

MINUTES OF COMMISSION MEETING

June 20, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi Jr.; Commissioner Andrew O. Bunn; Professor John K. Cornwell (via telephone), of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Grace Bertone, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

Commissioner Bunn requested that a change be made to the Minutes on page two, paragraph two, suggesting that they be amended to reflect that Mr. McMillin “suggested that, in addition to being inconsistent with the New Jersey Supreme Court decisions on this subject....,” Chairman Gagliardi also requested a change, on page 11, where it is stated “After returning from executive session....” The Chairman asked that the Minutes be amended to reflect that, “[a]fter returning from Executive Session, the Chairman reported that there was discussion and resolution of a salary adjustment....”

With the proposed amendments to the Minutes, Commissioner Bunn, whose motion was seconded by Commissioner Bell, moved to approve the Minutes from the May 2019 meeting of the Commission, which motion passed unanimously.

Imputing Negligence to a Public Entity

Jennifer Weitz explained to the Commission that the wording of the three sections of proposed language had been modified in response to Commission recommendations to clarify the entities to which they apply, but that everything else remained the same as the last time the project was considered.

Laura Tharney asked whether there had been any additional public comment on the project since the last time that it was considered, and whether anyone had objected as to its substance. Ms. Weitz assured Ms. Tharney that no new feedback, and no negative feedback had been received from the public.

On the motion of Commissioner Bunn, which was seconded by Commissioner Bertone, the Commission unanimously voted to release the project as a Final Report.

Definition of Misconduct - Unemployment Compensation Act

Jennifer Weitz discussed with the Commission a Draft Final Report relating to Misconduct and the Unemployment Compensation Act.

Mrs. Weitz explained that during the July 19, 2018, Commission meeting, Staff received authorization to conduct research and outreach concerning the effect of employee misconduct on disqualification from receiving unemployment benefits. This subject was discussed in *In re N.J.A.C. 12:17-2.1*, 450 N.J. Super. 152 (App. Div. 2017), in which the Appellate Division invalidated a regulation adopted by the Department of Labor and Workforce Development. The Court in that case found that the Department's definition of "simple misconduct" included behavior that was more severe than "severe misconduct." Furthermore, the Court noted that the regulation failed to distinguish between negligent and intentional conduct.

In May 2018, bills were introduced in both the Assembly and the Senate which clarified the term "misconduct" and eliminated the term "severe misconduct." The Statement that accompanied this legislation noted that the lack of clear definitions for both terms "contributed to repeated court decisions." Ultimately, the Assembly bill was substituted for the Senate bill, S2439, and was approved in August 2018, and the definition of misconduct was modified.

Mrs. Weitz concluded that the Commission has long viewed one of its responsibilities as bringing matters to the attention of the Legislature. Since the Legislature has acted to address the issue that gave rise to this project, by way of this Report, Staff recommended that the Commission formally conclude its work in this area.

On the motion of Commissioner Bunn, which was seconded by Commissioner Bell, the Commission unanimously voted to release the Report as a Final Report.

Definition of Actor

Laura Tharney presented the Draft Tentative Report prepared by Samuel Silver to define the term "actor" in the context of the DNA-tolling provision contained in N.J.S. 2C:1-6(c) and discussed in *State v. Twiggs*, 216 N.J. 513 (2018).

During the May 16, 2019, Commission meeting, the Commission discussed language that would clarify the meaning of the term "actor" pursuant to the Court's determination in *Twiggs*. Commissioner Long proposed language during that meeting that was acceptable to all in attendance, and subsequently provided her suggested language to Mr. Silver, who incorporated it into the Appendix to the Report. Ms. Tharney said that, if the language met with the approval of the Commission, Staff was seeking authorization to release the Report for comment.

Chairman Gagliardi observed that the original language was problematic because it only applied to a narrow set of situations. Commissioner Bell felt that the newly proposed language, recommended by Commissioner Long, captured the essence of the statute. Chairman Gagliardi agreed with the recommend language.

On the motion of Commissioner Bunn, which was seconded by Commissioner Bell, the Commission unanimously voted to release the Report as a Tentative Report.

Meaning of Widow

John Cannel presented a Memorandum outlining options for a definition of widow as used in N.J.S. 54:4-3.30. Mr. Cannel began by noting that, as revealed by a multi-state survey of the law in this area, many other states use phrasing that had been chosen seemingly without fully anticipating what those choices would mean elsewhere in their respective statutes. Mr. Cannel posed to the Commission the question of whether widowhood stops permanently at remarriage, or only for the duration of the remarriage. The Tax Court adopted the latter approach. Mr. Cannel noted that the Commission could consider either of those, or a third option, which is that widowhood continues regardless of later events.

Commissioner Cornwell stated that widowhood does not cease upon remarriage. Mr. Cannel noted that it is plausible to define widowhood so that this status remains intact even in the event that an individual remarries. Commissioner Cornwell remarked that other jurisdictions have not updated their standards regarding widowhood, and asked if it is a wise move for the Commission to try to do so.

Commissioner Bell expressed concern that this project may implicate a policy issues. He stated that defining “widow” will tax implications, and that he disagreed with the Tax Court decision in this case. Finally, he posited that when drafting a possible definition, Staff should consider the impact of such a definition on other legally recognized unions, such as civil unions.

Commissioner Bunn said that the Commission should defer to the decision of the Tax Court, while being faithful to the State Constitution. He noted that the phrase “during her widowhood” suggests a discrete amount of time and that any modification should be based on that phrasing, along with the Court’s decision. Chairman Gagliardi and Commissioner Bertone concurred with Commissioner Bunn’s reasoning.

Chairman Gagliardi stated that if the Commission opts to pursue either of the first two modifications then they should be accompanied with a special recommendation to the Legislature. The Commission may provide the Legislature with a number of options to choose from, and simultaneously inform them of how other states have chosen to address this issue. The Chairman said that doing so would allow the lawmakers to decide which solution they believe

works best for New Jersey. Finally, the Chairman suggested that the exploration of a third option, permanent widowhood, should be accompanied by fifty-state survey.

Commissioner Bell indicated that using dates to define the time period of widowhood could prove to be confusing because it would be difficult to determine when one time period began and when it ended, and noted that it is difficult to ascertain the intent of the drafters of the 1947 Constitution. Commissioner Cornwell disagreed with Commissioner Bunn's interpretation of the phrase "during her widowhood." Mr. Cannel said that the constitutional phrase is not definitive and also pointed out that other states have more specific language for this phrase.

Chairman Gagliardi stated that the Commission should present the Legislature with the results of the Court's decision along with proposed statutory language, and an indication of what other jurisdictions have done in this area. With this information, the Legislature can take the action that they believed to be appropriate. Commissioner Cornwell concurred with this approach. Commissioner Bunn added that the proposal should note that the financial impact has not been considered. It was suggested that civil unions be included in any proposed language.

It was the consensus of the Commission that Staff should proceed in accordance with the preferences expressed by the Commissioners.

Statute of Limitations, Workers' Compensation

Laura Tharney discussed a Memorandum prepared by Samuel Silver proposing a project to clarify whether the common law statute of limitations, or N.J.S. 34:15-51, applies to matters involving disputed claims by medical providers in workers' compensation cases as discussed in *Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc.*, 2019 WL 256698 (App. Div. 2019).

Ms. Tharney explained that Staff received communication from John D. Rogers, Assistant Vice President of Legislative Affairs for New Jersey Manufacturers Insurance, who was kind enough to alert Staff that the New Jersey Supreme Court granted certification in *Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc.* on May 14, 2019, after the preparation of the Memorandum and its distribution on filing day.

Pending the ruling of the Supreme Court in this matter, Ms. Tharney advised that Staff would take no further action in this area. The Commission approved.

Harassment

John Cannel presented a Memorandum regarding harassment, as defined in the Code of Criminal Justice, N.J.S. 2C:33-4. Mr. Cannel noted that the current version of this Memorandum was drafted with the assistance of Samuel Silver. The question that Staff wrestled with was how much to limit the definition of harassment. Noting that physical harm is already within the scope of the statute, Mr. Cannel inquired whether the Commission wanted Staff to address emotional harm as well.

Commissioner Bunn noted that stylistically, each subsection should begin the same way. Commissioner Cornwell indicated that he favored the Washington statute, which he felt provided the clearest statement of what constitutes harassment. Mr. Cannel stated that he believed that the language proposed by Staff was more comprehensive. Commissioner Cornwell asked whether “seriously distressed”, as it appears in the proposed statute, included both mental and physical harm. Mr. Cannel responded that it is harder to prove that a perpetrator’s intent was to harm the victim’s mental health than to prove emotional distress. Commissioner Cornwell opined that language using the term “mental health” is more modern and that “serious distress” sounded old-fashioned in addition to being vague. He also observed that even when the threat in question goes away, mental health issues may persist.

Commissioner Bunn asked if the proposal includes frightening someone. Commissioner Cornwell answered that mental health implies the effect and can incorporate many concepts. He noted that he believed that the term “distress” sets a very low bar for a criminal offense. Commissioner Bunn posited a hypothetical to the Commission in which an individual calls a babysitter alone in a house with young children, and says that he is watching the house, providing sufficient detail to make it clear that he was, in fact, doing so. The Commissioners agreed that this would constitute harassment.

Commissioner Cornwell advised that he believed that the language set forth in the South Carolina statute, “[t]o cause a reasonable person to suffer distress,” is more up-to-date. Mr. Cannel noted that if language concerning mental health impacts is too strict, then experts would be needed at trial. He also stated that these statutes generally are used for protective orders, and therefore the language should be broad enough to form the basis of a court order but not so vague that it includes things that were not intended to be covered.

Commissioner Bunn noted that most statutes do not use “alarm” and “mental health,” and that causing alarm is intentional behavior. He questioned whether a single communication could constitute harassment. Referring to the hypothetical that he posed earlier, he stated that an individual should be able to call the police on the basis of a single communication. Commissioner Cornwell stated that ordinary life contains “distress” and that the word “alarm” sounds more serious. He also noted that most other states do not use “threats.”

Laura Tharney asked whether the word “alarm” is synonymous with the word “threat.” In addition, she questioned whether the proposed language should exchange the word “distress” for “alarm.”

Chairman Gagliardi noted that the focus is on the intent of the actor. Commissioner Bunn recommended that the word “distress” be used in the place of “mental health” or “alarm.” Mr. Cannel felt that more than “alarm” is needed. Commissioner Cornwell noted the Nebraska definition of harassment, which uses stronger language but does not include “distress,” and wondered if it is too narrow. Commissioner Bell felt that stronger language is not necessary. Mr. Cannel asked if “intimidate” is too broad. Commissioner Cornwell thought that “intimidate” implies a pejorative purpose.

Chairman Gagliardi then read aloud a dictionary definitions of “alarm,” suggesting that the definition indicated something more than “distress.” Commissioner Bell indicated that one of the definitions appeared to convey “distress.” Commissioner Cornwell indicated that the word “distress” was too open-ended a term to be included in the statute. Commissioner Bunn stated that he preferred that the word “distress” be removed from the statute. Chairman Gagliardi stated that the word “alarm” is better than “distress.” Commissioner Bell concurred with this recommendation.

Commissioner Bell questioned whether the word “terrorize” should be included in the statute. He noted that other statutes include wording that New Jersey has left out, and that perhaps some of that wording should be used such as the idea of “inconvenient hours.” The unanimously agreed that in some instances, like watching a house in the babysitter example, or threatening to imminently cause a fire, one communication may be enough to satisfy the statutory requirements of harassment.

Commissioner Cornwell said he would like to see one more draft, using the best parts of statutes from other states.

Mr. Cannel will submit to the Commission at an upcoming meeting a Revised Draft Tentative Report, incorporating the Commission’s recommendations and including detailed commentary explaining the reasoning for adding or removing language.

Miscellaneous

Veronica Fernandes was pleased to inform the Commission that S2425, which was based on the Commission’s work in the area of Common Interest Ownership, was heard in Committee on June 3, 2019. John Cannel attended the committee hearing and provided testimony in support

of the bill. The bill was subsequently released from Committee, and later passed by the Senate with a vote of 34-2. Staff contacted the Assembly Sponsor, and will continue to follow up.

Ms. Fernandes also advised the Commission that so far in the current Legislative session, there are 22 bills introduced based on the work of the Commission.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Bertone.

The next Commission meeting is scheduled to be held on July 18, 2019, at 4:30 p.m.