



New Jersey Supreme Court Holds “Watchdog Employees” Are Protected by CEPA

Client Advisories

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As most New Jersey employers already know, New Jersey’s Conscientious Employee Protection Act (“CEPA”) is one of the most expansive whistleblower statutes in the country. On July 15, 2015, the New Jersey Supreme Court decided the closely watched case of Lippman v. Ethicon, Inc., which has a significant impact on the scope of CEPA. In the decision, the Court found that “watchdog” employees - those whose job it is to report on wrongdoing within the company - are entitled to all the protections of CEPA.

In this case, Dr. Joel S. Lippman, M.D. was employed by Ethicon, Inc., a subsidiary of Johnson & Johnson. Dr. Lippman held the position of Worldwide Vice President of Medical Affairs and Chief Medical Officer. As part of his many responsibilities, Dr. Lippman was tasked with reviewing possible adverse effects of products that were brought to Ethicon’s attention. Dr. Lippman also served on the Company’s Quality Board, whose responsibility it was “to assess the health risks posed by Ethicon’s products and to provide ‘medical input’ in determining whether the company needed to take corrective measures with respect to their products in the field.”

Dr. Lippman was terminated by Ethicon in 2006. The Company claimed his termination was the result of Dr. Lippman’s inappropriate relationship with a subordinate employee. However, Dr. Lippman argued that the reason provided by Ethicon for his termination was contrived, and that the real reason for his termination was his whistleblowing. Specifically, he alleged that he advocated for the recall of certain medical products he believed to be harmful to the public.

The trial court dismissed Dr. Lippman’s lawsuit, because he “failed to show that he performed whistleblowing activity.” Essentially, the trial court felt that, because it was Dr. Lippman’s job to be a “watchdog employee” - those whose responsibility it is to raise issues, such as compliance or safety, to the employer’s attention - he was not protected under the whistleblower law. In essence, the trial court held that employees reporting misconduct as part of their job were not whistleblowers.

The Appellate Division in 2013, however, reversed the trial court. In doing so, the Appellate Division “explicitly declined” to follow prior precedent set forth in the case of Massarano v. N.J. Transit, 400 N.J. Super. 474 (App. Div. 2008), which held that a security operations manager who reported her findings to her employer was merely doing her job and, therefore, not engaged in protected whistleblower activity. However, the Appellate Division did create a heightened standard for “watchdog employees” to establish a claim under CEPA, primarily by requiring the watchdog employee to at least have pursued internal complaint procedures before suing (which is not required for non-watchdog whistleblowers under CEPA).

The New Jersey Supreme Court sided completely with the plaintiff, Dr. Lippman. First, the Court affirmed the Appellate Division, holding that “watchdog employees” are entitled to the same protection under CEPA as all other employees. The Supreme Court went further and rejected the Appellate Division’s heightened standard stating that “the panel added to the burden required for watchdog employees to secure CEPA protection under subsection (c) by including an obligation nowhere found in the statutory language.”

This decision was made by the Court despite arguments by employer advocates that maintaining a distinction between actual whistleblowing protected by CEPA and activities that are part of an employee’s job were important because: (1) if watchdog employees are protected by CEPA, it would discourage companies from using this type of system as a method of compliance control and risk management; and (2) it would be difficult for employers to manage employees in “watchdog” roles because every time their performance was questioned or their job was in jeopardy, the employee could file a CEPA claim. Notwithstanding, in relying on the plain language of the statute, the Court held, “[t]here is simply no support in CEPA’s definition of ‘employee’ to restrict the Act’s application and preclude its protection of watchdog employees.”

As a result of this decision, employers need to be aware that ALL employees are treated equally under the protections provided by CEPA. Thus, before taking any adverse employment action against an employee who has blown the whistle, including those who hold a “watchdog” role, such a decision should be carefully examined.

If you have questions or concerns related to this ruling or other labor & employment matters, please contact a member of Archer’s **Labor and Employment Department** in Haddonfield, N.J., at (856) 795-2121, in Flemington, N.J., at (908) 788-9700, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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