SEYFARTH SHAW

Management Alert

"Watchdog" Employees Can Get Protection Too! The New Jersey Appellate Division Reaffirms the Broad Protections of CEPA

The New Jersey Appellate Division wants to remind employers -- in case they have forgotten -- that the state's whistle-blowing protections are broad -- very, very broad.

In a precedential decision, the New Jersey Appellate Division (Judges Fuentes, Harris, and Koblitz) reversed the Law Division's summary judgment ruling in favor of the defendant employer. The Law Division, relying in part on *Massarano v. N.J. Transit*, 400 N.J. Super. 474 (App. Div. 2008), held that the plaintiff in *Lippman v. Ethicon, Inc.*, No. A-4318-10T2 (Sept. 4, 2013), failed to establish a *prima facie* claim of retaliation under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, because he had "failed to show that he performed whistle-blowing activity." The employee, a former executive of Ethicon, a subsidiary of Johnson & Johnson, Inc., 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. The Law Division granted summary judgment in favor of the defendant, holding that because "it was his job to bring forth issues regarding the safety of drugs and products," the plaintiff failed to show that he engaged in protected whistle-blowing activity under CEPA.

On appeal, plaintiff argued that the trial court's "narrow interpretation" of CEPA "runs counter to the Supreme Court's repeated admonitions that, as a remedial statute, CEPA should be construed liberally to effectuate its social goal of protecting employees who report workplace misconduct from retaliation." Essentially, the plaintiff maintained that the Law Division misunderstood *Massarano* to suggest that certain employees fall outside the purview of CEPA protections when the whistle-blowing activity at issue is related to their essential job functions.

In reversing the Law Division's ruling, the appellate panel stated that an employee's job duties or title should not be "outcome determinative in deciding whether the employee has presented a cognizable cause of action under CEPA." In explaining why so-called "watchdog" employees, such as the plaintiff in this case, are deserving of protection under CEPA, the Appellate Division explained that they "are the most vulnerable to retaliation because they are uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety." The Court defined "watchdog" employees as those who, by virtue of their duties and responsibilities, are in the best position to: (1) know the relevant standard of care; and (2) know when an employer's actions (or planned course of actions) violate or materially deviate from the standard of care."

To provide clarity for trial courts and employment attorneys handling CEPA cases involving "watchdog" employees, the panel developed the following four-part test for establishing a *prima facie* case in such circumstances:

- The employee must reasonably believe that the employer's conduct was violative of a law, government regulation or public policy;
- 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;
- The employee must have suffered an adverse employment action; and
- There must be a causal connection between the complained-of conduct and the adverse employment action.

Only the second prong in the "watchdog" standard differs from the general CEPA standard. The general CEPA standard merely requires that an individual perform a "whistle-blowing" activity. Because a "watchdog" employee's job function typically is to perform whistle-blowing activity, however, 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.

The Appellate Division also took an opportunity to underscore the broad application of CEPA. In explaining that the Legislature's intent was not to exclude "watchdog" employees from CEPA protections, the Court noted that the New Jersey Supreme Court has recognized that "at the time of its enactment," CEPA was the most far reaching 'whistleblower statute' in the nation."

What This Means for New Jersey Employers

The *Lippman* decision poses concerns for employers whose employees may have responsibilities that include a "watchdog" function. This includes, among others, accountants and CFOs whose job duties are uniquely related to reporting compliance issues; and employees, like the *Lippman* plaintiff, whose function is to report safety concerns related to matters potentially affecting the general welfare of the public. For such employers, the *Lippman* decision not only makes clear that these individuals are to be afforded CEPA protections, but also, that they are the most vulnerable because the essence of their job is to report problem areas.

Accordingly, employers should be mindful of who could potentially be considered a "watchdog" employee and exercise caution before taking an adverse employment action against such an employee. To be clear, employers must be certain to have a legitimate reason for terminating an employee who engages in whistle-blowing and, as with all retaliation claims, should have contemporaneous written documentation evidencing the real reason for taking any unfavorable actions against the employee. Failure to do so could result in the imposition of damages, including punitive damages.

By: *Christopher Lowe*, *Scott Rabe* and *Alnisa Bell*

Christopher Lowe, *Scott Rabe* and *Alnisa Bell* are all located in Seyfarth Shaw's New York office. If you have questions please contact your Seyfarth attorney, Christopher Lowe at *clowe@seyfarth.com*, Scott Rabe at *srabe@seyfarth.com* or Alnisa Bell at *abell@seyfarth.com*.