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NEW JERSEY SUPREME COURT AFFIRMS THAT CEPA PROTECTS WATCHDOG EMPLOYEES

By Ian W. Siminoff

On July 15, 2015, in a highly anticipated decision, the New Jersey Supreme Court reaffirmed the wide expanse of CEPA (New Jersey's Whistleblower Law), by holding that the statute protects so-called "watchdog" employees. In so doing, the court eviscerated one of the most common, well-recognized, and strongest defenses to CEPA claims, thereby increasing employer exposure to CEPA liability.

Joel Lippman, vice president of medical affairs and chief medical officer at Ethicon (a manufacturer of medical devices used for surgical procedures), was responsible for, amongst other things, addressing strategic product activities and evaluating the health and safety risks of products. As part of his job, Lippman voiced concerns about the safety of certain products, occasionally suggesting that products should not go to market or be recalled. Lippman claimed that he received "push back" from executives whose interest aligned with the business priorities of Ethicon.

Lippman was terminated for having a romantic relationship with an employee who worked in a department under his authority. However, Lippman claimed he was terminated for advocating in favor of product recalls, in violation of CEPA.

The lower court concluded that it was Lippman's job to bring forth issues regarding the safety of drugs and products, and therefore, pursuant to CEPA's "job-

duty" exception, first enunciated in *Massarano v. New Jersey Transit*, 400 N.J. Super. 474 (App. Div. 2008), he failed to show that he performed a whistleblowing activity.

The Appellate Division reversed, holding that an employee's job title or employment responsibilities were not determinative in deciding whether an employee had engaged in whistleblowing activities. The Appellate Division noted that watchdog employees are the most vulnerable to retaliation because they are "uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety." Notwithstanding affording protection to watchdog employees, the court set forth a heightened CEPA standard that such employees were required to meet. More specifically, watchdog employees would be required to demonstrate that they *either*: (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct. Both sides appealed to the New Jersey Supreme Court.

In its argument to the Supreme Court, Ethicon argued, correctly, that the Appellate Division's decision created a class of employees against whom an employer could not take adverse employment action without risking CEPA liability. It further argued

that the decision incentivized employers to no longer entrust employees with critical matters of legal compliance or public safety, thereby neutralizing the very public policy the decision was designed to espouse.

The Supreme Court rejected Ethicon's arguments, and affirmed the Appellate Division's holding that CEPA extends to watchdog employees. The court based its decision on the plain language of the statute, which applies equally to all employees and is silent as to any job-duty exception. For example, CEPA defines an "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." *N.J.S.A. 34:19-2(b)*. For the same reasons, and critically, the court disposed of the Appellate Division's enhanced standard of requiring watchdog employees to either have (a) pursued and exhausted all internal means of securing compliance;

or (b) refused to participate in the objectionable conduct. As the court explained: "There can be no additional burden imposed on watchdog employees seeking CEPA protection, unless and until the Legislature expresses its intent to differentiate among the classes of employees who are entitled to CEPA protection."

Going forward, employers need to be particularly careful in their handling of watchdog employees, especially given the potentially jury-friendly appeal of an employee purportedly terminated for fighting against corporate irresponsibility. Employers should therefore consult counsel prior to terminating watchdog employees.

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