



# Workplace Whistleblower

## New Jersey Supreme Court: No Job-Duties Exception to CEPA Protection

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Yesterday, the New Jersey Supreme Court issued its long-awaited opinion in [Lippman v. Ethicon Inc.](#), No. A-65/66-13 (N.J. filed July 15, 2015), confirming the expansive coverage of one of the most far-reaching and widely interpreted whistleblower laws in the country, New Jersey’s Conscientious Employee Protection Act (“CEPA”), N.J.S.A. 34:19-1. The Court affirmed the Appellate Division’s determination that so-called “watchdog employees”—those “whose job duties entail knowing or securing compliance with a relevant standard of care and knowing when an employer’s actions or proposed actions deviate from that standard of care”—are protected by CEPA from adverse action for “doing their jobs.” Specifically, the New Jersey Supreme Court found “no support in CEPA’s language, construction, or application in [governing] case law that supports that watchdog employees are stripped of whistleblower protection as a result of their position or because they are performing their regular job duties.”

### Factual Background

Plaintiff Dr. Joel S. Lippman brought a claim under CEPA against his former employer, a pharmaceutical company (and its parent company), alleging he was terminated in retaliation for repeatedly expressing his concerns about the safety and efficacy of several pharmaceutical and medical products. In his role as Vice-President of Medical Affairs, Dr. Lippman served on several internal review boards, including a quality board, tasked with assessing the health risks associated with the employer’s products and providing “medical input” to determine whether “corrective measures,” such as product recalls, should be taken. In 2005, Dr. Lippman advocated a recall of one of the employer’s products. Subsequently, at Dr. Lippman’s suggestion, the employer reported data related to the medical product to the FDA, which ultimately resulted in its recall. In May 2006, the employer terminated Dr. Lippman for allegedly engaging in an inappropriate sexual relationship with a subordinate. Dr. Lippman sued under CEPA, alleging that his termination was unlawful retaliation for his earlier whistleblowing activity.

### The Lower Courts

Dismissing the case on summary judgment, the trial court held that Dr. Lippman failed to establish a *prima facie* case under CEPA, as “[a]ll evidence indicate[d] that [p]laintiff performed his job by notifying his supervisors of issues and [the employer] responded appropriately.” The trial court relied heavily on the Appellate Division’s decision in *Massarano v. N.J. Transit*, 400

N.J. Super. 474, 948 A. 2d 653 (App. Div. 2008), which found that the plaintiff security operations manager was not engaged in whistleblowing activities when she reported that blueprints of bridges, tunnels and public transportation facilities had been discarded in unsecure recycling bins, on the grounds that plaintiff was just “doing her job.” Similarly, the trial court found it was Dr. Lippman’s job to raise issues regarding the safety of drugs and products; thus, he could not show that he had engaged in whistleblowing activities.

Disagreeing, the Appellate Division reversed this holding on the grounds that *Massarano* was wrongly decided. The Appellate Division rejected the legal presumption that an employee’s title and job responsibilities could be outcome determinative of a cognizable CEPA action, finding that “watchdog” employees (a moniker the Appellate Division coined) are entitled to the same protections against retaliation that the legislature intended to apply to all employees.

Since 2003, the elements required for a plaintiff to establish a prima facie CEPA claim have been well settled: (1) he or she must have reasonably believed that his/her employer’s conduct was violating either a law, rule, or regulation promulgated to law, or a clear mandate of public policy; (2) he or she must have performed a whistleblowing activity, as defined by CEPA; (3) an adverse employment action must have been taken against the employee; and (4) a causal connection must have existed between the whistleblowing and that adverse employment action. However, on Dr. Lippman’s appeal, the Appellate Division modified the second prong of the prima facie case to require that a watchdog employee show he or she “either (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct.”

## New Jersey Supreme Court Decision

The New Jersey Supreme Court affirmed the Appellate Division’s holding, but rejected its modification of the second prong of the *prima facie* case. Regarding defendants’ argument that CEPA only protects watchdog employees if they are acting outside the scope of their regular job responsibilities, the Court stated: “We hold that 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.”

Relying on the plain text of CEPA, the Court emphasized that “[b]y its very terms, the statutory cause of action created by CEPA applies equally to all employees” and “[t]here is no evidence of legislative intent to have the Act operate any other way.” Accordingly, the Court found no legal support to justify precluding or otherwise limiting whistleblower protections for watchdog employees.

Further, the Court made clear that both the defendants and the trial court’s reliance on *Massarano* was misguided. Acknowledging that the *Massarano* decision contained some language which suggested that an employee who reports conduct as part of his or her job is not entitled to CEPA protection, the Court emphasized that the case turned on the conclusion that defendants did not retaliate against the plaintiff for reporting the alleged wrongdoing and did not create a “job-duties exception” to CEPA’s protection.

In rejecting the Appellate Division’s reconstruction of the second prong of a prima facie CEPA claim, the New Jersey Supreme Court found that it improperly added to the burden of watchdog employees to secure CEPA protection.

## Implications for Employers

After *Lippman*, New Jersey employers should be aware that potentially any expression of opinion or concern by employees whose job duties already *require* them to opine on the company’s compliance with any law, regulation or public policy could constitute protected activity under CEPA. Employers considering taking adverse action against an employee who may be deemed to have made a complaint should carefully consider their decision and confer with counsel to determine any potential exposure and recourse.

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