

# One Minute Memo®



## New Jersey's Conscientious Employee Protection Act Requires Election of Remedies Before Summary Judgment

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**Seyfarth Synopsis:** *The U.S. District Court for the District of New Jersey recently held that the proper time for a plaintiff to elect whether to proceed with a statutory whistleblower claim under CEPA, or a common law Pierce claim for wrongful termination, is at the close of discovery, before the summary judgment stage.*

In *Hrinuk v. Pub. Serv. Elec. & Gas Co.*, [an unpublished decision](#) issued on January 30, 2018, the District of New Jersey dismissed a plaintiff's common law wrongful termination claim at the close of discovery, finding that it was preempted by plaintiff's concurrent claim under the Conscientious Employee Protection Act ("CEPA"). With the common law claim dismissed, the case proceeds to the summary judgment stage in leaner form, with the CEPA claim only.

The plaintiff in the case had been employed as an inspector for thirty-three years, and his job was to monitor residential and business connections at construction sites. He claimed that, given the excessive work load he was assigned, supervisors instructed him to sign off on work that he had not actually inspected and knew had not been done. The plaintiff alleged that he raised these inspection practice problems with his managers, but was instead suspended and ultimately terminated. The plaintiff filed a lawsuit alleging, among other things, a CEPA whistleblower claim and a common law *Pierce* wrongful termination claim.

In New Jersey, it is not uncommon for plaintiffs to initially plead a CEPA claim as well as a common law *Pierce* claim. Interestingly, CEPA was a statutory codification of the common law wrongful termination *Pierce* doctrine, which was established by the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical* in 1980. But, CEPA specifically provides that, "the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under . . . under the common law." N.J.S.A. § 34:19-8.

Here, as is common practice, after the parties completed discovery, the defense sought for Plaintiff to elect whether he would proceed under CEPA or *Pierce*, because, as explained, a Plaintiff must elect his remedy under CEPA. The issue before the District of New Jersey was whether it was necessary for Plaintiff to drop his *Pierce* claim prior to the summary judgment stage, or, conversely, whether Plaintiff would be allowed to test whether his CEPA claim would survive summary judgment.

Plaintiff did not make the election, and instead argued that CEPA statute should be interpreted broadly to allow for the viability of the claim to be tested before having to elect. The defense disagreed, and filed a motion for judgment on the pleadings to dismiss the *Pierce* claim. The court first stated that the “[t]he waiver provision in CEPA bars plaintiff from bringing a parallel claim under New Jersey common law when both claims are based on the same conduct.” The court reiterated that Plaintiff had to elect between pursuing a remedy under CEPA or common law, because the counts were based on the same alleged conduct.

In granting the defense’s motion, the court clarified that the close of discovery was the appropriate time for Plaintiff to elect his remedy. The CEPA claim was not considered formally “instituted” until the close of discovery, because it was only until that time that Plaintiff would have been fully provided with the opportunity to explore the facts at issue. Accordingly, it was after the close of discovery that Plaintiff had to elect whether he wished to proceed with a CEPA claim or common law claim. Concluding that the “institution” of Plaintiff’s CEPA claim pre-empted him from pursuing any other recourse, the judge ultimately dismissed the common law count in the Amended Complaint.

The court’s clarification of this point serves as a reminder that a plaintiff does not get two bites of the same apple. While employers may have to conduct discovery with both a CEPA claim and *Pierce* claim at play, allowing for the broadest amount of discovery possible, nonetheless, at the close of discovery, a plaintiff must elect his choice of remedy. Plaintiffs have incentive to elect CEPA, which allows for attorneys’ fees with the potential for enhanced fees, as opposed to a common law, *Pierce* claim, which has no fee shifting mechanism. After discovery is complete, if a plaintiff’s complaint still contains overlapping remedies for wrongful termination and CEPA, a motion to strike the common law claim may be warranted.

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**Seyfarth Shaw LLP One Minute Memo®** | February 9, 2018

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