331 *U.S.* 586, 608, 67 *S.Ct.* 1355, 1365, 91 *L.Ed.* 1687, 1700 (1947)). The panel had available to it, and cited, only cases that generally dealt with private agreements to shorten statutes of limitations pertaining to common law actions and cases that did not engage in any searching analysis of whether public policy was contravened by the shortening of a limitations period for a public-interest statute. *See id.* at 319–20, 93 *A* .3d 760.[2] Consequently, the appellate panel determined that it had no basis on which to interfere with the substance of the parties' contract in this matter. In viewing the analysis as nothing more than a search for a preempting statute, the panel did not sufficiently assess the public-interest purpose of the LAD. The LAD deserves a closer
535 assessment.*535 A.

[2] The only New Jersey decision that the Appellate Division had available to cite that concerned a statutory claim was *Mirra, supra,* 331 *N.J.Super.* 86, 751 *A.* 2d 138. But that decision relies on prior cases approving the shortening of non-statutory common law actions. *Id.* at 90–91, 751 *A* .2d 138.

The LAD occupies a privileged place among statutory enactments in New Jersey. In 1945, prior to passage of our modern state constitution, the Legislature enacted the LAD to prevent and eliminate practices of discrimination based on
355 race, creed, *355 color, national origin or ancestry, and created an enforcement agency to achieve that goal. *L.* 1945, *c.* 169.

The LAD is an express exercise of the state's police powers. N.J.S.A. 10:5–2. In relying on police powers when enacting the LAD, the Legislature recognized nothing less than a civil right. The exercise of police power was deemed necessary "for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights." *Ibid.*

In justifying the LAD's enactment, the Legislature voiced its reasons for declaring abhorrence to discrimination in this state. It stated that practices of forms of discrimination against any of New Jersey's inhabitants "are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State [.]" N.J.S.A. 10:5–3. Further, the Legislature declared "its opposition to such practices of discrimination when directed against any person" for the forbidden reasons, and certain others connected by family, or employment, or otherwise listed, "in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured." *Ibid.* And connecting the harm to the individual to the harm that is visited on the State and the public interest by such actions, the Legislature did not mince words: "The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." *Ibid.*

Accordingly, it has long been recognized that the LAD seeks unequivocally to "eradicate" discrimination. *Jackson v. Concord Co.,* 54 *N.J.* 113, 124, 253 *A.* 2d 793 (1969). Our decisional law respects that private interests are intertwined with the public interests furthered by the LAD. *See, e.g., Lehmann v. Toys 'R' Us,* 132 *N.J.* 587, 600, 626 *A.* 2d 445 (1993) (stating that LAD was enacted "to protect not only the civil rights of individual aggrieved employees but also to protect
356 the public's strong interest in a *356 discrimination-free workplace" (citation omitted)). As further proof that eradication of discrimination is a public interest, the Legislature cast a wide net in crafting what is included among LAD violations. The LAD is violated not only when an individual of a protected class is discriminated

against, but also when reprisal is taken against any person who opposed such actions or practices forbidden by the LAD or who aided or encouraged any person in the exercise or enjoyment of any right granted or protected under the LAD. N.J.S.A. 10:5–12(d).

B.

To "prevent and eliminate" discrimination, the Legislature created a division now known as the Division on Civil Rights. *See L.* 1945, *c.* 169, § 6. Recognizing that "prevention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State," the DCR enforces the LAD to further both. *Ibid.* The LAD originally "provided for the filing of complaints with the Division Against Discrimination," *L.* 1945, *c.* 169, § 12, which was replaced by the DCR, *L.* 1960, *c.* 59, § 3. In 1979, the LAD was amended to provide for a right of action in the Superior Court, in addition to the
536 administrative *536 remedy originally available. *L.* 1979, *c.* 404, § 1.

In *Montells, supra,* 133 *N.J.* at 285, 627 *A.* 2d 654, this Court determined what statute of limitations would apply to LAD claims because the LAD was silent as to a limitations period. *Montells* held that the two-year limitations period of N.J.S.A. 2A:14–2, which is applicable in personal injury actions, comported with the purpose of the LAD and, importantly, provided needed uniformity, regardless of the underlying factual nature of the particular LAD claim. *Id.* at 291–92, 627 *A.* 2d 654. Twenty-three years later, the Legislature has registered its tacit approval of that determination. The lack of legislative action to signal disavowal of the two-year limitations period is significant in light of the many times since *Montells* was decided that the Legislature has taken affirmative steps to amend the LAD in other respects. *See L.*
357 1996, *c.* 126, *357 §§ 1, 2, 4–10; *L.* 1997, *c.* 179, § 1; *L.* 2001, *c.* 254, §§ 1, 2; *L.* 2001, *c.* 385, § 1; *L.* 2002, *c.* 82, §§ 1–4, 6; *L.* 2003, *c.* 72, § 1; *L.* 2003, *c.* 180, §§ 3–25; *L.* 2003, *c.* 246, §§ 11, 12; *L.* 2003, *c.* 293, § 1; *L.* 2004, *c.* 130, § 37; *L.* 2005, *c.* 258, § 1; *L.* 2006, *c.* 88, §§ 1–4; *L.* 2006, *c.* 100, §§ 1–15; *L.* 2006, *c.* 103, §§ 1, 88; *L.* 2007, *c.* 325, §§ 1, 2; *L.* 2009, *c.* 205, § 1; *L.* 2013, *c.* 154, § 1; *L.* 2013, *c.* 220, §§ 1, 2.

Indeed, the LAD has been amended many times since originally enacted. The Legislature's activity has been in one direction. It has acted only to strengthen the LAD, adding more protections and for more classes of individuals. *See L.* 1951, *c.* 64, § 1 (adding service in Armed Forces of United States as protected class); *L.* 1962, *c.* 37, § 2 (adding age as protected class); *L.* 1970, *c.* 80, § 8 (adding marital status and sex as protected classes); *L.* 1972, *c.* 114, § 2 (adding disability as protected class); *L.* 1977, *c.* 456, § 5 (adding public access to facilities for service and guide dog trainers); *L.* 1980, *c.* 46, §§ 4, 5 (extending disability protections to deaf persons); *L.* 1981, *c.* 185, § 1 (extending disability protections to persons with blood traits for numerous disorders); *L.* 1983, *c.* 412, § 2 (imposing penalties for violating LAD); *L.* 1990, *c.* 12, § 1 (authorizing recovery of emotional distress damages); *L.* 1990, *c.* 12, § 2 (providing jury trials in LAD cases); *L.* 1991, *c.* 493, § 1 (amending definition of handicapped to include persons with AIDS and HIV); *L.* 1991, *c.* 519, § 1 (adding affectional or sexual orientation as protected class); *L.* 1992, *c.* 146, § 1 (adding familial status as protected class); *L.* 1996, *c.* 126, § 5 (making it unlawful to discriminate for refusing to submit to genetic testing or refusing to reveal genetic testing information); *L.* 1997, *c.* 179, § 1 (making it unlawful to discriminate based on genetic information); *L.* 2001, *c.* 385, § 1 (making it unlawful to discriminate against employee who displays American flag); *L.* 2002, *c.* 82, § 3 (making it unlawful for landlords to discriminate based on source of income or age of children); *L.* 2003, *c.* 180, § 12 (providing "substantially same protections against discrimination as provided under Federal Fair Housing Act"); *L.* 2003, *c.* 246, § 12 (adding protections for individuals in

358 domestic partnerships); *L.* 2003, *c.* 72, §§ 2, 3 *358 (providing separate standards for handicapped access in public buildings versus multi-family dwellings); *L.* 2006, *c.* 100, § 2 (adding gender identity or expression as protected class); *L.* 2006, *c.* 103, §§ 1, 88 (adding protections for individuals in civil unions); *L.* 2013, *c.* 220, § 1 (requiring accommodations for pregnant women and women recovering from childbirth).

C.

To pursue relief under the LAD, a person alleging
537 discrimination can file a complaint *537 with the DCR within six months of the cause of action or file a direct suit in the Superior Court within two years. N.J.S.A. 10:5–13 ; N.J.S.A. 10:5–18 ; *see Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.,* 168 *N.J.* 124, 131, 773 *A.* 2d 665 (2001) ("[T]here is a clear mandate of public policy permitting persons alleging violations of the LAD to proceed administratively or judicially." (quoting *Ackerman v. The Money Store,* 321 *N.J.Super.* 308, 324, 728 *A.* 2d 873 (Law Div.1998))). However, the Legislature requires an election of remedy for an LAD action. Once a party files a Superior Court action, he or she may not file a complaint with the DCR while that action is pending. N.J.S.A. 10:5–13. The same is true if an aggrieved party first files with the DCR; during the pendency of the matter with the DCR, an aggrieved party cannot file with the Superior Court. N.J.S.A. 10:5–27. Once a finding is made in either the Superior Court or the DCR, "the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned." *Ibid.* [3]
359 *359 Permitting an aggrieved party to bring a discrimination claim to the DCR (within six months) furthers important public policies of this state. First, it allows for an alternative dispute resolution of the discrimination claim, and New Jersey has a "strong public policy in favor of the settlement of litigation." *Gere v. Louis,* 209 *N.J.* 486, 500, 38 *A.* 3d 591 (2012) ; *see also Bell Tower Condo. Ass'n v. Haffert,* 423 *N.J.Super.* 507, 510, 33 *A.* 3d 1235 (App.Div.) (noting "the long-established public policy of this State" favoring alternative dispute resolution), *certif. denied,* 210 *N.J.* 217, 42 *A.* 3d 889 (2012). Discrimination claims take time and require resources to pursue. Investigation, discovery between the parties, and possible conciliation or settlement discussions can prove lengthy and expensive. For those reasons, the LAD expects that the DCR will play an important role. When a party elects to purse a claim administratively, he or she is "availing himself [or herself] of a means of redress normally swifter and less expensive than formal litigation." *Sprague v. Glassboro State Coll.,* 161 *N.J.Super.* 218, 226, 391 *A.* 2d 558 (App.Div.1978) ; *see* N.J.S.A. 10:5–14, –15, –16, –17, –19. Thus, the DCR's ability to evaluate and investigate discrimination claims is consistent with the public policy of our State that favors alternative dispute resolution.

[3] The LAD does not contain an administrative exhaustion requirement that a party first file his or her complaint with the DCR before filing suit in Superior Court. N.J.S.A. 10:5–13. Because of that, our scheme differs from the federal employment discrimination scheme, which requires a party to first file his or her complaint with the EEOC within 180 days and receive a right-to-sue letter before commencing litigation. 42 *U.S.C.A.* § 2000e–5(e), (f)(1). An aggrieved party would therefore be foreclosed from filing suit under federal law if he or she had agreed to a shortened six-month period of limitations. For those reasons, federal courts have invalidated a six-month period if there is an administrative exhaustion requirement. Our statutory scheme differs and accordingly our analysis does as well. However, the absence of an administrative exhaustion requirement does not answer whether a contractually shortened limitations period contravenes the public-

> interest purpose advanced in our anti-discrimination scheme.

Although the DCR process is designed to provide more timely resolution than an action in Superior Court, that aspirational goal may not always be
538 met.[4] "When that *538 means of redress fails to
360 *360 achieve those goals, an injured party is entirely free to proceed in Superior Court .... and [the] pending complaint before the DCR may be withdrawn at any time provided that the DCR has not made a final determination." *Wilson v. Wal–Mart Stores,* 158 *N.J.* 263, 270, 729 *A.* 2d 1006 (1999). An aggrieved party can thus avail himself or herself of more than one forum as a complaint winds its way through the administrative and judicial process. The legislatively designed scheme acknowledges and allows a litigant to potentially utilize both forums, subject to the outer limit of the two-year limitations period for bringing an action in court, when the administrative procedure lags.

> [4] The administrative remedy of the LAD may not always work swiftly. The Legislature anticipated that a DCR investigation may require more than six months from the filing of the complaint with the DCR. If the DCR investigation extends beyond six months from the filing of the complaint, the complainant may request that the matter be transferred for a hearing with the Office of Administrative Law and, upon such request, the DCR "shall file the action with the Office of Administrative Law," unless the DCR has already determined there is no probable cause to credit the allegations. *N.J.S.A.* 10:5–13.

Second, permitting the aggrieved person to bring his or her claim to the DCR allows the DCR to perform the function that the LAD mandates—to prevent and eliminate discrimination. *See L.* 1945, *c.* 169. In addition to making the aggrieved party whole, the DCR has responsibility for curbing the behavior of the discriminator. When a complaint is brought to the DCR, the DCR's role is not simply to stand in the shoes of the aggrieved party and bring the claim on his or her behalf. The DCR "has a completely separate law enforcement interest in prosecuting the alleged discrimination[.]" *Dixon v. Rutgers,* 110 *N.J.* 432, 459, 541 *A.* 2d 1046 (1988). The DCR represents the aggrieved *public,* which has been injured by the perpetuation of discrimination that our society deems intolerable.

IV.

A.

This case raises for us a question of first impression. Undoubtedly, there is a strong belief in this state, as elsewhere, in the freedom to contract.

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> [Persons] of "full age and competent understanding" have the "utmost liberty of contracting." Contracts so freely and voluntarily made, in the absence of express or implied prohibition, are sacred and are enforced by courts of justice. And courts do "not lightly interfere with this freedom of contract."
>
> [*Sparks v. St. Paul Ins. Co.,* 100 *N.J.* 325, 335, 495 *A.* 2d 406 (1985) (quoting *Printing Registering Co. v. Sampson,* 19 *Eq.* 462, 465 (quoted in *Driver v. Smith,* 89 *N.J. Eq.* 339, 359, 104 *A.* 717 (1918))).]

But the right of freedom to contract "is not such an immutable doctrine as to admit of no qualification." *Henningsen v. Bloomfield Motors, Inc.,* 32 *N.J.* 358, 388, 161 *A.* 2d 69 (1960). The right must recede to "prevent its abuse, as otherwise it could be used to override all public interests." *Ibid.* (quoting *Morehead v. New York ex*

rel. Tipaldo, 298 *U.S.* 587, 627, 56 *S.Ct.* 918, 80 *L.Ed.* 1347, 1364 (1936) (Hughes, C.J., dissenting)).

Here we have the public interest to consider. The LAD exists for the good of all the inhabitants of New Jersey. N.J.S.A. 10:5–3. The LAD and its processes are imbued with a public-interest agenda. *See supra* at 354–56, 138 *A.* 3d at 535–36. Although the question before us arises in a private action under the LAD, this matter, like all LAD actions, concerns more than a purely private cause of action affecting only private interests. The private right of action authorized by the LAD advances and fulfills the private and legislatively
539 *539 declared public interest in the elimination of discrimination. N.J.S.A. 10:5–2, –3. Hence a contractual limitation on an individual's right to pursue and eradicate discrimination of any form prohibited under the LAD is not simply shortening a limitations period for a private matter. If allowed to shorten the time for filing plaintiff's LAD action, this contractual provision would curtail a claim designed to also further a public interest. As to the LAD, there is a marriage of interests that cannot be divorced.

In respect of the limitations period for LAD actions, a two-year period is the span of time within which an LAD claim may be brought in Superior Court. *Montells* so holds, but there is more to it than that. The Legislature's more than two-decades-long acceptance of the two-year limitations period established by *Montells*

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for LAD claims has woven that limitations period into the fabric of the LAD. It is part of the statutory program and how it operates. Thus, a shortening of that limitations period must be examined for its substantive impact to determine whether any shortening is impliedly prohibited by the LAD scheme.

First, it bears immediate consideration that shortening the time permitted for bringing an LAD action in Superior Court directly impacts and undermines the integrated nature of the statutory avenues of relief and the election of remedies that are substantively available to victims of discrimination under the LAD.

An LAD complainant has two years to file his or her action in Superior Court, and, during that time, the individual may choose between the two means of relief that the LAD authorizes. *See* N.J.S.A. 10:5–13. The Legislature allows an LAD litigant to take advantage of the less costly and more efficient process offered through the administrative remedy, but, if that process extends too long, the aggrieved individual can opt to withdraw his or her administrative complaint and file in Superior Court, using that action as his or her means to pursue vindication of the private and public interest in eradicating and remedying the challenged discriminatory practice. *Ibid.* Explicitly then, the Legislature understood and accepted that public policy requires a more lengthy period of time to obtain LAD relief through that permissible combination of avenues.

The Legislature's tacit approval of the two-year limitations period accommodates the two processes available under the LAD. A shortening of the limitations period applicable under law undermines and thwarts the legislative scheme that includes the DCR remedy as a meaningful option. In fact, the instant contractual limitations period works as an effective divestiture of the right to pursue an administrative remedy. The two forums that the LAD makes available both protect the public interest in identifying, rectifying, and eliminating discrimination. That public interest in rooting out forbidden discrimination may not be lightly contracted away by private arrangement.
363 *363 Second, a statute of limitations period short of two years effectively eliminates claims. As a practical matter, it takes time for an individual to bring his or her claim to an attorney. The individual may not immediately realize that he or

she has been a victim of discrimination. *See, e.g., Henry v. N.J. Dep't of Human Servs.*, 204 *N.J.* 320, 335–39, 9 *A.* 3d 882 (2010) (recognizing that claimants in LAD cases may not be immediately aware of their cognizable claims). Having arrived at an attorney's office, an individual may not realize that he or she signed or agreed to a waiver of the two-year limitations period. The two-year period established in *Montells, supra,* was
540 designed purposefully to impose *540 uniformity and certainty. 133 *N.J.* at 291–92, 627 *A.* 2d 654. The contractual shortening of the limitation period will frustrate that public policy, and lead to the dismissal of otherwise meritorious LAD claims.

Conversely, a shortened statute of limitations might compel an attorney to file a premature LAD action, whereas a thorough investigation might reveal a lack of a meritorious claim. One cannot ignore that an attorney's investigation into the purported claim may take many months after the client arrives for a consultation. Even the LAD itself acknowledges that the DCR investigatory process may take more than six months, and it includes a means for a complainant to accelerate the matter directly to the OAL after 180 days. N.J.S.A. 10:5–13. Such necessary steps and more, which are involved in bringing a complaint to an attorney, and investigating the matter, must be considered in weighing the substantive effect of any contractual shortening of the otherwise applicable two-year statute of limitations for LAD actions.

Moreover, it cannot be overlooked that our case law has built in powerful incentives for employers to first receive workplace complaints, investigate them, and respond appropriately to limit their liability. *See Aguas v. State,* 220 *N.J.* 494, 516–17, 107 *A.* 3d 1250 (2015). Any shortening of the current two-year statute of limitations period imposed by law would seriously affect an employer's ability to protect itself. Employers are
364 partners in promoting the *364 public policy of this state to deter and eradicate forbidden discrimination.

Our law does recognize that an individual may agree by contract to submit his or her statutory LAD claim to alternative dispute resolution and therefore different processes. *See Garfinkel, supra,* 168 *N.J.* at 131, 773 *A.* 2d 665 (acknowledging LAD claim may be submitted to arbitration forum). However, in permitting the submission of an LAD claim to an alternative forum by operation of contract, the contract is examined to determine whether substantive rights have been precluded. *See Martindale v. Sandvik, Inc.,* 173 *N.J.* 76, 93–94, 800 *A.* 2d 872 (2002) (holding same and noting that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 *U.S.* 614, 628, 105 *S.Ct.* 3346, 3354, 87 *L.Ed.* 2d 444, 456 (1985))). In this instance, plaintiff's substantive right to utilize all available avenues of relief, in tandem, is effectively foreclosed. As the six-month period runs, litigants would be forced to choose between filing with the DCR or filing in Superior Court because there would not be enough time to choose to begin with a filing with the DCR. Further, the shortening of the applicable statute of limitations, if allowed here, results in cutting off the opportunity to fulfill the public interest in eradicating discrimination.

Review of the interplay between the LAD's administrative remedy and right to file in Superior Court, and the joint public and private interests that are advanced by an LAD discrimination claim pursued in either forum, compel the conclusion that the contractual shortening of the LAD's two-year limitations period for a private action is contrary to the public policy expressed in the LAD. The DCR remedy must remain accessible and vibrant. It cannot be eviscerated, as would occur if a shortening of the present two-year limitations period were to be contractually permitted. And the anti-discrimination public
365 policy to be fulfilled *365 through LAD claims

541 may not be contractually curtailed *541 by a limitation on the time for such actions. The waiver provision at issue in this matter is therefore unenforceable as to the LAD.[5]

[5] To the extent that plaintiff's workers' compensation retaliation claim is derivative of his LAD action, the waiver is inapplicable to that claim as well.

In concluding, we note that the decision that we reach today is rooted in the unique importance of our LAD and the necessity for its effective enforcement. Other courts across the country have evaluated the enforceability of similar shortening of statute-of-limitations provisions as applied to their own state employment discrimination laws. At least two states have deemed these provisions contrary to public policy and refused to enforce them—focusing on the public purpose and benefit of anti-discrimination laws.

The Supreme Court of Kansas voided a provision in an employee handbook that required all potential claims against the employer to be brought within six months of the cause of action. *Pfeifer v. Fed. Express Corp.*, 297 *Kan.* 547, 304 *P.* 3d 1226 (2013). At issue was the worker's retaliation claim brought after the contracted-for six-month period. *Id.* at 1229. The court held that the provision "restricting an employee's time to bring a retaliatory discharge claim for a job termination suffered following that employee's exercise of a statutory right necessarily impedes the enforcement of that right and the public policy underlying it." *Id.* at 1234. Similarly, a California appellate court refused to enforce a provision in an employment application that shortened the statute of limitations for employment claims to six months. *Ellis v. U.S. Sec. Assocs.*, 224 *Cal.App.* 4th 1213, 169 *Cal.Rptr.* 3d 752, 755 (2014). Although California's scheme has an administrative exhaustion requirement, the court's focus was more broad, emphasizing that anti-discrimination laws "inure[ ] to the benefit of the public at large rather than to a particular employer or employee." *Id.* at 756 (citation omitted). *But see Hunt v. Raymour & Flanigan,* 105 *A.D.* 3d 1005, 366 963 *N.Y.S.* 2d 722 (N.Y.App.Div.2013) *366 (upholding six-month statute of limitations provision contained in Raymour & Flanigan's job application without engaging in analysis of contrary public policy or public benefit reaped through anti-discrimination laws).

We accordingly reverse the judgment of the Appellate Division on the enforceability of the waiver provision as to plaintiff's LAD claim. In light of our holding, it is unnecessary to reach the novation argument advanced by plaintiff.

V.

This matter was argued in part on the basis of unconscionability of the challenged waiver provision. Although our holding has proceeded down a different analytic path, we add that, undoubtedly, courts may refuse to enforce contracts, or discrete contract provisions, that are unconscionable. *See Muhammad v. Cty. Bank of Rehoboth Beach,* 189 *N.J.* 1, 15, 912 *A.* 2d 88 (2006), *cert. denied,* 549 *U.S.* 1338, 127 *S.Ct.* 2032, 167 *L.Ed.* 2d 763 (2007). The unconscionability determination requires evaluation of both procedure and substance. Procedural unconscionability "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." *Ibid.* (quoting *Sitogum Holdings, Inc. v. Ropes,* 352 *N.J.Super.* 555, 564, 800 *A.* 2d 915 (Ch.Div.2002)).

Here the reduced period for bringing an LAD 542 action, among other employment-related *542 claims, was contained in an employment application. Simply because the contract term was in an employment application does not end the inquiry for enforceability. In *Martindale, supra,* 173 *N.J.* at 81, 800 *A.* 2d 872, we upheld an

agreement to arbitrate contained in an employment application. However, the employee was a human resources officer, a more sophisticated employee than plaintiff, an applicant for an entry-level position. To apply for the needed job, plaintiff in this case was presented with a take-it-or-leave-it application. There was no bargaining here. The
367 instant matter plainly involves *367 a contract of adhesion and therefore necessarily involves indicia of procedural unconscionability. *See Delta Funding Corp. v. Harris,* 189 *N.J.* 28, 39, 912 *A.* 2d 104 (2006). Moreover, the employment application at issue in *Martindale* did not restrict the rights of employees to bring claims; it merely utilized an arbitration clause to agree in which forum to bring them.

When a contract is one of adhesion, the inquiry requires further analysis of unconscionability. *Rudbart v. N. Jersey Dist. Water Supply Comm'n,* 127 *N.J.* 344, 354, 605 *A.* 2d 681, *cert. denied sub. nom. First Fidelity Bank, N.A. v. Rudbart,* 506 *U.S.* 871, 113 *S.Ct.* 203, 121 *L.Ed.* 2d 145 (1992). Our Court has applied four factors for evaluating unconscionability of contracts of adhesion: "[1] the subject matter of the contract, [2] the parties' relative bargaining positions, [3] the degree of economic compulsion motivating the 'adhering' party, and [4] the public interests affected by the contract." *Id.* at 356, 605 *A.* 2d 681. Those factors focus on procedural and substantive aspects of the contract "to determine whether the contract is so oppressive, or inconsistent with the vindication of public policy, that it would be unconscionable to permit its enforcement." *Delta Funding, supra,* 189 *N.J.* at 40, 912 *A.* 2d 104 (citations omitted). In this instance, were an unconscionability analysis to be the prism through which a shortening of the LAD's statute of limitations should be analyzed, *Rudbart* 's fourth factor, namely "the public interests affected by the contract," *Rudbart, supra,* 127 *N.J.* at 356, 605 *A.* 2d 681, would feature in the analysis and would have led us to the same outcome based on the anti-discrimination concerns expressed in the LAD.

VI.

The judgment of the Appellate Division is reversed.

For Reversal —Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, SOLOMON and Judge CUFF (temporarily assigned)—6.

Not Participating —Justice FERNANDEZ–VINA.