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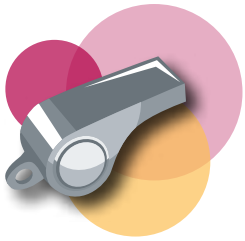

Workplace Whistleblower

Perspectives on whistleblower situations that employers frequently face

New Jersey Appellate Court Holds State Whistleblower Claim Preempted by Federal Labor Law

*By Ada W. Dolph, Howard M. Wexler and Jade Wallace**

New Jersey's whistleblower statute, the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, is one of the most expansive whistleblower statutes in the country, offering potential plaintiffs the allure of recovering uncapped compensatory and punitive damages and attorneys' fees. For this reason, employees and their counsel frequently try to strategically transform a straight-forward termination case into a whistleblower claim. Recently, employers with unionized workforces have made some headway against these claims by arguing successfully that they are preempted by federal labor law as provided in the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C.A. § 185(a), and the National Labor Relations Act of 1935 (NLRA), 29 U.S.C.A. §§ 151-166.

On October 10, 2014, in *Puglia v. Elk Pipeline, Inc.*, No. A-5273-12T4, 2014 WL 5042053 (N.J. Super. App. Div. Oct. 10, 2014), New Jersey's Appellate Division once again rejected a unionized employee's claim that he was entitled to remedies under CEPA after concluding that the employee's complaint ultimately asserted violations of the governing collective bargaining agreement (CBA), and thus was preempted by federal labor law, affirming the trial court's finding.

Puglia v. Elk Pipeline, Inc.

The plaintiff in *Puglia* worked as a laborer on a public works project. He alleged that his employer retaliated against him after he complained that his hourly rate was improperly reduced below prevailing wage. Although the correct pay rate was eventually restored to him, the plaintiff alleged that his complaints resulted in him being laid off the project, despite the fact that he had more seniority than certain employees who remained on the job.

Based on a review of the record, the lower court found that the plaintiff's CEPA claim was preempted by federal labor law as deciding it on the merits would require the court to interpret the parties' CBA, which specifically addressed the subjects of employee wages, pay rates, overtime, and seniority - the very basis of plaintiff's CEPA claim. In affirming the lower court's decision, the Appellate Division agreed, noting that the employer's "assessment of [plaintiff's] seniority status, as compared to that of his colleagues who continued working, can only be reviewed by an analysis of the CBA's factors." Therefore, the "[p]laintiff's attempt to limit review exclusively to whether he engaged in protected whistle-blower activities for which he was laid off ignores that the project neared completion causing Elk to trim labor based upon seniority, a defined term of art under the CBA."

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Although the plaintiff tried to stave off dismissal by reframing his CEPA claim as solely a whistleblower claim, the court saw through this attempt and found that "[a]n analysis of plaintiff's retaliatory discharge claim shows it is not limited to his report of Elk's wrongful payment practices," rather, the claim "is grounded on a violation of plaintiff's seniority status, as defined in the CBA, a negotiated provision governing his employment, and thus, invoked provisions of the NLRA, requiring administrative review by the NLRB." As such, the Appellate Division concluded that the plaintiff's CEPA claim was properly dismissed as preempted under the LMRA and NLRA.

Implications for Employers

Federal preemption remains a powerful tool for employers with a unionized workforce in trying to combat CEPA whistleblower claims. However, New Jersey employers should remain on high alert given CEPA's expansive scope and the array of damages available to aggrieved employees.

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