



# Workplace Whistleblower

## New Jersey's CEPA in Pennsylvania Federal Court? Motion to Dismiss Denied Post-*Ethicon*

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It's not too often that a federal court in a neighboring state has the occasion to decide issues under New Jersey's Conscientious Employee Protection Act (CEPA). But recently, the U.S. District Court for the Eastern District of Pennsylvania got to do just that in *James Kerrigan v. Otsuka America Pharmaceutical, Inc.*, denying a motion to dismiss based on the New Jersey Supreme Court's recent decision in *Lippman v. Ethicon, Inc.*

But how did Otsuka America Pharmaceutical, Inc. ("Otsuka"), a Delaware corporation whose principal place of business (and the location where the plaintiff worked) was in Princeton, wind up litigating a claim under NJ law on the other side of the Delaware River? Despite the fact that the plaintiff, James Kerrigan, worked in New Jersey, and thus the parties' relationship was governed by NJ law, he lived in Pennsylvania. So, he sued in Pennsylvania—the Bucks County Court of Common Pleas—under CEPA, among other NJ claims. Based on the parties' diversity, however, Otsuka removed the case to federal court in Philadelphia, opting for federal court over the Court of Common Pleas.

Once venue was established, Otsuka turned to the underlying allegations. Kerrigan, who was hired in 2006 as a Senior Director of Global Marketing at Otsuka, supervised the U.S. marketing of Samsca, a drug used to treat dilutional hyponatremia.<sup>2</sup> In preparation for the drug's launch, Otsuka conducted advertising, developed seminars, hired promotional speakers, and contracted with a third party to "prepare and send newsletters to health care providers who worked with hyponatremia." Kerrigan oversaw the newsletters that were sent, and at one point reported (as he was required to) that one such newsletter sent under his watch "failed to provide a 'fair and balanced approach,'" as required by the Food and Drug Administration ("FDA"), by failing to indicate "important limitations and side effects of the drug."

Otsuka promptly pulled the materials once the error was discovered, but Kerrigan further "complained that Otsuka's Legal, Medical Affairs, and Compliance departments failed to report the violation to the FDA in accordance with the agency's regulations." After Otsuka reported a later incident to the FDA "without consequence," Kerrigan "re-reported" the newsletter that was sent under his watch to Otsuka's Regulatory Affairs department, and eventually the FDA, which ultimately ordered Otsuka "to inform health care providers of its lack of compliance." About a year later, Kerrigan's employment was terminated after Otsuka investigated and corrected several promotional compliance issues relating to the drug for which Kerrigan was responsible, and after it discovered that Kerrigan's wife's company was contracting with a related Otsuka entity using one of the former Otsuka employees from Kerrigan's team who created some of the compliance issues. Kerrigan sued, however, arguing that he was a whistleblower, his reports were CEPA-protected activity, and alleging that the termination of his employment was retaliation for his "whistleblowing."

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<sup>2</sup> A condition that involves deficient sodium content in the blood. Merriam-Webster's Medical Dictionary (Feb. 24, 2014), <http://www.merriam-webster.com/hyponatremia>.

On Otsuka's motion, the District Court dismissed Kerrigan's CEPA claim, finding that his alleged whistleblowing was, in fact, part of his job duties, and thus not protected by CEPA under the New Jersey Appellate Division's decision in *Massarano v. N.J. Transit*. Undeterred, Kerrigan appealed to the Third Circuit. In light of the Appellate Division's decision in *Lippman v. Ethicon, Inc.*, which was critical of *Massarano*, the Third Circuit [remanded the case to the Eastern District to consider Kerrigan's CEPA claim](#).

After the case was sent back to the Eastern District of Pennsylvania, and the New Jersey Supreme Court decided *Ethicon*, Otsuka's motion to dismiss was denied. Because *Ethicon* held that "watchdog employees are entitled to CEPA protection when performing ordinary job duties," the District Court found that Kerrigan "whistleblowing activity" as defined by CEPA. And "in the light most favorable to [Kerrigan], ... he has alleged sufficient facts to plausibly allege retaliation."

New Jersey employers need no reminder of the implications of *Ethicon*, but *Kerrigan* provides a grim example of CEPA litigation where the plaintiff complained of alleged wrongdoing as his job duties required and was nonetheless able to establish standing as an alleged whistleblower. Indeed, according to Otsuka, Kerrigan may have blown the whistle on an infraction that was his own responsibility, and thus may receive a windfall for one of his own errors.

*Kerrigan* also provides a reminder that as more and more of the workforce is spread across the landscape, the possibility of being sued in a jurisdiction outside the direct vicinity of the employer's business has increased. Indeed, here, a Pennsylvania resident sued a New Jersey employer, asserting claims under New Jersey law, in Pennsylvania. For certain employers, especially those with a telecommuting workforce or with employees commuting across state lines (in New Jersey's case, from New York, Pennsylvania, Delaware, Maryland, and perhaps elsewhere), this risk becomes even more worrisome. Although removal may be a useful tool, the risk exists of finding oneself mired in litigation in a foreign jurisdiction.

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