



# Workplace Whistleblower

## New Jersey Supreme Court Takes on Preemption of CEPA Whistleblower Claims

*By Christopher Lowe, Robert Szyba and Samuel Sverdlov*

On Wednesday, January 6, 2015, the New Jersey Supreme Court heard arguments in *Puglia v. Elk Pipeline, Inc.*, on whether claims under the New Jersey Conscientious Employee Protection Act (“CEPA”) were preempted by the federal Labor-Management Relations Act (“LMRA”).

**The road to the Supreme Court.** The plaintiff in *Puglia* was a laborer on a public works project. After discovering that he was being paid less than what was required under the New Jersey Prevailing Wage Act (“PWA”), he made numerous complaints to management, resulting in an increase in his pay. As the project was winding down, however, plaintiff was laid off purportedly due to lack of work. Plaintiff commenced an action claiming that he was laid off in retaliation for his complaints under the PWA, pointing to the fact that he had more seniority than certain employees who were not laid off. The plaintiff’s employment, however, was governed by a collective bargaining agreement (“CBA”) between the employer and the plaintiff’s union, which contained a complicated seniority policy that takes into consideration both objective and subjective elements to determine an employee’s seniority.

The trial court granted summary judgment in favor of Elk Pipeline, and “rejected plaintiff’s claims as cognizable under CEPA, instead finding they were based on an interpretation of the parties’ CBA, and redress was governed by federal law.” In short, his claims were preempted.

The Appellate Division affirmed summary judgment, noting that the employer’s “assessment of [plaintiff’s] seniority status, as compared to that of his colleagues who continued working, can only be reviewed by an analysis of the CBA’s factors.” Therefore, the “[p]laintiff’s attempt to limit review exclusively to whether he engaged in protected whistle-blower activities for which he was laid off ignores that the project neared completion causing Elk to trim labor based upon seniority, a defined term of art under the CBA.” Although plaintiff tried to stave off dismissal by reframing his CEPA claim as solely a whistleblower claim, the court saw through this attempt and found that “[a]n analysis of plaintiff’s retaliatory discharge claim shows it is not limited to his report of Elk’s wrongful payment practices,” rather, the claim “is grounded on a violation of plaintiff’s seniority status, as defined in the CBA, a negotiated provision governing his employment, and thus, invoked provisions of the NLRA, requiring administrative review by the NLRB.” While the Appellate Division could not definitively determine whether the plaintiff’s complaints qualified as “protected concerted activity,” and thus was unable to determine whether plaintiff’s claim was preempted by the NLRA, the court determined that plaintiff’s claims were preempted by the LMRA.

**Supreme Court Arguments.** The Supreme Court is now considering whether plaintiff's CEPA claim is preempted under the LMRA and the NLRA. The plaintiff is pushing a new spin on his prior argument: that even if plaintiff's claim is preempted under the LMRA, CEPA claims should be exempt from preemption because the local importance of CEPA outweighs the federalism concerns underlying preemption. The defense, however, has pointed out that that most courts to consider this line of argument have nevertheless held that a plaintiff's claims are preempted if they require the interpretation of a CBA. Due to the subjective element of the CBA's seniority policy, the CBA must be interpreted to assess plaintiff's CEPA claim.

The plaintiff also argued that he complained about the prevailing wage for exclusively his own benefit, thus preventing his complaint from being protected concerted activity. In response, the defense pointed out that in his deposition the plaintiff admitted that he made the complaint about his wages with another employee and strategized with a group of employees about how to recover their wages. Thus, the plaintiff acted in concert with the other employees, and his complaint was concerted protected activity, bringing it under the jurisdiction of the NLRA.

**Why this case matters?** In determining the issues in this case, the New Jersey Supreme Court is positioned to impact the balance between state and federal law where one has to give way to the other. The Court's decision may provide a welcome bright line for employers seeking predictability as to how such contests end. Employers with a unionized workforce should also pay close attention, as a reversal of the Appellate Division might result in employees having the ability to bypass procedures in their CBA's in favor litigating their union disputes under the guise of CEPA complaints. Additionally, although New Jersey's Law Against Discrimination ("LAD") was not implicated in this case, the two statutes are often subject to uniform interpretation, so it is entirely possible that if CEPA is considered to be worthy of the local importance exception to preemption, then the LAD, may be as well.

**Stay tuned.** We anticipate a decision from, the Supreme Court within the next few months. Keep an eye out here for a follow-up blog post containing our analysis of the Supreme Court's ultimate decision.

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