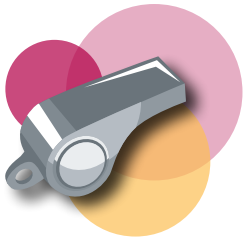
SEYFARTH SHAW



Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

NJ Supreme Court Considers Breadth of State Whistleblower Protections For "Watchdog" Employees

By Ada W. Dolph and Robert T. Szyba

The New Jersey Supreme Court heard oral argument on Tuesday, January 20, in the closely watched case, *Lippman v. Ethicon, Inc.*, addressing the scope of New Jersey's whistleblower statute, the Conscientious Employee Protection Act (CEPA). The question before the Court was:

> Can employees who are responsible for monitoring and reporting on employer compliance with relevant laws and regulations – so-called "watchdog employees" – seek whistleblower protection under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq., and, if so, under what circumstances?

For New Jersey employers, the question is more simple: if all or part of an employee's job duties include reporting violations of a law or regulation and the employee simply does his or her job, is that employee *always* a whistleblower under CEPA?

Consider the situation at issue in *Lippman*. The plaintiff, a physician, was Vice President of Medical Affairs and served on several internal boards. Among them, he served on a quality board that was tasked with providing "'medical input' in determining whether the employer needed to take corrective measures with respect to their products in the field." One of the areas the board reviewed were product recalls. In late 2005, after receiving complaints from the field about one of its products, Dr. Lippman openly advocated a recall at several board meetings, while other board members adamantly opposed a recall. Ultimately, at Dr. Lippman's suggestion, the information was submitted to the FDA, which made the determination to proceed with a recall. Approximately six months after the board meetings and deliberations, the employer terminated Dr. Lippman's employment, citing an "inappropriate relationship, with someone who worked directly for him." According to Dr. Lippman, however, the termination was retaliation for his whistleblowing activity. And thus, a lawsuit was born.

The trial court dismissed the case on summary judgment, finding that because it was Dr. Lippman's job to raise issues regarding the safety of Ethicon's drugs and products, he failed to show that he performed a whistleblowing activity, citing the Appellate Division's precedent in *Massarano v. NJ Transit*. The Appellate Division reviewed the issue de novo, and found that the trial court correctly applied *Massarano*, but that *Massarano* itself was wrong. It pointed out that CEPA's plain text does not make a distinction based on an employee's job duties. To state a viable, prima facie claim, it requires only that the plaintiff (1) 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) performed a whistleblowing activity, as defined by CEPA; (3) an adverse employment action was taken against the employee; and (4) a causal connection exists between the whistleblowing and that adverse employment action. In the case of "watchdog employees" -- those who "know the relevant standard of care," and "know when an employer's proposed plan or course of action would violate or materially deviate from that standard of care," like Dr. Lippman -- the Appellate Division modified the second element of the prima facie case to require the employee to show that he or she (a) pursued and exhausted all internal means of securing compliance, *or* (b) refused to participate in the objectionable conduct. And because the Court concluded that Dr. Lippman satisfied the "watchdog" prima facie elements, summary judgment was reversed.

At oral argument before the New Jersey Supreme Court, the employer-petitioner focused on two points: First, Dr. Lippman had made no complaints and had not objected to any unlawful conduct. Instead, while he was on the quality board, he had the specific role of providing his opinion -- his "medical input" -- as part of the deliberative process preceding the decision whether to move forward with a product recall. At that stage, the employer was weighing options, and Dr. Lippman supported one course of action over another. But so did everyone else that was part of the deliberative process. Their participation in the decision did not make everyone in that process a whistleblower. They were just doing exactly what they had been hired to do -- to provide their viewpoints and expertise. In fact, the employer followed Dr. Lippman's suggestion to submit the data to the FDA for their determination. Second, it was Dr. Lippman's job to participate on the quality board. That was all he did. He did not bring his concerns to, for example, the general counsel, or a compliance officer, or any government agency. In other words, he performed his job, and nothing more.

The petitioner thus urged the Court to hold that employees who are acting within the scope of their job are not whistleblowers under CEPA. Petitioner asserted that companies will be discouraged from having quality boards or compliance personnel, which are otherwise beneficial to the companies and to the public, because those employees would have the power to entangle the employer in expensive litigation if there is *any* adverse action against them. Instead, the Court should encourage companies to have such mechanisms and hire such employees, without having to risk significant exposure.

Dr. Lippman, on the other hand, argued that CEPA makes all employees potential whistleblowers, regardless of what their job is, so long as they engage in protected activity. The only limit he would impose: the elements of the prima facie case. He also argued that it would be an odd result if the Court ruled in the employer's favor, because in his situation he would be a whistleblower if he complained of accounting irregularities, but he would have no protection if his complaint was within his area of expertise. Dr. Lippman pushed the Court to protect employees who may be in a position to prevent harm to the public or some other unlawful activity, arguing that the way to do so is provide them with protection under CEPA.

The Court's questions revealed that it was concerned that employees who complained or objected to unlawful activity -- regardless of their job duties -- might be silenced by fear of retaliation. And, according to the Court, even if the employer is sued by such a whistleblower, it could still prevail at trial after presenting all of the evidence

to a jury. On the other hand, the Court appeared to recognize that the expansive reading and the fact questions involved would create untouchable employees, drive up risk and litigation costs, and create a chilling effect on companies' willingness to hire these so-called "watchdog" employees. Interestingly, neither the Court nor the parties discussed the Appellate Division's modified prima facie elements as a viable compromise.

Depending on the Court's decision in *Lippman*, New Jersey employers will have further guidance on handling employee complaints and CEPA coverage, as well as the risk analysis associated with the employment of watchdog employees.

With the parties' arguments in, we await the Court's decision. We will keep you posted on further developments.

Ada W. Dolph is a partner in Seyfarth Shaw LLP's Chicago office. Robert T. Szyba is an associate in the firm's New York office. If you would like further information on this topic, please contact a member of the Whistleblower Team, your Seyfarth attorney, Ada W. Dolph at adolph@seyfarth.com or Robert T. Szyba at rszyba@seyfarth.com.