SEYFARTH SHAW

Management Alert

Interest Groups Weigh in On Significant Whistleblower New Jersey Supreme Court Case

By Ada W. Dolph and Howard M. Wexler

New Jersey's whistleblower statute, the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, is frequently referred to as one of the most expansive whistleblower statutes in the country. Currently before the New Jersey Supreme Court is the case of *Lippman v. Ethicon, Inc.*, No. A-65/66-13 (cert. granted Mar. 14, 2014), which will have a significant impact on CEPA's scope, and employee and employer interest groups are weighing in. Most recently, several labor and environmental organizations hosted a joint conference call to discuss their amicus brief advocating that the Supreme Court use *Lippman* to expand CEPA to permit claims by "watchdog" employees—those employees for whom whistleblowing could be considered part of their job duties. Oral argument on this case is set before the New Jersey Supreme Court for after September 2014. We will continue to monitor developments in this case.

Lippman v. Ethicon

For those of you hearing of *Lippman* for the first time, here is the background that you need to know. In *Lippman v. Ethicon, Inc.*, 432 N.J. Super. 378 (App. Div. 2013), the New Jersey Appellate Division reversed a trial court decision which held that an employee failed to establish a prima facie claim of retaliation under CEPA, because he had "failed to show that he performed whistle-blowing activity." The employee, whose primary job was to review and report on product safety, allegedly advocated for the recall of certain products that, in his professional opinion, were harmful to the public. He was subsequently terminated.

In reversing the trial court, the Appellate Division refused to abide by a preceding appellate case, *Massarano v. N.J. Transit*, 400 N.J. Super. 474 (App. Div. 2008), which held that an employee's reporting was not protected whistleblowing activity because in doing so, she was "merely doing her job as the security operations manager by reporting her findings and her opinion." *Lippman* rejected the legal presumption that "an employee's job title or employment responsibilities should be considered outcome determinative in deciding whether the employee has presented a cognizable cause of action under CEPA." The panel developed the following four-part test for establishing a prima facie case in situations involving "watchdog" employees: (1) The employee must reasonably believe that the employer's conduct was violative of a law, government regulation or public policy; (2) The employee must establish that he or she refused to participate or objected to the unlawful conduct, and advocated compliance with the relevant legal standards to the employer or to those designated by the employer with the authority and responsibility to comply; (3) The employee must have suffered an adverse employment action; and (4) There must be a causal connection between the complained-of conduct and the adverse employment action. The Appellate Division made a somewhat higher standard for "watchdogs," requiring them to show that they have either (a) exhausted all internal means of ensuring compliance or (b) refused to participate in the offensive conduct.

Implications for Employers

The potential far-reaching implications of this decision are underscored by the fact that several employer and employee groups have filed *amicus curie* briefs with the Supreme Court, including the Employers Association of New Jersey, N.J. Business and Industry Association, New Jersey Association for Justice and a compilation of 27 environmental, labor and community organizations. Whether and to what extent (if any) these "watchdog" employees will be able to avail themselves of CEPA is an issue that all employers with operations in New Jersey should monitor - stay tuned!

Ada W. Dolph is a partner in Seyfarth's Chicago office and *Howard M. Wexler* is an associate in the firm's New York office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Ada W. Dolph at *adolph@seyfarth.com* or Howard M. Wexler at *hwexler@seyfarth.com*.