NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTON ACT

ABA SECTION OF LABOR AND EMPLOYMENT LAW
Employment Rights and Responsibilities Committee Midwinter Meeting
March 27-31, 2007
Royal Sonesta Hotel
New Orleans, Louisiana

Ty Hyderally, Esq.
Law Offices of Ty Hyderally, PC
96 Park Street
Montclair, New Jersey 07042
phone (973) 509-0050 x118
facsimile (973) 509-7090
tyh@employmentlit.com
www.employmentlit.com

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a. **Elements of a CEPA Claim**

The Conscientious Employee Protection Act, NJSA 34:19-1, *et seq.* ("CEPA"), enacted in 1986, is a powerful statute in New Jersey that protects employees who are subjected to adverse employment actions based on taking part in protected whistleblower activity. CEPA contains highly scrutinized criteria that must exist for an employee to be successful in presenting a whistleblower claim. The statute includes the following elements:

> An employer shall not take any retaliatory adverse action against an employee because the employee does any of the following:
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> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, *including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity,* or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, *including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity*;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, *including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity,* or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, *including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee,*

retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, *including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity*; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

b. Who is covered by CEPA?

In the recent case of D'Annunzio v. Prudential Ins. Co. of America, 383 N.J. Super. 270, 891 A.2d 673 (App.Div., 2006), cert. granted, D'Annunzio v. Prudential Ins. Co. of Am., 186 N.J. 608, 897 A.2d 1062 (2006), the Appellate Division expanded CEPA's coverage to include not only common law employees, but also many independent contractors. In rejecting the analysis set forth in Pukowsky v. Caruso, 312 N.J.Super. 171, 711 A.2d 398 (App.Div.1998), the Court found that the following factors should be considered in determining whether a person is to be considered an "employee" for purposes of CEPA:

1. the employer's right to control the means and manner of the worker's performance
2. the kind of occupation-supervised or unsupervised
3. who furnishes the equipment and workplace
4. the manner of termination of the work relationship

c. Defining an adverse action

There have been a plethora of recent cases that define adverse actions in contradictory fashions. Like the analysis under the LAD, "adverse action" will often be decided on a case by case basis. CEPA defines adverse action as discharge, suspension, demotion, or other adverse employment action taken against an employee in the terms and conditions of employment. It is this third category that lends to contradictory interpretation by the courts. The issue of what constitutes an adverse action is still one that must be examined closely to survive summary judgment.

In a very recent opinion, the U.S. District Court for the District of New Jersey held that constructive discharge constitutes an adverse action under CEPA. DeWelt v. Measurement Specialties, Inc., 2007 U.S. Dist. LEXIS 11373 (D.N.J. 2007) The Plaintiff, Robert L. DeWelt, questioned the propriety of the company's financial reporting. He did not suffer retaliation for whistleblowing, and was in fact promoted after raising his concerns. id., at 8. But he did continue thereafter to find fault with the company's practices, and eventually "resigned from his position at Defendant, Measurement Specialties, Inc. ("MSI"), rather than sign what he believed to be fraudulent and misleading financial statements . . . " id., at 1. Because he "was being

required to participate in the fraud," Plaintiff argued that this "created an intolerable condition sufficient to give rise to a constructive discharge." id., at 9. The Court found that "(i)t is clear that "other adverse employment action taken against an employee," as contemplated by N.J.S.A. 34:19-2(e) includes constructive discharge . . . ," and rejected Defendants' motion for summary judgment. id., at 8-9.

d. **What constitutes a violation of public policy**

One method of asserting a CEPA claim is to engage in whistleblowing activity toward the company engaging in activity that violates public policy. The question that is often presented in these instances, is whether or not the activity violates public policy. Thus, the courts examine various scenarios to explore what constitutes a violation of public policy.

i. The Constitution can be the source of a violation

New Jersey has found the Constitution to be such a source. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92, 93 (1992).

ii. A Pierce violation

The New Jersey Supreme Court defined a common law retaliation cause of action in the seminal case of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980). In this case, the court ruled that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions.

iii. The Public interest is at issue

The essence of a CEPA claim should revolve around an issue that touches the public and not just the individual plaintiff. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187-88 (1998). At its core, the legislative intent of CEPA is to protect from retaliatory discharge, those employees who, "believing that the public interest overrides the interest of the organization [they] serve[ ], publicly 'blow[ ] the whistle' [because] the organization is involved in corrupt, illegal, fraudulent or harmful activity." *Ralph Nader et al., Whistleblowing: The Report of the Conference on Professional Responsibility* (1972). To discern such a violation, you should look generally to the federal and state constitutions, statutes, administrative rules and decisions, judicial decisions, and professional codes of ethics to discern whether specific corrupt, illegal, fraudulent or harmful activity violates a clear mandate of public policy. The guiding principle is that the offensive activity must pose a threat of public harm and not merely pose a private harm or a harm solely to the plaintiff.

iv. A survey of what constitutes public policy

- Code of Ethics: Hippocratic Oath is not a source of public policy - Pierce v. Ortho., *supra*
- Society of Toxicology's Code of Ethics can be public policy. Mehlman v. Mobil Oil Corp. *supra.*
- Attorney's Code of Professional Responsibility is a source of public policy. Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10 (1992). (Restrictive covenants unenforceable against attorneys - because of public policy protecting attorney-client relationships).
- State Board of Psychological Examiners Regulation is a source of public policy. Comprehensive Psychology System v. Prince, 375 N.J. Super. 273 (App. Div. 2005); 2005 WL 275822. - (Restrictive covenants unenforceable against psychologists because of public policy protecting psychologist-patient relationship
- Internal Complaints
    - Abbamont v. Piscataway Twp. Bd. of Ed., 136 N.J. 28 (1994). Public policy is implicated where a teacher complained that improper ventilation was causing an unsafe working condition
    - Higgins v. Pascack Valley Hosp., 158 NJ 404 (1999). Public policy is implicated where employee makes internal complaint that improper forms were filed and that a co-worker mishandled a patient's medication.
    - Roach v. TRW, 164 N.J. 598 (2000). Public policy is implicated where employee makes an internal complaint about fraudulent activity of a co-worker.
    - Gerard v. Camden Co. Health Services, 348 N.J. Super. 516 (App. Div. 2002), *certif. denied* 174 N.J. 40 (2002). An employee's complaint that another employee is being falsely disciplined constitutes public policy.
- Employment Agreements
    - Maw v. Advanced Clinical Communications, 179 N.J. 439 (2004). A dispute between an employer and employee over a restrictive covenant does not implicate public policy.
    - Ackerman v. The Money Store, 321 N.J. Super. 308 (Law Div. 1998). Requiring employee to sign an arbitration agreement can implicate public policy.

e. **Reasonable belief of violation**

The employee's reasonable belief that his or her employer's conduct was violating a clear mandate of public policy must be '*objectively reasonable*.' Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

f. **Some Logistics of Pursuing a CEPA Claim**

i. The statute of limitations for CEPA is one year, N.J.S.A. 34:19-5.
ii. CEPA broadly protects against "any retaliatory action." N.J.S.A. 34:19-3.
iii. Attorneys fees are available under CEPA (NJSA 34:19-5e).

iv. Exclusivity Provision

The State Legislature partially codified the Pierce claim when it passed the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.* in 1986. Barratt v. Cushman & Wakefield of New Jersey, Inc., 144 N.J. 120, 126-27 (1996); Young v. Schering Corp., 141 N.J. 16, 26-27 (1996). While the Legislature codified the common law retaliation Pierce claims, it did not abolish common law claims. Id. However, CEPA has a provision that requires that a plaintiff cannot pursue another retaliation claim if that person is pursuing a CEPA action. N.J.S.A. 34:19-8. Both CEPA and Pierce actions may be pled in the Complaint, as long as one cause of action is dropped before trial.

However, the waiver or exclusivity provision of CEPA only extends to claims that require a finding of retaliatory conduct that is actionable under CEPA. The waiver exception does not apply to those causes of action that are substantially independent of the CEPA claim. Young v. Schering Corp., 141 N.J. 16, 29 (1996).

v. The necessity of prior complaints

To pursue a CEPA claim, there is a statutory requirement that before complaining to an outside agency, the employee must first make an internal complaint, unless the employee is reasonably certain that one of more supervisors already know about the problem, or the employee reasonably fears physical harm or that the situation is emergent. N.J.S.A. 34:19-4. There is no requirement of a complaint to an outside agency on part (c) claims, *see supra* Abbamont v. Piscataway Twp. Bd. of Ed., 136 N.J. 28 (1994); Higgins v. Pascack Valley Hosp., 158 NJ 404 (1999); Roach v. TRW, 164 N.J. 598 (2000); Gerard v. Camden Co. Health Services, 348 N.J. Super. 516 (App. Div. 2002), *certif. denied* 174 N.J. 40 (2002).